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From the Editor-in-Chief

Stephen R. Miller

This issue begins the thirtieth year of the Journal of Affordable Housing & Community Development Law’s publication. Future issues will celebrate this landmark and offer some retrospectives, but it goes without saying that the Journal’s emphases remain as valuable as ever.

The articles and essays here focus attention on what housing needs look like in rural and tribal communities. As the authors in this issue illustrate, the range of housing needs and legal issues in such rural and tribal communities is broad, timely, and just as compelling as can be found in any city. Collectively, they make clear that rural housing presents its own unique challenges and opportunities.

This unique nature of rural housing received one of its first major treatments in Liberty Hyde Bailey’s Report of the Country Life Commission, which was published in 1909. At the time, the country’s population had only recently crossed the threshold from primarily rural to primarily urban, and the pull of the new urban centers had begun the first wave of “emptying out” the places in between. Bailey’s report helped launch a movement focused on improving rural life that bore the imprimatur of President Theodore Roosevelt, who, in a well-known introduction to the Report, wrote that “the great recent progress made in city life is not a full measure of our civilization; for our civilization rests at bottom on the wholesomeness, the attractiveness, and the completeness, as well as the prosperity, of life in the country.” Although those words were written over one hundred years ago, they resonate today. This issue of the journal seeks to provide some light to the unique nature of rural and tribal housing issues, as well as the legal, regulatory, and policy issues that arise in such contexts.

In addition to content related to this issue’s theme, readers here will also find a letter from prominent law professors and practitioners urging a federal recommitment to engaging housing policy, as well as a recent history of housing policy in Boston. Added to this call is our ongoing review of recent literature, providing what should be a welcome mix of articles for all.

Stephen R. Miller
April 2021
HUD’s Collaboration with Tribal Nations to Respond to COVID-19

Elly Kugler & Kyra Perrigo*

Introduction

The U.S. Department of Housing and Urban Development (HUD) has a long-standing mandate to administer funding that it provides to federally recognized tribal nations1 in support of those nations’ sovereignty and in recognition of the U.S. government’s trust and treaty responsibilities. Many of these programs have been instrumental in assisting tribal nation communities disproportionately harmed by the COVID-19 pandemic. During the pandemic, HUD has played an active role in providing congressionally appropriated funds to tribal nations to address urgent, unmet housing infrastructure needs. In addition, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) provided HUD with important authority to waive many of the normal restrictions on use of the funding provided through the Act, giving tribal nations greater flexibility and resulting in broadened discretion for nations in addressing their unique housing needs. In addition to its ongoing work in these areas, the Biden-Harris administration has also announced important priorities around the sovereignty of tribal nations, equity for First Peoples, and the provision of a cohesive response to COVID-19 that will inform HUD’s future activities.

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1. Authors’ note: There is wide variation in the language used to describe the people, communities, and land discussed in this article. In many cases, the relevant federal statutes use dated language that may not be aligned with the identities and preferences of the persons and communities described herein. Moreover, many tribal nation members may prefer to identify with membership in their particular tribal nation or community or may have varying preferences about how to self-identify. This article uses the terms “tribal nations” to refer to federally recognized tribes, “tribal land” to refer to the land and territory held by tribal nations, and “First Peoples” to refer to individual people who may or may not be members of federally recognized tribes. Where appropriate, the article also refers to the relevant statutory language.
HUD’s Role in Supporting Tribal Nations to Respond to the Pandemic

HUD’s Office of Native American Programs (ONAP) administers the housing and community development programs for the 574 federally recognized tribal nations in the United States. ONAP headquarters is located in Washington, DC, and six regional offices are located throughout the country. ONAP exists as a separate office within HUD because HUD’s programs for tribal nations and the manner in which they are implemented, administered, and enforced are different due to the federal government’s unique relationship with tribal governments.

American Indian and Alaska Native (AIAN) tribal nations are recognized as sovereign governments under the U.S. Constitution, treaties, and statutes. As sovereign governments, tribal nations have a “government-to-government” relationship with the federal government. Executive Order 13175 of November 6, 2000, and the Presidential Memorandum of November 5, 2009, require executive agencies to engage in regular and meaningful consultation and collaboration with tribal officials in the development of federal policies that impact tribal nations. The Biden administration recently reaffirmed the federal government’s commitment to tribal consultation. ONAP regularly engages in consultation with tribal governments to make sure they have a voice in the policy decisions that are made. The regulations governing HUD’s tribal nations-related programs were created in direct consultation with tribal officials through negotiated rulemaking.

While respecting the sovereignty of tribal nations, HUD also recognizes that it has a responsibility to fulfill the federal government’s trust and treaty responsibilities to tribal nations. The federal trust responsibility is a legally enforceable fiduciary obligation on the part of the United States government to protect tribal treaty rights, lands, assets, and resources and

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2. The six regional offices are Alaska ONAP (Anchorage, AK), Northwest ONAP (Seattle, WA), Southwest ONAP (Phoenix, AZ and Albuquerque, NM), Northern Plains ONAP (Denver, CO), Southern Plains ONAP (Oklahoma City, OK), and Eastern Woodland (Chicago, IL).


HUD’s Collaboration with Tribal Nations to Respond to COVID-19

to carry out the mandates of federal law with respect to tribal nations. HUD fulfills the trust responsibility by addressing the housing and community development needs of AIAN nations.

The housing shortage on tribal lands (also known as Indian Country) preceded the COVID-19 pandemic, and the shortage has been an obstacle to preventing and responding to the pandemic. As of 2014–2015, a total of 68,000 new housing units were needed to replace severely inadequate units and to eliminate overcrowding. While the needs across tribal lands vary drastically from nation to nation, the overall poverty rate for the AIAN population is twenty-six percent. For remote tribal nations or those without basic infrastructure such as plumbing, providing services and constructing housing can be extremely difficult. Many tribal nations lack the resources to address these issues on their own so federal funding is critical.

The largest housing and community development programs administered by ONAP are the Indian Housing Block Grant (IHBG) funded pursuant to the Native American Housing and Self Determination Act of 1996 (NAHASDA) and the Indian Community Development Block Grant (ICDBG) funded pursuant to the Housing and Community Development Act of 1974 (HCD Act).

NAHASDA and the Indian Housing Block Grant Program

When Congress enacted NAHASDA, it stated that the federal government, as part of its trust responsibility to tribal nations, has an obligation to provide safe, affordable housing in a manner that recognizes the right of tribal self-governance. Prior to NAHASDA, tribal programs were funded with public housing programs under the United States Housing Act of 1937 (1937 Act). To give tribes more control over their housing programs and the spending of federal funds, NAHASDA eliminated the separate

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8. 18 U.S.C. § 1151 defines Indian country as “(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . . , (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.”
10. Id. at 34.
11. HUD has numerous other smaller tribal programs that will not be discussed in this article, but include Tribal HUD VASH, Section 184, Continuum of Care grants, Housing Counseling, and Tribal Healthy Homes.
programs under the 1937 Act and replaced them with a single block grant, IHBG.

The IHBG program authorizes housing assistance under a single block grant to eligible tribal nations or their tribally designated housing entities (TDHEs).\(^{14}\) The funds appropriated to IHBG each year are allocated among all eligible tribal nations under a needs-based formula.\(^ {15} \) For FY 2021, HUD awarded over $652 million in IHBG formula-based grants to over 570 tribal nations.\(^ {16} \) To receive its allocation, the tribal nation submits for HUD’s review an annual Indian Housing Plan (IHP) describing the various programs that the grantee will operate and the funds allocated to each.\(^ {17} \)

With limited exceptions, NAHASDA funds can only be used to provide affordable housing or housing related services to low-income tribal nation families.\(^ {18} \) Section 202 of NAHASDA defines what qualifies as eligible affordable-housing activities, including modernization/operation of existing housing, development of additional affordable housing, housing-related services, management services, and crime-prevention measures to protect residents.\(^ {19} \) To ensure the long-term affordability of housing funded by NAHASDA, tribal nations are required to record a binding agreement that requires the unit be maintained as affordable housing for low-income families for the useful life of the unit.\(^ {20} \)

At the end of each year, the grantee submits an Annual Performance Report (APR) to HUD that reports how the IHBG funds were spent.\(^ {21} \) HUD monitors each grantee’s use of federal funds to make sure that the grantee complies with NAHASDA, HUD regulations, the grant agreement, and program guidance.\(^ {22} \)

In recent years, Congress allocated additional funding for an IHBG competitive grant. Over FY 2018, 2019 and 2020, Congress appropriated a total of $300 million for the competitive grants.\(^ {23} \) When funding became available, HUD released a Notice of Funding Availability (NOFA) that outlined

\(^{14}\) Eligible tribes are the 574 federally recognized tribes and state recognized tribes that previously received funding pursuant to the 1937 Act. 25 U.S.C. § 4103(13).

\(^{15}\) 42 U.S.C. § 4152.


\(^{17}\) 25 U.S.C. § 4112.

\(^{18}\) Id. § 4131(b).

\(^{19}\) Id. § 4132.


\(^{22}\) Id. § 4163.

the requirements for the grant and invited tribal nations to apply. For the FY 2018–19 IHBG competitive grants, HUD received over 200 applications and awarded nearly $200 million to 52 tribes to fund new housing construction, housing rehabilitation and critical housing infrastructure projects. IHBG competitive grants, like the IHBG formula grants, are governed by NAHASDA and the implementing regulations at 24 C.F.R. part 1000.

The Indian Community Development Block Grant Program

The HCD Act authorizes the Community Development Block Grant (CDBG) program, which established a separate allocation for tribal nations known as ICDBG. It provides that one percent of the total CDBG allocation will be awarded to tribal nations. Two type of grants are available under the ICDBG program: single purpose grants and imminent threat grants.

The single purpose ICDBG grant is allocated through a competitive process. HUD releases an ICDBG Notice of Funding Availability (NOFA) each year, and eligible grantees apply for grants that can be used for housing and economic opportunities, primarily for low- and moderate-income persons. The program provides funding for housing, which includes rehabilitation and land acquisition (with new construction permitted only in limited circumstances); community facilities, including infrastructure, roads, and community buildings; public services; and economic development.

The ICDBG Imminent Threat (IT) grants are used to respond to emergencies. HUD can set aside up to five percent of each year’s allocation of ICDBG funds for the noncompetitive first-come, first-served ICDBG IT grants. The ICDBG grants are awarded to tribal nations to eliminate or

25. Indian Housing Block Grant Competitive Grant Program, supra note 24.
27. 24 C.F.R. § 1003.100(a).
29. New housing construction is only permitted when provided under the last-resort housing provisions or when carried out by a Community-Based Development Organization. 24 C.F.R. § 1003.207(b)(3).
30. ICDBG funds for public services cannot exceed fifteen percent of the total grant, so projects that include public services must include other projects that comprise at least eighty-five percent of the total requested ICDBG grant amount. 24 C.F.R. § 1003.201(e).
31. Id. § 1003.201.
lesser problems that pose an imminent threat to public health or tribal land resident safety. To be eligible, a tribal nation must demonstrate that it faces an urgent and immediate threat; the threat is not recurring; it impacts an entire service area; and other federal and tribal funding sources are unavailable to address the threat.33 Recent ICDBG IT grants have funded reconstruction of access roads destroyed in storms, wastewater treatment plant repairs, responses to river erosion, and connecting water and sewer to homes damaged by flooding.34

Like IHBG, HUD monitors each grantee’s performance to make sure they complied with the HCD Act, grant agreement, and other applicable laws and regulations.35

COVID-19 and Tribal Lands

The current pandemic has created new challenges for tribal nations and ONAP as COVID-19 has disproportionately impacted the AIAN population. The Centers for Disease Control and Prevention (CDC) has estimated that AIAN are 3.5 percent more likely to contract COVID than the non-Hispanic white population.36 While transmission rates vary across tribal nations, it is clear that COVID rates are generally higher among the AIAN population. Due to the remote location of some tribal lands and inadequate access to medical care and supplies, the risk of serious complications or death due to COVID are higher for the AIAN population as a whole.37 As of February 2021, data show that AIAN people are dying from COVID at twice the rate of white Americans.38

Tribal governments have each approached the pandemic differently. Most tribal governments, including TDHEs, have shifted to remote work. Some tribal governments have barred access to their reservations entirely.39

33. 24 C.F.R. § 1003.400.
35. 24 C.F.R. § 1003.700.
This closing creates challenges for federal employees or others who may need to access the reservation as part of administering and monitoring federal grants. The needs of individual tribal nations also vary. For instance, at the start of the pandemic many tribal communities in Alaska were in need of basic medical supplies and food as the main airline that provided service to remote villages had just declared bankruptcy and ceased operations. Most tribes, due to pre-existing housing shortages, needed additional housing to address overcrowding and to quarantine individuals who were sick or exposed to the virus.

At the outset of the pandemic, ONAP took steps to stay informed of what actions different tribal governments were taking, the overall transmission rate and deaths related to COVID among the tribes, and the specific challenges that tribes faced. This information was collected informally through calls and emails to the tribes and online research. HUD recognized the need to provide increased flexibilities in the way that the agency administered and monitored its grants on tribal lands.

The CARES Act allocated additional IHBG and ICDBG funds to tribes to respond to the pandemic. The CARES Act also provided HUD the authority to waive and establish alternative requirements for numerous statutory and regulatory requirements for the IHBG and ICDBG programs. Public and Indian Housing (PIH) Notice 2020-13 outlines the statutory and regulatory waivers that HUD provided for funding provided under the CARES Act, FY 2020 IHBG formula funds, and FY 2020 ICDBG funds.

**IHBG CARES Act Funding**


43. Id.

pandemic. The funding was distributed among all eligible tribal nations based on the formula used to fund FY 2020 IHBG. As outlined in PIH Notices 2020-13 and 2020-06, the IHBG recipients were only required to submit an abbreviated IHP to be eligible, and once the IHP was approved they received their IHBG CARES grant.

HUD used its authority pursuant to the CARES Act to waive additional requirements of the traditional IHBG program. This allowed tribal nations to be more flexible in how they responded to the individual needs of their nations and to non-AIAN populations living on tribal lands.

To help IHBG recipients effectively respond to the pandemic, HUD waived the NAHASDA requirement that IHBG funds be used only for low-income tribal nation families, effectively allowing them to serve all affected people without regard to income limits or tribal nation membership status. To assist otherwise ineligible families, the IHBG recipient must document that the assistance is designed to protect the health and safety of low-income First Peoples families, is provided on an urgent basis, and is temporary in nature.

Section 202(3) of NAHASDA limits the use of IHBG funds to housing-related services for affordable housing. PIH Notice 2020-13 waived this requirement and permitted recipients to use IHBG funds to carry out a wide range of public health services under this category of eligible activities. PIH Notice 2020-06 provides examples of the type of activities that would qualify, such as resident education on COVID-19 and social distancing measures, testing, food services, emergency shelters, sanitation equipment, cleaning products, beds for quarantine centers, telehealth equipment, units for temporary quarantining, personal protective equipment, and the costs associated with the TDHE and tribe’s housing staff switch to a remote working environment. PIH Notice 2020-13 also extended deadlines for the submission of the IHBG recipient’s IHP and Annual Performance Review (APR) and explicitly gave IHBG recipients the ability to deviate from their written admissions and occupancy policies to allow them to conduct income recertifications of tenants remotely or less frequently.

The CDC eviction moratorium, providing a temporary cessation of evictions due to the risk of increased transmission of COVID for those who would become homeless or have to move to congregate living conditions if evicted, also applies to tribes. While the moratorium does not

47. 25 U.S.C. § 4131(b); PIH Notice 2020-13.
relieve tenants of their obligation to pay rent, covered persons cannot be evicted for failure to pay rent. IHBG recipients were permitted to use their IHBG CARES Act funds to cover the shortfall in rent receipts during the pandemic.51

In addition to the specific waivers outlined in PIH Notice 2020-13, ONAP also canceled all in-person monitoring during the pandemic and moved to remote monitoring as permitted under NAHASDA.52 For past monitoring actions, ONAP extended deadlines as necessary for the IHBG recipient to respond to open findings.

ICDBG IT CARES Act Funds

The CARES Act provided an additional $100 million in funding for ICDBG IT grants. Tribes had to apply for the ICDBG IT CARES grants, and they were funded on a first-come, first-served basis.53 To meet the urgent needs in the tribal nations, HUD reviewed applications and awarded the ICDBG IT CARES grants quickly. The agency started receiving applications on June 1, 2020, and awarded the full $100 million by the end of August 2020.54 Over ninety tribal nations throughout the country received ICDBG IT CARES grants.55

Similar to the IHBG program, HUD used its waiver authority pursuant to the CARES Act to change the eligibility and funding criteria for ICDBG IT CARES grants. Since the COVID-19 pandemic is a well-documented emergency impacting all tribal communities, tribes were not required to demonstrate the urgency or immediacy of the COVID-19 threat or that the threat was non-recurring.56

Section 105 of the HCD Act and the ICDBG implementing regulations at 24 C.F.R. § 1003.201(e) limit the amount of ICDBG funds used for public

52. 25 U.S.C. § 4163 (monitoring reviews only include “an appropriate level of onsite inspection” to determine compliance); 24 C.F.R. § 1000.503; Off. Native Am. Programs, Grants Evaluation Oversight and Monitoring (HQ), https://www.hud.gov/program_offices/public_indian_housing/ih/grants/oversight (last visited Apr. 20, 2021) (explaining that HUD monitoring consists of both on-site and off-site (or remote) review of records, reports, and audits).
55. HUD Press Release, supra note 54 (list of funding).
services to not more than fifteen percent of the respective ICDBG grant.\(^{57}\) The CARES Act lifted this cap for ICDBG IT CARES funding and for FY 2020 ICDBG, giving grantees more flexibility in the public services that they fund to help address and prepare for the impact of COVID-19.\(^{58}\)

While ICDBG funds typically cannot be used to fund new housing construction,\(^{59}\) PIH Notice 2020-13 waived Section 105 of the HCD Act and 24 C.F.R. 1003.207(b)(3) to allow tribes to use ICDBG funds for new housing construction when necessary to reduce overcrowding or respond to COVID-19.

Among all the ICDBG recipients, the primary activity funded by the ICDBG IT CARES grants was new construction to respond to overcrowding and housing shortages and to decrease the spread of COVID-19. Other grants funded an ambulance, mobile medical unit, food pantries, the purchase of hotels for temporary lodging, and educational programing for youth out of school due to the pandemic.

**New Administration Priorities Relevant to Native Tribes and Communities**

The Biden-Harris administration has placed a strong emphasis on tribal sovereignty, on improving equity and on engaging in a cohesive and strategic response to the pandemic. Agencies across the federal government have a cross-cutting mandate to align agency practices and policies with these priorities.

The administration put forth a memorandum stating that respect for Tribal sovereignty and self-governance, fulfillment of Federal trust and treaty responsibilities, and meaningful and robust consultation with tribal nations will be cornerstones of federal administrative agency policy.\(^{60}\) In recognition that the United States has made solemn promises to tribal nations for more than two centuries, and that honoring those commitments is particularly vital now, executive agencies must engage in meaningful and robust consultation with tribal officials when developing federal policies with tribal implications. Furthermore, federal agencies—including HUD—must make plans of action to comply this mandate and must report regularly to the White House on implementation. This memorandum applies to tribes, bands, nations, pueblos, villages, and communities recognized by the Secretary of the Interior pursuant to the Federally Recognized Indian Tribe List Act of 1994.\(^{61}\)

\(^{57}\) 42 U.S.C. § 5305(a)(8).

\(^{58}\) PIH Notice 2020-13.

\(^{59}\) 24 C.F.R. § 1003.207(b)(3); 42 U.S.C. § 5305.


\(^{61}\) Id.
It is notable that, when Congress appropriated more flexible funding under the CARES Act, tribal nations then used that funding to construct housing in order to address serious tribal housing shortages impacting community health. This flexibility was highly beneficial, ensuring that tribal nations were able to respond to their COVID-19-related infrastructure needs in ways that were tailored to their individual conditions and that recognized the sovereignty of tribal nations.

The Biden-Harris administration has also placed a strong emphasis on equity, including equity for Native people whether or not they are members of federally recognized tribal nations. The administration has instructed federal agencies to pursue an ambitious whole-of-government equity agenda that creates opportunities for communities that have been historically underserved, marginalized, or adversely affected by persistent poverty and inequality. Federal agencies are mandated to identify and alter programs and policies that perpetuate systemic barriers to opportunities for people of color and other underserved groups. The order recognizes that First Peoples, as well as other people of color, belong to underserved communities that have been denied consistent and systemic just, fair, and impartial treatment. The order also states that persons who live in rural areas and persons otherwise adversely affected by persistent poverty are also underserved communities. The Biden-Harris administration also put forth a memorandum directed to the Secretary of HUD, recognizing that communities of color, including First Peoples, have been impeded from building wealth by racially discriminatory housing policies and that the racial wealth gap is wider than it was when the Fair Housing Act was enacted.

62. Not all First Peoples are members of federally recognized tribes. Some are members of tribes that are in the process of seeking such recognition. See U.S. Department of the Interior Indian Affairs, List of Petitioners for Federal Acknowledgment, https://www.bia.gov/as-ia/ofa (last visited Apr. 12, 2021). Others have petitioned for and been denied federal recognition. See U.S. Department of the Interior Indian Affairs’ list of petitioners denied federal acknowledgment, https://www.bia.gov/as-ia/ofa/decided-cases; Executive Office for Immigration Review, Statistics Yearbook: Fiscal Year 2018, https://www.justice.gov/eoir/file/1198896/download. Members of immigrant communities may also be First Peoples. Three of the top twenty-five languages most commonly spoken by immigrant petitioners were languages spoken only by indigenous communities from Mexico and Guatemala.


The administration has also put forth a series of Executive Orders recognizing the disproportionate burden of climate change and pollution on low-income rural and urban communities, communities of color, and tribal nations, mandating the creation of sustainable and climate resilient infrastructure and good jobs using an environmental justice framework. Ultimately, the Biden administration is prioritizing a carefully managed and equitable response to the COVID-19 pandemic.

In keeping with these administration priorities, HUD—both through ONAP and across the agency—will continue to identify ways to improve equity and undo the legacies of federal policy that has led to wealth gaps and segregation, address disproportionate burdens of climate change and pollution, and play a role in the federal government’s response to COVID-19. The agency will also continue to administer both COVID-related and preexisting programs for First Peoples while also identifying ways to consult with tribes to facilitate the sovereignty of tribal nations.

Conclusion

Moving forward, HUD will continue serving tribal nations that have been hit hard by the pandemic. ONAP will continue to pursue flexible and responsive mechanisms to meet the needs of individual tribal nations and to effectively administer and monitor federal grants. Where Congress allows federally recognized tribal nations greater flexibility in the use of federal funds, such as CARES Act funding, those tribal nations can make their own judgments about using those funds to address urgent housing needs.


shortages and other housing, shelter, and infrastructure needs. Meanwhile, federal agencies, including HUD, will also work to ensure that they are making policy and running programs with a focus on equity, climate resilience, environmental justice, and a cohesive response to COVID-19.
Determinate In-Lieu Fees in Inclusionary Zoning Policies

Aaron Shroyer (May 2020)

https://www.urban.org/research/publication/determining
-lieu-fees-inclusionary-zoning-policies

“In-lieu fees” allow a developer to buy out of its obligations to build on-site affordable housing units. This article considers how in-lieu fees can both advance and undermine the goals of inclusionary zoning, and how to best structure such fees. About two-thirds of jurisdictions with inclusionary zoning have some form of in-lieu fees. In-lieu fees are typically lower than the cost to actually build on-site units, and developers pay the fees into affordable housing trust funds that local jurisdictions can draw from as a flexible funding source to provide rental assistance to tenants or to build low-income housing off-site. Developers prefer in-lieu fees because they cost less than building actual affordable units and because producing affordable units within market-rate projects can be time consuming and red-tape burdened, particularly when units must remain affordable for the long-term, usually thirty years or more. Critics of in-lieu fees see them as a way for developers to avoid contributing on-site affordable units.

The author concludes that a jurisdiction should consider the goal of its inclusionary zoning policy as a starting point to determine if in-lieu fees are appropriate. If the aim is to create mixed-income developments, and to increase the number of affordable units in high-demand, amenity-rich neighborhoods, in-lieu fees probably counter that goal by fostering historic patterns of segregation. However, if a local government simply wants to build more affordable housing generally and create a flexible funding source, in-lieu fees effectively serve that purpose. The author notes that, while setting higher in-lieu fees would prevent developers from buying out of their obligations, making inclusionary zoning policies too stringent could prompt the state to prohibit such policies altogether, as nine states have done. The author concludes by suggesting that aligning inclusionary

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zoning with other zoning and policy changes, such as allowing higher density, could foster the goal of more affordable units. Either way, jurisdictions inevitably face trade-offs when they allow developers to pay in-lieu fees instead of building on-site units.

**Expansion of New Law in Southeast May Stave Off Black Land Loss**

Thomas W. Mitchell, Sarah Stein & Ann Carpenter

This article examines the negative consequences that can arise from heirs’ property land ownership, the disproportionate effect these consequences have on lower-wealth African Americans in the Southern region referred to as the Black Belt, and the steps that can be taken to address the issue. Heirs’ property landowners are more likely to lose their land through partition sales, which are typically initiated by an unrelated third party who has an investment interest in the land.

The Uniform Partition of Heirs Property Act (UPHPA) is legislation aimed at protecting generational wealth by providing a backstop against land loss for heirs’ property owners. This year, Florida, Mississippi, and Virginia joined Georgia and Alabama as Southeastern states that have adopted the UPHPA. The authors contend that the impact of the COVID-19 pandemic coupled with limited access to estate planning resources could result in an increase in heirs’ property, primarily among minority communities, and the enactment of UPHPA is increasingly important. Next, they discuss the creation of, and problems associated, with heirs’ property, noting particularly the possibility of a large number of tenants in common with interests in one tract of land and the risk posed by a lack of clear title.

