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From the Editor-in-Chief

Anika Singh Lemar

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This is an eclectic issue of the *Journal of Affordable Housing & Community Development Law*. We bring to you articles on good cause eviction, affirmatively furthering fair housing, and medical marijuana in federally subsidized housing. A thread connecting all of these pieces is a worry about law reform and social change. What is possible when the federal judiciary's taste for following precedent has waned and sixty votes are required to pass bills in the Senate? Our authors take three very different approaches. One looks to the states and local governments, another looks to cautious baby steps by the federal administrative state, and the last one notes irreconcilable differences between federal and state law that will never be fully settled until there is a change in federal law.

Alongside these articles, we are thrilled to bring you book reviews of two excellent new contributions to the housing affordability canons. One is a must-read comprehensive attempt to tackle housing law, and the other is a must-read comprehensive attempt to tackle housing policy. I hope you enjoy both the reviews and the books themselves. We also endeavor to bring some hope to your day by spotlighting the work of Legal Aid of Northwest Texas, an organization that has built an impressive community development practice over recent years.

We welcome your thoughts on future themes and article topics. If you teach or mentor law students, start telling them about our writing competition. Application information will be available later this fall. We are thrilled to include last year's winning piece, an excellent essay by Albany Law student Thomas McCarthy, in this issue and look forward to receiving submissions just as good in 2023.

From the Chair

Ian Adams

Ian Adams

Dear Readers and Members of the Forum,

It is a privilege to start my term as Chair of the Forum as our world, and our practice, begin to reconnect in person. After years of toiling in my basement office, I have been delighted to catch up with friends, colleagues, and coworkers in the office and at Forum events. The May conference was a roaring success, and we are looking forward to more in-person events over the coming year. In particular, the "Boot Camp" scheduled for October in Portland, Oregon, will be a fantastic opportunity to learn the basics of Low Income Housing Tax Credits, HUD programs, and Community Economic Development from the experts.

However, as we return to the world of conferences and in-person meetings, it is important for us to take stock of the challenges as well as the opportunities ahead of us. Our practice is awakening after two years during which many of us have had little in-person interaction with our coworkers and the people who may want to be our coworkers in the future. How will the new generation of practitioners be affected by the lack of in-person interaction? Have we done enough to educate and encourage these new lawyers? These questions will guide the Forum, and its programs, in the coming years.

Beyond the new lawyers already working within our firms and organizations, we must be mindful of the barriers to entry to our practice that have existed in the best of times. In particular, I worry about whether we have done enough to inspire the next generation of practitioners of all backgrounds. As part of the effort to expand access to, and interest in, the practice, our Forum is committed to seeking out, and actively encouraging, individuals interested in affordable housing. We will continue to work with law schools to educate future lawyers about the rewards of our practice, and the Forum will remain focused on creating a more diverse, equitable, and inclusive practice.

Outside of the confines of our practice, we are reemerging into a world that has been especially difficult for those living on the margins. While many law firms have thrived, financially, over the last two years, our unhoused and housing-insecure neighbors have not been so fortunate. The ever-increasing cost of housing, from which many Americans have benefited, has not translated into an increased supply of traditionally "affordable" development. The Forum does not pretend to have easy answers to this problem, but it informs everything that we do, from partnership agreements to RAD closings. Over the coming year, I am committed to exploring

the issue of homelessness and learning how we can help in ways both large and small.

On the days when homelessness and the problems of the world seem overwhelming, I urge you to think small and take a moment to check in on your coworkers and colleagues. How are they doing? Is there someone that you haven't spoken to recently? For many of us, our work allowed us to survive, perhaps even thrive, in recent years; however, long hours of work without the physical and temporal boundaries of the office can also take a toll, and I hope that the Forum can be a place where we can honestly discuss how the past two years have affected us as professionals.

In closing, I would like to recognize the amazing work done by the previous Chair, Michael Hopkins, and all those who served the Forum over the past year. Despite constant challenges, the Forum's publications and programs have been top notch. Last fall's virtual "Deep Dive" provided valuable answers to our questions about preservation, and this Journal continued to offer unmatched scholarship on topics ranging from the history of exclusionary housing practices to the latest on Year-15 investor exits.

In addition to acknowledging Michael's service, I would also like to thank past chairs Kelly Rushin and Dan Rosen, who were sadly deprived of the opportunity to preside over an annual conference by the pandemic. Without their extraordinary efforts during the darkest days of the pandemic, the Forum would not be in the strong position that I have been fortunate to inherit.

Ian Adams
Kantor Taylor PC

DIGEST OF RECENT LITERATURE*

ABA Journal of Affordable Housing and Community Development Law

The Digest of Recent Literature in the *Journal* is an opportunity for attorneys and law students new to the practice of affordable housing and community development law to participate in the *Journal* and the Forum. This feature of the *Journal* provides brief summaries of academic and nonprofit policy institute reports, federal government notifications and reports, social science publications, and law review articles that have been published in other sources and may be of interest to the *Journal*'s readership. Each summary is accompanied by a citation and link for readers who would like to read the full article or report. Attorneys and law students interested in contributing to future Digests are welcome to contact Emily Blumberg at eblumberg@kleinhornig.com.

Beyond Recovery: Policy Recommendations to Prevent Evictions and Promote Housing Security in Santa Fe

PolicyLink, Chainbreaker Collective, and Homes for All (2021)

(https://www.policylink.org/sites/default/files/beyond_recovery_08_11_21.pdf)

Santa Fe faces an escalating eviction crisis that threatens to negatively impact community health outcomes, particularly among low-income families of color who are disproportionately rent-burdened. In a collaborative report, PolicyLink, Chainbreaker Collective and Homes For All propose fifteen actions for Santa Fe to take to keep families housed during the COVID-19 pandemic; stave off an uptick in evictions when eviction moratoria are eventually phased out; and codify tenant protection measures for the long-term. The report emphasizes that Santa Fe can use targeted solutions to support those facing the highest eviction risk, as well as adopt policies that are informed by the communities most directly impacted by housing insecurity and injustice.

First, the report identifies immediate steps that the city should take to strengthen its local eviction moratorium. While city, state, and federal protections have kept many Santa Feans safely housed over the past two years, some landlords continue to evict tenants through "no-fault" eviction proceedings, illegal self-help evictions, or in connection with lease violations

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that are not covered by existing eviction moratoria. The report proposes that the city extend its eviction moratorium as long as possible, beyond the duration of state and federal equivalents, while also expanding its parameters to cover all eviction cases. It further recommends shifting the moratorium's enforcement from law enforcement to other city staff based on a finding that many tenants who face eviction are scared to interact with law enforcement. Last, the report suggests that Santa Fe permanently fund its eviction hotline, a program first established in 2020, while also funding community-based organizations to conduct tenants' rights outreach to residents who are most vulnerable to eviction.

The report next identifies medium-term steps that the city can take to support residents who may face evictions when various moratoria expire. One option is for the city to address residents' outstanding water debt—a significant source of tenant financial insecurity—by leveraging federal funds to pay off water debts among low-income families. The report also proposes that the city expand its temporary cash assistance program, an initiative that has succeeded in providing direct cash assistance to Santa Feans who lack the formal lease documentation necessary to access rental assistance. Finally, it proposes that the city require landlords and tenants enter a city mediation program to help resolve their disputes before the eviction process can start, a measure that has been found to sharply decrease eviction rates in cities like Philadelphia.