The article provides a brief history of involuntary land loss among vulnerable populations in the Southeast and explains that, while the precise extent of heirs’ property ownership is unknown, recent reports suggest that 1.6 million acres of land in the Southeast is held as heirs’ property. The article also notes that less than twenty-four percent of Black adults have a will in place, making it much more likely that real estate owned by Black adults will become heirs’ property.

The article next discusses the three significant areas of reform covered by the UPHPA. First, heirs who wish to retain the land are given the opportunity to buy out fractional interests of other heirs who petition for a forced sale of the property. Second, courts must consider the social, cultural, and historic value of the land in addition to economic value when deciding to sell or parcel the land out. Third, an open-market sale is required, rather than selling the property at an auction in instances where it is not possible to physically divide the property among common owners.

Finally, the article concludes by describing additional strategies that could be beneficial in addressing problems proposed by heirs’ property.
These strategies include providing resources to facilitate estate planning, subsidizing legal services to clear title on existing heirs’ property, organizing technical assistance programs to assist heirs’ property owners, and encouraging property owners to create a family tree that identifies all heirs who potentially have an interest in the property.

What Should We Do with the GSEs? Common-Sense Reform Recommendations for the Biden Administration

Don Layton


This paper addresses the government-sponsored enterprise (GSE) status of Freddie Mac and Fannie Mae and discusses steps that the Biden administration can take to reform or eliminate the conservatorship of these two GSEs. The author’s stated goal is to provide information that will prevent the Biden administration from starting from scratch or pursuing avenues that have already proven fruitless with regard to GSE reform. Two viable paths exist: (1) leaving the companies in long-term conservatorship and revisiting the question in a few years after additional reforms and improvements have been enacted; or (2) implementing the beginning steps of a long-term transition to a utility model. Both paths can reduce taxpayers’ exposure to the risks of the GSEs.

The author notes that the Biden administration will have a substantial list of issues to address, and GSE reform realistically will not be a top priority. The mortgage system is presently working well, and, despite predictions to the contrary, extended conservatorship has proven to be sustainable and efficient. The mortgage industry is largely happy with the current state of affairs and, if anything, fear disruption to the status quo caused by reform. The main argument in favor of tackling reform sooner rather than later is the embarrassment to the government caused by companies designed to be privately owned staying in government hands with no end in sight.

The failure of past legislative reform attempts is briefly discussed, and the idea of administrative reform is set forth as a superior option. Administrative reform would allow the GSEs to be released from conservatorship while still enacting meaningful reform. Regulatory changes to the Federal Housing Finance Agency (FHFA) coupled with adding clauses to the Preferred Stock Purchase Agreement (PSPA) could remedy many of the defects that were present in the pre-conservatorship GSEs. These changes would allow the U.S. Department of the Treasury (Treasury) to offer support to the GSEs through the PSPA in exchange for their compliance with additional limitations and requirements.

The author suggests six major changes that he believes would allow the companies to be successfully released from conservatorship. They include (1) level guarantee fees, (2) a limited mortgage investment portfolio, (3) a proper post-2008 SIFI consistent capital requirement, (4) a fee for explicit
Treasury support, (5) prohibiting borrower-abusive products, and (6) utility-style price regulation. Other large and small fixes may exist that could be addressed by the FHFA over time, but the article argues that these six reforms are the best places to start. The author suggests that cooperation between the Biden administration and the current director of the FHFA may be strained by partisan differences; however, the Supreme Court is expected to decide a case in June 2021 that would allow the director to be dismissed without cause by the President. This would enable the Biden administration to install someone with industry and housing finance policy experience whose view align with the administration’s view on GSE reform.

Finally, the article concludes by proposing four steps that the Biden administration should take over the next one to two years. First, it recommends that the administration immediately stop in-flight actions that require Treasury approval with respect to GSEs. Second, it suggests that the administration work with the director to amend the PSFA to eliminate the cap on retained earnings. Third, it encourages the administration to begin searching for a qualified candidate to replace the current director, and, fourth, it states that the administration needs to determine which of two proposed paths it wishes to pursue with regard to GSE reform generally.

COVID-19 Emergency Rental Assistance: Analysis of a National Survey of Programs

This research brief summarizes and analyzes the results of a survey of COVID-19 emergency rental assistance programs nationwide. The COVID-19 pandemic has left American renters with tens of billions of dollars in back rent. In response, in March 2020, Congress enacted the CARES Act, which provides state and local jurisdictions with $3.9 billion dedicated to meeting emergency rental assistance needs. Two main sources of funds for rental assistance are available under the CARES Act: the Coronavirus Relief Funds (CRF) and the Community Development Block Grants (CDBG-CV). While the CRF and CDBG-CV funds fall short of most estimates of COVID-19 related needs, about eighty percent of the COVID-19 rental assistance programs surveyed relied in part on the CARES Act funding.

Nearly seventy-two percent of the emergency rental assistance programs surveyed are new, created in response to the COVID-19 pandemic. Other programs were substantially enlarged to meet the growing need for rental assistance. The programs surveyed demonstrate lack of uniformity in approach of providing aid, qualifying for aid, as well as the amount of assistance available to applicants. The brief illustrates that these new and expanded programs face myriad challenges in delivering the needed assistance, including incomplete rental assistance applications, limited staff capacity, and landlord refusal to participate. It also describes how these programs demonstrate that, despite the challenges of rapidly responding to the need for rental assistance stemming from the COVID-19 pandemic, many potentially effective ways to provide aid are available.
Taking Neighborhood Mobility to Scale Through the Housing Choice Voucher Program

Martha M. Galvez & Sarah Oppenheimer

(https://www.urban.org/research/publication/taking-neighborhood-mobility-through-housing-choice-voucher-program)

This article addresses how the Housing Choice Voucher program can be improved to increase voucher holders’ access to low-poverty neighborhoods with opportunity-enhancing amenities. A disconnect currently exists between the known benefits of living in high-opportunity neighborhoods and neighborhoods where voucher-holders currently live, suggesting a critical need to reassess the program’s structure and improve performance on this unmet goal.

This article reports that those voucher holders who relocated to opportunity-rich neighborhoods experienced increased physical health benefits, as well as long-term economic and educational benefits for children. However, under the current landscape of the voucher program, voucher holders seem to be faced with a nearly insurmountable challenge to escape areas of high poverty with unfavorable living environments.

Although the Housing Choice Voucher program is intended to support financially struggling families, it imposes many obstacles to a voucher holder’s ability to achieve geographic and economic mobility. First, the waiting list to receive a voucher may take years; once a voucher is received, the time window to find housing that checks all the necessary boxes that the program requires is very short. Second, there is an information overload presented once a voucher is acquired, leading to confusion about program requirements and availability of options. Lastly, many who receive a voucher likely do not have a clean credit record, making the application process and potential landlord interactions lengthy and expensive.

This article proposes a four-step solution, which requires additional federal support: first, a “refresh” of basic Housing Choice Voucher program administration; second, actively address known barriers to landlord participation; third, provide waivers or regulatory relief allowing Public Housing Authorities greater financial flexibility; fourth, support voucher payment standards that align with rents in opportunity neighborhoods.

Workforce Housing and Housing Preference Policies Under the Fair Housing Act

Jeffrey D. Jones

24 Lewis & Clark L. Rev. 1413 (2020)

(https://law.lclark.edu/live/files/31361-7-jones-article-244pdf)

This article looks at the history of workforce housing under the federal Fair Housing Act and Oregon fair housing law. While there is no single definition of workforce housing, the author points to the most salient factors, such as close proximity to work, and targets specific categories of workers.
Further, workforce housing is a planning tool for building inclusive communities for workers across income levels and improving the overall quality of a city. The article illustrates how the need for affordable housing can be seen in states such as Oregon, where a third of all renters pay more than fifty percent of their income in rent. In Oregon, this figure is partially driven by second-home owners and policies limiting urban sprawl, as well as past segregation and gentrification of lower socioeconomic neighborhoods. The article goes on to describe and analyze challenges to housing preference policies under the Fair Housing Act and Oregon fair housing law and lessons to be learned.

The Effects of Concentrated LIHTC Development on Surrounding House Prices

Richard Voith et al.

This article discusses research that investigated the cumulative effect of the presence of multiple LIHTC projects within a single community. While significant research has considered the impact of a LIHTC project on the surrounding community, the authors identified an area that had not been studied, namely whether having more LIHTC projects within a community created a different effect than a single project. Using Chicago, Illinois, and its immediately surrounding suburbs as a sample, the authors examined changes in short- and long-term property values. They found that LIHTC projects increased local property values by approximately ten percent for properties within one quarter mile of another LIHTC project, and clustering LIHTC projects in communities increases this positive affect by approximately fifteen percent for properties within one quarter mile of three other LIHTC projects.

Land Use Reforms for Housing Supply: Case Studies on the Process for Passing and Implementing Regulation Changes

Lydia Lo, Eleanor Noble, Diane K. Levy & Rolf Pendall

As the national housing shortage continues, local communities are turning to zoning reform as a potential tool to encourage more housing production. A clear connection has been identified between zoning ordinances and local housing production. Therefore, the authors aim to examine the factors that are necessary to pass and implement zoning reforms by using two case studies. The first case study looks at the process by which accessory dwelling units (ADUs) in Washington, D.C., became permitted. The second case study evaluates the process leading up to waivers of impact fees for ADUs in Portland, Oregon. The authors identify five key factors that contributed to passing and implementing zoning reforms, which included (1) working
with a community’s vision for its own growth, (2) leveraging political capital, (3) addressing the potential financial risks and barriers, (4) prioritizing public education and messaging, and (5) thoughtfully implementing new codes that align with other local and state laws. The article concludes by discussing the need to research further restrictions and by acknowledging factors other than land use reform that influence housing production.
Indigenous peoples and communities have long used stories to understand the world and our place in it. As I wrote this article about affordable housing in Indian Country, I was brought back to the story of my grandfather’s experience growing up on the Standing Rock Sioux Reservation and how it profoundly changed the trajectory of our family’s history.

One of my earliest memories is of my grandfather waking me up one summer morning to go fishing on the banks of the mighty Mississippi. In those few moments, I treasured my grandfather’s quiet presence. I learned later that my grandfather’s stillness belied his own chaotic and precarious childhood.

My grandfather was born in 1902 on the Fort Berthold Reservation in North Dakota at the height of the federal government’s reservation policies in the United States. Like so many Indian children of that time, he would grow up with his feet in two worlds. One foot would be in the Indian world, rich with traditions and ceremonies, a language that nurtured his spirit and heart, and a homeland that gave him a sense of place. With his other foot, he would step out into the strange white world of noisiness and different habits. It was a time of grinding poverty...
and relentless forces of assimilation. Like thousands of other Indian children, his older brother was sent to the Carlisle Indian Industrial School, the main institution in the boarding school system aimed at breaking up families and severing their ties to the land. That separation had calamitous consequences.

In the early 1900s, the Fort Berthold Reservation of the Mandan, Hidatsa, and Arikara Nation was a prairie paradise. Elbowoods, my grandfather’s birthplace, was the central hub of the reservation at the time—the headquarters of the Indian Bureau, the Indian school, and the Indian hospital. All of that was suddenly wiped out when the Garrison Dam flooded the Missouri River Valley, along with the homes of 900 Native families, including my grandfather’s family. The reservation headquarters were moved to New Town, literally a new town that the Bureau of Indian Affairs built to relocate those people and businesses displaced by the dam.

Families on the Standing Rock Sioux and Cheyenne River Sioux reservations met a similar fate. My grandfather’s family moved to Fort Yates on the Standing Rock Reservation, the home of his mother’s family. They settled into a simple government-issued house on the shores of Lake Oahe. Eventually that place too was destroyed when the Pick-Sloan Missouri Basin Program flooded the area, again dislocating scores of Native families.

The lands that the Tribes were forced to give up were not just some random, undesirable tracts. The rivers and hills and the plains and prairies had been their home for perhaps more than a millennium. Their houses were much more than a physical structure—they were shelters and dwellings connected to place and time, to people and sacred cultural lifeways. Removal and upheaval from these places dampened Native peoples’ lives for generations.

Two generations later, the Standing Rock Tribe offered me an opportunity of a lifetime—an in-house position at the Tribe’s headquarters in Fort Yates to help them seek compensation for the unjust taking of these lands. I was drawn to that place where my grandfather grew up running along the banks of the Oahe River and to the land where my relatives have lived for many generations. I thought I’d live there too and give back to the community that helped shaped my own identity. But there was a problem: there was no place for my family to live in the Fort Yates community. No houses to rent or to buy. In the end, I could not make sense of commuting 140 miles each day with two young children.

So the scarcity of housing and affordable housing options on American Indian reservations is quite personal to me. Limited housing options prevent many more people from taking jobs, raising families, and building economies where businesses flourish and children thrive. When families move away from the reservation or cannot settle there because they cannot find suitable housing, the community is deprived of millions of dollars that could have been spent and invested in reservation-based goods and services.

The need for affordable housing in Indian Country is stark. Twenty years ago, the Government Accountability Office could find just ninety-one mortgages extended on all of the nation’s hundreds of reservations during a five-year span.
Today, estimates of 200,000 units are required to meet the needs of Native families. Worse yet, Indian Country’s housing crisis has become a life-threatening health crisis; overcrowded conditions on many reservations have exacerbated the spread of COVID-19 infections, leading to the highest infection and mortality rates in the nation.

Why is building affordable housing so challenging on American Indian reservations? Perhaps the two biggest challenges are funding and urgency. Reservation trust lands present a non-standard financing model that discourages investors and even the federal government’s own agencies from engaging in development discussions. In addition, housing has not been identified as essential infrastructure or an economic development priority on many reservations.

Several tribes have set out to change that paradigm. Harnessing their capacities as self-determined governments, they are directing resources to build safe, secure, and affordable housing opportunities on tribal lands. What they really are doing is investing in their people and creating opportunities to build healthy, flourishing communities.

Introduction

For nearly two hundred years, the United States has exercised significant control over American Indian tribes and reservations, with federal officials making most of the decisions about their lands, resources, and everyday living conditions. This includes housing, from deciding the type and location of housing, to who lives in a particular house. The federal government’s pervasive power derives from its trust responsibilities, defined in treaties, statutes, and court decisions that are still vibrant and legally binding. The federal government has never adequately fulfilled

1. Author’s note: terms used in this document reflect both official and unofficial naming conventions. For example, the term “reservations” is part of the legal definition of “Indian Country,” 25 U.S.C. §1151, and often is used interchangeably with “Native communities.” The U.S. Census uses the term “tribal areas,” which includes both on- and off-reservation lands. In addition, “Native,” “Native American,” and “American Indian” are used interchangeably and correspond with the U.S. Census designation of American Indians and Alaska Natives (AIAN).

2. The 574 federally recognized American Indian tribes and Alaska Native villages have a government-to-government relationship with the United States and possess inherent rights of self-governance (i.e., tribal sovereignty). Because of this political relationship, the federal government has a general trust obligation to promote the welfare of Native peoples by providing housing, health care, and other services on reservations and tribal areas.

3. In an opening line of a remarkable decision sure to reverberate through Indian law and history, Justice Neil Gorsuch wrote, “On the far end of the Trail of Tears was a promise.” McGirt v. Oklahoma, 140 S. Ct. 2452, 2459 (2020). With these powerful words, the Court reaffirmed the federal government’s trust obligations to tribes, which in this
these trust obligations, resulting in generations-old deficits, deficiencies, and now disease.

Today, Indian Country’s housing crisis has also become a major public health emergency—Native communities are suffering some of the highest rates of COVID-19 infection in the entire nation. The pandemic has hit reservations particularly hard due to pervasive overcrowded and substandard housing conditions. According to the Department of Housing and Urban Development,

the overcrowding and physical housing problems of American Indians and Alaska Natives living on reservations and in other tribal areas remain strikingly more severe than those of other Americans. Particular circumstances of tribal areas—remoteness, lack of infrastructure, and complex legal and other constraints related to land ownership—make it extremely difficult to improve housing conditions in those areas.

To make Indian Country flourish and well again, we need more housing, about 200,000 more units. Under the government’s current funding levels, however, it would take more than a century to resolve all of Indian Country’s housing crisis.

This fragile infrastructure footing was not created by the pandemic. It was here all along, festering for generations—the sticky residue of stubborn economic disparities and political incongruities.

Where the federal government has failed Indian Country, Native people themselves are creating new communities. Exercising their inherent rights of self-determination, many tribes are striving to increase the supply, quality, and affordability of housing. Self-rule is the only federal policy that has

case means that it must honor its promises set out in treaties establishing Indian Country in Oklahoma.


ever succeeded in improving the health and wellbeing of Native people.\textsuperscript{7} At its core, tribal self-governance means determining priorities, allocating resources, directing programs, and instilling cultural values into every decision and action.\textsuperscript{8} Overcoming more than two hundred years of paternalistic federal government oversight and a convoluted maze of laws and regulations requires a mighty effort. While the federal government continues to woefully underfund its trust responsibilities,\textsuperscript{9} tribes often must go to extraordinary lengths to meet the needs of their community members. This need is especially true with housing.

Indian Country’s housing needs cannot be addressed like housing in the suburbs or inner cities. This is because of Indian Country’s enduring interconnection between land and people. It also is due to a complex web of historical, legal, and social forces that make it unnecessarily difficult to use trust lands to the benefit of their people. Today, the strong demand for affordable housing and homeownership in Indian Country is driving renewed efforts to confront these barriers and unlock the potential of all reservation land. These unprecedented times require innovative approaches to improve both social and economic growth in Indian Country.

This article describes one tribe’s determination to build a large-scale affordable housing subdivision and its experience surmounting myriad legal and financial challenges to create a healthy, thriving, and sustainable community. The first part offers a snapshot of the housing and mortgage lending landscape on American Indian reservations. The second part is a short case study of the Badger Park subdivision on the Cheyenne River Indian Reservation, a highly successful affordable housing program developed by the Cheyenne River Housing Authority in Eagle Butte, South Dakota. This ongoing project exemplifies tribal self-governance through its inspired leadership, community-driven planning, and leveraged financing strategy. The third part concludes with policy recommendations for both tribes and the new Biden-Harris administration, mainly to support and finance similar models in other Native communities and to establish an integrated federal agency approach to mortgage lending in Indian Country.


\textsuperscript{8} Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended at U.S.C. §§ 450–450m, recodified at § 5301) (Jan. 4, 1975). The Act was the result of fifteen years of change, influenced by American Indian activism, the Civil Rights Movement, and community development based on grassroots political participation. At its core, self-governance inherently respects tribal institutions, particularly tribal laws and courts, and honors the uniqueness of each tribe’s cultures and histories, especially language and ceremony.

I. Native Americans and Housing

Today, 574 federally recognized Indian tribes control about 60 million acres of land in the United States. The vast majority of these tribal lands are held in trust by the federal government and are encompassed within American Indian reservations. Social and cultural connections to Indian Country remain strong among the 5.4 million American Indian and Alaska Native peoples. This population is rapidly growing. Importantly, about 60% of Native people live on or near reservations. Options for housing on American Indian reservations are extremely limited, and households confront a very different market than in rural and urban areas.

A. Housing Needs in Indian Country

A drastic need exists to increase both the supply and quality of housing in tribal areas. In 2017, the Department of Housing and Urban Development (HUD) estimated that 68,000 housing units were needed to meet the housing needs and homeownership demands in tribal communities. This estimate overlooks the gravity of overcrowded housing conditions and the need to replace substandard homes on most reservations. About 16% of reservation households are overcrowded, compared to 2.2% of the general population.


11. Title to most of reservation lands is held by the federal government in trust for the use and benefit of present and future generations of tribal nations. Thus, tribes do not have legal title to their lands, but they do have the right to put the land to use, subject to the approval of the Bureau of Indian Affairs (BIA) on behalf of the United States. The BIA must balance two competing responsibilities with respect to trust land: the duty to protect lands and resources (e.g., water, oil, and timber), and the duty to support the development of tribal lands.


13. Tribal Area Study, supra note 6, at 10. This report studied “tribal areas,” as used by the U.S. Census Bureau, which generally includes Indian reservations and counties that encompass or surround them.

14. In 2008 the U.S. Census Bureau reported that Native Americans were almost twice as likely to live in poverty as the rest of the population: 27% compared with 15%. As a result, overcrowding, substandard housing, and homelessness are far more common in Native American communities; nearly 46% of Native American households were overcrowded in 2008, a rate that was almost three times as high as the rest of the country. For thorough discussions of the problems of overcrowdedness in Indian Country,
eral population. All told, acute overcrowding, poor-quality housing stock, and a rapidly growing population indicate that the real need for additional housing units in Indian Country likely is substantially higher than HUD’s 2017 estimate. The precise level of need is difficult to gauge because tribal-level data generally is unavailable. But the social consequences of substandard and inadequate housing are painfully obvious and distressing—chronic disease and other health problems, as well as harmful effects on childhood development.

Additional housing units also are required to meet the demands for homeownership in Indian Country. About 75% of Native households in tribal areas report a strong desire to own their home. Despite Native households’ steadily increasing credit scores and strong preference for homeownership, a smaller share of Native households own homes today than in 2000, and homeownership rates among American Indians are lower than the nation as a whole. The main reason for this gap is the federal government’s regulation of trust lands and its impact on access to and the cost of credit and capital in Indian Country.

Tribes have sovereign authority over their lands, but they do not have full authority to put these lands to good and productive use. The Bureau of Indian Affairs at the U.S. Department of the Interior (BIA) oversees the multi-agency process for approving leases and loans on trust lands. In the long term, building affordable housing on trust land will require fundamental reforms to standardize the land use and lending processes and make it more efficient and reliable for tribes, lenders, and borrowers alike. For now, given the pressing need for safe homes and the strong demands for affordable housing across Indian Country, tribes must use all


15. National data on Native communities is aggregated and reported as generalized observations, lacking much contextual information at the tribal level. To better understand the needs and assets of their communities, several American Indian tribes have undertaken tribe-specific community assessments, including a more accurate reservation census count, the number of habitable housing units, and a survey of housing needs.


17. Tribal Area Study, supra note 6, at 86.

18. See Listokin et al., supra note 7.

tools and resources available to surmount those challenges. The Cheyenne River Housing Authority is showing us how to do that, with the determination and alacrity to make things happen.

B. Federal Housing Programs and Mortgage Products for Native Americans

More than two hundred years of disastrous federal policies have resulted in the alarming disintegration of reservation conditions and shocking impoverishment of Native people. In the 1960s, Congress attempted to reverse course by enacting legislation affirming tribal rights, strengthening tribal autonomy, and establishing resources to build reservation economies. On January 4, 1975, Congress enacted the Indian Self-Determination and Education Assistance Act of 1975 (ISDEAA), making self-determination the focus of future government action. The Act reversed a thirty-year effort by the federal government under its preceding termination policy to sever treaty relationships with and obligations to Indian tribes. Thereafter, tribes contracted for the administration and operation of certain federal programs and directly provided services to their members and communities. Many tribes have assumed full self-governance and responsibility for the design and implementation of their own programs without federal oversight.

Housing was one of the first programs over which tribes assumed control under the ISDEAA, but new construction on reservations continued to lag, and existing housing conditions deteriorated. In 1996, Congress moved explicitly to ramp up tribal control of housing. The Native American Housing and Self-Determination Act (NAHASDA) encouraged expansion of reservation housing options by allowing NAHASDA-allocated funds to be leveraged for new home construction. In 2012, Congress enacted


complementary legislation encouraging tribes to manage the leasing and development of their lands, including housing development. The Helping Expedite and Advance Responsible Tribal Homeownership (HEARTH) Act\(^2\) is designed specifically to enhance tribal governance over tribal lands and promote the efficient leasing of those lands for housing and business purposes.

In addition to funding tribal programs, several federal programs support mortgage lending to individual Native borrowers in a range of income levels.\(^3\) These include the HUD Section 184 Home Loan Guarantee program (Section 184 program), the Veterans Affairs Native American Direct Loan program (VA NADL), and the Department of Agriculture Rural Development Rural Housing Service 502 Direct Loan program (RHS 502). With billions of dollars in loan authority, these programs collectively should be making deep inroads into Indian Country’s housing deficits. Unfortunately, not much of these funds and resources reach tribes or help address housing needs on trust lands.

For example, the HUD Section 184 program specifically is designed to facilitate homeownership and increase access to capital for low- and moderate-income Native communities. The program has greatly expanded the supply of mortgage credit available to Native borrowers by providing lenders with a 100% guarantee for mortgages to Native borrowers. By design, it should eliminate concerns related to the collateralization of trust land. Moreover, its utility for new construction, as well as improvements to existing homes, low down payments, low interest rates, and protection from predatory lending, should make the Section 184 program a very popular funding option for Native borrowers. Unfortunately, the Section 184 program has largely bypassed reservations. Only 7% of 184 program capital funded homes were on reservations in recent years, resulting in billions of dollars of federally guaranteed funds supporting communities outside of Indian Country. See Figure 1 on the following page.\(^4\)

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\(^4\) See id. at 64 (updated TLHH graph for 2018).
Other federal programs that support mortgage lending on trust lands, such as the U.S. Department of Agriculture (USDA) RHS 502 and the VA NADL programs, also are woefully underutilized on trust lands. These powerful financial tools, established to help one of the most underserved populations, are not reaching Native borrowers on trust land. This institutional systems failure left many Native families languishing for generations. Any real possibility of building more housing units in significant numbers enough to address the severe deficits in Indian Country requires an intentional effort to integrate the federal government’s approach to mortgage lending in Indian Country mortgage: regulations should be streamlined, and the processes should be normalized to industry standards.