The report concludes by noting that Santa Fe will face tremendous housing challenges beyond the pandemic, as an influx of new residents has led housing prices to sharply increase in a city in which most renters were already rent-burdened. The report proposes that the city address housing instability by passing long-term tenant protection measures, such as requiring good cause for evictions, expanding access to legal counsel during evictions, prohibiting source of income discrimination, and establishing a rental registry and landlord licensing program. Finally, the report identifies strategies for Santa Fe to transform its housing system into one that emphasizes equity and housing as a human right. These policies include providing funding and capacity-building support to community land trust and other community land ownership models, enacting anti-speculator policies like land value and vacancy taxes, and using the city's planned redevelopment of a sprawling former college campus as a model for large-scale community ownership.

Resident Engagement in the Context of the Rental Assistance Demonstration Program

Tiana Moore; Sarah Lazzeroni; Diana Hernandez

Columbia University

23 Cityscape: Journal of Policy Development and Research (2021)

(https://www.jstor.org/stable/27039950)

In recent history, federal housing redevelopment programs have sought to strongly emphasize participatory planning. Participatory planning in an

inclusive strategy that seeks resident input in the design and implementation of affordable housing programs, with the ultimate goal of developing housing that closely parallels the needs of the community. HUD's Rental Assistance Demonstration (RAD) program is one of the latest programs to utilize participatory planning. The authors investigated and analyzed the impact and result of participatory planning in a RAD conversion that took place in California from 2012 to 2015. While investigating the impact on both housing authority staff and residents, the authors focused on three main questions:

(1) What was the nature of the resident engagement?

A: Overall, the authors discovered that while attendance was high, in-depth involvement by residents was lacking. Most residents viewed the meetings as opportunities for information gathering, rather than an opportunity for their input to be heard. Staff revealed that the biggest concern among residents was typically relocation schedules.

(2) Were there any barriers to resident participation in the renovation process?

B: Interviews revealed numerous barriers to resident attendance at meetings, such as inconvenient timing, childcare responsibilities, work commitments, information oversaturation, and disillusionment with the planning process.

(3) To what extent was resident input incorporated in the renovation plan?

C: Interviews revealed that many residents saw a disconnect between their input on the redevelopment plans and the ultimate outcome of the RAD renovation. This estrangement led to a feeling of dissatisfaction among some residents. Staff recognized that a lack of resources was the primary cause for this disconnect.

Overall, the authors noted that many of the obstacles to resident participation can be overcome with simple solutions, such as providing childcare during meetings or making additional efforts to reach absent tenants. However, solving more fundamental issues—such as the disconnect between resident expectations and development resource constraints—will take additional efforts by all stakeholders.

Direct-to-Tenant Payment Implementation: Increasing Flexibility and Equity in Emergency Rental Assistance Programs

Emma Foley

National Low Income Housing Coalition (2021)

(https://nlihc.org/sites/default/files/Direct-To-Tenant.pdf)

The COVID-19 crisis left millions of American renter households behind on rent and at risk of eviction. In response to the looming emergency, Congress passed legislation that funded billions in emergency rental assistance (ERA). Despite this support, many renters remained unable to access ERA

funds as some landlords decline to participate in ERA programs for various reasons. The author identifies direct-to-tenant ERA payments as one means to overcome the issue and analyzes the structure of four such programs in existence today. The programs tended to share six core features:

(1) Landlord Outreach: Federal Treasury guidelines require all ERA program administrators to attempt to contact landlords before authorizing direct-to-tenant payments, but the four programs surveyed varied in terms of how they performed outreach and how long the program waited for a landlord response.

(2) Outreach Tracking: All four programs documented their efforts at landlord outreach, as required by Treasury Guidelines, but their method for doing so varied based on program scale and technological capabilities. Some programs utilized an assigned staff member, such as a dedicated manager, for each application, while others took an "assembly line" approach that involved handoffs between different teams or specialists for different application stages.

(3) Quality Assurance Accountability: Two of the four programs had dedicated individuals who ensured that direct-to-tenant payments were utilized for rent, while others used internal audit practices. This difference may be due to the role that each program sees itself fulfilling. Some programs may view their role as fraud investigators, while others do not.

(4) Tenant Requirements: Different programs required significantly different proof of rent payment from tenants who received program awards. One program merely sent payment recipients an award letter stating that improper use of the payment (for expenses other than rent) would violate federal law. Another required concrete proof of payment, such as a cancelled check.

(5) Tenant Payment Method: All four programs provided automated clearing house (ACH) payments or allowed checks to be mailed directly to renters.

(6) Transparency Regarding Availability: The author notes that surveys have found that tenants are often unaware of a direct-to-tenant payment option, even when it may be available. She suggests that all ERA programs make information about direct-to-tenant payment readily apparent to all potential applicants. Three of the four programs surveyed clearly emphasized this information in their public-facing materials.

State and Local Source-of-Income Nondiscrimination Laws: Protections That Expand Housing Choice and Access

Poverty and Race Research Action Council (updated June 2022)

This helpful resource summarizes and provides links to various states' and local governments' efforts to protect voucher holders from landlord

discrimination. While Housing Choice Vouchers are intended to provide tenants choices about where to live, too often landlord refusal to accept vouchers betrays the goals of the legislation and the program. Even where landlords might be willing to accept vouchers, local and homeowners' association prohibitions on tenants or, more specifically, on tenants with vouchers are increasingly common. There has been some effort to change federal law to require landlords not to discriminate against voucher holders but, in today's political climate, it is unlikely that we will see change coming from the federal government. Some states and local governments, however, have been busy addressing this issue with prohibitions on discrimination or incentives to take tenants with vouchers. This resource includes the text of twenty-one states' laws as well as many more local laws. It also includes proposed legislation. The resource also discusses enforcement of each law or ordinance. As evidenced, recently, by a lawsuit against eighty-eight New York landlords found routinely to refuse to rent to voucher holders, enforcement remains spotty, even in those jurisdictions with statutory protections. For those interested in pursuing enforcement, this guide is the best place to begin.

Representation in the Housing Process: Best Practices for Improving Racial Equity

Katherine Levine Einstein & Maxwell Palmer

Massachusetts Coalition for Racial Equity in Housing (2022)

(https://www.tbf.org/news-and-insights/reports/2022/june/racial-representation-in-housing-report-20220615)

Thanks in part to the work of Katherine Levine Einstein, Maxwell Palmer, and their co-author, David Glick, we know now, better than we ever did, the ways in which participants at land use hearings are not representative of the general public. As Einstein, Palmer, and Glick describe in their 2019 book *Neighborhood Defenders: Participatory Politics and America's Housing Crisis*, people who testify at land use hearings tend to be older than the average resident. They also are more likely to be white and more likely to be opposed to affordable housing construction than the average resident. These findings will hardly be surprising to those who have spent substantial time at planning and zoning hearings. In this report, Einstein and Palmer endeavor to craft a public participation process that is more inclusive and representative of the population at large. They undertake targeted outreach, seeking out voices that are typically underrepresented in public hearing processes. Their techniques range from the newfangled (Whatsapp) to the old-fashioned (meeting people where they already are, at the public library, for example). They also rely on social science methodologies, including focus groups of populations that they know, based on research, are underrepresented at public hearings. These groups include people with disabilities, people of color, and young people. They found that the difference of opinion between focus-group participants and

traditional public hearing-goers "were massive." Of course, engaging in a process that introduces new voices will not necessarily translate into more equitable policy solutions. More inclusive and equitable process is, however, a necessary first step, and this guide will be a helpful to start to government officials, developers, and others seeking to improve on the traditional public hearing.