II. The Power of Place and People: Building a Community on the Cheyenne River Indian Reservation

The Cheyenne Sioux Indian Reservation (CRIR) was established in 1889, following the violent breakup of the Great Sioux Nation, known in Lakota as the Očhéthi Šakówiŋ.25 Wrapped around the rolling hills of the Moreau River in South Dakota, CRIR is the home of four of the traditional seven bands the Lakota: the Minneconjou, Two Kettle (Oohenunpa), Sans Arc (Itazipco), and Blackfoot (Sihásapa). The Reservation is 4,267 square miles, making it the fourth-largest Indian reservation in the United States. Its

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25. The Great Sioux Reservation, established by the 1868 Treaty of Fort Laramie, spanned six states. In subsequent treaties, Lakota leaders were forced to concede more lands in the 1870s and 1880s, drastically diminishing the tribes’ land holdings and dispersing their communities onto distance reservations. The last major conflict fought by the Sioux was the 1890 Battle of Wounded Knee, which resulted in the massacre of more than 200 unarmed Native people and confinement of the survivors on reservations.
largest community, Eagle Butte, is the headquarters of the Cheyenne River Sioux Tribe (CRST). It also is home of a transformative housing endeavor, Badger Park.

CRST’s population is large and growing. Current enrollment is 22,000, with approximately 8,500 members living on the Reservation.26 Many of the sixteen small communities on CRIR are geographically isolated and undeveloped. In recent years, rural water systems have been constructed that tap the Missouri River’s Main Stem reservoirs, such as Lake Oahe, on the eastern edge of the Reservation. The CRST governing body is a nineteen-member tribal council that manages most of the Reservation’s essential services including law enforcement, utilities and water services, education and workforce development, housing, and several government enterprises.

The Cheyenne River Housing Authority (CRHA) administers the Tribe’s housing programs and federal funds on the reservation. Sharon Vogel has led the CRHA since 2002. Vogel has extraordinary knowledge of the CRST community and culture, having raised her family on the reservation and served in several tribal government positions. Similar to other American Indian reservations, CRIR suffers from a severe housing shortage, and much of its housing stock is substandard.

Vogel has a vision to transform her community: every reservation family would live in safe, sanitary, and affordable housing in a community with a central social and cultural gathering place. Achieving this goal requires Vogel and her team to weave together many housing programs and constantly scout new funding opportunities. Her current mission is to create an affordable housing community called Badger Park, a 160-acre subdivision nestled in rolling grassland plains in Eagle Butte. Vogel’s plans include 160 rental units, an elderly community, a 20-unit apartment complex, 35–45 home ownership, and space for community and economic development. The entire park will create 265 family units, housing a total of 1,000–1,500 people. The site also anticipates more park areas and a business center.27 Exhibit A, infra, illustrates the scope and design of this planned community.

The hallmarks of Vogel’s success are her inspired leadership and determination to persevere. Her work essentially exemplifies four principles of affordable housing development: self-governance and capacity building; community planning; financial partnerships; and design and sustainability. In the process, she is creating a more agile and responsive government, employing leading-edge technology, and working across boundaries in multiple sectors. What makes this work truly remarkable is that it is being

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27. A full description of this project can be found on the Cheyenne River Housing Authority website, http://crhanetwork.org/homebuyers-program.html.
done in an intentional cultural context and on reservation trust lands in rural South Dakota.

**Self-governance and capacity building.** The real power to make lasting change in Indian Country lies within Native Nations themselves. Tribes are the vanguard problem-solvers of some of the most serious social, economic, and environmental challenges in Indian Country. They must rectify generations of disastrous federal policies and build their own capacity to impact long-term positive outcomes at both the tribal and individual levels.

Vogel’s big visions for reservation housing are shared by the Cheyenne River Sioux Tribal Council, with whom she has cultivated an agile relationship through her knowledge of the community and tribal administration. The Council’s approval of the Badger Park project was only the first step in the process of creating more housing for its community. To ensure the subdivision could actually be built and units sold to homebuyers, the Council took on one of the most challenging aspects of developing reservation land—its trust status.

Lenders need certainty, stability, and a straightforward process. Transactions in Indian Country do not follow the typical loan origination and
underwriting processes. Moreover, many lenders are unfamiliar with tribal legal systems and may be hesitant to defer to tribal court jurisdiction over their loans. Over the years, the Cheyenne River Sioux Tribal Council has worked diligently to establish the underpinnings of a reservation-based business structure: a comprehensive legal system for mortgage lending and lender recourse and, more recently, a land-use device to facilitate encumbering tribal trust lands.

At the heart of tribal sovereignty and self-governance is the tribe’s authority to enact its own laws and be ruled by them. The Cheyenne River Sioux Tribe is governed by a comprehensive code of tribal laws and a court system with full jurisdiction to hear civil disputes, render judgments, and enforce remedies for loans on reservation lands. Court decisions may be appealed to the Tribe’s Supreme Court.28

Lenders also need to secure their loans. With mortgage lending, lenders secure their loans with the land. In Indian Country, trust land cannot be encumbered, so tribes must create a property interest that can be used as collateral for a loan. This is called a leasehold interest. A home loan made on trust land is called a leasehold mortgage.29 For the Badger Park project, each individual parcel must be separately eligible to carry a mortgage and, with a subdivision of 160 acres, this process would be massively tedious and time-consuming.

Vogel and the Tribal Council had another big idea—create a master lease of the Badger Park lands and then authorize the CRHA to create subleases of individual parcels to be assigned as leasehold interests. Lenders can secure their loans on leasehold properties and, if necessary, enforce those loans in tribal court. This unique arrangement is similar to a condominium model, but with the added requirement of complying with federal trust land regulations and securing BIA approval. But with the Tribal Council creating the master lease and sublease structure on the front end, along with a well-established court system, Vogel ensured smooth financing transactions on the back end.

Vogel also realized early on that the most important investment that she could make was in her team. CRHA managed rental properties, but designing and developing a large subdivision is a highly complex undertaking that requires an array of professional skillsets. Instead of relying on outside consultants, Vogel determined to expand the capacity of CRHA staff to design, plan, build, and maintain the homes on tribal lands. She and her team attended extensive training in grant writing, financing, housing

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29. For a fuller description of the land use and leasehold mortgage process, see TLHH, supra note 23, ch. 7: Navigating Land Issues.
development, and project management. They put these new skills to use immediately and gained invaluable practical experience as the project expanded. CRHA now serves as a critical source of skilled jobs and training for the CRIR community.

Vogel credits the ability of her Housing Authority team to build the Badger Park subdivision to the overarching commitment of the Tribal Council to the community’s health and safety. The entire project, premised on the core trust and fluid working relationship between the Tribal Council and CRHA, illustrates the essential principles of self-governance: tribes setting tribal priorities, making their own decisions, and operating tribal programs according to their needs.

Community planning. Another important constituency is the Cheyenne River Sioux community—the individuals and families who actually will live in Badger Park. According to Vogel, “In order for us to understand the interest and preferences of tribal members in homeownership, we needed to gather information and data.” The CRHA Housing Needs Study, one of the first self-studies in Indian Country, became Vogel’s most important guide to planning the Badger Park subdivision. The Study collected and analyzed tribal members’ interests on an array of housing issues: awareness of mortgage loan products and the lending process; need for financial education; location of their homes; and desire for neighborhood amenities.

At first, tribal members were hesitant to respond to the survey, and then they did not know how to answer the questions: no one had ever asked them about their needs or interests. Never had they been asked to be the architect of their own vision or to be in charge of designing their own community—for example, how many bedrooms their families needed or if they wanted a front porch or space for a garden. But Vogel did, and more. She asked them to imagine a place rich in culture and tradition and to envision a place for their relatives, young and old, bounding with opportunities for future generations. Inspired and encouraged, they readily complied and completed housing questionnaires. The final report provided Vogel and her team with incredibly valuable information about the community’s housing needs and interests, as well as prospective homebuyers’ readiness for homeownership and an array of possibilities for the site design.

Armed with good data and the trust of her community, Vogel impatiently began creating the blueprint for Badger Park. Individual housing units had to be affordable both as rental units and for homeownership, and the plan needed to offer a variety of options to meet all income levels and

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30. Vogel credits the National Development Council and Enterprise Community Partners for providing the most useful training, guidance, and resources.

31. THHL, supra note 23, at 48; Author’s interviews with CRHA Executive Director Sharon Vogel (Feb. 2021) [hereinafter Vogel Interviews].

32. A copy of the Cheyenne River Housing Authority Housing Needs Study is available in TLHH, supra note 23, at 48–51.
housing needs, accommodating large families, single households, as well as the elderly. Vogel’s team elected to use factory-built housing units as the most economical option and models with significant design-technology advantages, such as simple design modifications. It was also very important to Vogel to use upgraded materials and amenities to ensure tribal members received quality, energy efficient homes. While these amenities added to the development costs and created financing issues later on, Vogel made two pivotal decisions at the outset. First, she concluded that quality materials would lower the cost of maintaining the home, thus making it more affordable to the homebuyer in the long run. She also determined that her community deserved dignified housing and that Badger Park units would include amenities such as dishwashers and microwaves, washer-dryer units, garages, and Internet service. Previously, these features of quality and convenience have not been synonymous with housing in Indian Country.

Finally, knowing that funding drives the pace and scope of project development, Vogel evaluated the Badger Park development plan from the perspective of a lender. To attract investors, she needed to ensure that the design, costs, and securitization process would attract investors and encourage lender participation.

**Financial Partnerships.** Despite her inexperience and lack of project funding, Vogel began planning Badger Park with a major advantage—land. The property also was served with basic water, sewer, and electricity, and, with the Tribe’s support (it owns the telephone company), broadband was an easy add-on. Vogel thus avoided incurring substantial upfront costs required of most affordable housing projects. With the land, utilities, and master lease in place, CRHA began developing the 160-acre parcel and finding funders.

Vogel’s two primary financial concerns were the high costs of building homes on rural reservations and Indian Country’s non-standard lending process. In the past, very few lenders would finance construction or offer private mortgages on trust lands. Moreover, even when Native borrowers are able to secure a home loan on the reservation, their mortgages are higher priced—nearly two percentage points higher than for

non-Native borrowers outside the reservation (mainly for manufactured housing, which is the most prevalent type of private housing on many reservations). Vogel promised housing for hundreds of tribal families, and she needed to resolve these thorny issues.

Given the unique qualities of the Badger Park project, Vogel understood that she needed to share her vision and cultivate a close collaboration with banks and state and federal housing agencies. Her first financing meeting was with the South Dakota Housing Development Authority (SDHDA), which, along with the state’s Housing Trust Funds, provide affordable housing to low- and moderate-income South Dakotans. The project was challenging for both parties: for the SDHDA, working with a tribal housing authority and Native homebuyers exposed a new depth of need for housing; and, for CRHA, working with the state, which imposed a new set of complex governmental regulations. In its first application to SDHDA, CRHA failed to secure funding. Vogel used this as an opportunity to review the Badger Park plan vis-à-vis the funding terms, revised the plans, and resubmitted the following year. This time the project was awarded funding, and straightaway Badger Park broke ground and began laying foundations for future home sites.

Leveraging diverse funding sources is critical to building affordable housing, a concept Vogel quickly grasped. She helped CRHA build a strong development portfolio with both tribal and public funds. To take advantage of state and federal funding cycles, which are time-bound and replete with requirements and conditions, CRHA created a cache of completed project plans ready to submit or be tailored to the funding source. Vogel’s motto is “When opportunity strikes, we must be ready to go.”

CRHA recently put this practice to good use by jumping on a funding opportunity under the CARES Act Imminent Threat program to secure funding to build six more houses in Badger Park. The imminent threat was the virulent spread of COVID-19 throughout the CRIR, caused in large part by overcrowded houses and incomplete sanitation facilities, which compelled the Tribe to take the drastic action of closing reservation borders to non-residents and non-essential business. While six houses may seem like a small number of units compared to the dire need for hundreds of

35. Vogel Interviews, supra note 31.
36. At the height of the pandemic last year, the Cheyenne River Sioux Tribe set up nine checkpoints across the Reservation and limited non-residents from entering the Reservation unless on essential business or the tribal government has granted them a travel permit. When South Dakota Governor Kristi Noem demanded that the Tribe open the borders and threatened legal action, the tribal government held steadfast to its authority to protect the health of its people and address high rates of COVID-19 infections and mounting deaths. See Johns Hopkins Univ. COVID-19 Tracker for Dewey and Ziebach Counties (2021), https://coronavirus.jhu.edu/region/us/south-dakota.
houses, every new unit helps improve the well-being of extended families and the community.

Another distinguishing feature of Vogel’s financing strategy for Badger Park is her refusal to take on loan debt. So far, CRHA has funded all of the construction work, materials, and development costs with a combination of state and tribal funds, along with low income housing tax credits. While CRHA has capacity to take on debt, for now the “pay-as-you-go” model allows CRHA more flexibility to address the CRIR’s wide-ranging housing needs.

Vogel also seeks co-financing opportunities to lower the cost of development. For instance, an old rural water system served the Eagle Butte area and had no capacity for the expanded community envisioned by Badger Park. Without a substantial upgrade, Badger Park would be limited to a few dozen units, not the planned 400 houses. So when the new Indian Health Services hospital was being built in Eagle Butte and required more water, Vogel encouraged the tribal council to expand the system to serve Badger Park as well. There is no doubt that the entire reservation community benefits from these infrastructure investments, including, roads, broadband, water, and electricity. With these investments, Badger Park is not only a housing subdivision for tribal families, it is a real economic engine spurring new commercial ventures, a new high school, and other community services.

Individual financing also requires careful planning and readiness. CRHA recognizes that families come to homeownership through different paths and with different needs. Mobile homes have been a preferred type of housing on most reservations—easy to finance and quick to install on a home site. But they come at a very high cost. CRHA mediates these challenges by offering financial education courses and connecting tribal members to more affordable conventional loan products and low-interest federal mortgage programs. These efforts substantially increased affordable homeownership opportunities throughout CRIR and supported the demand for standard housing.

Key partners in providing much needed credit building services and affordable mortgage products to Native borrowers are Native American financial institutions. Given their proximity to the borrowers and the

37. About 17% of reservation households currently reside in a manufactured home, on par with the rate in rural America generally. Close to half of the American Indians who borrow to buy a home on reservation land secure their loan with a manufactured home. For a detailed discussion of manufactured housing in Indian Country, see Manufactured Homes: An Affordable Ownership Option, in TLHH, supra note 23, at 114.

communities that they serve, Native community development funds institutions (CDFIs) have emerged as perfect lending partners to tribal housing programs; they know the community’s consumer needs, help educate homebuyers, originate loans, and service the loans. Where USDA and other federal mortgage programs have struggled for decades to connect their loan programs with Native borrowers, despite federal guarantees, three Native financial institutions in South Dakota have figured out how to make these mortgage products work in Indian Country.

Lakota Funds, the first Native CDFI in the country, along with its sister institution Mazaska Owecaso Otipi Financial on the Pine Ridge reservation, and the Four Bands CDFI on the Cheyenne River Sioux Reservation, are the first re-lending intermediaries for the USDA RHS 502 program. Collectively, they have shown how to fill the critical capital needs of some of the poorest places in the entire nation. Their exceptional success at packaging affordable home loans on trust lands (33 years at 1% interest) is equally matched with their continued support of homebuyers after closing the loans. Poverty and economic distress, especially in communities that have little experience with financial stability, are pernicious pressures that often erode new homebuyers’ confidence in maintaining their loans. In the Cheyenne River Sioux community, CRHA and Four Bands CDFI work closely together from the inception of the lending process to well beyond the loan closing by cultivating long-term supportive relationships with their borrowers and homeowners. Lenders have started to realize the high value of this model—overall cost savings with efficient loan packaging, low risk of default through localized intervention, and a steady pipeline of mortgage-ready borrowers.

**Design and Sustainability.** It is widely accepted that much of the housing on Indian reservations built from the twentieth century was a massive failure; its configuration was too isolating, its scale too incongruent with traditional Native ways of communal living, its quality too inferior, and its residents too uniformly poor. Unfortunately, powerful negative images of decrepit housing projects and social issues associated with persistent poverty have burned into Indian Country’s collective consciousness. They are further embedded in the interstices of intergenerational trauma that have eroded a sense of pride and worthiness.

Lessons from the past have not been lost on Vogel and the CRHA team. The Badger Park project gave them the opportunity to leverage the past and be self-determined in designing their future. Vogel challenged her team to reassess how spaces are used in both housing structures and interior spaces. She also dared to think differently about materials and amenities and insisted on creating high-quality housing that also is affordable. From the beginning, Badger Park was intentionally built for the future, integrating sustainability into all aspects of the project and design. The layout offers a variety of housing options from single units to multifamily structures, blends publicly subsidized housing with private homeownership, and uses high-quality materials for both interior and exterior
elements. Streets are arranged to create an intimate sense of neighborhood, with sidewalks for safety and distinctive signage and street lights. Landscaping defines property lines and provides shade and wind blocks for the harsh prairie winds.

Overall, Badger Park epitomizes the essential elements of a well-designed, affordable, and sustainable housing development: a comprehensive needs assessment that creates a community vision for new neighborhoods; an infrastructure that makes Badger Park a fully modern networked community ready to participate in the gig economy; and a cadre of financial partners who provide a steady stream of critical capital to the reservation. The project will be sustainable because it meets the community’s actual needs, not externally imposed artificial criteria. Moreover, it will be sustainable because it unites the power of place with an empowered people who live there.

The power of this design cannot be overstated. Not only does it foster stronger community connections, it emphasizes health and safety and instills a sense of respect and dignity—aspects rarely considered in the legacy of reservation housing development. Indeed, what Vogel and the CRHA team have accomplished is much more than an affordable housing project. They have inspired equity, equality, and the possibility of transformational social change for the Cheyenne River Sioux community. It is a vision that sees what ought to be through the lens of what is and endeavors to remove the contradiction between the two.

III. Conceiving a Vision for Housing in Indian Country

Lakota theologian and political scientist Vine Deloria, Jr. often framed the centuries’ old Native American experience as a complex fusion of history and humanity, of identity and ideation, and of the pull between pervasive negative experiences and inherent determination to repair and rebuild. He wrote vividly about the transcendence of the Native systems of values and of conceiving visions for long-term solutions. Deloria illustrated this cultural perspective through an “old Indian saying”:

The white man, the Indians maintain, has ideas; Indians have visions. Ideas have a single dimension and require a chain of connected ideas to make sense. The connections that are made between ideas can lead to great insights on the nature of things, or they can lead to the inexorable logic of Catch-22 in which the logic inevitably leads to the polar opposite of the original proposition. The vision, on the other hand, presents a whole picture of experience and has a central meaning that stands on its own feet as an independent revelation.39

What kind of vision is needed to re-imagine housing in Indian Country? It is a vision that reconciles historical contradictions and transforms the way communities are created. The vision must be big enough to encompass all

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of Indian Country, bold enough to hold institutions accountable, and deep enough to make real lasting impacts. An evolved national vision for Native housing must account for the many bad past practices: restrictive housing inventories, substandard housing conditions, and unfair lending practices. It must further reckon with its indifference to current housing conditions in Indian Country that are causing a highly vulnerable population to be deprived of their health and the opportunity to grow old. It must dismantle the discriminatory practices and systemic barriers that economically and socially segregate Native people and imperil their lives with intolerable risks and indignities.

Such an evolved vision for housing is particularly important because it is the place where all cultural, social, and political forces converge to express themselves with the greatest clarity and consequence. Housing is where the community environment reveals social determinants and defines intergenerational economic opportunities.

There is some hope on the horizon—housing is a central part of the new Biden-Harris administration’s tribal agenda. President Biden has promised to go big: 1.5 million new homes and public housing units; incentives and tax credits for homebuyers and renters; reauthorization of the NAHASDA; and help for tribes to raise private capital to invest in affordable housing. It must go further, however, and aggressively take on a wide system of structural barriers that directly impede tribal self-governance and mortgage lending on trust lands. Here are a few broad recommendations.

Change the way the federal government interacts with tribes

Such a vision begins with ensuring that the federal government lives up to its trust and treaty obligations by working legislatively to correct the severe and chronic underfunding of Indian Country programs. This goal means fundamentally changing the way the federal government interacts with tribes on a government-to-government basis in three critical ways: funding trust services and programs; respecting tribal self-governance; making trust lands usable. Specifically, the federal government needs to consider the following:

- Change the way the government agencies fund trust services by replacing the century-old discretionary and erratic budgeting process with a mandatory funding stream to tribal governments.
- Promote self-governance by providing tribes real tools and resources to effectively deliver essential programs and services to their citizens.


41. Biden’s full housing plan is available online, joebiden.com/housing.
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particularly through the HEARTH Act of 2012, a law specifically to enhance self-governance over tribal lands and to promote the efficient leasing of those lands for housing and business purposes.\textsuperscript{42}

- Make trust lands usable by overhauling federal processes as described briefly below; it does not mean privatizing tribal lands.\textsuperscript{43}

\textit{Normalize the lending process and open up the capital market}

Much has been written about overhauling federal regulations and streamlining processes in almost every aspect of land use and development. In the particular area of housing development on reservation trust lands, the federal regulations are terribly burdensome and discouraging to most investors. There are practical and expedient ways to promote lending and incentivize investments in Indian Country.


\textsuperscript{43} A persistent pitch in the substacks of federal Indian policy is the notion that American Indian reservation lands should be privatized to accelerate economic development, mineral extraction, monetization of reservation lands. While an in-depth discussion of this issue is beyond the scope of this article, a few thoughts illustrate this concept of privatization. The Trump administration eyed American Indian reservations as great sources of untapped oil and gas: reservations cover just 2% of the United States, but contain about a fifth of the nation’s oil and gas, along with vast coal reserves. Trump’s energy and deregulation agenda intended to “free” those resources and put tribal lands into private ownership. While also promoting privatization, Terry Anderson and Naomi Schaefer Riley of the Hoover Institution want to free Native people from the dispiriting legacy of poverty, dependency, subsidies, and “dead capital.” See, e.g., Naomi Schaefer Riley,\textit{ The New Trail of Tears} (2016); Naomi Schaefer Riley,\textit{ One Way to Help Native Americans: Property Rights}, \textit{Atlantic} (July 30, 2016), https://www.theatlantic.com/politics/archive/2016/07/native-americans-property-rights/492941; Unlocking the Wealth of Indian Nations (Terry Anderson ed., 2016); Terry L. Anderson, Biden’s Chance to Renew Reservation Economies, \textit{Hill} (Jan. 2, 2021), https://thehill.com/opinion/white-house/532133-bidens-chance-to-renew-reservation-economies. Neither approach recognizes the federal government’s trust responsibilities, tribal sovereignty, or self-determination. Tribes and Native people are projected as having no agency in their own lives, and so Native people should remove themselves from their reservation communities, sell their trust lands, and then reap magical benefits from the potency of private property. These are the tactics of nineteenth-century assimilationist ideas that led to the termination of many tribes and the destruction of their lands and cultures. Pursuing this notion today would destroy what little is left of Indian Country. For two diligent critiques of privatization, see Kristen A. Carpenter & Angela R. Riley, Privatizing the Reservation?, 71 STAN. L. REV. 791 (2019); and Jessica A. Shoemaker, Transforming Property: Reclaiming Indigenous Land Tenures, 107 CALIF. L.REV. 1531(2019).
• Normalize the lending process on trust land and stimulate use of government programs and private capital investments in Indian Country. Regulatory hurdles, bureaucratic hoops, and extended timelines dissuade lenders from participating in government programs specifically designed for Native people. Moreover, each federal agency has its own complicated and lengthy process. Collectively, they are stifling worthy investments. Indian Country is ready to break these patterns and envision a future where conventional lending is a standard practice, not a privilege, and housing opportunities are readily available, not an extraordinary occurrence.

• Modernize the BIA title system to meet the real estate market standards for processing loan transactions. Without a doubt, the BIA’s title, lease, and recording processes obstruct and impede mortgage lending and development investments in Indian Country. These practices often prevent and preclude even the possibility of obtaining a home on trust lands. Recent research from Indian Country and oversight hearings in the U.S. Senate provide specific recommendations to reform the BIA’s processes. In addition to these concrete and practical reforms, the array of Native-focused federal mortgage programs need to be harmonized for more fluid use and public accountability to Native constituents.

• Expand access to capital and credit in Indian Country by optimizing the value of Native CDFIs to provide funding and technical assistance to tribes and tribal housing authorities. For the past several years, droves of conventional lenders have retreated from the mortgage market available to Native borrowers, pushing prospective Native homebuyers to higher priced loans or worse, no place to live. These lending practices are dangerously discriminatory. Native CDFIs are emerging as critical sources of capital. Locally based, community-focused, mission-driven, Native CDFIs are in the best position to service private mortgages and federal direct loans and mortgage guarantees. Native CDFIs also primary providers for credit for manufactured homes, small business, vehicles, and other consumer needs otherwise unavailable to borrowers on the reservation.

What is needed: making more capital investments into Native CDFIs; expanding and making permanent pilot programs using Native CDFIs as

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re-lenders of federal home loans; and creating innovative programs such as a national capital pool for Native CDFIs and another pool of leasehold mortgages. These steps would offer investment-quality mortgage-backed securities to a wide range of investors, and strengthening secondary markets in Indian Country to support liquidity and keep capital circulating for more mortgage lending. If all or even some of these recommendations were to somehow coalesce, they would propel the housing market and open doors to homeownership in Indian Country.

IV. Conclusion

Indian Country’s growing population, economic growth, and acute need for housing present a momentous opportunity for tribal communities, lenders, and the United States. Tribes across the country, such as the Cheyenne River Sioux Tribe, are already finding innovative and powerful ways to expand housing and homeownership opportunities in Indian Country. They are determined to overcome generations of economic deficits, lagging infrastructure investments, and heavy bureaucratic burdens. They are reconnecting to the vibrancy of the land and igniting the engines of economic self-sufficiency. Their visions are realized through bold imagination and ingenuity, distinctive cultural values, and inspired leadership. Their collective successes underscore the most meaningful manifestations of tribal sovereignty and self-governance.

The power of place is the key to achieve the vision of affordable housing in Indian Country. It instills hope for future generations of Native families to find shelter and community on their own homeland. This work—bringing new resources and ideas into action in Indian Country—requires many hands. It can be done only through partnerships and perseverance. If we can land a spacecraft on Mars, we can build affordable and quality homes in Indian Country.

45. Others tribes at the forefront of housing self-governance include the Confederated Salish & Kootenai Tribes in Montana, Ho-Chunk Nation of Wisconsin, San Felipe and Santo Domingo Pueblos in New Mexico, Bristol Bay in Alaska, and Makah Tribe in Washington. TLHH, supra note 23, provides cases studies on these Native Nations, highlighting their planning, financing, green design, and large-scale development practices.
Preservation Issues and Strategies for USDA’s Rural Housing Service Multifamily Direct Loan Portfolio

Richard Michael Price & Rebecca Simon*

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I. Defining Rural Housing

In the context of federal housing programs, rural housing typically refers to a series of housing programs under what used to be the Farmer’s Home Administration (FmHA). This history goes far back, before the current multifamily programs, to the 1930s and 1940s.¹ The FmHA administration gave way to what is now known as the Rural Housing Service (RHS). As the successor agency to FmHA, RHS now functions as an agency within the Rural Development office (RD) at the U.S. Department of Agriculture (USDA).

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This article will lay out the existing structure of the RHS rental housing programs operated by USDA. We will discuss recent developments in these programs, the funding issues that have created challenges to preservation, and preservation strategies that have been used to overcome, in part, the funding challenges. However, ultimately far more financial need and housing demand exist throughout the rural communities than the current available resources can support, and changes are needed.

The multifamily rural housing program run by RHS, also known as the Rural Rental Housing (RRH) program, began in the early 1960s through amendments to Title V of the Housing Act of 1949. The statutory section that embodies most of the RRH program is Section 515, and program participants typically refer to this as the “515” program. The 515 program brings with it an interest credit component that subsidizes the effective interest rate down to 1% generally, though there are exceptions. A cousin to the 515 program is the 514 farm labor housing (FLH) program. Section 514 can also bring with it grants under Section 516. And both the Section 515 and Section 514 programs can have project-based rental assistance (RA) under Section 521. All of these programs exist under Title V, noted above, codified at 42 USC Section 1471 et seq. By a quirk of statutory construction, an apartment complex cannot receive RA unless the property is also financed with and encumbered by a 514 or 515 mortgage loan. As a result, a real crisis exists within these programs, as 514 and 515 loans are maturing and properties are facing the loss of the 514 or 515 loan, which results in the immediate termination of the RA upon mortgage maturity.

As of 2018, the Section 515 and 514 programs supported 13,766 apartment complexes with 421,816 units. There has been a general decline in the number of properties and units, even while overall vacancy rates remained consistent. Looking back to the inception of the programs in the early 1960s, the program has seen an approximately 51% decrease in the overall assisted housing stock, losing 14,234 properties and over 111,000 apartment homes. The 514 and 515 properties were mainly constructed and financed from 1973 until 1996, when construction funding was drastically reduced.

Congress attempted to preserve the portfolio through the Emergency Low Income Housing Preservation Act of 1987 (ELIHPA) by stripping away owner prepayment rights. This statute has been the source of much

litigation and controversy among owners. Still, owners with promissory notes that did not expressly prohibit prepayment are able to request prepayment through the ELIHPA statute. While this history makes prepayment impossible or very difficult, it also did not solve the preservation problem as few RD financial resources exist to support the properties that do remain in the programs. One program consultant, John Meyers, calls the situation a toll-road without exits.

The first of the 514 and 515 loans started to mature in 2014. RD has encouraged housing preservation with the small resources that it does have; however, the number of RD properties continues to dwindle, and that loss is only expected to accelerate in coming years. RD is left with an aging portfolio, greatly reduced or eliminated resources, and loans that are reaching their natural maturity dates. With little, and in some years no, new properties under construction, preservation has become the mission for this program and the people who work with it and who live in and depend on it. And the clock is not only ticking but the alarm has begun to ring. So what to do?

II. Overview of Rural Development

When FmHA was succeeded by RHS, the operation of the program was restructured with an Administrator of RHS (Administrator) in the National Office (National Office) that set policy, while offices located throughout the country (State Offices) administered the many programs, including both RHS programs and others, and attempted to implement the policy generated in the National Office. Each State Office had and still has a State Director (State Directors) with significant operational autonomy from the...


9. In addition to the programs described herein, RD operates other programs that can address other housing needs but do not address needs of renters. Some of these programs are focused on other business or community development purposes. Additional RD programs include making direct loans for single family housing through the Section 502 Single Family Housing Direct Loan program, financing business and industry acquisition, construction, conversion, expansion, and repairs in rural areas through the Business and Industry (B&I) Direct and Guaranteed Loan program, making loans for constructing, enlarging or improving essential community facilities in rural areas and towns through the Rural Community Facilities Direct and Guaranteed Loans program, and making block grants to be used in conjunction with the direct loan programs to provide communities facilities to the neediest communities through the Community Facility Grants program. Title V, Section 502 of the Housing Act of 1949, 42 U.S.C. § 1471 et seq.; Consolidated Farm and Rural Development Act of 1972, 7 U.S.C. § 1932.
Administrator. This structure led to operational inefficiencies and lack of consistency in the administration of the programs and interpretation of the policies.

As of October 2020, the RD program was restructured into three divisions: Production and Preservation, Asset Management, and Field Operations.10 The Production and Preservation division assumed the work previously performed by the Preservation Office with a new emphasis on directly processing applications intended to preserve projects throughout the country. In fact, for the first time in recent memory, RD has a dedicated underwriting staff. The Asset Management division focuses on supervising and managing program risk and develops policy for the field operations. This office assumed the work of the previous portfolio management office and is also tasked with counterparty participant reviews, including reviews of the lenders, owners, and management agents. The Field Operations division is the largest division with offices throughout the country that interact with owners, managers, and residents. It is tasked with budget and site inspections, including physical condition assessments.

Almost 70% of the 514 and 515 properties are over thirty years old and are facing significant deferred maintenance issues. While the restructuring is intended to refocus RD locally, to work directly with the residents and site managers, the lack of focus on maintenance over the years and the inconsistent approaches across the country have left the portfolio in a difficult place.

A. Section 515 Rural Rental Housing Direct Loan11

The Section 51512 rental housing program provides direct federal loans13 with thirty-year to fifty-year terms and interest credit that subsidizes these loans to a 1% effective rate.14 The program is typically used in conjunction with RA, where the tenant pays a maximum of 30% of their income toward rent and utilities. There is no 30% rent limit in the 515 or 514 programs outside of the RA program. As a result, there are nearly 70,000 households without RA that qualify for RA, the majority of which are paying more than 30% of income in rent, and RHS considers those residents “rent-overburdened.” Some 515 projects also use U.S. Department of Housing and Urban Development (HUD) Section 8 project-based assistance or Housing...
Choice Voucher (HCV) assistance. Originally, four variations of the Section 515 loan program existed: (1) Cooperative Housing, (2) Downtown Renewal Areas, (3) Congregate Housing or Group Homes for Persons with Disabilities, and (4) the Rural Housing Demonstration Program. As of September 2019, elderly or disabled households make up 65.2% of Section 515 households, and the average income is $13,551.\footnote{15} Decreases in funding for both the loan and subsidies of the Section 515 program have occurred over the last twenty years.\footnote{16}

In the years that Congress provides funding for new 514 and 515 loans, that funding is typically then distributed through a Notice of Funding Availability (NOFA) for each program. Section 514 (and 516 grant) funding tend to be more reliable over the past decades, though the amounts have typically been small.\footnote{17}

Acquiring an existing property in the RD programs and assuming a Section 515 or 514 loan represent a substantial undertaking. The transfer procedures available under 7 C.F.R. § 3560.406 (Transfer) require new third-party reporting, often including both a new appraisal and a new Comprehensive Needs Assessment (CNA or Needs Assessment). RD assesses current value, possible value for near term loan security, and future costs over the following twenty years. It is perhaps most practical to think of this

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\hline
Rural Development (dollars in millions) & FY19 Final & FY20 Final & FY21 Admin Proposed & FY21 House Bill & FY21 Senate Bill & FY21 Final \\
\hline
515 Rental Housing Direct & 40 & 40 & 0 & 40 & 40 & 40 \\
515 Subsidy & 9 & 12.1 & 0 & 6.6 & 6.7 & 6.7 \\
514 Farm Labor Housing & 27.5 & 28 & 0 & 30 & 28 & 28 \\
516 Farm Labor Housing Grants & 10 & 10 & 0 & 10 & 10 & 10 \\
Combined 514/516 Subsidy & 16.9 & 18.7 & 0 & 15 & 15 & 15 \\
\hline
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\footnote{Funding Charts created by CARH using information from the Housing Assistance Council and the National Low-Income Housing Coalition.}
requirement as at least two third-party reports (appraisal and CNA) and an additional checklist of over forty items plus the infusion of new capital as a minimum threshold to complete the Transfer application.

Completing an appraisal for a Transfer application is complicated by the fact that RD puts out its own appraisal instruction, contained in Handbook HB-3560-1, Chapter 7, which tends to vary from conventional appraisal directions. Debates about the meaning of the Uniform Standards of Professional Appraisal Practice (USPAP), the generally recognized professional appraisal standards, between RD staff and commercial appraisers are a common occurrence in most transactions. These debates arise as many appraisers find RD instructions to be atypical and not necessarily in line with USPAP standards.

The RD CNA follows the same standards and formatting that HUD requires in similar transactions in HUD multifamily programs. One notable exception is that RD requires the CNA to show all of the needs for the following twenty years with the work either being funded immediately or funded according to a combination of current work, deposits, and annual funding resources all provided at closing of the transfer. HUD requirements tend to be, in many respects, focused more on the first ten years. This mandate, in effect, forces the entity seeking to acquire and preserve the property to raise, at the time of acquisition, enough funds for two recapitalizations—one to be used in the present and another to be used in the future twenty years. This strategy arose during the Obama administration, and the rationale provided was that it made the properties financially secure for the long term. While a laudable goal, it is often not practical because RD provides little or no funding for those requirements. RD may provide RA, but the amount of RA allowed is often insufficient, which is the very reason why the recapitalizations with non-RD funds are needed.

B. Section 514 and 516 Farm Labor Housing Program Loan and Grant Program

The Section 514 and Section 516 Farm Labor Housing Program Loan and Grant Program is the only nationwide program to provide housing for farm laborers. Housing providers who do not work with the RD programs often confuse the limitations of 514 and 515. The 514 program is focused on current farm laborers and their families but also permit retired farm laborers and can also be used as rental housing with special waivers. Section 515 is multifamily rental housing that increases the overall supply of housing in rural areas. Section 516 grants are used in

19. Loan authorization in FY2005: $32.9 million ($15.5 million in subsidies) and $30.3 million in grants; FY2006: $38.1 million ($17.0 million in loan subsidies) and $13.9 million in grants; FY2007: $38.1 million ($18.3 million in loan subsidies) and $13.9 million in grants; FY2008: $27.5 million ($11.9 million in loan subsidies) and $9.9 million in grants; FY2009: $21.7 million ($9.1 million in loan subsidies) and $9.1 million in grants; FY2010: $27.3 million ($9.9 million in subsidies) and $9.9 million in grants; FY2011: $25.7 million
conjunction with Section 514 loans to finance affordable, off-farm rental housing to low-wage farm workers.

Section 514 loans are also direct federal loans to farmers, Native American tribes, farmer associations, public bodies, and nonprofit organizations to provide living quarters, furnishings, and related facilities for domestic farm workers. Section 514 loans have a 1% interest rate and a maximum repayment term of thirty-three years. Grants may cover up to 90% of development costs.

C. Multifamily Preservation and Revitalization (MPR) Program

The Multifamily Preservation and Revitalization program is often thought of as its own program, operating under a series of Federal Register notices. However, MPR most accurately provides a path to restructure existing RHS multifamily rental housing as part of a larger revitalization plan. If funding is available, MPR can provide new loans or convert hard mortgage payment into soft cash flow only payments. More typically, MPR defers payments on existing RHS mortgages for twenty years, accruing at a 1% interest rate.

D. Section 521 Rental Assistance Grant Program

Section 521 Rental Assistance Grant Program provides RA to reduce housing costs, including rent and utilities, to 30% of the household’s adjusted income. This assistance is available only to very low- and low-income households, and assists approximately 65% of Section 515 units. The remaining households may pay more than 30% of their income. While annual appropriations statutes authorize RA for preservation purposes, the Obama administration eliminated that use. In the last two years, new language in the annual appropriations statutes has provided for rental

($9.8 million in subsidies) and $9.8 million in grants; FY2012: $27.3 million ($7.1 million in subsidies) and $7.1 million in grants; FY2013: $21.4 million ($7.1 million in subsidies) and $8.3 million in grants; FY2014: $23.8 million ($5.6 million in subsidies) and $8.3 million in grants; FY2015: $23.6 million ($7.6 million in subsidies) and $8.3 million in grants; FY2016: $23.8 million ($6.8 million in subsidies) and $8.3 million in grants.


21. Farm workers who lease Section 514/516 units must be either U.S. citizens or permanent residents, and the majority of their income must come from farm work. Grants are available only to governments or nonprofit organizations.

22. The subsidy goes to the housing unit, not an individual tenant. In effect, the subsidy indirectly goes to the tenant through lower rent payments.

23. FY2005: $587.3 million; FY2006: $646.6 million; FY2007: $608.1 million; FY2008: $478.7 million; FY2009: $902.5 million; FY2010: $968.6 million; FY2011: $953.7 million; FY2012: $904.6 million; FY2013: $834.3 million; FY2014: $1.1 billion; FY2015: $1.1 million; FY2016: $1.2 million. (Rental assistance funding also includes rental assistance under the Section 502 (c)(5)(D) program, Section 515, and farm labor housing new construction.)
assistance contracts with twenty-year terms, subject to annual appropriations; however, these new provisions are yet to be implemented.

E. Rural Development Voucher Program (RDVP)

The RDVP was created to offer some protection to eligible multifamily housing tenants in properties financed through Rural Development’s Section 515 Rural Rental Housing Program who may be subject to economic hardship through prepayment of the RD mortgage. When the owner of such a development pays off the loan, the RD affordable housing requirements may be modified, including that rents may increase thereby making the housing unaffordable to tenants. The RDVP applies to any property financed through Section 515 where the mortgage is paid off prior to the maturity date in the promissory note, including foreclosed properties. Tenants in these properties are eligible for an RD voucher under the same conditions as properties that go through the standard prepayment process. The RDVP are supposed to function as close as practical to the HUD Section 8 Housing Choice Voucher (HCV) program but have two noticeable differences. Operationally, these programs are administered by RD directly, and once the rent subsidy is set it does not increase annually, due to an administrative cost-cutting policy adopted many years ago. Also, the RDVP can take many months to process, leaving gaps in the rent subsidy for the tenant.

F. Emergency Low-Income Housing Preservation Act of 1987

The Emergency Low-Income Housing Preservation Act of 1987 (ELIHPA) changed the way that Section 515 and Section 514 operated in respect to mortgage obligations. Previously, loans made prior to December 15, 1989, were eligible for prepayment; however, ELIHPA changed that. Even if a covered loan is prepayable on its face, it may not actually be able to be prepaid in light of the ELIHPA statute. The ELIHPA statute removed or repudiated the prepayment rights for many owners. At its inception, ELIHPA featured incentives to owners to not prepay; however, most types of incentives that could be offered have generally not been funded for many years.

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28. Hous. Assistance Council, Rural Rental Housing Preservation: Purchase Process (Sept. 2006), http://www.ruralhome.org/storage/documents/preservpurchaseprocesses.pdf. This article glosses over several statutes that changed prepayment rights starting in the mid-1980s and also changed the terms of loans then being originated from and after December 15, 1989, because the ELIHPA statute has either replaced those other statutory changes or, de jure or de facto, folded into the ELIHPA process.
ELIHPA resulted in significant litigation that culminated in two lines of cases, one seeking to quiet title, essentially setting aside ELIHPA, and the other seeking damages. In *Kimberly Associates v. United States*, the Ninth Circuit initially agreed with the plaintiffs’ claim that ELIHPA should not prevent prepayment under state quiet-title law, but later cases effectively reversed that decision. The plaintiff owners argued that ELIHPA was not enforceable because it violated legal title. The federal government argued the “unmistakability doctrine” in response, claiming that as sovereign it retained its sovereign powers unless those powers were unmistakably waived. As sovereign, the federal government argued it could pass a new statute abridging the 515 mortgage loan terms. The U.S. District Court for the District of Idaho essentially agreed with this position on remand.

The decision in *Franconia Associates v. United States*, and related cases sought a different path, not striking down ELIHPA, but finding that damages could be assessed for the value taken due to the removal of the prepayment rights. The Supreme Court ruled unanimously, finding a waiver of sovereign immunity and therefore reasoned that the federal government, in doing business with its citizens, “does so much as a party never cloaked with [sovereign] immunity.” On remand, the Court of Federal Claims awarded damages. There have been a series of cases and settlements subsequent. The monies recovered by litigants are compensatory damages for the loss of value because owners cannot prepay, remove low-income restrictions, and charge market rents, but instead are locked into the 515 program until loan maturity.

While difficult, ELIHPA does allow owners to apply to prepay. Loans issued after the passing of ELIHPA generally contain a prepayment prohibition. While the ELIHPA application process may result in prepayment, it often does not. ELIHPA processing is designed to require owners to offer to sell the property to a nonprofit entity who will continue in the Section 515 program. While there were originally some funds to assist nonprofits in purchasing these properties, there are few, if any, presently. Many owners have found that the more practical approach is simply to market the property for sale under a Transfer process.

**G. Section 538 Multi-Family Housing Guaranteed Loan Program**

The Section 538 program is really RD’s production program and funds construction, acquisition, and rehabilitation of multifamily housing for low- to moderate-income residents. It provides 90% loan guarantees to certified lenders to make rental housing affordable to low- and moderate-income

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29. Kimberly Assocs. v. United States, 261 F.3d 864 (9th Cir. 2001).
32. Id. at 141.
residents. For the nonprofit sector, the program covers 97% loan-to-value ratios. Residents of the completed housing facility must be very-low- to moderate-income households; or elderly or disabled persons with income not in excess of 115% of the median income of the surrounding area. The Section 538 program can be used with Section 515 preservation efforts. RD policy is to use this resource for preservation as well as to expand affordable housing by using 538 as a stand-alone financing tool outside of other RD programs. Fiscal year funding for 2021 for this program is $230 million. Prior to 2011, Section 538 also provided an interest-rate subsidy component, but it was eliminated as a cost-cutting measure.

III. Preservation Strategies

A. Transfers of RD Properties

Preservation and Transfer efforts often begin by utilizing RD’s Preliminary Assessment Tool (PAT). The PAT is a series of underwriting spreadsheets that analyze typical low-income housing tax credit (LIHTC) development underwriting and incorporate key RD requirements. The LIHTC program is the key affordable housing production and preservation program under 26 U.S.C. § 42. In the RD space, the LIHTC program is the main source of new equity capital for preservation.

RD has, for some years, adopted the informal strategy of “OPM”—using other people’s money—through the LIHTC program and other sources of funding. RD generally facilitates new debt financing by offering to subordinate its existing debt to new debt. RD typically resets the interest rate, known as the note rate, and also extends the interest credit subsidy to provide in most cases a 1% effective interest rate (subject to various restrictions and requirements) as well as reamortizing and extending the RD loan term (often up to an additional twenty years to thirty years, depending on facts and circumstances). This keeps any RA with the property for an extended period. RD also continues as a servicer; while some parties dislike the company of the agency, other parties appreciate having another experienced servicer monitoring the property. The new debt added on top of the RD debt is often a Section 538 guaranteed loan, a Section 538 credit-enhanced tax-exempt bond, or conventional bank debt.

35. Loan authorization in FY2005: $97.2 million; FY2006: $99.0 million; FY2007: $99.0 million; FY2008: $129.0 million; FY2009: $120.8 million; FY2010: $129.1 million; FY2011: $31.0 million; FY2012: $130.0 million; FY2013: $150.0 million; FY2014: $150.0 million; FY2015: $150.0 million; FY2016: $150.0 million. Loan subsidies (budget authority) for FY2005: $3.4 million; FY2006: $5.4 million; FY2007: $7.6 million; FY2008: $12.1 million; FY2009: $8.1 million; FY2010: $1.5 million; FY2011: $3 million; FY2012: $0; FY2013: $0; FY2014: $0; FY2015: $0; FY2016: $0.


MPR can also be utilized in this structure to repurpose dollars that previously would have gone to service the RD debt to instead service new debt to support much needed rehabilitation and modernization of the property. MPR loan modifications require congressional appropriations, and this tool has been so popular that it is oversubscribed, and more budget authority is needed. MPR also has a number of operational issues that have never been fully resolved. One example is the lack of a set policy on how to pay or refinance the resulting balloon payment on the 515 loan being deferred at the end of the twenty-year deferral period.

B. Difficulties to Transfer

Transfers can be very difficult. For example, RD closely regulates sales prices by limiting how much “equity” (regarded as appraised value in excess of debt) is available to owners selling their property. RD also closely regulates any rent increase based on the RD-approved and budgeted operating and repair needs. And any party seeking to preserve these properties would have to arrange funding for project needs over the twenty-year period required in the can. The LIHTC program is a limited resource, and intense competition exists with other RD properties and with non-RD properties. The 515 properties often do not compete well as they tend to be small, much smaller than suburban and urban apartment complexes. Redevelopment may also require seeking other loan and grant sources depending on project underwriting. Preservation often means competing for HUD’s HOME Investment Partnerships Program loans or Federal Housing Finance Agency’s Affordable Housing Program grants or loans.

C. Substitution as an Alternative to Transfer

An alternative or even an interim step that is often utilized is a substitution under 7 C.F.R. § 3560.405 (Substitution). A Substitution effectively changes control of the property through a transfer of the general partner or managing member interests in the owner entity. The Substitution process is a more limited than Transfer, focusing on the qualification of the incoming general partner or managing member of the owner. This process allows the property to have new, and generally re-invigorated leadership in the owner entity to assess operations and assess and assemble the non-RD financial resources for longer term preservation.

D. Other RD Strategies Under Discussion

In 2004, RD commissioned ICF Consulting, a consulting firm that specializes in government analytics, to provide a study on preservation strategies called *Rural Rental Housing—Comprehensive Property Assessment and Portfolio Analysis*. ICF recommended a multiple strategy approach and

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controversially found that as much as twenty percent of the portfolio was too expensive to keep in the program, because of both escalating costs for incentives to avoid prepayment and escalating costs for maintenance in rural markets. Around the same time, the Council for Affordable and Rural Housing (CARH) issued its Position Paper on Aging Section 515 Rural Housing Portfolio, recommending that the best solution to preserve the portfolio would be new Section 515 loans coupled with additional Section 521 funding to cover unsubsidized tenants and meet operating needs. CARH issued a second position paper repeating this stance in 2009. Despite this advocacy, funding has not generally increased or even kept pace with needs.

A recent change, contained in the Consolidated Appropriations Act of 2019, Public Law 116-6, authorized RD to provide owners with twenty-year RA contracts, subject to annual appropriations. While RD has yet to implement this provision, it is hoped that the law will reduce the costs associated with reprocessing contracts on an annual basis in an effort to create more reliable subsidy that can be leveraged for additional financing. This change will put the RD rental assistance program on similar financial footing as HUD’s Section 8 project-based contracts. Section 8 contracts historically create greater investor and lender interest in part because of the stability of the twenty-year contracts.

An additional tool that has been considered in recent years is to decouple RA from the RD mortgages. In other words, allow RD properties to maintain the rental assistance, even as the Section 515 or 514 mortgage loans mature. This approach protects the residents who are in jeopardy of losing their benefits and ensures that the properties can find new financing as a result of a long-term and stable income stream through the rental assistance. This change would require a statutory change.

In 2019, Representative William Lacy Clay (D-MO) introduced H.R. 3620 to the 116th Congress. H.R. 3620 proposed to decouple RA and create a more predictable and permanent structure around the MPR program. The bill ultimately passed in the House of Representatives but did not proceed past committee in the Senate. That measure, with some changes, was re-introduced by Congresswoman Zoe Lofgren (D-CA) in the 117th Congress as Subtitle B of H.R. 1603. H.R. 1603 passed the House in March 2021. While H.R. 1603 would provide more preservation tools, as written the bill also adds additional administrative procedures and a new advisory board. Given that these mortgages are maturing now, and RD has helped create at least some preservation tools, H.R. 1603’s new procedures and advisory board provisions might create more steps in the preservation process and actually slow down some preservation efforts.

IV. Conclusion

As the current portfolio of affordable rural housing supported by RD programs ages and many of the loans mature, the best option for preserving this portfolio is greater funding for RD. However, in the absence of such funding, the key to preservation is finding new and improved ways to accept and accommodate third-party financing sources.
Market-Anticipatory Approaches to Rural Property Vacancy

Ann M. Eisenberg*

If you rehab it, they will come . . . right? That is, if a local government ends up at the step of last resort with a vacant, dilapidated property—having been unable to find the owner, for instance, or spur a known owner to action—and takes on the burden of acquiring and either demolishing or rehabilitating the problem property, a new buyer will want to purchase the nice, new version of the property afterwards, helping offset the costs the local government incurred—right?1 Maybe—but maybe not. Maybe no new consumer is waiting at the other end of the process, and the property will continue to sit, unused, with the local government having spent funds that it could not necessarily afford, unable to recoup a much-needed return on its investment.

The calculation of whether and how to acquire and either demolish or rehabilitate a dilapidated property is probably a gamble for any local government, especially those in communities with high rates of property vacancy and dilapidation.2 Except in localities experiencing consistent growth or the mixed bag of gentrification, it is not necessarily clear that a new user will emerge at the end of a rehabilitation process in order to put a once-derelict property back into productive use and provide a local government with a return on its investment.3

For rural local governments in particular—and for the more than one third of rural local governments that are experiencing regional population loss and related socioeconomic decline and distress—this gamble is quite

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1. Cf. Ann M. Eisenberg, Addressing Rural Blight: Lessons from West Virginia and WV LEAP, 24 J. Affordable Hous. & Cmty. Dev. L. 513, 534 (2016) (describing concern among local government officials that, even when they had the resources to acquire neglected properties, a municipality “could spend tens of thousands of dollars on the process and end up burdened with an empty lot of minimal value”).