Racial Disparities in Housing Returns

Amir Kermani & Francis Wong

National Bureau of Economic Research (2021)

(https://www.nber.org/papers/w29306)

Research on race and homeownership indicates that Black families and other people of color pay more than white homebuyers for identical homes and experience less appreciation. Since many Americans' wealth is largely tied up in one asset—the home—this research has troubling implications for closing the nation's significant racial wealth gap. Using administrative data on housing transactions, economists Amir Kermani and Francis Wong find that Black and Hispanic homeowners realize lower returns than white homeowners and that previous studies have actually underestimated the racial gap. But they also find that the difference is explained almost entirely by differences in distressed home sales, mainly foreclosures and short sales. Black and Hispanic homeowners are more likely both to experience a distressed sale and to live in a neighborhood where distressed sales create larger price discounts. The authors indicate that the greater likelihood of experiencing a distressed sale is due to greater income instability and illiquidity among people of color. They also offer evidence that distressed sales experienced by people of color lead to larger price discounts because Black and Hispanic homeowners disproportionately live in "shallower" markets, where real estate professionals may perceive comparability data as less reliable.

A key implication of the study is that closing the racial wealth gap not only requires expanding homeownership among people of color but also increasing housing returns. Finding that lower returns among Black and Hispanic homeowners are largely due to distressed sales, the authors estimate that expanding the availability of mortgage modification programs could meaningfully increase returns. Therefore, the authors assert that policies that allow for payment flexibility in distressed contexts would make homebuying a more reliable savings vehicle and, in turn, help to reduce the racial wealth gap.

Pandemic Rental Assistance Funding Strengthened the Renter Safety Net

Abby Boshart, Elizabeth Champion & Susan J. Popkin

Urban Institute (2022)

(https://www.urban.org/research/publication/pandemic-rental-assistance-funding-strengthened-renter-safety-net)

It will not be news to *Journal* readers that the United States fails to provide enough rental assistance to meet the needs of families, even in normal times. During the COVID-19 pandemic, as many as forty million renters risked eviction. In response, the federal government authorized an unprecedented $46.55 billion in Emergency Rental Assistance (ERA), administered by the U.S. Department of Treasury, with funds allocated to states, localities, and tribal governments using a per capita formula. Researchers at the Urban Institute interviewed local ERA administrators to draw lessons on the effective delivery of rental assistance during this unprecedented situation. Their findings include the following:

- Lowered application barriers—for example, through loosened documentation requirements—expanded access to assistance and increased the speed of assistance delivery.
- Relevant previous experience administering assistance was critical to program success, providing a strong indicator of higher assistance allocation rates.
- Effective use of data and technology enabled targeted outreach that improved the scale and speed of assistance delivery.
- A systemic approach—for instance, including legal services and courts—allowed for coordination that helped families access assistance.
- Outreach that "meets communities where they are," such as partnering with community-based nonprofits, was more likely to prove successful.
- Landlords were critical partners, not only for delivering assistance but ensuring compliance with tenant protections.

Finally, the researchers highlight the importance of holding onto these lessons learned from the pandemic experience to ensure that the rental safety net, while still insufficient, can operate as effectively as possible to promote stability for renters moving forward.

FROM THE READING ROOM

A Policy Cookbook for the New Progressive YIMBY

Stephen R. Miller*

Fixer-Upper: How to Repair America's Broken Housing Systems
Jenny Schuetz
Brookings Institution Press (2022)
210 pages; $29.99 (paper); $23.99 (ebook)

Fixer-Upper,[1] the excellent new book from Dr. Jenny Schuetz at Brookings Metro, might be the closest thing there is to a restatement of the current progressively infused "Yes in My Back Yard" (YIMBY) housing movement. This new consensus—to the extent one can be discerned from a decentralized movement—is animated by several overarching tenets also at the center of *Fixer-Upper*. These tenets include a distrust of local government land use regulation (e.g., the YIMBY movement against zoning), a preference for federal market-based housing subsidies and entitlements (e.g., LIHTC and vouchers), and a reliance on state government intervention in housing to increase both production and quality (e.g., preemption of NIMBY land use policies and increased technical assistance). What makes *Fixer-Upper* a must read is the ability of Schuetz to lay out, in clear and coherent language, the amalgam of strategies and policies in one systemic platform. No other book on the market puts so many of these strands of housing advocacy together that is, at the same time, as accessible and thorough as *Fixer-Upper*.

So many policy prescriptions are packed into these two hundred pages that it would be impossible to discuss them all. But *Fixer-Upper* may be best positioned to be the main course in the feast of housing scholarship and advocacy that has emerged in the past few years. It serves this purpose not by providing the whole story or a deep dive in any one area of housing

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1. Jenny Schuetz, Fixer-Upper: How to Repair America's Broken Housing Systems (2022) [hereinafter Fixer-Upper].

policy, but that is the point. So much writing on housing goes narrow and deep; Schuetz goes broad and connects the dots in a readable manner that housing books seldom accomplish. A delight on its own, *Fixer-Upper's* readers will undoubtedly be left wanting more detail on areas they have not encountered before. *Fixer-Upper* paired with other readings in recent literature doubly illuminates today's broader housing debate. With that in mind, what follows here is a review of *Fixer-Upper*'s primary prescriptions for the housing crisis, with suggestions for pairings with recent literature and context to frame some of these proposals.

* * *

Fixer-Upper aligns with a core YIMBY conceit: local governments have most of the authority to regulate housing production, they do a poor job of it, and the federal and state governments need to intervene more. Schuetz hones in on what she calls excessive zoning, zoning that hinders housing development. She posits that such excessive zoning exists in places where "housing prices (or rents) are high relative to household income."[2] Such excessively tight land use regulations have the greatest effect on coastal metros—the West Coast and East Coast from Washington, D.C., to Boston—where the ratio of median housing prices to median household income is the highest.[3] The heightened cost effect created is like a fractal unequally distributed on the coasts and, within those coastal cities, unequally distributed into a few neighborhoods with restrictive zoning.[4]

Schuetz argues that this excessively restrictive zoning, in turn, distorts the ability of an already urbanized area to develop new housing throughout the metropolitan region. Schuetz uses the example of Washington, D.C., which has experienced a housing boom, but where almost all new development has been highly concentrated in a handful of neighborhoods that were historically middle-class Black neighborhoods like Columbia Heights. The increased demand for those neighborhoods has made it harder for existing communities of color to remain in the neighborhood, much less sustain itself over time with similarly situated residents.[5] Restrictive zoning also restrains the process of "filtering," in which older homes become affordable as newer homes are built.[6] By-right zoning would permit more development in areas that otherwise would fight it, Schuetz argues.

Schuetz proposes two clear principles for better land use policies, though she states that there are "many variations in implementation."[7] Schuetz's first principle is that "each jurisdiction should allow a diverse

2. *Id.* at 23.
3. *Id.* at 24.
4. *Id.* at 28–29.
5. *Id.*
6. *Id.* at 29.
7. *Id.* at 31.

range of residential structure types and home sizes."[8] Schuetz's second principle is that "the development process should be simpler, shorter, and more transparent."[9] But Schuetz stops shy of offering detailed proposals, noting that "exactly what 'better' zoning would look like will vary across places."[10] Her most detailed policy prescriptions are for "consistent citywide revisions (e.g., legalize apartments across all residential areas)" and "to focus the push for increased density in high-opportunity neighborhoods."[11]

Schuetz does call out certain types of exclusionary zoning and, in particular, single-family districts, minimum lot sizes in areas near central cities, and capping building heights at three stories in coastal locations where it makes development of multifamily units financially infeasible.[12] Historic preservation, while not directly mentioned, is implicated in a discussion of the refusal to have high-rise units in Greenwich Village.[13] All of these restrictions are standard targets in today's wars to open up exclusive enclaves for missing middle housing. Here again, Schuetz's argument that exclusionary zoning needs to go is meritorious, and she is squarely in the consensus on strategy. It is still worth probing this position to better assess its implications.