2. Although the prevalence of vacant and dilapidated properties in rural communities remains under-studied and poorly documented, small towns and remote regions across the country face associated challenges. See Kim Skobba, Adenola Osinubi & Karen L. Tinsley, What About Rural Blight? Housing and Neighborhood Conditions in Southeastern Small Towns, 85 Rural Soc. 85, 85–86 (2019).

uncertain. Rural markets for housing, commerce, and other industries are more limited due to greater population scarcity and distance. It is far from guaranteed that a market of consumers will be interested in acquiring any particular rehabilitated property, whether it is a post-demolition vacant lot or a parcel suitable for housing, retail, or industrial uses.

In addition to being uncertain, the gamble for a would-be local government rehabilitator can also be high stakes. Many rural local governments today are experiencing acute fiscal distress as regional tax bases shrink. Local officials are faced with difficult choices as to which services can still be provided in order to match shrunken budgets. Should the police force, schools, or the library be reduced one or two days a week to save money? Or can money be saved by forgoing functions that seem less urgent, like building code enforcement and trying to figure out how to deal with the old, empty theater building crumbling at the end of Main Street?

As an example, Michelle Wilde Anderson notes that distressed Northwestern timber communities have encountered “striking questions about how deep they are willing to cut back the public sector: Must there be police and ambulances available for emergency dispatch at night and on weekends? Do we need a safety net related to mental health disorders, poverty in old age, and drug addiction?” She provides a harrowing account of a rural Oregon woman who called 911 in 2012 “to report a violent ex-boyfriend trying to break into her home, [but] [b]udget cuts meant that the local sheriff’s department did not have anyone on duty on weekends,” and the dispatcher had no one available to send. The woman was raped and murdered, and the county sheriff issued a statement recommending that victims of domestic violence “consider relocating to an area with adequate law enforcement services.”

The choices among some services may seem obvious: keep school open and the police working on weekends, hold off on building code enforcement. But the obviousness of this choice means that “[s]ervices unrelated to public safety and taxes—such as regular park maintenance, summer youth programs, child welfare services, facilities to house the indigent elderly, land use planning, and proactive code enforcement [become] a
luxury of the past.” A problem undergirding this difficult trade-off is that letting the less urgent-seeming, shorter-term issues with building code enforcement and nuisance properties fall by the wayside can have long-term consequences.

Property vacancy and dilapidation rates go up when a locality is distressed. Properties emptying out and falling apart are one piece of the puzzle in a difficult, vicious downward cycle of socioeconomic decline. The cycle often goes like this: A local employer, one among few (if not the only one), shuts down. A portion of local residents move away, and more young people move away when they come of age because they are unable to make a living by staying. The local government’s tax revenue shrinks with the loss of population. The built environment becomes too large for the population, so more and more buildings sit empty and untended. The buildings start to crumble, but the local government becomes less and less equipped to step in to fix them due to its growing budgetary concerns.

Yet, if a community has a chance at reversing such a downward cycle, addressing the property vacancy and dilapidation problem has to be part of the solution. Not addressing the crumbling built environment means that a community will have a much more challenging time attracting new residents, new employers, and new businesses and services. Thus, if a locality hopes to turn things around, it likely needs to find some way to address problem properties. Such a strategy needs to include both short-term problems including acute hazards, such as a vacant house posing a fire risk to neighboring residents, and long-term problems, such as a high volume of vacant properties that need to be addressed strategically and systematically.

So, what is a cash-strapped, rural local government supposed to do? Ideally, a given community will approach its problem properties with a multi-pronged strategy. That strategy should include creating a legal foundation if it does not already exist, such as by adopting building codes, comprehensive plans, and zoning ordinances; determining the right enforcement mechanisms for the locality; and aiming to access and leverage as many federal and state resources as possible, such as the U.S. Department of Agriculture’s grant and loan programs for housing and infrastructure.

11. Id. at 485–86.
Different communities will be at different starting points on the long-term journey of addressing a crumbling built environment. Some may be ready for a land bank, while others may need to take the first step of simply inventorying their properties and garnering support among residents to take action. Most communities need to take action both to mitigate immediate hazards and to work towards prevention of property deterioration in the future.

One interesting strategy for addressing vacant and dilapidated properties in rural areas is what recent law graduate Mairead Fitzgerald-Mumford has labeled the “market-anticipatory approach” in her Note on tackling greyfields. The market-anticipatory approach is a potential answer to the problem outlined above of limited consumer markets for any given property in any given rural area. In light of these limited markets, it may be neither the most strategic move for a local government, nor the most efficient use of resources, for a local government to acquire a problem property, rehabilitate it, then hope that the right buyer will come along to make it all worthwhile. Rather, Fitzgerald-Mumford argues, the local government should first anticipate the likeliest end use for the property, then use that end use to shape its strategy for addressing the property at the outset.

Fitzgerald-Mumford describes the market-anticipatory approach in the context of greyfields still in the hands of private owners who are failing to find new, productive tenants for vacant retail properties. According to this approach, municipalities “must first identify the path of least resistance by which a new tenant will take over the structure, and then take steps to remove barriers that would slow down or prevent such a transaction.” The first step, a diagnostic one, “is to determine the marketability of the building in question by identifying the highest-value use of the property and then assessing the suitability of the existing structure to that use.”

This assessment “is highly contextual and will depend largely on the likely economic return on a particular use of the parcel, offset by negative externalities imposed on the community by that use.”

The next step for the local government is to expedite and streamline the process for placing the property in the hands of the next user. Fitzgerald-Mumford recommends several strategies for local governments to do so. To encourage action on the part of owners, local governments can enact ordinances that penalize inaction. To encourage adaptive reuses by new tenants, local governments can remove barriers to such uses by being more flexible granting variances and by adopting building codes that minimize the need for structure modifications for particular uses. Fitzgerald-Mumford empha-

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15. See Toolkit, supra note 14, at 4 (describing first step in blight remediation plan as “laying the foundation”).
17. Id.
18. Id.
19. Id.
20. Id. at 1814–15.
sizes the need for rural local governments to tackle these issues “in ways that will have the least amount of impact on strained municipal budgets.”

In prior work, this Essay’s author formulated a similar recommendation as to strategic approaches to problem properties for local governments with limited resources. That recommendation focused on local governments either dealing with properties directly due to owners that are unknown or absentee or engaging with known owners who have not taken action to address their problem properties. Drawing upon anecdotal data gathered in West Virginia, this prior work observed, “Generally, having an intended end use for a property can streamline the process of acquiring and transferring the title to a productive user.”

One county’s land bank in West Virginia observed that it “benefited from acquiring only properties that had a known and intended end use.”

Determining what the best use of a particular property may be at the outset of proceedings—“whether it is sale to a new owner, redevelopment, or simple repairs”—can allow that choice “to shape the strategy of how to address it.” That is, “[k]nowing the end use first shapes the choice of appropriate strategy and partnership and can facilitate title acquisition” by a new owner. Significantly, the ability to tailor the strategy to the predetermined outcome has the potential to help reduce entanglement with burdensome legal processes, reduce costs to the local government, and move the process along more quickly.

As one example, if a vacant and dilapidated residential property with an unknown or absentee owner were located next to an occupied residential property, the city attorney could reach out to the owner of the neighboring property before taking action. If the neighboring owner were interested in potentially expanding her lot, the local government and the neighbor might be able to come up with an agreement wherein the city would acquire title to the lot, split the costs of demolition with the neighbor, then have the neighbor become the new owner of the formerly problematic lot at an affordable price—a win-win solution for both the local government and the neighbor. As another example, if the locality were experiencing a housing shortage or needed a senior center, local government officials

21. Id. at 1800.
22. Eisenberg, supra note 1, at 542 n.174.
23. Id.
24. Id. at 545.
25. Id.
26. Id.
27. Of course, whether this or similar avenues were available to the local government would depend on state and local law. For instance, a municipality in South Carolina “may sell property by negotiated contract without public bidding” for a value that city council deems appropriate, but may only do so after council passes an ordinance. Forms and Powers of Municipal Government, S.C. MUN. Ass’n 12 (2017), https://www.masc.sc/SiteCollectionDocuments/Administration/Forms%20and%20Powers2.pdf (discussing S.C. Code. ANN. §§ 5-7-40, 5-7-260, 30-4-70).
could seek analogous partnerships with housing developers and non-profit organizations to turn an abandoned school building into apartments—again finding ways to share costs among multiple stakeholders.28

In one sense, these market-anticipatory approaches are about what a cash-strapped local government should try to avoid. On the one hand, a local government must not fail to act to address the problem properties at all. But, on the other hand, a local government with a strained budget is likely not in a position to acquire title to all problem properties in the hopes of finding resources to demolish or rehabilitate dilapidated structures and then find new users out in the ether. When the anticipated end use determines the strategic approach, it can save the local government time, energy, and resources, of which it likely has little to spare.

Certainly, attempting to anticipate the end use of the property does not mitigate all the risks and uncertainties inherent in the challenge of dealing with problem properties. One risk is that local government officials will incorrectly anticipate a possible end use for the property, and their efforts will be for naught, despite their use of this approach. Ideally, the market-anticipatory approach would be pursued within the context of a community’s broader planning initiatives. For instance, a comprehensive plan would provide helpful guidelines about possible uses for any given property, reflecting the input of the community, local residents’ hopes for the future, and prior consideration of the community’s strengths, weaknesses, and areas of potential, possibly shedding light on relevant markets for properties and neighborhoods.

Every community’s approach to addressing property vacancy and dilapidation will be a little bit different. No one-size-fits-all approach will work for every locality. But savvy tactics and success stories from around the country can be informative. Market-anticipatory approaches to problem properties are one way that rural local governments might be able to stretch their resources further and produce more impactful outcomes for their communities.

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The Risks and Opportunities
Well-Intentioned Policies Pose for Urbanized Lower Income Rural Communities

Jovana Morales-Tilgren & Phoebe Seaton*

A vibrant, healthy, and equitable California demands attention to and remediation of two of the greatest challenges facing the nation and the world: climate change and race- and income-based segregation that cuts off entire communities from access and opportunity. California has taken important policy steps toward addressing both climate change and equitable development. In order, though, for those policies to benefit the whole of California—in particular its rural, lower income communities—it is critical to ensure that those necessary goals, and well-intentioned policies, don’t exclude and further disadvantage rural, historically disadvantaged areas.

A note on geography and terminology. We focus our analysis on two economically and culturally important regions of California: the San Joaquin Valley and the Coachella Valley. Collectively, we refer to them as the inland valleys. We discuss the valleys as a whole, but pay greatest attention to disadvantaged unincorporated communities—those lower income neighborhoods that fall beyond city boundaries. We will further discuss the phenomenon of unincorporated communities below.

To better understand the myriad challenges and opportunities posed by well-intentioned policies to the inland valleys of California, we must take a step back and address the agricultural and industrial boom of the early and mid-twentieth century and its impact on development. During this time, California experienced a proliferation in the agriculture economy that resulted in an influx of migratory workers. They were largely composed of immigrants or people of color from China, Japan, Philippines, Mexico, the southern U.S. states, and areas impacted by the dust bowl. As people migrated to the San Joaquin Valley in particular, they settled in segregated enclaves in “communities that are similar to colonias in every aspect other than their proximity to the Mexican Border.”1 Due to the inherent racism within government institutions, many laborers were excluded from farm

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labor camps established by the Farm Security Administration and were forced to live in shanty camps, cars, or trailers. These communities developed without government intervention or urban planning, which led to their lack of basic infrastructure, including potable water, sewer systems, parks, sidewalks, community centers, storm water drainage, and streetlights. Similar settlement patterns occurred and continue to occur in the eastern portion of the Coachella Valley where development of very small mobile home parks without basic infrastructure developed and continue to develop to address the housing needs of primarily agricultural workers.

Lower income unincorporated communities, and in particular lower income unincorporated communities of color, in the inland valleys have experienced decades of neglect and disinvestment in water infrastructure, transportation, housing, and other services and community amenities. They are also home to undesirable land uses that contaminate the air, the water, and the ground.

Disadvantaged Unincorporated Communities (DUCs) are an important piece of the architecture of California but have been outside of the mainstream of policy and even consciousness for most of the state’s history. A recent law in California, the first in fact that gave these areas a name, defined DUCs and established three different types of DUCs. The overarching characteristic of a DUC is that the median income is eighty percent or less of the statewide median income, it is densely populated, and it does not lie within city boundaries. There is not yet an overall count of DUCs in California, but the study by California-based Policylink notes that the San Joaquin Valley has over 500 DUCs.

The three different types of DUCs are legacy, fringe, and island communities. A fringe community is within a city’s sphere of influence; an island community is surrounded or substantially surrounded by one or more cities or by one or more cities and a county boundary or the Pacific Ocean; and a legacy community is a geographically isolated community that is inhabited and has existed for at least fifty years.

While overarching themes of perseverance, exclusion, racism, and unequal investment mark the history and existence of DUCs, each has its own origin story. The story of each deserves a much longer analysis, but a brief word on general development patterns of three main types of DUCs may be helpful here.

More remote “legacy” communities grew as a response to the boom of certain industries, most notably agriculture, as well as state and federal

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5. Id.
policies including investments to build a railway system and build an
industrial agriculture sector. They were then sustained by a combina-
tion of the ongoing operations of some of those industries, perseverance,
racial exclusion, and economic exclusion from other neighborhoods in the
region.\textsuperscript{6}

Fairmead, Lanare, and Thermal are examples of legacy DUCs. Lanare,
a community in Fresno, was historically African American and is primar-
ily Latino today. Lanare had contaminated water for over decade and
launched a local and statewide campaign for an improved water supply
and system. The community now finally has access to clean drinking
water, yet the drinking water source remains at risk of contamination from
arsenic and benzene. Lanare has no municipal sewer system like hundreds
of other DUCs, and residents rely on often inadequate septic systems that
lead to contaminated soils and groundwater. Fairmead in Madera has
also struggled with inadequate water and wastewater infrastructure. The
neighborhood well ran dry during one of California’s worst droughts,
when neighboring farms had exhausted the groundwater. Residents in
Fairmead went without running water for over a week.\textsuperscript{7} Several years later,
when the next drought struck, residents in Fairmead reliant on domestic
wells saw their wells fail, and they remained without water for days until
they received water hauled by trucks. Thermal in Riverside County has
scores of mobile home parks, many of them without municipal water and
wastewater service, many of them unpaved, and many of them contending
with contaminated water and soils due to contaminated groundwater and
inadequate septic systems.

Island and fringe communities often developed to house lower income
workers that supported industrial development in the growing cities of
mid-twentieth century California. They often developed near burgeoning
industrial zones and transportation hubs—close to the economic engine of
cities but outside of municipal boundaries and thus beyond the reach of
municipal representation and services.

Planning and development practices that favored (and continue to
favor) outward expansion and greenfield development led to cities grow-
ing away from and around lower income fringe and island communities
of color. In some instances, local rules encouraged continued exclusion
of island and legacy DUCs from municipal services\textsuperscript{8} and city boundar-
ies. Such was the case in Modesto, California, where the city’s master tax
sharing agreement was shown to discriminate against island and legacy

\begin{itemize}
\item \textsuperscript{6} Camille Pannu, \textit{Bridging the Safe Drinking Water Gap for California’s Rural Poor}, 24 Hastings Envt’l L.J. 253 (2018).
\item \textsuperscript{7} Camille Pannu, \textit{Drinking Water and Exclusion: A Case Study from California’s Central Valley}, 100 Cal. L. Rev. 223 (2012).
\end{itemize}
DUCs and hinder their annexation into the city.9 Hundreds of island and fringe DUCs are similar to Modesto’s, shut out of municipal services and investments due to historic and ongoing exclusionary practices and living without some of the most basic amenities including safe drinking water, wastewater services, and sidewalks that are at times only yards away.

Legacy, island, and fringe DUCs alike have been denied basic infrastructure necessary to support the people who live there. Bordering cities have elected not to annex them, resulting in neighborhoods lacking basic municipal infrastructure.10

Planning and development policies, including and especially those designed to ease some of the greatest crisis facing California—inequality, climate change, and housing—have often been crafted with the needs of urban and coastal areas in mind. And while California, in its entirety, faces a housing and climate crisis, it is unsound to postulate that these same policies address problems that are unique to rural communities in the central and inland valleys. Policies that are critical to avoid harmful sprawl, for example, make assumptions of the existence of basic infrastructure in existing communities; policies that focus investment where transit exists ignore the lack of investment in transit in rural areas; and housing policies guide investment outside of rural areas in their important attempt to increase opportunity for all Californians.

Through this paper we review important efforts to decrease urban sprawl, increase housing in high-opportunity areas, and fight climate change with an eye toward their impact on lower-income rural communities. We highlight the opportunities embedded in each of those policies for rural Californians, but only if critical safeguards are in place and if policymakers maintain a focus on addressing historic inequalities.

A Focus on Infill Development and Building where Services Already Exist

Foundational to California’s notion of building better, of building in a more environmentally friendly way, and of building more equitably lies a fundamental inequality given historic underinvestment in lower income rural, in particular unincorporated communities, that we should build where basic infrastructure and transit exists.

California Government Code, section 65041.1 outline California’s planning priorities, which are intended to promote equity, strengthen the economy, protect the environment, and promote public health and safety in the state, including in urban, suburban, and rural communities:

To promote infill development and equity by rehabilitating, maintaining, and improving existing infrastructure that supports infill development and appropriate reuse and redevelopment of previously developed,


10. Abood, supra note 2.
underutilized land that is presently served by transit, streets, water, sewer, and other essential services, particularly in underserved areas, and to preserving cultural and historic resources.\textsuperscript{11}

We do not mean to argue that a focus on infill is misguided. To the contrary. Promoting infill development is a critical tool for ensuring investment in existing communities while curtailing sprawl development, which exacerbates environmental degradation and threatens to draw funding and investment out of the existing neighborhoods. But we do aim to draw attention to the reality that policies that limit investment opportunities in neighborhoods that do not have basic infrastructure and transit due to decades-long policies and practices that prevented such investments in disadvantaged communities reinforces the path toward greater inequity, not greater equity.

Sprawl and new town development have had disastrous impacts on the environment, have stretched infrastructure capacity, and have drawn resources from existing urban and rural communities. It increases pollution from car travel, requires expanded infrastructure development (and ongoing funds to maintain such infrastructure), even when existing neighborhoods lack such infrastructure, often exacerbate economic and racial segregation, and draw attention and resources away from both incorporated and unincorporated neighborhoods.

Sprawl and new town development seem to be particularly threatening to communities in the inland valleys of California where land remains abundant. The city of Merced provides an example of the tendency and threat of sprawl development. The somewhat recent installation of the University of California campus in Merced was sited to the east of town. Merced drew students and staff to the region, and affordable housing opportunities for existing Merced residents plummeted. The affordable housing crisis built on decades of disinvestment in the central core neighborhoods of South Merced and unincorporated neighborhoods just outside of Merced’s boundaries. Lack of access to services and amenities including grocery stores, hospitals, libraries, and urban greening characterize the neighborhoods. Now, the city of Merced is considering five annexation projects that will site new developments to the east of town while it lags desperately behind its production goals for affordable housing development for existing residents. People are concerned that the move eastward will only leave existing neighborhoods further behind.

Yet, our efforts to curb sprawl must not be focused exclusively on building and development where infrastructure and transit exist, unless and until existing communities that have contributed to the growth, economies, and culture of inland California receive the infrastructure and transit investments they have been denied for decades. Doing so will only undermine the very goal of the state’s planning priorities that, alas, are intended to further equity in urban and rural areas alike. Instead, there

\textsuperscript{11} Cal. Gov’t Code 65041.1(a) (emphasis added).
must be an effort to upgrade infrastructure and transit as necessary and, in the meantime, reflect the state’s planning priorities on prioritizing development including necessary infrastructure and transit upgrades in existing neighborhoods.

*One Route to Addressing Climate Change—Reduced “Vehicle Miles Traveled”*

California’s inland valleys have among the highest rates of pollution in California. Some of the biggest contributors to pollution are heavy truck traffic, as well as agriculture, oil drilling operations, and large industries. According to the California Air Resources Board, “transportation accounts for about 40 percent of greenhouse gas (GHG) emissions, with cars and light trucks accounting for almost three-quarters of those emissions.” To reduce GHG emissions, Senate Bill 375 (SB 375) was signed into law. It required the California Air Resources Board to set targets that regional agencies would then have to meet through three complementary and consistent plans: Sustainable Communities Strategies (SCS); the Regional Transportation Plan (RTP), and the Regional Housing Needs Allocation (RHNA). The basis of the policy, relating to land use and transportation plans that induced a reduction in vehicle miles traveled (VMT), was a critical step in achieving California’s greenhouse gas emissions targets while also addressing air pollution.

Several regions in California complied with SB 375 by developing land use scenarios (through their SCSs) that concentrate growth and resource allocation in areas that already have high-quality transportation systems or are in physical proximity to jobs, schools, health care centers, and commerce. As discussed, low-income communities in rural settings often lack potable water, sewer systems, quality and quantity of affordable housing, adequate public transit, complete streets, and essential services. Thus, ironically, the general practice of planning for land use development (and thus transportation improvements) through the SB 375 scope put lower-income rural communities at great risk of losing out on future investments that they need to support nearby employment opportunities and services and expand public transit services that, in turn, would reduce the vehicle miles traveled by residents in those neighborhoods.

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It is possible, in fact necessary, to create and implement a framework for investing in existing urbanized rural communities while also reducing reliance on personal vehicles. Local agencies charged with developing and implementing SCS and RTPs must develop plans with a neighborhood-centered approach that ensures inclusion of rural communities in these plans to reduce vehicle miles traveled. This objective means investing in shared transportation and public transit options that are scaled to rural communities and regions; implementing investment strategies that focus investment in basic infrastructure in towns that have been excluded from such investments in the past so that they too can support development of nearby jobs and amenities in town; and generally focusing on planning for and investing in existing neighborhoods to improve health and well-being where people live, rather than building out infrastructure to support expanded sprawl that, in turn, increases vehicle miles traveled.

Through these holistic measures, transportation and land use agencies can and will simultaneously reduce vehicle miles traveled (and the air and climate emissions that accompany those miles traveled) and improve opportunity and the quality of life in lower-income, rural areas.

**California Climate Investments for Housing and Neighborhood Transformation**

California developed a robust climate change mitigation investment program through its greenhouse gas reduction fund (GGRF), which is funded through proceeds from cap-and-trade auction revenues. The GGRF funds a variety of programs, but we focus here on two: the Affordable Housing and Sustainable Communities program (AHSC) and the Transformative Climate Communities program (TCC).

The AHSC program is designed to address affordable housing needs, while also furthering climate goals. Early rounds of the AHSC program limited funding to housing projects located near high-quality transit, housing projects located near many services and amenities, and high-density housing. These eligibility criteria and/or preferences effectively disqualified rural communities from AHSC investments due to the lack of high-quality transit in rural areas, density standards that did not conform with development standards in rural areas, and lack of services and amenities in rural communities. A group of advocates and not-for-profit affordable housing developers that are part of a coalition called the Rural Smart Growth Task Force submitted correspondence to the state, highlighting both the risk of excluding rural communities from AHSC investments and the climate opportunities of investing in affordable housing resources in rural communities. Correspondence highlighted the catalytic impact of affordable housing in rural areas for increasing nearby amenities and transit/shared mobility resources, as well as the appropriate scale for dense, affordable housing in more rural neighborhoods. Above all, the Rural Smart Growth Task Force argued that a rural set aside within the AHSC was critical for promoting much needed climate-smart affordable housing.
in rural areas to address the unmet housing and transit needs in existing rural communities and small towns while also catalyzing a change in rural areas throughout the state to promote more dense, amenity-rich, transit-friendly neighborhoods.

The state ultimately created a rural set aside of ten percent each year targeting climate smart affordable housing and transportation projects in rural communities throughout the state. Investment through the rural set-aside has been successful, resulting in hundreds of affordable housing units, improved pedestrian safety infrastructure in rural areas, increased transit options including ride-share programs, and increased access to amenities.

Following the success of the AHSC program generally, the state initiated a more aggressive and intensive climate-investment program called the Transformative Climate Communities program. The program created a competitive grants program whereby jurisdictions could receive tens of millions of dollars for a suite of climate-smart investments including housing, urban greening, transportation, educational, and economic-development investments. The program explicitly excluded unincorporated communities. Thus, those DUCs that had been systematically excluded from municipal boundaries and municipal services for decades or even a century, would now be excluded from these critical climate investments. Legislation was passed in 2019 and requires that the agency administering the TCC program to consider unincorporated communities in its investment decisions. In response, the state agency launched a workgroup to develop guidance on how best to expand TCC investments to unincorporated communities.

There are myriad opportunities for transformative climate community initiatives in rural communities throughout the state, and we are confident that the state will soon recognize the role of unincorporated communities in combatting and adapting to climate change. While, to date, the state has not selected unincorporated communities for transformative climate community implementation funds (money that would develop and implement projects and programs), the state has funded several planning processes in disadvantaged unincorporated communities. These processes have led to community-driven plans designed to address community needs, reduce climate impacts, and promote adaptation to a changing environment. These and similar plans provide the blueprint for critical climate investments in disadvantaged, unincorporated communities.

Housing in High Opportunity Areas Exclude Rural Communities from Housing Development

Many of California’s cities remain highly segregated along race lines as well as along income and wealth lines, with more affluent communities having greater access to superior services and amenities. It is critical, for the well-being of families, neighborhoods, municipalities, and the state as a whole, to address disparities in access. Once again, policies designed to
The Risks and Opportunities Well-Intentioned Policies Pose

address disparities and further a critical government priority will, if not done with an eye toward true equity for unincorporated communities and small towns in inland California, threaten to further reinforce inequality.

The Opportunity Map created by the California Tax Credit Allocation Committee (TCAC) was intended “to measure and visualize place-based characteristics linked to critical life outcomes, such as educational attainment, earnings from employment, and economic mobility.” The state uses the tool as part of its scoring of applications for tax credits for affordable housing. Tax credits are the biggest source of funding for affordable housing in the country. Projects that are located in “high opportunity” areas receive extra points and are eligible to win a tiebreaker in their favor, meaning that if two projects otherwise score the same and one is in a high-opportunity area and the other is in a low-opportunity area, the high-opportunity area project will be chosen. The state created this result in an effort to affirmatively further fair housing and to address the fact that historically about seventy-three percent of tax credit projects are located in lower-income neighborhoods with lower access to resources and amenities. While this is an essential effort, it runs the risk of excluding and denying funding to important projects that benefit and serve rural communities because they are unable to rise to the high opportunity threshold.

However, unless intentional efforts ensure inclusion of lower-income rural communities and cities in this effort, it can instead be one more policy that unintentionally undermines equitable development in historically, under-prioritized areas. The first map adopted in December 2017 relied on census tracts to identify high and low opportunity areas that, due to their size and lack of relationship to neighborhood boundaries, obscure differences among distinct communities that occupy the same census tract. Additionally, according to a comment letter submitted by the National Housing Law Project (NHLP) and Leadership Counsel for Justice and Accountability, this map did not accurately represent the condition in many rural areas or opportunities therein. As a result, it excluded vast areas from the determined areas of opportunities. The city of Lindsay was given as an example; it has a population of 13,000 and “has no high resource areas—placing the entire community at a disadvantage for the receipt of tax credits to create affordable housing.” Lindsay is but one of the many cities and communities excluded in whole from a classification as a high-resource area and therefore at a great disadvantage for securing affordable housing tax credits. These broad exclusions of entire towns and cities will only further


patterns of underinvestment and exclusion of rural towns from critical and needed investments in quality housing.

While new methodology and data now use data on a block-group level to identify opportunity areas in rural communities, the state should go further in ensuring adequate consideration of opportunities in small cities and communities in inland California. One suggestion proffered by advocates is to complement census-level data with community-informed data to better capture unique opportunities and resources that do not show up in statewide scans. Additionally, the state should not exclude entire towns with existing and demonstrated affordable housing needs from participation in the tax credit program; such exclusion would not only perpetuate patterns of divestments from small towns, but would also exacerbate the state’s housing crisis.

**Conclusion**

California’s efforts to address climate change, expand housing opportunities, and address decades of discriminatory investment and housing policies offer magnificent opportunities for small, especially disadvantaged, unincorporated communities, to develop into healthy, resilient areas that contribute to the state’s important goals of equity and environmental sustainability. But only if those efforts take into consideration the decades-long neglect that many unincorporated communities have faced, and also take into account the many opportunities that small communities present if granted the resources—and opportunity to secure resources—that other communities and neighborhoods throughout the state enjoy.
Rural Housing in the Crosshairs: How USDA Affordable Housing Is Targeted for Market Rate Conversion and What Advocates Can Do to Preserve It

Kelly Owen & Scott Crain*

Rural communities are losing affordable housing at an alarming rate. The United States Department of Agriculture (USDA) finances and subsidizes a large portfolio of privately owned low-income housing throughout the rural United States, often providing the only low-income affordable housing in these communities. As owners prepay their loans, they leave the USDA program, resulting in a loss of affordable housing in rural communities. The country’s total number of USDA multifamily rental properties decreased by 1.4–2% each year between 2017 and 2020, with 947 USDA multifamily projects totaling 17,804 units lost during that four-year period.1 In addition to prepayments, units are lost due to loans maturing, which is expected to increase rapidly after 2028. While this housing is decreasing, most states lack a preservation strategy to address the preventable loss of units through prepayment of loans.

This essay outlines the crisis of losing rural affordable housing, the difficulties of preservation, and the success stories that have led to the preservation of several developments of affordable housing in the Pacific Northwest. Specifically, the essay focuses on the work necessary to

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preserve specific properties at risk of prepayment and what advocates can do to prevent projects being lost through prepayment of loans. In presenting this information, this essay draws on the experiences of the attorneys at Northwest Justice Project, a Washington-based LSC-funded nonprofit law firm that uses litigation and non-litigation strategies to preserve these developments, the expertise of the National Housing Law Project and Gideon Anders, as well as experiences of those advocating for policymakers to invest in rural housing.

Part I of this essay describes the housing developed by USDA and the tenant populations that live there. Part II discusses what it means for an owner (called a “borrower” by USDA) to prepay their USDA loan. Part III shows how both litigation and non-litigation strategies should be used in concert to help preserve these properties. Part IV details the progress needed to guarantee that these properties are not lost to the private market.

I. USDA Housing Provides Affordable Housing to a Diverse Array of Low-Income People Around the Country

USDA’s multifamily housing is crucial for the well-being of very-low-income rural residents. For more than 80% of USDA units, rents and landlord-provided utility costs are set at 30% of the tenant’s income, with those units receiving deep federal subsidies in the form of unit-based rental assistance, project-based Section 8 assistance or HUD vouchers. Because rents are based on the tenant’s income—in contrast to rents in Low Income Housing Tax Credit units that do not receive other federal subsidies, which are based on area median income—USDA apartments are truly affordable for very-low-income people, such as those living on Supplemental Security Income (SSI), Temporary Assistance for Needy Families (TANF), and minimum-wage or seasonal work. The average annual income for all USDA tenants is approximately $14,000, with average incomes of under $12,000 for those living in rental assistance units.

Additionally, USDA housing has federal rules that create strong tenant protections, including an opportunity to cure lease violations before eviction, and a bar on eviction or refusal to renew leases except for good cause. These protections have enabled tenants to remain in their homes for many years, creating family stability. In our representation of USDA tenants, we often meet tenants who have been in their homes for a decade, or

2. USDA finances and subsidizes housing under two programs. The Section 515 program, authorized by 42 U.S.C. § 1485, finances affordable rental housing for families, elderly persons, and persons with disabilities in rural areas. The Section 514/516 Farm Labor Housing program, authorized by 42 U.S.C. §§ 1484 and 1486, finances on- and off-farm labor housing. Nearly two-thirds of the housing financed under these programs is deeply subsidized by a Rental Assistance program, authorized by 42 U.S.C. § 1490(a)(2). This article addresses prepayment in Section 515 housing.
4. 7 C.F.R. § 3560.159 (a).
5. Id. § 3560.159 (a), (b).
even two. When we ask tenants, most of them elderly, single women living on SSI or Social Security, what they would do if their rents increased, they often explain that they would have to move into their cars. These tenants do not have another affordable housing option.

USDA housing also serves as a crucial asset for fair housing. Nationally, non-white households make up about nine-tenths of tenants in Farm Labor housing. Among all USDA households in the country, two-thirds are white non-Hispanic, a fifth are Black, and a bit more than a tenth are Hispanic. These overall figures somewhat obscure the reality that, in many states, USDA complexes that are not Farm Labor provide crucial housing for families of color. In nine states and one territory, Black households are 40–75% of total households in non-Farm Labor housing, and, in five states, Hispanic households are 25–57% percent of the total households in non-Farm Labor housing. A large majority of the non-Farm Labor households, 71%, are female-headed, and elderly and disabled households make up nearly two-thirds of non-Farm Labor households.

For many of these households, there is simply no other option to USDA housing. Rural communities face extremely tight housing markets. In Washington State, vacancy rates are below 1% in some counties. The affordable housing that does exist is aging and often in need of significant rehabilitation. The reality is that the pace of creating new housing in rural counties has simply not kept up with losses.

II. USDA’s Regulations Governing Preservation of Its Housing and USDA’s Failure to Enforce These Regulations

USDA housing is usually privately owned, constructed with federal loans, and operated with ongoing federal subsidies. USDA provides long-term loans, generally for terms between thirty and fifty years, to private, non-profit, or public entities that construct housing for low-income households. In Washington, as well as nationally, most projects are developed by and remain in private ownership, as opposed to nonprofit or public ownership, due to the favorable terms of the USDA’s federal loans and very favorable income-tax treatment. Most USDA developments also receive a subsidy, which further reduces the interest paid on the loan, allowing the interest reduction to be passed onto residents who pay a below-market rate rent.

7. Id. at 19.
Rental assistance lowering individual tenants’ rents and utilities to 30% of income creates a stable base from which owners receive rent.

A complex web of federal statutes, regulations, and guidance governs the prepayment process for USDA mortgages. Recognizing that the nation faced a substantial loss of available affordable housing and record numbers of homeless citizens, Congress enacted detailed legislation in 1987 and 1992 to preserve affordable housing, including USDA multifamily projects, starting with Title II of the Housing and Community Development Act of 1987, Pub. L. 100-242, 101 Stat. 1815, 1877-91 (1988), entitled the Emergency Low Income Housing Preservation Act of 1987 (ELIHPA). ELIHPA sought to discourage project owners from prepaying their loans through the use of detailed prerequisites for approval of any prepayments of loans made before December 21, 1979. Since 1992, preservation restrictions have been extended to pre-1989 projects, while post-1989 projects cannot be prepaid and must be maintained as low- and moderate-income housing for the full term of the loan.

Despite these restrictions, there are three ways in which an owner may prepay its loan: (1) immediate release from all regulations and obligations; (2) marketing for sale to a nonprofit or public agency; or (3) imposition of Restrictive Use Covenants (RUC) written to protect current tenants from improper rent increases and displacement for other than good cause. As discussed below, the path by which an owner is allowed to prepay a loan is controlled in part by the owner’s choice and whether USDA properly adheres to statutes and competently performs its work. Of great concern is the fact that in spite of all the protections built into the law to preserve affordable USDA housing, all these paths to prepayment often result in the actual immediate release of the owner from all obligations simply because the owner manipulates the process and/or USDA fails to enforce its statutes and regulations.

To prepay a USDA loan, owners must first file a request to prepay the loan. In response, USDA is required to offer financial incentives to the owner to stay in the program. Should the owner turn down the incentives, the owner may voluntarily offer the project for sale to a nonprofit or public body. Otherwise, the owner’s right to prepay is governed by the result of a Civil Rights Impact Analysis (CRIA) conducted by USDA to determine two factors: (1) whether prepayment will materially affect

12. See Kimberly Assocs. v. United States, 261 F.3d 864, 867 (9th Cir. 2001).
14. 7 C.F.R. § 3560.658(a)(2), (d).
15. 42 U.S.C. § 1472(c)(5)(G)(ii); 7 C.F.R. § 3560.658(b).
housing opportunities of minorities in the development or community at large, and (2) whether an adequate supply of “safe, decent and affordable housing” exists in the market area, and sufficient actions have been taken to ensure that such rental housing will be made available to each tenant upon displacement. If USDA determines that the prepayment will have a material impact on minority housing opportunities, the owner is required to offer the property for sale, for a six-month term, to a nonprofit or public agency at its appraised market value. During that 180-day period, if a nonprofit or governmental agency makes a good-faith purchase offer for the property, the owner must accept that offer, and the property remains in the USDA program. An offer is considered bona fide if it is at the full appraised price and the party making the offer has identified a reasonably likely source of funding for the purchase. The owner must work with the nonprofit for up to an additional two-year period to complete the sale. If no purchase offer is made, or the sale is not consummated, the owner is free to prepay the loan without any restrictions.

When USDA determines that the there is no material impact on minority housing and that there is adequate affordable housing in the community to which the residents can relocate, the owner can prepay the loan and increase the rents to the remaining residents. However, if USDA finds that such housing is not available, the owner can only prepay the loan after agreeing to the imposition of use restrictions that protect the remaining residents by requiring the owner to operate the units that they occupy as if the continued to operate as a USDA subsidized development. In other words, the owner cannot increase the residents’ rents or evict them except for good cause for as long as they choose to remain in their homes. This result is accomplished by the owner having to record a Restrictive Use Covenant (RUC) that shields existing tenants from rent increases and no-cause evictions.

Unfortunately, USDA has adopted regulations that substantially weaken the standard for making the first CRIA determination. Statutorily, USDA is required to determine whether the prepayment will have “a material effect” on minority housing opportunities. Since 2005, however, the agency has required its staff to only determine whether the prepayment will “disproportionally adversely affect” minorities in the development, on its waiting list, or in the community. The difference in the two determinations is significant. Under the statutory standard, RD staff are required to look solely at the impact of the prepayment on minorities at the

17. 7 C.F.R. § 3560.659(b), (e).
18. Id. § 3560.659; see also 69 Fed. Reg. 69,032-01 (Nov. 26, 2004) (discussion of defining bona fide offer).
19. 7 C.F.R. § 3560.659(k).
20. Id. § 3560.658(4).
21. Id. § 3560.658(b)(3), (c); id. § 3560.662(e).
22. See id. § 3560.658(b).
development, on the waiting list, and in the community. Under the regulatory standard, the determination is made by comparing the impact on minorities as against non-minorities and, notwithstanding the fact that the impact on minorities is material, if the impact on both is the same, the owner is not required to offer the development for sale.

When USDA allows an owner to prepay a loan subject to use restrictions, the agency does not review whether the owner follows the use restrictions. Moreover, even if it is advised that the owner is not operating the restricted units in accordance with the RUC, it will take no action to enforce them. When it published the current regulations, it claimed that it did not have the staffing to do so and, instead, granted enforcement rights to residents.

Gideon Anders from the San Francisco-based National Housing Law Project (NHLP) has been involved in many lawsuits against the agency for improperly approving the prepayment of USDA affordable housing loans and not protecting residents who live in them. According to Anders, Congress enacted legislation in 1987 that was supposed to preserve these USDA properties and protect their residents against displacement. “Unfortunately,” he stated,

in thirty-three years that these protections have been in place, USDA has not properly implemented the law. It is approving prepayments that should not be approved, not adequately funding nonprofit and public agencies seeking to purchase and preserve housing that owners are selling, and it is failing to properly explain, to both landlords and tenants, or enforce the obligations that landlords have under recorded post-prepayment-use restrictions that are intended to protect resident living in these developments as of the date of prepayment against displacement. This has resulted in thousands of households, many of them elderly, being illegally evicted from their homes or having their rents increased to the point of causing severe hardships.23

USDA’s failures are causing the RD-financed affordable housing to disappear slowly. In testimony before Congress, Anders stated that over 100,000 affordable units have already been lost, and all units will be lost by 2050 without congressional action to stem prepayments and develop mechanisms to preserve mortgages that are maturing.24 In Washington, prepayment removed 533 USDA units at 19 complexes from the affordable housing supply between 2012 through 2019.25 These numbers show that this type of affordable housing is endangered.

In this process, USDA has made missteps at each point from determining whether the housing is needed, to determining minority impact, to ensuring good-faith marketing and acceptance of a bona fide offer of

23. E-mail from Gideon Anders, Senior Attorney, National Housing Law Project, to Kelly Owen (Feb. 12, 2021).
25. Data was developed by the authors and reviewed by Washington State USDA officials, based on review of USDA notices of prepayment and other USDA records during that time period.
purchase of a project once marketing is ordered and to ensuring RUCs actually protect tenants. The missteps are caused not by individual USDA staff on the ground, but systematically by the agency as a whole because it has neither enacted appropriate regulations and procedures, nor are its staff given legal support for enforcement of existing protections.

III. Advocacy to Preserve Developments in Washington

When NJP began helping tenants facing USDA prepayments a decade ago, affordable housing advocates told NJP that USDA had repeatedly determined that projects in prepayment were not needed and that their communities had adequate affordable housing. This decision allowed owners to simply prepay and exit the USDA program despite the acute shortage of affordable housing in every county in the state. USDA’s determination is counterintuitive to what is, now, an axiom for everyone on both sides of the political aisle: there is an acute shortage of affordable housing in every county in the state. NJP’s advocacy with USDA over the years was essential to changing USDA’s repeated conclusion that there is an adequate supply of housing.

In the subsections below, stories have been recounted of successful litigation and non-litigation-based advocacy to preserve USDA housing. These subsections also include relevant practice tips that NJP has learned over the years fighting to preserve this housing.

Practice Tip: The first step in protecting USDA housing is finding out what is at risk from prepayment. The simplest way to do this is to sign up for and regularly check USDA’s database of properties for which the owners have applied to prepay their loans. The second step in any prepayment case is to make a request under the Freedom of Information Act (FOIA) for the documents involved in prepayment and submit comments on the need for the affordable housing. The FOIA process also can be used to discover what documents USDA produced on previous prepayments as findings on affordable housing need and CRIA analyses. The third step is to inform and educate tenants on their rights in the prepayment process.

A. Would prepayment materially affect housing opportunities for minorities?
The CRIA analysis is a very powerful tool to preserve affordable housing and affirmatively further fair housing. Under this analysis, USDA should assess both the current minority tenant demographics and the minority low-income demographics in the complex’s market area. Advocates should be successful in arguing that USDA must find minority impact even

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27. Sample tenant education handouts appropriate for the initiation of prepayment, in the event of marketing to a nonprofit, and where restrictive use covenants are recorded, are available online. National Housing Law Project, USDA Rural Housing Programs (2017), https://www.nhlp.org/resource-center/usda-rural-housing-programs.
if a particular complex is at a lower ratio than its housing market area’s minority low-income population, a distinct possibility due to housing discrimination and widespread failure to affirmatively further fair housing.

It is important to find out whether a nonprofit is interested in purchasing the prepaying development when considering a CRIA challenge. If a nonprofit is not likely to purchase the property, the owner who was forced to market the complex will be allowed to prepay without use restrictions that will protect the existing tenants. While vouchers may be available to existing tenants, in the experience of the authors this is not enough to preserve affordable housing in those communities for renters to come. NHLP and others have also argued that USDA operates the voucher program out of compliance with federal law. Early in its prepayment advocacy, NJP successfully pushed USDA to make a CRIA minority-impact finding, but no nonprofit could be found during the marketing period. It was a difficult way to find out how few nonprofits were then able or willing to purchase these buildings.

USDA’s CRIA determinations historically have been erratic, in some cases applying a torturously narrow definition of minority impact. In 2014, USDA found no minority impact for the Harbor Heights apartment complex in Oak Harbor, Washington, after determining that minorities were not treated in the prepayment any differently from non-minorities. The agency found that all tenants would face rent increases and that all low-income community members would have less access to affordable housing. In other words, the agency found that in the absence of racial discrimination that would violate the Fair Housing Act, the protection of 42 U.S.C. § 1472(c)(5)(G)(ii) did not apply. In that case, half the apartment complex’s tenants were minority, compared to a third of the city residents and just 16% of residents in the housing market area. USDA allowed the owner to prepay the loan with only RUCs to protect the existing tenants. Tenants, frightened by the landlord’s verbal threats of rent increases, simply moved out after prepayment. The CRIA lack of impact on minority housing determination was not legally challenged in this case because no nonprofit was willing to purchase USDA-financed properties in the Harbor Heights area.

In another matter, NHLP and Oregon Law Center sued on behalf of low-income tenants and a nonprofit organization to preserve a USDA property in Tillamook County, Oregon. Among the plaintiffs’ claims was that USDA’s CRIA finding of no adverse impact to minority housing

28. For litigation challenging USDA’s administration of the voucher program in the context of prepayments, the authors suggest reviewing NHLP and Oregon Law Center’s pleadings, https://www.nhlp.org/resource-center/usda-rural-housing-programs.
30. Id.
opportunities was based on an improper legal standard, bad math, and failure to comply with the governing statute. After plaintiffs filed their original complaint and moved for a preliminary injunction to enjoin the approval of the requested loan prepayment, USDA rescinded prepayment approval and issued a second CRIA that found that prepayment would materially affect minority housing opportunities. Based on that finding, USDA required the owner of the property to market the project for sale to a nonprofit or public agency to try to maintain it as affordable housing.

Plaintiffs then defeated USDA’s motion to dismiss for mootness, based on the court’s finding that the regulations and practices plaintiffs challenged had not changed; this was despite USDA reversing its conclusion and finding minority impact for that property. At the time this article went to press, the parties agreed to a stay of litigation, pending completion of the purchase of the building for preservation by a local nonprofit.

Practice Tip: Obtain census data on the housing market areas for buildings in prepayment and provide written comment to USDA on the impact on minority housing opportunities. Do this early in the process, before USDA issues a negative CRIA. Include data of the tenant population’s racial and national original makeup, if possible. File a formal written comment on the prepayment using that data and need for the housing. Having local housing agencies and advocates comment as well is helpful.

B. What happens when USDA requires marketing to a nonprofit, or an owner chooses to do so?

Successful purchase by a nonprofit offers the sole way to preserve affordable housing in the RD program if a private owner is determined to prepay the USDA loan. Marketing for nonprofit purchase is required following a determination of an impact on minority housing opportunity in the CRIA. In Washington, owners have also voluntarily marketed to a nonprofit, generally because they did not want to have to sign RUCs, and, if no nonprofit stepped up with a full-price offer with a reasonable funding source, the property came out of USDA program with no limits on the owner’s rent increases for existing tenants. The owners’ subsequent interesting actions made clear that they neither wanted to sell to a nonprofit at an appraised price nor be subject to the two-year period allowed by regulation to close the deal. The owners, however, had learned that nonprofits could rarely come up with the funding or possess the technical knowledge to make a good faith purchase offer in 180 days.

Eight Washington properties totaling 246 units were marketed from 2012 through 2019 and did not receive a bona fide purchase offer. These units were thus lost as affordable housing without any tenant protections.

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32. Plaintiffs’ Amended Complaint is available online. See NHLP GUIDE, supra note 10, at 57–82.
34. Id. at *10–12.
aside from vouchers to individual tenants. NJP staff worked to find nonprofits to purchase most of those properties but could find none willing to do so. Impacts on tenants were stark: in one senior and disabled buildings in Gig Harbor, Washington, half the residents had moved out within a year after the owner prepaid in 2018 after unsuccessful marketing and immediately raising rents by $100 a month.

What did owners who marketed do to avoid a sale to a nonprofit? In many cases, they did not advertise and offer to sell the property to nonprofits and government agencies in a commercially reasonable way as required by regulation. More than one owner’s marketing efforts were to place a small sales ad in a local newspaper. When advocates called the contact telephone number in one such ad, it turned out to be the home phone number of the local USDA agent assigned to that project. This was an error that USDA staff were not able to explain.

The tide started to turn in Washington in 2017, when an owner began prepayment marketing of a USDA apartment complex on San Juan Island, Washington. The San Juan Islands are known nationally as a stunning set of islands near the Canadian border with Washington, accessible solely by plane or boat, and replete with expensive vacation homes and tourist enclaves. Yet very little permanent rental housing exists in this part of the state, and even less rental housing serves low-income residents.

In response to this particular owner marketing their property, NJP advocates informed tenants of their rights and on their behalf, approached a local community action agency based in Bellingham, Opportunity Council (OC). OC’s director was either moved by the plight of the islanders or worn down by NJP’s repeated requests for OC to buy other buildings undergoing prepayment. In this case, OC’s director agreed to purchase the property and pursued the purchase as a high priority.

Despite deciding to pursue the property and recruiting the help of an experienced consultant, OC struggled. First, OC could not find sufficient funding to purchase the property as there were limited resources made available to states from USDA. After eventually lining up funding, OC faced an owner who was reluctant to negotiate the details of a sale despite OC offering the appraisal price. OC learned from local residents that the owner had another potential buyer willing to pay above the appraised value of the property.

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35. This information is based on analysis by authors, with data reviewed by USDA staff. See NHLP GUIDE, supra note 10, at 57.


A few days before the 180-day offer window expired, the party negotiating for the owner left the country and discontinued conversations. USDA had taken a completely hands-off position on the negotiations, despite a regulatory mandate that USDA determine when a bona fide purchase offer is made. On behalf of tenants, NJP formally communicated to USDA that its regulations require the agency to facilitate purchase and preservation of such properties and stated that it would represent tenants in the transaction. As NJP was readying to fax a pre-filing demand letter to USDA over its failure to require the owner to accept the good-faith offer, the owner finally accepted OC’s full-price offer.

NJP and OC’s collective efforts saved a twenty-unit affordable complex in a small, ferry-served community that had already lost several affordable complexes and with high barriers to constructing new affordable housing. This case also had an important ripple effect. The prepaying owner later marketed a larger USDA complex for sale elsewhere in the state. NJP advocates made sure when that marketing started, relevant nonprofits knew about it. This time, the prepaying owner cooperated to sell to a nonprofit. The days of sham marketing were over.

**Practice Tip:** Because the 180-day marketing period passes quickly, contact potential nonprofit purchasers as soon as it is determined that the property should have an affirmative CRIA finding, or if upon reviewing other prepayments, it is clear that owners in the state are voluntarily agreeing to market. NHLP has been available to connect parties with technical experts to assist nonprofits seeking to purchase. Be prepared to assist with knowledge about how regulations support the purchase.

**C. USDA fails to enforce restrictive covenants meant to protect existing tenants after prepayment**

Where USDA finds that affordable housing is needed, but the CRIA finds no minority impact, USDA must require the owner sign a RUC to protect existing tenants’ rights to affordable rent and USDA-type protections such as good-cause evictions after prepayment. On paper, these covenants are powerful. Designed to protect the current residents at time of prepayment, they require that rent and conditions of housing indefinitely remain for those tenants as they would have been in the USDA program. For those in units that previously had rental assistance, rent should stay at 30% of adjusted income, and good-cause eviction protections continue.

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38. 7 C.F.R. § 3560.659(e)(6).
40. 7 C.F.R. § 3560.658(b)(3).
41. The standardized Restrictive Use Covenant, titled Restrictive Use Covenant—The Last Existing Tenant Use If No Impact on Minorities but There Is Not an Adequate Supply of Housing (7 C.F.R. § 3560.662(b)(2)), appears in the *RD Handbook 3-3560, supra* note 36, Attachment 15-E-2.
USDA in Washington historically has done nothing to enforce RUCs entered at prepayment. NJP in one case called the local USDA office asking for data on rent increases over time for a client in a RUC-protected tenancy. The agency responded that it kept no such data, despite the regulatory requirement that USDA approve all rent increases for these tenants. The agency flatly ignored the requirement. The client was too afraid of eviction to bring a complaint to the landlord. A few years later, a USDA state-level manager called NJP seeking help for tenants of another prepaid complex, after tenants called the USDA official complaining that the owner threatened immediate rent increases after prepayment. The USDA staffer told NJP that, though the complex had RUCs, she had no ability to do anything to enforce the RUCs, nor could she get help doing so from USDA’s legal counsel.