Like many YIMBYs, Schuetz singles out discretionary zoning as a critical area for reform. Yet, the long history of zoning makes it less clear that this focus will yield the benefits that reformers propose. The dirty little secret of Euclidean zoning, the form of zoning used by most local governments around the country, is that it was unworkable from the start. The model enabling statute that the U.S. Commerce Department proposed in the 1920s, and that was adopted by most states, permitted discretionary variances and special-use permits that could be granted to individual projects to release them from otherwise generally applicable zoning requirements. That was not enough. Post-World War II subdivision development and master-planned communities could not be crammed into the Euclidean formula. Instead, the planned unit development (PUD) and a contractual turn in land use emphasizing development agreements were necessary tools that created something like *ad hoc* planning for large developments.

Zoning does very little to establish the first buildout of a community; rather, what zoning does best is lock that first buildout in place and prevent redevelopment. For instance, empirical studies have found almost no difference in land use patterns between cities that adopted local growth management policies and those similarly situated cities that did not do

8. *Id.*
9. *Id.*
10. *Id.* at 32.
11. *Id.*
12. *Id.* at 21.
13. *Id.* at 22.

so.[14] One study compared the development pattern of Houston, which has no zoning but is regulated through private covenants, with Dallas, which adopted its first zoning ordinance in 1930.[15] The study found that the two cities had largely developed in a similar fashion despite Dallas's early zoning, and Houston's lack of it.[16] Perhaps even more surprisingly, another study comparing development in metropolitan Portland, arguably the most regulated city in America, found almost no difference between Portland and other similarly situated western cities.[17] A key take-away from such studies, University of Pennsylvania planning professor John Landis has noted, is that planning research indicates that "zoning tends to follow market preferences rather than lead them."[18] Growth management similarly only had an effect at the margins. Landis studied the 178 largest metropolitan areas since 1990 and "found no evidence that local regulatory regimes or growth management programs had any effect on sprawl patterns, but that administering local ordinances in ways that provided regulatory consistency and incentivized infill development did contribute to slight reductions in sprawl."[19] In effect, the development pattern that we have inherited is the one that developers wanted in an environment where federal highways promised endless greenfields of cheap land.

Nonetheless, Schuetz and many others these days argue that discretionary permitting is a significant problem in housing supply. Schuetz writes that the CUP process gives "older, affluent white homeowners" a chance to "dominate the proceedings, even when they constitute a minority of the residents."[20] There is no doubt that NIMBYs have abused the CUP process to delay permits of individual projects, but the post-World War II land use system still prioritizes PUDs and contractual development agreements for most large housing projects. The empirical studies further call into question

14. *See generally* John D. Landis, *Fifty Years of Local Growth Management in America*, 145 Progress Plan. 1, 5 (Mar. 2021) (finding few differences in development patterns between stringently zoned and loosely zoned places).

15. *Id.* (citing Christopher Berry, *Land Use Regulation and Residential Segregation: Does Zoning Matter?*, 3 Am. L. Econ. Rev. 251, 251 (2001) (comparing Houston and Dallas development patterns)).

16. *Id.*

17. *Id.* at 6 (citing Robert E. Lang & Steven P. Hornburg, *Planning Portland Style: Pitfalls and Possibilities*, 8 Hous. Pol'y Debate, 1997, 1, 10 (discussing the regional growth management in Portland)). *See generally* Arthur C. Nelson, *Comparing States with and Without Growth Management Analysis Based on Indicators with Policy Implications*, 16 Land Use Pol'y. 121 (1999) (asserting another example comparing Portland's urban management to other cities—specifically Florida cities).

18. Landis, *supra* note 14, at 6; *see also* Robert C. Ellickson, *The Zoning Straitjacket: The Freezing of American Neighborhoods of Single-Family Houses*, 96 Ind. L. J. 395, 396 (2021) (asserting that the politics of local zoning force neighborhoods to remain virtually unchanged).

19. *Id.*

20. Fixer-Upper, *supra* note 1, at 20.

how much CUPs actually inhibit greenfield development, though they are certainly more problematic in redevelopment.

It remains to be seen whether by-right zoning, which would eliminate discretion, can achieve what Schuetz and the YIMBYs desire. By-right zoning proposals today comes in three common forms—"building anything anywhere" proposals, form-based zoning, and—most commonly—Euclidean zoning provisions. The first is a libertarian ideal that seems unlikely to produce long-term significant development if only because its lack of guardrails almost ensures abuse and backlash.[21] Second, form-based codes, which permit development to proceed within highly prescribed forms, is more tenable as a long-term strategy because the resulting urban experience is guaranteed from the details of the code. Creating such codes is time-consuming and expensive, however, and few urban cities or already-urbanized areas have been able to make the switch. Form-based codes also have not eliminated discretion entirely. For instance, the city of Cincinnati has a form-based zoning code, but its city council is currently embroiled in a pay-to-play scheme that should not even be possible if such codes truly eliminated discretion.[22] The third type of by-right development—and the one Schuetz is likely most interested in advancing—exists already in Euclidean zoning codes, but usually only for small projects. Presumably Schuetz's preference would be to extend this type of by-right development to larger projects. While there is merit to such an approach, the logistics are daunting; there are very few examples of where it has worked. In fact, most Euclidean codes simply do not contemplate larger development projects in any meaningful fashion, which is why increasingly discretionary approaches like PUDs and development agreements became the way that things got done in almost all cities. While discretion may be abused to exclude, it also permits development in many Euclidean codes that are clunky, decades old, and incomplete. This is not to diminish the importance of clarifying zoning codes and making them as transparent and efficient as possible in producing integrated neighborhoods. However, it is important to take note of how difficult by-right codes have been to produce at scale and maintain as market conditions change over time. The by-right project appealing to today's developer may not be appealing in a decade, and many local governments have chosen simply to use discretionary permits to address the market shift than rewrite their codes. By-right development

21. For a sampling of this argument, see Roger Valdez, *Zoning Is a 20th Century Solution to a 19th Century Problem, Let's End It*, Forbes (May 16, 2019), https://www.forbes.com/sites/rogervaldez/2019/05/16/zoning-is-a-20th-century-solution-to-a-19th-century-problem-lets-end-it/?sh=b2d35169dfa0 ("The answer to price problems is to abolish all land use and zoning regulations other than the building code which is about safety and health.").

22. Press Release, U.S. Dept. of Justice, Cincinnati City Council Member Arrested, Charged with Accepting $40k in Bribes (Nov. 19, 2020), https://www.justice.gov/usao-sdoh/pr/cincinnati-city-council-member-arrested-charged-accepting-40k-bribes.

is an important part of the solution, but other approaches to reform may be equally valuable in light of evolving market complexity.

Other places to look in eliminating exclusionary effects of discretionary permitting that Schuetz desires—especially in redevelopment projects—include revisiting the mechanics of the discretionary permitting process. For instance, discretionary permits in many states are held to heightened procedural standards of adjudications, instead of legislative actions. Reenvisioning those due process precedents could lessen the administrative burden. Or states could adjust statutory and judicial requirements related to findings. While findings are important to ensure that local governments state reasons for their actions, many land use findings are essentially boilerplate and take valuable staff time. Rethinking findings could give planners more time to do meaningful work and lessen the burden of discretionary review.

Legal standards on citizen participation at public meetings should change. Rethinking the legal requirements on the hearing process in a way that meets due process minimums without ossifying government decision making is essential. For instance, some states require public comment for each individual to be a minimum of three minutes, even if those comments are repetitive.[23] It is hard to sit through a late-night planning hearing where person after person hits the same talking points on a project and believe we are watching democratic participation at its best. Test cases are in order to redefine due process at the local level in light of technological advances. For instance, does the ability to record and submit on-the-record testimony prior to the meeting meet due process standards? Can arguments against a project be grouped together in ways that inform decision makers while improving the hearing process? Due process is a flexible enough concept to comport with the twenty-first century's technological means of political discourse. Fully realizing these technological options for discourse, however, may mean reversing some of the last century's state-level judicial precedents.

For local governments looking to reconceptualize participation, a recent study by Katherine Levine Einstein and Maxwell Palmer provides useful suggestions to achieve more racially equitable outcomes in planning decisions.[24] Einstein and Palmer note that these strategies include ensuring diversity and representation among decision makers across all aspects of diversity, including race, ethnicity, gender, age, and home-ownership.[25]

23. *See, e.g.*, Cowan v. Bd. of Comm'rs of Fremont Cnty., 148 P.3d 1247, 1258 (Idaho 2006) ("[L]imiting public comment to two minutes is not consistent with affording an individual a meaningful opportunity to be heard.").

24. Katherine Levine Einstein & Maxwell Palmer, *Representation in the Housing Process: Best Practices for Improving Racial Equity*, Bos. Found (June 15, 2022), https://www.tbf.org/news-and-insights/reports/2022/June/racial-representation-in-housing-report-20220615.

25. *Id.* at 2.

They note that achieving such diverse representation may require outreach and recruitment. They also encourage decision makers to be cognizant that those who tend to show up at public meetings are often not representative of the broader community.[26] Similarly, decision makers need to be reminded to contemplate the beneficiaries of housing policy, not just the loudest voices, in their deliberations.[27] Engagement needs to be broad and should take advantage of new technological possibilities. Two such possibilities that they discuss are equitably targeted focus groups and civic lotteries.[28] Finally, they note that surveys can be an important tool for local government, but also can reinforce the biases of the usual suspects that tend to show up at traditional meetings.[29] They write that "[s]trong opponents (or supporters) of housing can organize fellow group members to take a survey."[30] If local governments use such surveys, they need to embrace the usual statistical sampling methodologies that are well established, but likely require assistance from a consultant versed in such strategies.[31]

Judicial review of land use discretionary permits could also be substantially altered. Land use permits are usually already subject to shorter limitations periods than other types of administrative actions. Making it harder to challenge permits—perhaps, establishing new standards other than the usual administrative review glosses of arbitrary and capricious, substantial evidence, and unlawful procedure—and using specialized courts for permits like in Oregon or Vermont—could make discretionary permitting less burdensome while also allowing the flexibility of such permits that zoning has always needed.

* * *

Eliminating single-family districts in favor of "missing middle" housing—a reference to a variety of modestly upzoned uses such as accessory dwelling units (ADUs), duplexes, triplexes, and fourplexes—is another part of the new consensus that Schuetz proposes in *Fixer-Upper*. The idea is that single-family districts occupy a remarkable percentage of land in American cities. Providing smaller units in these prized central neighborhoods will permit more people to live in coveted urban locations that are almost exclusively white enclaves resulting from a century of racist housing policy. These enclaves are doubly problematic when other districts of opportunity—such as school boundaries or resource districts, such as those used to fund a library or a recreation center—are overlayed on the single-family district.

26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 13.
31. *Id.* at 2.

Nonetheless, there are cracks in the consensus about this approach. A study from the Terner Center at U.C. Berkeley found that just 5.4% of single-family lots in the state could realistically be redeveloped to a duplex, triplex, or fourplex due to project finance.[32] Olympia, Washington, recently reported that the elimination of its single-family districts saw virtually no construction of missing middle housing after several years.[33] Minneapolis, one of the leaders in retrofitting single-family districts, has had just 81 units of missing-middle housing *permitted*, much less built, in a community with 180,000 housing units.[34] Communities of color are sounding the alarm because it is routinely their neighborhoods where the land is undervalued and most likely to be redeveloped.[35]

Yet, if conditions arose that caused the retrofitting of single-family districts to take off, it's hard to imagine it wouldn't start to look like market-based urban renewal. Redeveloping existing areas is always riskier than developing on greenfield land. Project financiers will demand a premium for risk, and so the financial markets that feed development are going to trend toward demanding higher returns. The methods of doing that are well known: seeking out undervalued land and building high-amenity units to increase the cost per square foot. Economies of scale will trend toward redeveloping neighborhoods, not a single lot over here and another over there.

It is also hard to overstate what a dramatic change infilling single-family districts to meet our housing need would be for American housing policy. A 2012 study by the EPA that examined 209 metropolitan regions found that only 21% of all new homes were built in previously developed—or infill—areas.[36] Trying to solve the housing problem with infill duplexes or

32. *See* Ben Metcalf et al., *Will Allowing Duplexes and Lot Splits on Parcels Zoned for Single-Family Create New Homes?: Assessing the Viability of New Housing Supply Under California's Senate Bill 9*, Terner Ctr. for Innovation, U.C. Berkeley (2021); Manuela Tobias, *California's Housing Crisis: How Much Difference Will a Zoning Bill Make?*, Capradio (Sept. 17, 2021), https://www.capradio.org/articles/2021/09/17/californias-housing-crisis-how-much-difference-will-a-zoning-bill-make (affirming SB 9's policy of allowing development of two duplexes, or four total units, on single-family lots without local approval).

33. Brandon Block, *Abolishing Single-Family Zoning Had No Effect on Olympia Housing Development in 2021*, Olympian (Jan. 21, 2022), https://www.theolympian.com/news/local/article257068052.html#storylink=cpy.

34. Yonah Freemark & Lydia Lo, *Effective Zoning Reform Isn't as Simple as It Seems*, Bloomberg CityLab (May 24, 2022), https://www.bloomberg.com/news/articles/2022-05-24/the-limits-of-ending-single-family-zoning.

35. *See, e.g.*, Ashley Claster, *Denton Historically Black Neighborhood Rezoned*, Spectrum News 1 (Oct. 29, 2021) ("The City of Denton just voted to rezone this small plot of land so a duplex can be built. The problem is that this area is a historically Black neighborhood with a lot of history behind it. Now the neighbors are worried whatever is built here will disrupt the integrity of the neighborhood.").

36. U.S. Env't. Prot. Agency, Residential Construction Trends in America's Metropolitan Regions: 2012 Edition (Sept. 1, 2020), https://archive.epa.gov/epa

triplexes may not be the easiest way to invert those percentages at the epic scale that is necessary. Consider the math: for the United States to meet its 3.8 million dwelling unit shortfall with duplexes in existing single-family districts, the country would need to *demolish* 3.8 million single family homes (3.8 million single-family homes demolished, 7.6 million duplexes built).[37] To put that in perspective, that means demolishing the equivalent of *all the dwelling units* in Los Angeles County.[38] The cost and logistics of demolition, not to mention the potential political headwinds if such a strategy were to gain momentum, make reliance on single-family district elimination a risky bet to solve the housing crisis. As noted earlier, first adopters of single-family district elimination, such as Minneapolis, have not seen significant upticks in missing middle housing production though the reasons why are too early to tell.

There have to be other tools, and Schuetz hints at some of them. Among the most promising is retrofitting retail corridors with multifamily housing. A recent report by the Boston Metropolitan Area Planning Council found that the region's housing needs could be solved by each local jurisdiction retrofitting just a few undervalued retail strips.[39] Repurposed to residential uses, such strips provide significant housing opportunities without disturbing existing communities. Similarly, a proposal by the architect Peter Calthorpe for the Bay Area's retail strips and, in particular, El Camino Real, illustrate the vitality of this approach.[40] Retail strips are built into the fabric of neighborhoods, even many exclusive single-family districts. As a result, retrofitting retail could produce many of the same redistributive and moving-to-opportunity benefits that tearing down single-family districts would yield. In addition, the corridor model of development has many other benefits that the YIMBYs tend to ignore. Building density along corridors makes public transportation much more relevant, and meaningful, to low-income individuals. Corridor planning also permits bi-directional traffic if jobs and homes are distributed along that route. That lessens the infrastructural needs of single-direction commuting.