D. Advocates sue USDA and an owner to protect two projects in rural Washington

In 2016, an owner of two USDA properties in Whatcom County, Washington, prepaid on its loans on two properties, totaling fifty-four units of senior/disabled housing, all with rental assistance. Their tenants included mostly very-low-income residents and nearly all elderly single women. USDA determined that the prepayment would not have minority impact but required the owner sign RUCs to protect existing tenants.

NJP attended the meetings that USDA held for each building’s tenants shortly before prepayment. NJP found that the agency did not inform tenants of the RUC or the rights that it confers on tenants. USDA’s presentation stated that the landlord could raise tenant rent and could decline to continue to house tenants, which was in clear contradiction of the RUCs. Shortly after prepayment, the owner raised utilities in violation of the RUC, and the owner forced the tenants to sign new leases with onerous terms that violated USDA regulations and lacked good-cause eviction requirements. Confused and scared, these tenants sought legal assistance from NJP. The tenants ultimately formed two tenant associations and sought representation from NJP to roll back the new leases and stop rent increases.

Having previously seen tenants threatened with rent increases move out in fear of eviction, NJP and NHLP quickly filed a lawsuit against USDA and the owner. It sought a temporary restraining order (TRO) and an injunction to enforce the RUCs, rescind the new leases, prevent rent increases, and require USDA to comply with federal law when advising renters and owners about the requirements of the RUC. The RUCs specifically give tenants the right of enforcement. After entry of an agreed TRO, plaintiffs engaged in protracted negotiation with USDA, and the owner, as

42. 7 C.F.R. § 3560.662(e)(4).
43. Plaintiffs’ Motion for Temporary Restraining Order and Preliminary Injunction is available online. See NHLP Guide, supra note 10, at 83.
44. See Restrictive Use Covenant, supra note 41, ¶ 2.
to what leases the RUCs would require. It became clear that USDA had no RUC-compliant model lease, no written information for owners or tenants on how RUCs affected tenancies, and no procedures to facilitate or encourage owners’ compliance with RUCs. It appeared that USDA had rarely, if ever, acted to encourage RUC compliance or enforcement.

Counsel for USDA and the owner soon agreed that the RUCs prevented rent increases on the tenants, all of whom received rental assistance and rent set at 30% of income. The parties eventually reached agreements to resolve the complaint that resulted in the return of both properties to the USDA program until the end of their original loans in 2032, thereby preserving the affordable housing and the federal rental assistance going to these rural communities.

Although NJP and NHLP sought to negotiate with USDA to improve RUC enforcement nationwide, no settlement was reached on those proposals, despite the evident interest of USDA staff in improving RUC compliance. The case against the building owner was dismissed by agreement, and the federal court dismissed the case against USDA as moot due to the buildings returning to the USDA program. 45 Work remains to be done nationally with USDA in this area; possibly, with a new administration, it may be more fruitful.

The enforcement of RUCs in this one case rippled outward. After settlement of this case, a RUC-protected tenant at the Harbor Heights complex, who received a rent increase notice sought NJP’s help. The Harbor Heights building had a new owner, whose attorney said he had been told by USDA prior to purchase that the RUCs would not impact his operation of the building. When shown the Whatcom County litigation, this attorney rolled back the rent increase and negotiated a RUC-compliant lease.

Practice Tip: Enforcement of RUCs may take litigation because their impact on rents is so economically consequential. If needed, it is important to act quickly because tenants afraid of rent increases may move out quickly—even if they lack other affordable, sanitary housing—to avoid eviction and damage to their rental history.

IV. Washington State Steps in to Preserve USDA Housing

After the litigation in Whatcom County, NJP met several times with affordable housing advocacy groups, presenting the stark numbers on unit loss described above. Many of the units were lost after interested nonprofits could not make a purchase offer in the 180-day marketing period without a reliable source of funding for acquisition. Spurred on by the successful reintroduction of the Whatcom properties, and OC’s successful purchase of the San Juan Island property, advocates in the affordable housing community, such as the Washington Low-Income Housing Alliance’s policy director Michele Thomas, successfully lobbied the legislature to include

ten million dollars in funding to help housing providers acquire and reha-
bilitate properties, particularly USDA properties, at risk of being converted
to market-rate housing. Without the partnership of knowledgeable advoca-
tes in the legislative arena like Thomas, and willing nonprofit commu-
nity partners to invest in these properties like Opportunity Council, it is
unlikely that Washington would have been able to create a fund specifi-
cally targeted at preserving these units.

Decision makers seemed greatly influenced by the cumulative state-
wide unit loss, which was not clearly visible until NJP gathered the data
decision by USDA had not publicized or even tabulated it, although USDA did
ultimately confirm NJP’s calculation. They also responded strongly to two
ideas: (1) that the affordable housing crisis cannot end if we keep digging
the hole through the loss of existing affordable housing, and (2) that USDA
housing brings federal subsidies into Washington that are lost forever with
each prepayment. For example in the case of the previously described
USDA building in the San Juan Islands, preservation of that property
would keep $2 million in federal rental subsidies coming to state tenants
over a twenty-year period.46 Legislators understood the value of keeping
federal funds coming in to support low-income residents in the state.

After the legislature approved these funds for preservation, the state’s
Department of Commerce (Commerce) requested that NJP advise the
agency on how the prepayment process would interact with the funding
requirements. This request allowed the agency to adapt its normal site-
control requirements to allow awards to fund purchase of properties in
active prepayment where the nonprofit would not have site control prior
to receiving the award. Nonprofits applied for funds to purchase all USDA
buildings then being marketed in prepayment, as well as to purchase sev-
eral other complexes at risk of prepayment.

Commerce ultimately granted $12.5 million in preservation funds for
seven buildings. The agency used additional housing funds to approve
all applicants, which resulted in the permanent preservation of 150 USDA
units. For one property in prepayment, NJP staff quickly helped find a
nonprofit to apply for funding and make a purchase offer on the property,
providing expertise to the nonprofit on prepayment processes to support
the purchase offer.

The state preservation funds were further key to efforts to save two
buildings that offer essential housing for Latinx families in two remote
towns in rural Okanogan County. Since 2017, NJP staff had worked closely
with a housing authority director dedicated to preserving the two com-
plexes owned by the same party and deemed crucial for affordable hous-
ing for Latinx residents. NJP commented on the prepayment requests,
tracked their progress, and consulted regularly with the housing authority
on prepayment requirements.

46. Wash. State, Office of Rural and Farmworker Housing (Jan. 20, 2020), avail-
able at https://www.nhlp.org/resource-center/usda-rural-housing-programs.
The owner first listed the buildings for prepayment in 2017. NJP commented to USDA on the request, particularly pointing out the extreme housing scarcity for low-income Latinx families in the area. In 2019, the owner marketed one of the buildings following an affirmative CRIA finding. When the housing authority began negotiating purchase of the building, the owner resisted making a sale, going so far as to pull both buildings out of prepayment once the housing authority made a purchase offer. The housing authority persisted, applying for the new state preservation funding. The owner finally signed purchase agreements on both buildings with the housing authority, after the housing authority made clear that it was not ever going to let the buildings go out of the program via prepayment.

In April, 2021, the Washington legislature approved another $10 million for housing preservation over the next two years, following Governor Jay Inslee’s request to continue funding for the effort.47 This support will allow Washington’s innovative USDA preservation work to continue.

V. Putting the Pieces for Preservation Together

Preserving USDA housing requires strategic planning by parties with capacity to preserve this valuable housing. It takes collaboration between tenants, advocates, and affordable housing providers. It also requires increased funding from states and the federal government to enable nonprofit and public entities to quickly access funds that will enable them to purchase housing threatened by prepayment and conversion to higher-income housing. Enforcing USDA regulations and statutes, which have historically been ignored, is also essential to this process. As all parties learned over time in Washington, if tenants are willing to enforce their rights, they become critical players in preserving the USDA housing stock under current laws. However, preservation of USDA housing should not be dependent upon residents bringing lawsuits but by the proper administration of existing law and partnerships with the nonprofit sector to keep these properties in the affordable portfolio for years to come.

Fair Housing and Zoning
as Anti-Gentrification:
The Case of Boston, Massachusetts

James Jennings*

Introduction

The Fair Housing law protects individuals and groups based on race, color, religion, sex, familial status, national origin, or having a disability. In addition to the federal protected classes, Massachusetts Anti-Discrimination Law, Massachusetts General Laws, ch.151B, prohibits discrimination against the following protected classes: sexual orientation, marital status, ancestry, age, presence of children, veteran status or membership in the armed forces, receipt of Section 8 or other public assistance, source of income, or genetic information.1

Under the Obama administration, the final rule relating to housing, promulgated by the U.S. Department of Housing and Urban Development (HUD Rule 2015), requires local and state governments to assess affirmatively furthering fair housing in meaningful and expansive ways based on the Fair Housing Act of 1968. As reiterated in HUD Rule 2015:

Affirmatively furthering fair housing means taking proactive steps beyond simply combating discrimination to foster more inclusive communities and access to community assets for all persons protected by the Fair Housing Act. More specifically, it means taking steps proactively to address significant disparities in access to community assets, to overcome segregated living patterns and support and promote integrated communities, to end

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1. See MASS. GEN. LAWS ch. 151B, https://malegislature.gov/Laws/GeneralLaws/PartI/TitleXXI/Chapter151B.
racially and ethnically concentrated areas of poverty, and to foster and maintain compliance with civil rights and fair housing laws.²

This approach requires “meaningful” actions that would not only respond to rectifying intentional or unintentional housing discrimination but also address inequalities in the areas of segregation, poverty, transportation, public health, education, or obstacles to the application of fair housing for protected classes. It also called for strong community participation in the assessment and analysis of impediments to fair housing as well as policy and program responses.³

Under the Trump administration, this approach was abolished with its own “2020 Rule.”⁴ But it was the HUD 2015 Rule that molded the framework and work of the Assessment of Furthering Fair Housing Community Advisory Committee (CAC), formed in 2017, to assist Boston with its Assessment of Fair Housing (AFH). Members included housing, civil rights, and community activists. This coalition insisted that the city of Boston continue with the more expansive approach to fair housing and reflective of the 2015 Rule; Boston’s leadership agreed with this stance. Within the framework of the HUD 2015 Rule, the key questions in the assessment of fair housing related to (1) the impediments to affirmatively furthering fair housing in Boston, and (2) the kinds of goals that should be adopted in response to the identified impediments and barriers.

Boston’s AFH was completed in 2020. It was based on HUD guidelines for affirmatively furthering fair housing, including documenting and analyzing history of segregation in Boston and the Boston metropolitan region; reviewing historical and continuing patterns of intentional and unintentional discrimination; collecting and analyzing census and administrative data about social, economic, housing, health, transportation, education, and public safety inequalities that would inhibit the guarantee of fair housing. It also involved collecting and analyzing public testimony and written testimony about obstacles to fair housing.

In 2017 the CAC helped to organize fourteen public meetings and conducted extensive outreach to more than sixty community organizations

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alerting them about the importance of a comprehensive assessment of furthering fair housing, reaching more than 500 residents. This outreach was planned and carried out in partnership with the city. The Boston Housing Authority (BHA) and the Boston Tenant Coalition (BTC) also designed two city-wide surveys to solicit input from residents related to their fair housing experiences. Gentrification and the fear of displacement loomed as the most salient concern throughout this process. The BTC provided logistical support and resources for food and childcare at all the public meetings facilitated by CAC and the City.

The CAC collaborated with many organizations that do significant work in mobilizing communities around issues directly and indirectly related to fair housing. These organizations included the Chinese Progressive Association, the Urban League of Eastern Massachusetts, Roxbury Neighborhood Council, Right to the City Coalition, Coalition for Occupied Homes in Foreclosure (COHIF), Reclaiming Roxbury, Action 4 Equity, City Life/Vida Urbana, Dudley Square Neighborhood Initiative, NAACP Boston Branch, and other organizations. Working with city representatives, CAC completed the first full draft of the assessment of furthering fair housing and shared a draft at a Town Hall meeting attended by approximately 100 community representatives, elected and city officials on June 6, 2020. This draft, *Assessment of Fair Housing Affirmatively Furthering Fair Housing in Boston, Massachusetts: Process, Findings and Goals*, was known as the *June 2019 Plan* and was dubbed by some as the *Juneteenth Plan*. It is this draft that was used to complete Boston’s final assessment of fair housing, which included updated census data and expansion of some of the goals.

Overwhelming public testimony presented in the affirmatively fair housing sessions focused on gentrification and dislocation. Residents explained throughout the public meetings that unless gentrification is mitigated and the dangers of displacement eliminated, racial and neighborhood inequalities would only continue to grow and impact negatively the

5. City representatives represented the Department of Neighborhood Development (DND), Boston Housing Authority (BHA), Boston Fair Housing Commission (BFHC), Boston Public Health Commission (BPHC), and Boston Planning and Development Agency (BPDA).

full application of fair housing. The widespread angst related to gentrification is not a surprise in this city, of course. Miletsky & Gonzales reported the following: “Ask anyone in Boston, ‘what’s going on in Roxbury?’ and the word you’re most likely to hear is gentrification. Ask that same question in the predominantly Black neighborhood of Roxbury, and the word you’re probably going to hear is displacement.”

Initially the city administration proposed that Boston could build its way out of a housing and gentrification crisis and put a stop or at least slow down considerably residential and commercial rent increases was widely challenged. The CAC disagreed vehemently with the presumption that building thousands of housing units over a period would, ipso facto, lead to lower and more affordable rents. One reason that it was criticized is that rapidly increasing housing supply does not result in housing affordability for everyone, especially in a highly speculative real estate market. In addition, emphasizing increases in the supply of housing is not affirmatively furthering fair housing within the framework of the HUD 2015 Rule.

It was wide community input, especially from protected classes, that moved to join the discussion about gentrification with fair housing. This was very much a grassroots idea and victory in how an assessment of fair housing in Boston should be conducted and developed. It was this same community input, along with the work of CAC and the leadership of City Councilor Lydia Edwards (East Boston), that insisted that zoning changes represented the teeth for this proposition. This view is similar to one shared in a blog by Emily Chong:

Most gentrification occurs because of a lack of policies that value community input, offer equitable rezoning policies, and provide intentional housing options. Without policies that attempt to remedy the trends that cause forced displacement, gentrification will continue to dismantle and displace lower-income communities. To develop such policies, we must recognize the disproportionate and destructive effects of gentrification.

The next section describes how gentrification has been unfolding in Boston over years. The latter is followed by a discussion about how fair housing advocates have utilized fair housing goals and zoning changes to respond to the challenge of gentrification and displacement.

Gentrification in Boston, Massachusetts

In the context of Boston, gentrification is an economic, class, and racial dynamic in areas of the city that have experienced disinvestment—or lack


of investment—or economic distress but are nevertheless now experiencing significant (and even rapid . . .) increases in land and real estate values, while attracting relatively significant numbers of new and wealthier renters and homeowners. These same areas may be witnessing a loss of lower-income individuals and families and longtime residents.9

Displacement applies to those situations where individuals and families are forced to move due to speculative real estate activity; this dislocation can also include local businesses. Typically, households in these areas are replaced with those that tend to be whiter and wealthier, and smaller in family size.

This city has long historical and racist roots, which is also a fundamental part of the story of gentrification. Decades ago, federal policies that were meant to address the needs of working-class Americans have largely excluded or minimized comparable benefits to people of color. During the Great Depression, the National Recovery Administration offered more jobs and paid higher wages to white workers, and the Federal Housing Authority (FHA) would not insure mortgages in neighborhoods that were home to communities of color, or in “white” neighborhoods that did not incorporate racially restrictive covenants. In Boston, even when the worst of the FHA policies changed in the 1960s, a local plan to address lending disparities by providing low-interest loans to homebuyers of color instead further increased segregation by restricting these loans to Mattapan, parts of Dorchester, and other city areas where the majority of Black and Latinx persons live today.10

Black residential patterns were a result of racist real estate practices and hostile attitudes towards Blacks, even to the point of using violence to prevent the integration of neighborhoods or public schools. Richard Rothstein recently documented a history of how Black communities became disinvested, and suburbs turned into bastions of white-based political and economic, and cultural power.11 Rothstein’s work is a reminder of a decades-old genre of urban literature documenting and analyzing how Black, Latinx, and Asian urban communities were formed on the basis openly de jure and subtle

Black neighborhoods emerged in a context of suburb-based geographic racism throughout the Boston metropolitan region. In many instances, inner and outer suburbs represented physical and zoning-defined bulwarks against the inclusion of Blacks and other people of color. Zoning regulations were used to excuse, in effect, blatant or subtle racial discrimination throughout the Boston metropolitan region. The Fair Housing Center of Greater Boston has documented a long history of suburban municipalities using zoning regulations to control density and protect open space to restrict access to Black Americans and Latinx families. The effects of these practices are reflected today in Boston’s continuing segregation. A 2017 *Boston Globe* series exposed the existing sectors of Bostonian life, including education, health, media institutions which still reflect racial segregation and limit access to high quality care due to racial prejudice. In 2018, another *Globe* piece showed that the city’s public schools are more segregated today than in earlier periods.

Today the same areas that Blacks were confined to, and then joined by growing number of Latinx persons, are exploding in terms of land value. Speculative real estate is contributing to major movement of wealthier, mostly white households into these areas. Gentrification has emerged as one of the city’s greatest challenges. The city-issued report *Housing a Changing City: Boston 2030* states that gentrification is alarming: “Today, there are only four neighborhoods with no significant signs of gentrification. Ensuring that long-time residents can remain in their homes is critical to the stability of our neighborhoods.” Further,


14. The Fair Housing Center of Greater Boston has ceased operations due to funding issues, but information can still be retrieved from its website, https://www.bostonfairhousing.org.


Gentrification puts increased pressure on moderately priced existing housing, making it less and less affordable to low- or middle-income households. This can quickly change the nature and economic dynamics of a neighborhood and make it difficult for long-term residents to stay in their community. It is not acceptable that residents who worked diligently to strengthen their community could potentially be priced out of their neighborhoods.18

The explosion of real estate activity in predominantly Black, Latinx, and Asian areas of the city may have been slowed temporarily because of COVID-19, but it is now continuing. Landlords and developers are again raising rents, pushing evictions, and allowing previously subsidized housing to become market based because of the loss of “expiring use” regulations. As reported in The Bay State Banner, “While the coronavirus epidemic . . . slowed the pace of real estate development during the spring and early summer, the pace has picked up again, and with it, concerns about the city’s development process”19

Gentrification and resulting displacement are having a significant and disparate impact on communities of color in several of Boston’s neighborhoods, including Chinatown, East Boston, and parts of Dorchester and Roxbury. This effect is coupled with continuing racial inequality and poverty in these communities of color. According to the American Community Survey (ACS) 2014–2018 5-Year Estimates, the city’s overall poverty rate for all persons was 20.2% or one fifth of the city’s estimated population of 679,413 persons.20 While only 11.7% of whites (who are not Latinx) were reported in poverty, 23.6% of all Blacks, 29.9% of all Asians, and 31.3% of all Latinx persons were impoverished. And a whopping 86.8% of all children seventeen years and under in poverty were Black and Latinx.

Whites (not Latinx) who hold an associate or bachelor’s degree show average wages and salaries at $56,943, compared to Blacks at $38,898 and Latinx persons with the same degree at $40,727. These gaps remain controlling for school level, educational attainment, work experience, and occupation. Black male unemployment rate (ages 16 to 64) is 13.2% and for Black women it is 9.5%. White males (not Latinx) have an unemployment rate 5.6%, and white women (not Latinx) have an even lower rate at 3.8%. Asian male and Asian female unemployment is basically the same at 7.3% and 7.7% respectively. Latinx males have a 9.2% unemployment rate and Latinx women, 9.9%. These stark racial differences have persisted over both a period of major economic turmoil during the Great Recession (ACS 2008–2012), and period of post Great Recession recovery for Boston (ACS 2013–2017).

18. Id. at 88.
Gentrification is reflected in multiple ways: implicit subsidy or unfair advantage for wealthier newcomers; increasing housing prices and loss of housing affordability, especially in communities of color; eviction waves based on speculative real estate practices; instability and closing of small and neighborhood businesses; physical and social capital displacement in Black, Latinx and Asian communities; and public health and public education challenges associated with housing insecurity. The next section explains these facets of gentrification in greater detail.

**Gentrification as Subsidy and Unfair Advantage for Wealthier Newcomers**

Despite extensive economic inequality, it is important to acknowledge the history and role of resident voices in advocating for racial and spatial equality in Boston. Earlier struggles by longtime residents have laid a foundation for subsequent improvements in the quality of life in these neighborhoods, an important fact that is often left out of some scholarly and popular mediums about supposed benefits of gentrification. It can be argued that, due to the earlier struggles that low-income and working-class families endured to make their neighborhoods better, a sort of “subsidy” for newer and wealthier households has resulted. Or, as described by Robert Terrell, a long-time housing and transportation activist, and former executive director of Fair Housing Center of Greater Boston, the presence of low-income and working-class people have kept the space “warm” for gentrify-ers, while longtime residents were experiencing disinvestment and lax government services.21

An editorial in the *Our Streets, Our Stories: Learn 2 Listen Media Project* describes similarly:

Imagine a large working-class family, who’ve been renting a home for decades. . . . The parents work 40 hours a week, sometimes putting in a few hours of overtime, and still, they struggle to live a respectable existence, capable of only making ends meet, trying to provide a good life for their children. Now imagine a developer who is looking to make profit from the same community, a community that has been disinvested from and ignored for decades by landlords . . . as well as the majority of the affluent class—but not by its residents.22

The next step is for landlords to increase rents or build luxury housing resulting in displacement of residents who, as Terrell explains above, have been keeping the land and space warm for those who can pay the higher rents.23

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At times, gentrifying spaces are associated with improvements in municipal services and public transportation. Longtime residents in communities of color are not against any of these kinds of improvements but they might wonder if they are the intended beneficiaries, even though it is they who have been asking and organizing for improvements. This issue was described by a long-time Cape Verdean resident who lived in the predominantly Black neighborhood of Mattapan: “In a community I grew up in, I can now get easily lost due to all the construction and development . . . which residents know nothing about, [nor have] control over its direction.” Another resident commented, “We always knew that our community was a diamond in the rough, and we struggled for years to refine it; now others, outside of our community, only see a diamond . . . . I don’t want them to move out the people that have been here in this diamond in the rough. All of a sudden, you want to shine it, polish it [up] and make it a great place . . . no, it’s always been like this.”

Another example of how local struggles for improving services such as transportation access emerges as a subsidy for wealthier newcomers is provided on the website of City Life Vida Urbana, a grassroots organization working with residents of the Fairlawn Apartments in the Mattapan neighborhood:

Although Mattapan is located within the city, it did not have a stop on the Fairmount Commuter rail line, which had passed through the community for decades. Mattapan residents, along with civic leaders and community activists, believed a train stop in Mattapan would help Mattapan become more accessible and encourage better economic development. For nearly 20 years, these residents worked diligently to bring this train stop to their community. The new Blue Hill Avenue stop on the Fairmont line opened in February 2019. . . . In July of 2018, months before the new Blue Hill Avenue stop opened, DSF Group, which is managed by Corcoran Management Company, purchased Fairlawn Apartments for $65 million dollars. They quickly rebranded Fairlawn Apartments as “SoMa Apartments at the T” as a means to erase the history and culture of the Mattapan community.

Ironically, residents in this neighborhood have struggled for decades, pushing to ensure that a rail transit line, the Fairmount Line, would be accessible for abutters in predominantly Black neighborhoods along the various stops.

25. Id.
27. Jennings, DeSouza, Jackson & Tang Yan, supra note 24.
Marketing language used by real estate agents is clearly not meant for long-time residents:

It’s all right here! At SoMa Apartments, you will find the convenience you have been looking for along with the comforts that make a home truly enjoyable. SoMa Apartments has a suburban feel in an urban location, two blocks from the heart of Mattapan Square and its many shops and services. Residents enjoy immediate access by car or public transit via the MBTA Commuter Line to universities, major medical centers, recreation, and the many cultural activities that the Greater Boston area has to offer.28

SoMa stands for “Southern Mattapan,” a term not ever heard or used by long-time Mattapan residents and activists. The average monthly gross rent for an area within one tenth of a mile radius around Fairlawn Apartments was reported at $1,200 in the ACS 2014–2018 five-year survey; the rents asked by the developer and associated with the company’s new name, SOMA Apartments, was reported at approximately $1,800. This figure means that many families and long-time residents, and where twenty-five percent of all family households are comprised of four persons or more, and their average income for renters is approximately $24,000, will have to move in the face of rent increases.

**Increasing Housing Prices and Loss of Affordability**

A major challenge for the city is the availability of affordable and low-income housing. As stated in the city’s Consolidated Plan,

Boston’s housing market is a very strong, extremely high-cost market, both for rental housing and for ownership housing. The citywide median sales price increased for the seventh year in a row, rising 4% above last year’s record high, from $575,000 in 2016 to $600,000 in 2017. . . . Rents have skyrocketed to a median rent of $2,037 in 2016. While this is good news for homeowners and the housing industry, this is bad news for low-income renters and prospective homebuyers.29

Rents have continued to rise since the latter was reported, presenting an especially dire situation for extremely low-income households who have incomes of thirty percent or less of the area median income, and the very low-income with households with incomes at fifty percent or less.

Residents in predominantly, Black, Latinx, or Asian-American neighborhoods find that they are increasingly unable to afford to live in their old neighborhoods or are actively being displaced through rapid and relatively high increases in housing costs. Their spaces are being replaced

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by households that tend to be wealthier and whiter. Across the city, but especially in these places, many residents live with anxiety, concern, and a sense of vulnerability that they may not only lose their homes but their sense of community as well; and COVID-19 has served to highlight these fears.