/smartgrowth/residential-construction-trends-americas-metropolitan-regions-2012-edition.html.

37. Jared Bernstein et al, *Alleviating Supply Constraints in the Housing Market*, White House (Sept.1, 2021), https://www.whitehouse.gov/cea/written-materials/2021/09/01/alleviating-supply-constraints-in-the-housing-market.

38. Los Angeles County had 3,579,329 housing units in 2019 according to the U.S. Census Bureau. https://www.census.gov/quickfacts/losangelescountycalifornia

39. Metro. Area Plan. Council, Rethinking the Retail Strip: Transforming Old Uses to Meet New Needs (2022), https://www.mapc.org/planning101/are-strip-malls-key-to-solving-greater-bostons-housing-woes, https://storymaps.arcgis.com/stories/cb9bec551f9d48599f267f4ff6282906.

40. Robert Steuteville, *The Corridor Model for More Affordable Housing*, Pub. Square: Cong. for New Urbanism J. (Sept. 15, 2020), https://www.cnu.org/publicsquare/2020/09/15/corridor-model-more-affordable-housing.

Many other alternatives abound, but, like corridor development, they require embracing some modicum of local or regional planning rather than the libertarian ideal that animates too much of the YIMBY movement (though not necessarily Schuetz). Here again, a dive into land use policy other than zoning yields options. Consider the oft-forgotten subdivision code. Ministerial lot splits could be permitted for ADUs, as California recently piloted though for a restricted subset of lots.[41] In most jurisdictions, such a lot split would create an illegal substandard lot of record. However, ADUs are the one type of missing middle housing that do not require demolition and use existing land value. Providing ADUs as a for-sale property, as opposed to just a rental property, would help low-income individuals or households begin to acquire the benefits of homeownership earlier.

Another natural way to create more affordable housing, since land value is the core of housing unaffordability, is to simply require that subdivided lots vary the lot size. In many older subdivisions, lots were small, and homebuilders could choose to buy one, two, or three lots. This created natural variability in land value, such as in Boise's North End, as individuals purchased one, two, and three lots and homes were built one at a time. Variability in lot size locks in missing middle housing in a pattern difficult to exclude. Such basic treasures of equity are waiting in the subdivision code, which could be standardized for today's master-planned communities.

Schuetz spends few pages on which zoning reforms she prefers. Perhaps she would support some of the ideas mentioned here, or perhaps she would consider them too radical or too impractical. The reader turns naturally to questions of implementation, however, because Schuetz does such a fine job establishing the preconditions of inequality that mandate change. In the existing discourse, those preconditions are often associated with the YIMBY movement whose goals are laudable but for which policy is still evolving. A more robust discussion of land use policy awaits to heed Schuetz's clarion call.

* * *

Beyond the zoning wars, Schuetz lays out many of the arguments that have been made against local governments' control of land use in a concise and clear fashion. One problem with local governments that Schuetz identifies is simply how decentralized they are: there are nearly 40,000 local governments with land use authority in the United States and some

41. Among the limitations on ministerial lot splits in SB9 is that they are not available in historic districts. Several other limitations apply. See California Legislative Information, Senate Bill No. 9 (Sept. 17, 2021), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB9.

eighty-five percent of these jurisdictions have less than 10,000 residents.[42] Add to that the tens of thousands of other special districts—such as urban renewal or redevelopment districts, business improvement districts, and such—that affect land use even if they do not have direct land use authority.

Justifying all of this decentralization is 1950s' economist Charles Tiebout's "consumer voter" hypothesis. Tiebout argued that there should be many local jurisdictions in a metropolitan region to permit consumer voters to choose the mix of tax and amenities that resident preferred. Some residents might want to pay taxes for a senior center and a public swimming pool while others might not, and each should be able to have their preference and taxing policy to go along with that amenity preference.[43] Schuetz notes, however, "Tiebout sorting raises concerns about the equity of a world where people choose their neighbors based on purchasing power." She continues, "A clear implication is that wealthy households can pay more for public services, creating an incentive for them to cluster in the same community while excluding less affluent people."[44]

Schuetz does not give details on how Tiebout's theory of sorting evolved into practice, so this is another opportunity to pair *Fixer-Upper*'s survey with other works that provide detail. For instance, a discussion of Tiebout sorting pairs nicely with scholarship on the Lakewood Plan, which permitted cities to incorporate in Los Angeles County and then contract for services from the county.[45] The ability to purchase services was a turning point that lessened the upfront cost of municipal incorporation. The success of the Lakewood Plan as a method to lessen the burden of incorporation became an important model followed across the country. For today's reformers, however, these details matter because they also point to aspects of municipal law that could deliver more equitable results.

Similarly, the rise of homeowners' associations permitted developers—and cities—to place infrastructure costs onto private organizations. So, too, have infrastructure districts, regulated by state statute, served as the enabling tools to decentralization and its inequality of service. These structures facilitated increasingly smaller units of government—public and private—that now dominate suburban land use policy. It is important to bring these structures to the fore in questions of inequality precisely because their complexity and opaqueness can lead reformers to too much emphasis on urban core cities. The long-term governmental choices that have been made over the last century cannot be underestimated and addressing them is an essential part of the housing puzzle. UC Berkeley law professor Eric Biber's new article "Small Suburbs, Large Lots: How the Scale of Land-Use Regulation Affects Housing Affordability, Equity, and

42. Fixer-Upper, *supra* note 1, at 133.

43. *Id.* at 133–34.

44. *Id.* at 134.

45. *See, e.g.*, Gary J. Miller, Cities by Contract: The Politics of Municipal Incorporation (1981).

the Climate," pairs well with this section of *Fixer-Upper* as it fills in many of these structural details of suburban governance and its influence on housing decision-making.[46]

Schuetz also explores the broad array of powers delegated to local governments that affect housing. In addition to land use decisions, these powers include setting fiscal policy through taxes and fees, implementing climate resilience policies for mitigation and adaptation, and maintaining building stock through code implementation and historic preservation ordinances, as well as adjudicating landlord-tenant complaints and rent control or stabilization programs.[47] Schuetz also notes that, while local governments in a region usually have the same or similar authority to implement land use planning, the reality is far different. Wealthy cities have well-staffed planning departments that can often focus on planning, while lower-income neighborhoods are often understaffed and must focus on code enforcement resulting from a more varied array of uses and residents.[48] In addition, local governments can make housing policy—large lot zoning, for instance—that has regional effects on the housing market, but the local government does not have to pay for those externalities. She notes the prevalence of fiscal zoning, or the emphasis placed by many local governments on land uses that generate significant tax revenue, such as a big-box store, while eschewing multifamily housing, which usually brings with it needs for services such as schools for children.[49]

Like many scholars and activists today, Schuetz argues that the states, which have usually delegated the authority for these actions to local governments through constitutional police power authorities and enabling statutes, should begin to claw back some of that power where housing is concerned. States can do this, she argues, through preemption statutes, as well as in the states' role as an intermediary distributing federal funds such as Community Development Block Grant (CDBG), LIHTC, and transportation funds.[50] Here again, Schuetz is espousing a consensus position that could be found in many proposals, but granting states more control of housing decisions is not without controversy. University of Virginia law professor Richard Schragger's recent article, "The Perils of Land Use Deregulation,"[51] pairs well with this section of *Fixer-Upper* because he lays out the long history of bad land use policies at the federal and state level. Schragger's article is an important counterpoint to those that believe centralizing land use power will automatically yield better results than today's

46. Eric Biber et al., *Small Suburbs, Large Lots: How the Scale of Land-Use Regulation Affects Housing Affordability, Equity, and the Climate*, 2022 Utah L. Rev. 1.

47. Fixer-Upper, *supra* note 1, at 132.

48. *Id.* at 137–40.

49. *Id.*

50. *Id.* at 129.

51. Richard C. Schragger, *The Perils of Land Use Deregulation*, 170 U. Pa. L. Rev. 125 (2021).

decentralized approach. As always, the devil is in the details, and it would take a crystal ball to know which approach will get us to better housing decisions. Together, though, Schuetz and Schragger lay out the possibilities, and problems, inherent in any option our housing federalism presents.

Fixer-Upper also does an excellent job of summarizing how states control housing through landlord-tenant law, state environmental review statutes for development, and statewide "fair share" laws, such as those in California, New Jersey, and Massachusetts.[52] Although Schuetz envisions a role for the federal government, her discussion is limited almost exclusively to finance. The federal government does not have land use authority, though she notes that the allocation of funds such as LIHTC, CDBG, and other HUD funds should have conditions attached to them that reward jurisdictions prioritizing sensible housing policies.[53] This section pairs well with recent Democratic presidential platforms from the last election, which present some options for federal agencies to do more. For instance, in his presidential candidate platform, Senator Michael Bennet proposed a Low Cost Housing Innovation Fund, which would have been a $100 million national demonstration grant competition for home builders to rethink housing to bring down the cost per square foot or total cost per unit by half or more.[54] Then-presidential candidate Beto O'Rourke proposed American Rescue Plan Act (ARPA)-Build, a new agency focused on breakthroughs in building, which he proposed to pair with zoning reform to address climate change and housing costs.[55] These proposals and others like them focus on making infill development—and green infill development in particular—more attractive to developers. Such federal policies could also target the financial industries that put capital into development projects in order to incentivize funding riskier infill projects, instead of the safe bet of the project at the urban edge.

Schuetz's discussion of the importance of land value in housing is also worth highlighting. While she stresses the importance of land value as a reason to build more dense housing, she stops short of more radical land value propositions. Two section titles declare the argument that "[l]and is more expensive in places where people want to live,"[56] and "[t]o make housing in desirable locations cheaper, use less land per home."[57] Other readings pair well here to discuss how land value could be used to solve the housing crisis in ways that are arguably more radical, but also more powerful, than density alone. The origins of land value as a method of

52. Fixer-Upper, *supra* note 1, at 130.

53. *Id.* at 128–29.

54. Stephen R. Miller, Housing Policy Ideas from the 2020 Presidential Candidate Platforms (Mar. 27, 2020) (unpublished), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3547833.

55. *Id*.

56. Fixer-Upper, *supra* note 1, at 15.

57. *Id.* at 16.

addressing housing affordability date back over a century to the writings of Henry George who proposed taxing land to eliminate the speculative value across the landscape. Doing so would equalize the cost of development in all locations of a region. George is radical, and no government has seriously entertained a Georgist land value tax as he proposed it. Still, the essence of his idea remains important as an approach to funding public infrastructure in transit-oriented developments. In these projects, taxes charged within a certain circumference of a public transit project recapture the value to land adjacent to the public infrastructure. Those additional assessments then go to pay for the public asset, maintain it, and expand it. Such value recapture can be controversial, but it remains an option for local governments needing a way to pay for infrastructure in areas with growing density.

* * *

The middle chapters of *Fixer-Upper* present important context to housing's broadened impact that are too often glossed over. In Chapter 3, Schuetz focuses on the economic and environmental effects of "building homes in the wrong places."[58] Failed policies prohibiting density in existing communities have forced new development into farther-flung suburbs and exurbs, both of which continue to grow faster than urban cores.[59] The median commute is now over ten miles one way, and, in most parts of the country, the vast majority of those trips are taken by solo drivers.[60] Such driving increases greenhouse gas emissions through increased vehicle miles travelled, while also affecting local environments through increased stormwater pollution and incursions into farmland. In addition, Schuetz notes that these land use patterns also place housing in increased risk of natural hazards.[61] In some instances, federal subsidy encourages placing homeowners in harm's way, such as the federal flood insurance program of federal suppression of wildfire adjacent to exurban Western communities.[62] Because the federal government is subsidizing the risk, developers are more likely to continue building in areas where climate change is most likely to have the greatest impacts. One solution that Schuetz proposes is to price climate risk into houses. For instance, Fannie Mae or Freddie Mac could refuse to securitize mortgages on properties in high-risk locations. Another option is to incorporate climate risk into the prices, through higher interest rates, lower loan-to-value ratios, or other fees.[63] She also proposes retooling federal disaster recovery funds and climate insurance

58. *Id.* at 37.
59. *Id.* at 43.
60. *Id.* at 39–41.
61. *Id.* at 45.
62. *Id.* at 45–47.
63. *Id.* at 51.

policies.[64] And, of course, she suggests a climate-friendly policy that integrates housing, transportation, and land use.[65] She reviews proposals for a carbon tax, as well as tax credits and programs for weatherizing homes, as well as ensuring that communities of color do not end up located in areas prone to disaster and without resilience strategies taking into account the heightened risks climate will bring to those vulnerable communities.[66]

Schuetz's summary of the green effects of land use decision-making are commendably succinct and accessible. Two sources accentuate her arguments here. The first is California's 2017 Scoping Plan, which is the state's policy guidebook for how it will meet its climate change goals.[67] The Scoping Plan notes, "Contributions from policies and programs, such as renewable energy and energy efficiency, are helping to achieve the near-term 2020 target, but longer-term targets cannot be achieved without land use decisions that allow more efficient use and management of land and infrastructure."[68] In turn, that Scoping Plan (currently under revision) provides detailed plans for how housing and climate policy can work together. For those that doubt the importance of housing policy to climate action will find the Scoping Plan's discussion as important reading that fleshes out *Fixer-Upper*'s nice summary. Second, an ominous note about failing to meet the housing challenge through the lens of climate action is within the newly released sixth IPCC climate report. Though Schuetz's goal is American housing policy, the IPCC report makes many of the same arguments

64. *Id.* at 52–54.

65. *Id.* at 56.

66. *Id.* at 60.

67. *See* Gregory L. Newmark & Peter M. Haas, *Income, Location Efficiency, and VMT: Affordable Housing as a Climate Strategy* 2–3 (Ctr. for Neighborhood Tech., Working Paper, 2015), https://chpc.net/wp-content/uploads/2016/05/CNT-Working-Paper-revised-2015-12-18.pdf (arguing that California's 2017 Scoping Plan is progressive in evaluating the relationship between housing and GHG emissions); *California TOD + GHG Analysis*, Ctr. for Neighborhood Tech., https://www.cnt.org/projects/california-tod-and-ghg-analysis (last visited Jan. 31, 2022) (outlining the need for better access to public transportation for lower-income households due to driving trends, which aids California in meeting climate goals under the 2017 Scoping Plan). *See generally* Marlon G. Boarnet et al., Affordable Housing in Transit-Oriented Developments: Impacts on Driving and Policy Approaches (Nat'l Ctr. for Sustainable Transp. & Univ. S. Cal. eds., 2015), https://dot.ca.gov/-/media/dot-media/programs/research-innovation-system-information/documents/f0016779-ca17-2983-finalreport.pdf (documenting the relationship between affordable housing and public transportation, including policy recommendations to expand affordable housing in areas with widely accessible public transit through supply and subsidies and incentivizing landlords to keep existing units affordable).