Strategies for lessening housing cost burdens are critical for Boston’s livability, but the proportionality of the problem is greater for households with lower incomes. The city-issued report, Resilient Boston: An Equitable and Connected City, states that “21 percent of Boston households spend more than half their incomes on housing. Low-income neighborhoods with sizeable communities of color—notably East Boston, Mattapan, and Roxbury—feel the effects of this trend most acutely” CAC raised the particular definition of housing affordability as a potential problem in assuring fair housing for families with the lowest incomes.

Housing affordability has been defined by HUD as a household not earning more than eighty percent of the city’s metropolitan area median income. CAC insisted, however, that determining housing affordability based on a city or regional median income levels disadvantages and restricts housing opportunities for thousands of low-income households. In effect, the latter are placed in a housing affordability bucket with households reporting considerably higher incomes. The differences in median incomes are also racial. Based on the ACS 2014–2018 median household income for Blacks is $42,175, but for whites (not Latinx) it is $98,342. White households, regardless of composition, almost double the earnings of Black, Asian, and Latinx households throughout the city. This income amount compares to Asians at $43,891 and Latinx persons at $34,852.

Individually or cooperatively owned homeownership can be a buffer in reducing displacement. But homeownership is low in Boston’s Black and Latinx communities. Only 29.7% of Blacks own homes in Boston, compared to 44.5% for whites; the rate for Asians is 28.6% and for Latinx persons is a paltry 16.2% according to the ACS 2014–2018. A major problem in increasing Black homeownership in Boston is continuing rejections of home purchase loans. But it is also that Black and Latinx homeowners have had difficulty in securing financing for home improvements.

Residents face a huge problem with severe housing costs (where households pay fifty percent or more of their household income for housing costs). Households affected by severe housing costs do reflect racial and ethnic differences. In many census tracts in predominantly Black and Latinx neighborhoods (Roxbury, Mattapan, Dorchester, East Boston), one third or more of all households pay gross rents that are fifty percent or greater than their household income. Map 1 shows how concentrations of Black and Latinx residents are strongly associated with these places.
Evictions Waves Based on Speculative Real Estate Practices

Rapidly rising rents in low-income and the poorest areas contribute to the displacement of families and children, and primarily Black, Latinx, and Asian households. One report authored by City Life/Vida Urbana and MIT found that “[s]eventy percent of market-rate eviction filings occur in neighborhoods where the majority of residents are people of color. . . .”33 Also reported is the fact that “[m]arket-rate eviction filings are more likely to occur in census tracts where there’s a larger share of Black renters, controlling for other variables.”34 While there have been eviction moratoriums as a response to COVID-19, many community activists expect a floodgate of evictions in low-income communities after these kinds of moratoriums expire.35 This same report notes that evictions are linked to real estate profit-motivated interests and are not necessarily occurring due to non-payment of rent. In many places, evictions are due to developers buying properties and then asking longtime residents to leave or simply raising rents to unaffordable levels.

Instability and Closing of Small and Neighborhood Businesses

Gentrification poses threats to small neighborhood-based businesses that have helped to guarantee a degree of economic and cultural vitality in many neighborhoods in Boston. The smaller neighborhood-based businesses not only generate wealth but keep it in circulation longer at the local level. Many owners of smaller businesses see themselves as part of a community. This is the sector that employs thousands of residents and generates disposable income that remains in neighborhoods for longer periods than is the case with corporate chain stores. They have partnered with nonprofits and community-based organizations on a range of issues. This was the case with businesses such as Bella Luna/Milky Way that had to close in 2009 due to rent increases in the range of seventy to eighty percent, or Sonia’s Bridal & Quinciñera, which closed due to displacement in a previously predominate Latinx neighborhood.36 These kinds of beneficial externalities are in danger as gentrification imposes extraordinary costs on

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34. Id. at 90.  
36. For information about some of these businesses, see Ashli Molina, Latina Entrepreneurs Aim to Thrive as Hyde Square Changes, Jamaica Plain News (Nov. 20), 2014,
small and neighborhood-based businesses, while the resident market associated with this sector increasingly faces displacement.

**Physical and Social Capital Displacement**

Some scholars and journalists proffer gentrification as “urban revival,” since wealthier, white newcomers are merely buying vacant or unused properties; thus, displacement is not really taking place.\(^{37}\) This suggests a static situation where wealthier households are moving into these areas, but nothing then happens; they merely fix up parts of the neighborhood. An assumption exists that new wealth and poverty co-exist smoothly and that racial or class tensions are insignificant. Overwhelming testimony on the part of renters in many community meetings and news coverage of displacement in neighborhood newspapers in Boston belie this claim.\(^{38}\)

One thing is certain: parts of the city with the highest poverty rates are attracting wealthier households with economic resources that are considerably higher than the median incomes of longtime residents. For example, Map 2 shows the movement of wealthier households into census tracts and neighborhoods in Boston with poverty rates higher than the city’s overall twenty percent impoverishment rate.\(^{39}\) The light purple tracts show where new residents, moving from other counties in Massachusetts, have a median income at least $5,000 to $10,000 higher than residents reporting the same residence one year earlier. The darker purple tracts are where new movers from other counties in Massachusetts have median incomes $10,000 and much higher than longtime residents. Many of these areas also reflect relatively high poverty rates among residents.

39. This data is based on the American Community Survey 2013–2017 Five-Year Estimates and shows the median income of persons moving from a different county within the state of Massachusetts compared to the median income of residents in the same house one year ago, and the poverty rate by census tracts.
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This kind of migration contextualized with systemic racial inequalities can trigger what sociologist Elijah Anderson describes as the conversion of community spaces into “White spaces,” where the presence of Blacks, Latinx and other people of color is implicitly (and explicitly) questioned by new residents. This is because “[a]s demographics change, public spaces are subject to change as well, impacting not only how a space is occupied and by
whom but also the way in which it is perceived." 40 In a short period of time, Black longtime residents lose a sense of belonging in their own community and can feel disempowered suddenly to the possibility that “[a]lmost any white person present in the [new] white space can possess and wield this enormous power. And those who feel especially exercised and threatened by the rise of blacks may feel most compelled to wield that power.”41

In Boston, new and wealthier white residents are not “mixing” in with long-time low-income and working-class Blacks that have lived in these communities for generations. As one participant reported in another study: “When you go to the community meetings and those people are resent some of what is talked about is not ‘how do we share the space?’ but how do we make the space serve our own needs and desires?’—more cafes, a dog park, more greenery. They’re putting those things as a priority where folks of color are not. . . .”42 Another long-standing Roxbury resident noted:

When we moved in decades ago, we did a lot to try to bring the community back in line, confront heroin, etc. . . . We’ve always had clean-ups and concerts and events for years. Now that the White people are here, they send out emails saying, “First Street Clean-Up” or “First Concert in the Park” and when people challenge them there’s this sense of arrogance. Because we’ve been here 45 years, we used to attend all the meetings and every little thing, but now we’ve gotten older and we don’t really feel like it and how many battles can we fight. . . . You go to the meeting and you try to have a conversation around something like, “It’s not the first concert” and they say, “What difference does it make? We are trying to start a new beginning” and they are so arrogant you don’t feel like talking to them. There’s a very clear racial divide, the Black people don’t talk with the White people and that’s the way it is.43

Public Health and Public Education Challenges Associated with Housing Insecurity

Urban planners and public health experts have documented a range of negative effects on residents due to sudden physical disruptions or new urban designs (many times presented as “improvements”) that impact the health of residents.44 A recent study by the National Community Reinvestment Coali-

41. Id. at 15
43. Id.
tion shows that these effects have become exacerbated within the COVID-19 pandemic. 45 COVID-19 has not only exposed housing inequality but made it worse. There are many places in Boston which report higher rates of overcrowding, multi-generation households, and higher rates of sub-families. This illustrates a strong nexus between the quality of public health and the pursuit and application of fair housing. Family moves due to increasing rents or displacement also can have a deleterious effect on the learning experiences of children. Consistent learning situations become unstable when home addresses are continually changing or just in the threat of changing.46 Anxiety about unstable housing conditions affects the sense of well-being on the part of children and families. Thus, access to quality education for children who face housing insecurity is also a fair housing issue.

**Fair Housing and Zoning as Anti-gentrification**

The Fair Housing Act is a conceptual umbrella that can be utilized in responding to gentrification in Boston due to its intersectionality in approaching what are obstacles to guaranteeing fair housing for protected groups. But the pursuit and guarantee of fair housing must be aggressive and proactive and not simply prohibit discrimination:

While the obligation not to discriminate is critical, it is the obligation to affirmatively further fair housing that is most overlooked and/or misunderstood, and which establishes the requirement that the Commonwealth and its political subdivisions assume a proactive posture with respect to fair housing. . . . Liability may arise when there is a failure to affirmatively further fair housing as required. Such a failure may include perpetuating racial segregation patterns and adopting policies and activities that have a disparate impact on a protected class.47

More recently, this intersectional scope of fair housing was reaffirmed by the new Biden administration declaring that federal departments and agencies are required to

administer their programs and activities relating to housing and urban development . . . in a manner affirmatively to further fair housing (42 U.S.C. 3608(d)) . . . This is not only a mandate to refrain from discrimination but a


mandate to take actions that undo historic patterns of segregation and other types of discrimination and that afford access to long-denied opportunities.\textsuperscript{48}

The public meetings noted above, as well as review of hard data and government reports, highlight the face of Boston gentrification and how strong fair housing can be a tool to respond to the challenges of gentrification and displacement. Working closely with city representatives and based on extensive public testimony, the CAC identified fourteen major goals associated with specific objectives and recommendations for government action under a fair housing umbrella. The adopted goals include the following:

1. Increase Housing Availability and Accessibility for Older Adults and People with Disabilities;
2. Reduce and Prevent Homelessness;
3. Build and Strengthen Regional Strategies to Create Housing and Further Fair Housing;
4. Expand Housing Choice for Voucher Holders;
5. Redevelop and Preserve Existing Public and Income Restricted Housing;
6. Enhance Fair Housing by Creating Economic Opportunity;
7. Use Zoning as a Fair Housing Tool;
8. Reduce the Disparity in Homeownership Rates by Race and Ethnicity;
9. Develop Practices across Agencies that Instill the Use of an Equity Lens;
10. Promote Equitable Access to Housing and Reduce and Eliminate Discrimination, Both Intentional and Non-Intentional;
11. Ensure the Equitable Distribution of City Resources Based on Need by Providing Supports for Rent-Burdened Residents and Residents Facing Potential or Actual Displacement;
12. Increase Resources for Housing and Homelessness;
13. Create Healthy Homes and Promote Collaboration between Efforts to Address Housing, Health, and Safety; and
14. Address Discrimination Against LGBTQIA People and Create LBTQIA Inclusive Housing.\textsuperscript{49}


The final Assessment includes information about how these fourteen goals should be implemented and monitored by government. To reiterate, the fourteen goals reflect how residents and community activists approach the meaning of comprehensive fair housing. It reflects the belief that fair housing goes beyond housing supply or housing affordability issues but, rather, needs to be conceptualized and approached as intersectional in the lives of people and their communities. It is this framework which pointed to the need to amend Boston’s zoning codes.

Zoning as “Teeth” for Fair Housing

CAC showed that an intersectional assessment and implementation of fair housing as framed by national legislation, policies, and judicial decisions can serve as a framework for addressing gentrification and displacement. It could be a tool to reduce the impacts of racial inequality and inequity. But the latter was not achieved because Boston zoning codes inhibited the intersectionality of fair housing by not prioritizing it, or even including any mention of fair housing over decades of zoning regulations and codes. The CAC in coalition with many community-based organizations and the leadership of Boston City Councilor Lydia Edwards and other City Council members insisted that zoning reflect fair housing requirements.

Spearheaded by Councilor Edwards, this effort resulted in a major victory when, on December 9, 2020, Mayor Martin Walsh issued a press release supporting the call to incorporate fair housing language into the city’s zoning codes. It would be the first time that zoning procedures and regulations would have to reflect enforcement of fair housing. Boston’s Zoning Commission unanimously adopted language on January 13, 2021, to reflect this change, and Mayor Walsh signed off on the new regulations the very next day.

Beginning March 2021, any large-scale development proposals will not be approved unless they reflect strong fair housing goals. Now, big developers cannot submit proposals to build anything in Boston unless they first meet specific fair housing criteria. At a minimum, this change can slow

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50. The *Bay State Banner* has reported on the growing support of using fair housing in the city’s development projects. E.g., Morgan C. Mullings, *Councilor Seeks Fair Housing Zoning Law*, *Bay State Banner* (Oct. 15, 2020).


g gentrification or displacement associated with bigger real estate projects. It reflects a lesson observed by Way, Mueller, and Martin in their review of case studies involving gentrifying neighborhoods in Portland, Oregon, Washington, D.C., and Austin, Texas:

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.53

Further, “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.”54

Now developers in Boston have to satisfy “Process Options” and “Market Options.” The former can be deepening the affordability of housing units or increasing the proportion of larger family-size (2+ bedrooms) units or increasing density in order to increase the number of units available to protected classes or agreeing to partner with nonprofits to enable affordable housing construction. Developers must also meet requirements under “Market Options,” which can include providing preference to first-time homebuyers where home-ownership units are proposed; or allowing “last month’s rent and security deposit to be paid in installments for an agreed upon percentage of units or by renters up to a certain income level,” or agreeing to “best practices related to the use of CORI, eviction, and credit records in the tenant screening and selection process, and in marketing of units, for example following Fair Chance Housing guidelines, and/or waiving eviction and credit checks for affordable units especially housing voucher holders.”55

In areas of the city designated as reflecting high potential for displacement or historical exclusion of protected classes, developers have to meet higher standards under these options.56 They may opt to assist

54. Id.
56. Criteria for determining the displacement risk in neighborhood areas are detailed in the Boston Planning & Development Agency AFFH Assessment Form. BOSTON PLAN. & DEV. AGENCY, AFFIRMATIVELY FURTHERING FAIR HOUSING ARTICLE 80 (2021), http://www.bostonplans.org/housing/affirmatively-furthering-fair-housing-article-80 (choose “AFFH Assessment Form” at bottom of page).
in establishing a local housing stabilization fund or voluntarily deeding “tenants the right of first refusal to purchase property upon conversion” or establishing or contributing to “a neighborhood housing Acquisition Opportunity Program” or supporting mixed-use and local small businesses with “long term flexibly lease options.”

To monitor the enforcement of these new zoning requirements, the Boston Planning & Development Agency (BPDA) is creating an interagency body known as the Boston Interagency Fair Housing Development Committee (BIFDC). As described by the Boston Planning and Development Agency, it will be a body of five city representatives from the Office of Fair Housing and Equity (OFHE), the Department of Neighborhood Development (DND), the Mayor’s Commission for Persons with Disabilities, the Boston Planning & Development Agency, and the Boston Housing Authority (BHA). Currently, CAC is organizing to ensure community participation on this body. It is also insisting that all big development projects—whether public or private—be held to the new fair housing standards. If fully implemented and monitored, this reform can prevent giant development plans to reach approval without a lens of how residents in low-income and working-class areas of the city or the small businesses in these places would be impacted by design, intent, and ultimate beneficiaries of development.

**Conclusion: Fair Housing Is Full Equality and Cannot Be Siloed**

Fair housing cannot be “silo-ed.” Thus fair housing strategies must reflect connections to public schools, public health, public safety, and economic opportunities. This fundamental intersectionality is consistent with the linking of “fair housing considerations with issues of transportation, employment, education, land-use planning, environmental justice, and access to housing—consistent with Livability Principles developed by the U.S. Department of Housing and Urban Development.” It represents a foundation where fair housing as defined by law, statutory regulations, and judicial decisions can be a community empowerment resource to develop and implement strategies that respond to gentrification by challenging racial, economic, and spatial inequalities in the areas of housing, educational opportunities, employment, health, and public safety.

This point is made by legal scholar Tim Iglesias:

Displacement due to gentrification can become a form of resegregation. Often the tenants being involuntarily displaced are members of protected classes who will not find any viable housing opportunities in the city from


which they are being displaced and who may be forced to move to other cities, often segregated suburbs with few employment, social services, and other opportunities. . . . Under this view, displacement raises fair housing issues and a city’s response to displacement is subject to fair housing analysis.\(^{59}\)

He suggests that cities have an obligation to respond to other issues that inhibit affirmatively furthering fair housing such as, “relief for overcrowding and rent burdened households” and to “help residents preserve their existing community-based safety nets such as access to schools, places of worship, and health care providers.” Cities also must emphasize “retaining neighborhood character, the cultural and economic diversity of its neighborhoods, and enhancement of the affordable housing supply.”\(^{60}\)

An example of the intersectionality of fair housing is provided by Williams’s review of gentrification and displacement in California. The author notes that an occurrence of “[d]isplacement of residents due to economic pressures . . . [can] perpetuate one or more fair housing issues, such as segregation or disparities in access to employment or educational opportunities.”\(^{61}\) Affirmatively furthering fair housing means that these and other kinds of contributing factors must be addressed by government, and zoning should not inhibit proactive responses.\(^{62}\)

The making of these links requires that zoning regulations and practices be consistent with strong fair housing goals. The goals adopted by the Boston upon the insistence of CAC and many community groups serve to link adequate and non-discriminatory housing to other areas in the lives of people. If implemented fully and monitored, this action becomes a civic framework to consider how any economic development strategy will help or hurt residents. It means that the availability and adequacy of housing will not be denied based on the whims of developers, or their lack of thought about the well-being of residents. Insisting that zoning is utilized as a fair housing tool will also help the smaller and neighborhood-based businesses which represent such a critical component of Boston’s overall economy. Now, zoning can be used to ensure that local businesses, and particularly minority-owned, and women-owned businesses, are protected from speculative real estate activities.

On April 9, 2021, the Boston City Council unanimously adopted the Assessment of Fair Housing and its fourteen goals.\(^{63}\) This breakthrough in Boston can result in building significant challenges to continuing gen-


\(^{60}\) *Id.* at 55.


\(^{62}\) See *id.* at 387.

Fair Housing and Zoning as Anti-Gentrification

trification—but this is not a panacea. To quote City Councilor Edwards, “[T]he real test is not the signing or even passage of this amendment, but its implementation.”\textsuperscript{64} The next phase of work for the CAC and community activism is to ensure that this and all the fair housing goals are implemented fully. One way that this is occurring is advocacy for a mayoral executive order to be signed by the new Acting Mayor Kim Janey, to enshrine fair housing in all the city’s work. There will also be a need to train public officials about what Affirmatively Furthering Fair Housing means in terms of their professional responsibilities in carrying out city policies and programs.\textsuperscript{65}

Finally, it will be most important to raise community awareness about this new potential anti-gentrification and anti-displacement tool. This possibility must be continually raised among residents concerned about their housing and community well-being in the face of intense real estate and capital development. Residents must be able to use these goals to become more involved in ensuring their community and collective well-being are not sacrificed or violated by the dreams and proposals of big, and wealthy developers. The residents must be involved to ensure that development happens without displacement and not at the expense of the people and neighborhoods of Boston.


\textsuperscript{65} Id.
A Call for Action: Renewing the Federal Government’s Commitment to the Construction of New Affordable Housing

Peter Buchsbaum, Daniel Mandelker, Frank Schmidman & Michael Allan Wolf

The American people, as evidenced through the work of their representatives in the federal government, used to care deeply about affordable housing for all. More than seventy years ago, in ringing terms that were endorsed by Democrats and Republicans alike, Congress declared that

the general welfare and security of the Nation and the health and living standards of its people require housing production and related community development sufficient to remedy the serious housing shortage . . . and the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family . . . .


The articulation of these ambitious goals was not mere talk. Over the next thirty years, Congress supported affordable housing efforts, culminating in the construction programs contained in the Housing and Urban Development Act of 1968, P.L. 90-448, 82 Stat. 476 (1968), and its progeny. We now know and recognize that these programs were far from perfect, as too many African Americans and members of other minority groups were excluded from many of the generous benefits afforded to white homeowners. Nevertheless, for those fortunate enough to take advantage of these affordable housing programs, the results were life-changing.

The 1968 HUD Act, adopted the same year as the Fair Housing Act enacted in the wake of Dr. Martin Luther King’s assassination, included several ambitious provisions, particularly the Section 235 and 236 programs. Under the former, individual homeowners could receive FHA-insured mortgages with subsidized interest rates (with the subsidies being paid from the federal government to the lenders, reducing the rate to as low as one percent). Under the latter, private multi-family housing developers received the interest subsidy, and in some cases tenants also received Rental Assistance Payments. But the thrust was federal assistance to foster new construction to supplement what the market could provide.

By the end of the 1960s, subsidies to private developers had resulted in the creation of hundreds of thousands of rental housing units. According to the Congressional Research Service,

Approximately 700,000 units of housing had been built through the Section 236 and Section 221(d)(3) programs alone. The Section 202 program
had created more than 45,000 units for elderly households. The Section 235 program and Section 23 leased-housing program provided ownership and rental subsidies for thousands more. Through 1972, the Section 235 program subsidized nearly 400,000 homeowners, while the Section 23 leased-housing program provided rent subsidies for more than 38,000 private market rental units. However, despite this growth in the role of private developers, public housing was still the largest housing subsidy program, with roughly 1 million units built and subsidized by the early 1970s.

From the vantage point of the early 1970s, it looked like an ambitious, though flawed program. From our perspective in the 2020s, we now see that it was the high point of federal involvement in affordable housing. All these construction programs and others, such as the Section 515 program for housing in rural areas, which had produced over one million homes for Americans, came to a screeching halt with the Reagan administration in the 1980s. We have retreated in many ways. The Faircloth Amendment ensured that public housing—the first of the federally assisted housing programs (dating from 1937)—could never be increased beyond 1999 levels. The long-standing (though reduced and re-envisioned) Low Income Housing Tax Credit is so complex that implementing it has become an industry for specialists only. The Section 8 housing assistance program does not build housing, but subsidizes rent for existing homes. It is painfully evident that the federal government has abandoned the goals set by a broad nonpartisan coalition in 1949 to ensure that Americans of whatever income level are well-housed.

The results of federal abdication are obvious. Homelessness has become an all-too-common problem. While one might have expected it during the Great Depression, homelessness has persisted through the incredible affluence that has characterized much of America for the post-Great Society decades. In many areas the large majority of working people, of whatever color, cannot afford rents or the down payment and loan interest needed to purchase a home in most neighborhoods that feature well-funded schools and other publicly funded amenities. True, this situation has been aggravated by land-use restrictions that have increased the cost of housing; yet restriction of supply should have been addressed by continued robust federal efforts to increase the stock of affordable housing for all Americans. We have had the worst of all possible worlds: increased restrictions with minimal effort to enhance supply.

And now we have the COVID-19 crisis as well as the growing awareness of structural racism in the American fabric (including housing programs). Millions of people cannot afford housing as incomes have diminished. The response—moratoria on evictions and foreclosures—provides short-term help for many, but does not solve the problems of cost or availability. At some point, renters will become homeless, and landlords who find themselves without an income stream to pay mortgages, property taxes, and maintenance will simply have to abandon their buildings.
This emergency should wake us from the forty years slumber in federal support for affordable housing construction. It is time for the Federal government to renew its 1949 commitment to a decent home and a suitable living environment for every American family, particularly for the thousands of essential workers, many of them African Americans and other minorities, who are bearing more than their share of the burden of the pandemic while the more fortunate members of society see their wealth increase.

We know how to increase the supply of affordable housing because we did it for decades. The techniques are tried and tested; we need only put the experience gained and the lessons we have learned to work.

These proven techniques include:

1. **Subsidizing mortgage interest rates for the development of multifamily and townhouse rental housing (known as missing middle housing), including but not limited to mixed-use developments approved in a local planning process.**
2. **Eliminating restrictions on the reasonable expansion of public housing (other than restrictions on high-rise structures).**
3. **Providing down payment, closing costs, and educational assistance to facilitate the purchase of affordable homes by creditworthy purchasers.**
4. **Making available federal assistance (such as additional educational, infrastructure, and wrap-around social services funds) for communities that implement inclusionary zoning, missing middle housing, and other programs for increasing affordable housing in their land-use plans and regulations, and getting these units built.**
5. **Incentivizing municipalities to set aside funding for community housing trusts by providing a federal match.**
6. **Establishing a system of grants and loans to allow religious and other non-profit organizations to expand their already considerable efforts to construct affordable housing.**
7. **Helping to revive our rural areas by reinstituting Department of Agriculture affordable housing construction incentive programs or by embarking on direct construction to bring job and homes to parts of the country that were not prospering prior to the pandemic.**
8. **Addressing the housing and wrap-around social services needs in Native American communities, with the lead role taken by the Department of the Interior.**

It is long past time for real action: In addition to working to enact the bipartisan Neighborhood Homes and Investment Act (S. 98) and to implement other housing elements in the American Jobs Plan, the Biden Administration should establish a Task Force on Workforce and Affordable Housing to determine the best opportunities for federal support for affordable housing construction. We should re-awaken the dream of
helping people find housing, especially essential workers and vulnerable citizens who are bearing the brunt of the pandemic.

**We appreciate efforts by the Administration and its allies in Congress to eliminate regulatory barriers to housing.** For example, the Executive Order on reenactment of the 2015 Affirmatively Fostering Fair Housing rule is a critical first step. But regulatory changes should be accompanied by a renewed commitment by the federal government to ensure that, when barriers to development are eliminated, the private and public sectors can build housing in a suitable living environment, as Congress and President Truman promised the American people so long ago. If a post-war United States could promise so much in 1949, our country, as it emerges from the pandemic, can and certainly should do much more.

**We invite you to join us in this important effort.**¹

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¹. The inclusion of the affiliation of the undersigned is for identification purposes only and does not represent the views of any named institution. If you are interested in joining this effort, please contact Michael Allan Wolf at wolfm@law.ufl.edu.