68. Cal. Air Res. Bd., California's 2017 Climate Change Scoping Plan 100 (2017), https://ww2.arb.ca.gov/sites/default/files/classic/cc/scopingplan/scoping_plan_2017.pdf.

but in the context of global development and, especially, the developing world.[69]

The relationship between homeownership and household wealth is addressed in Chapters 4 and 5, entitled "Give Poor People Money" and "Homeownership Should Be Only One Component of Household Wealth." Collectively, these chapters investigate the way that the preference for homeownership in federal policy, as well as a century of policies that have decreased minority homeownership, has resulted in dramatic differences in home equity, which is routinely a family's greatest source of wealth.[70] As she puts it, "[H]omeownership allows households to borrow cheaply to leverage their initial investment and build wealth over time through forced savings, and it provides a hedge against future rent increases."[71] She also singles out three activities within housing markets that are particularly important in creating and reinforcing racially disparate wealth outcomes: landlords' decisions about whom they will rent to; real estate agents choices on which neighborhoods they will show prospective home buyers; and financial services companies deciding which households they will underwrite applications for.[72] Despite passage of the Fair Housing Act and the Community Reinvestment Act, these discriminatory actions remain difficult to track and remedy.[73] Partly because of these discriminatory actions, even when Blacks and Latinos do purchase homes, they have significantly less equity in those homes than white Americans.[74] Meanwhile, renters are increasingly squeezed by rising rents and wages that have not kept pace.[75]

Schuetz supports the federal voucher program, though notes that, because it is not an entitlement, there is a long waiting list for those to receive it. In addition, vouchers can be turned down by landlords, which necessitates source-of-income protections for voucher holders. Moreover, the calculation of the value of the vouchers is also complex and can make it difficult to obtain housing in high-opportunity areas.[76] She also notes that market-based strategies, such as vouchers and LIHTC, do not always work for those with greater needs, such as mental or physical disabilities.[77] Schuetz's discussion of vouchers pairs well with Georgetown University public policy professor Eva Rosen's recent book *The Voucher*

69. IPCC, Working Group III, Climate Change 2022: Mitigation of Climate Change—Summary for Policymakers §§ C.6–C.7 (2021), https://report.ipcc.ch/ar6wg3/pdf/IPCC_AR6_WGIII_SummaryForPolicymakers.pdf.

70. Fixer-Upper, *supra* note 1, at 82.

71. *Id.* at 84.

72. *Id.* at 87.

73. *Id.* at 87–88.

74. *Id.* at 89.

75. *Id.* at 61–65.

76. *Id.* at 76.

77. *Id.* at 77–78.

Promise,[78] which explains in detail how voucher holders in Baltimore are not always able to move to the opportunity that the voucher promises. Personal and logistical issues can make it hard to move far from friends and family, which often serve as the nannies and help for working parents in low-income communities. Moreover, source-of-income discrimination can make it difficult to find landlords that will accept a voucher, leading to a cottage industry of predatory landlords that will take the voucher but that do not always provide an apartment or home commensurate with the market value of the voucher or in a neighborhood with the kinds of advantages—education, health, and beyond—that the voucher is intended to provide.

She also argues for better landlord-tenant protections, such as a right to counsel in eviction proceedings and making it more difficult for landlords to "screen" out marginalized populations, such as those with criminal records.[79] Although Schuetz does not lay out what landlord-tenant protections she would support, California and New York both passed omnibus changes to their respective landlord-tenant laws in 2019 that provide a roadmap for anyone looking to go down that path. An article published in this *Journal* by Gerald Lebovits is a concise summary of the new standards in New York and provides useful reading along with this part of the book.[80] Readers may also want to review New Jersey's 2021 statute that provided statewide protection for renters with a criminal justice history, an important development since such renters are not a protected class under the federal Fair Housing Act.[81] Similarly, research published by Nicole Summers in this *Journal* provides helpful details on how right to counsel may help in landlord-tenant proceedings, and it also makes a useful reading alongside this chapter because it also found instances where the presence of counsel did not yield better results for tenants.[82]

78. Eva Rosen, The Voucher Promise: "Section 8" and the Fate of an American Neighborhood (2017).

79. *Id*. at 80.

80. Gerald Lebovits, John S. Lansden & Damon P. Howard, *New York's Housing Stability and Tenant Protection Act of 2019: What Lawyers Must Know*, 29 J. Affordable Hous. & Cmty. Dev. L. 75 (2020).

81. A.B. 1919, 219th Sess. (N.J. 2020), https://pub.njleg.gov/bills/2020/A2000/1919_R4.PDF. Although those with a criminal justice history are not part of a protected class under the Fair Housing Act, HUD has issued guidelines on the use of criminal records in real estate transactions because of the discriminatory effects that the use of such records can have on protected classes. See U.S. Dept. of Housing & Urban Development, Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions (Apr. 4, 2016), https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF.

82. Nicole Summers, *The Limits of Good Law: A Study of Housing Court Outcomes*, 29 J. Affordable Hous. & Cmty. Dev. L. 29 (2020).

* * *

Fixer-Upper also provides solutions for funding infrastructure.[83] Schuetz encourages a broader definition of what infrastructure entails beyond the usual roads, bridges, and sewers into the types of businesses in the private sector necessary for a person to live a healthy life.[84] That could include private sector offerings such as grocery stores or laundromats. But funding, and maintaining, infrastructure cost money, and local governments still rely heavily on property taxes, which account for almost half of total revenue, for their funding.[85] The long-standing reliance on property tax has a long list of problems, which Schuetz does a fine job of analyzing. Among the obvious, wealthier jurisdictions have the ability to tax their higher-value homes at a lower rate and still provide high levels of service. Jurisdictions with lower value properties must charge higher rates just to meet basic needs. The difference is most hotly debated in school funding, but the same problem runs through all other services local governments typically provide, such as parks, recreational facilities, services for seniors, and so forth. She also discusses the inequalities wrought by the property tax revolts, such as Prop 13 in California, which have resulted in neighbors with identical properties paying vastly different property tax bills depending simply on when the person acquired the property.[86]

Schuetz traces local governments' movement away from borrowing debt through bonds to what she refers to as "indirect taxes," which are things like impact fees on development.[87] She also places the fiscalization of land use into this category because local governments can utilize siting decisions to preemptively add revenue sources—the sales tax-producing big box store—and prevent uses like multifamily housing that bring population growth and expenditures. A closer investigation of special districts, through which assessments for development can be charged, and the placement of infrastructure responsibility onto homeowners' associations, are also an important part of the story here that deserved more attention. These may be especially relevant in the West; for instance, a recent study found that eighty-six percent of new development in the Mountain West was subject to a homeowner's association.[88] This type of de facto private land use governance is notable in a region that has a special disdain for public control over land.

Such private controls, as well as the hidden lines of special districts, can prove significant obstacles in redevelopment of already existing urban

83. Fixer-Upper, *supra* note 1, at 102.

84. *Id.* at 101.

85. *Id.* at 108.

86. *Id.* at 110–13.

87. *Id.* at 116.

88. Wyatt Clarke & Matthew Freedman, *The Rise and Effects of Homeowners Associations*, 112 J. Urb. Econ. 1, 9 (2019).

infrastructure, which may yield solutions that Schuetz does not address in this book.[89] For instance, restrictive covenants often limit the use of existing commercial properties and the types of units that can be built in many residential communities. Repurposing such tools of restriction could be a fertile role for state legislatures to promote infill development.

Schuetz also proposes driving, housing, and carbon taxes that could also internalize the environmental and economic effects of land use decisions.[90] Property tax could be restructured to charge more on land than on buildings, which would incentivize more intense use of the land.[91] She also proposes to mitigate racial and economic disparities in access to high-quality public services. Such options include vouchers that could increase mobility out of areas of concentrated poverty, as well as tax policies that distribute funds for things like schools equally across the state on a per pupil basis rather than based upon the local tax base of a jurisdiction.[92] Tax policies, like Prop 13, that incentivize fiscalization of land use, should be repealed, and impact fees should reflect the regional costs of a development—including its externalities across jurisdictional lines.[93]

This retelling of the consensus position on funding options for infrastructure is helpful for those that have not come across the issues before. Two large clouds loom over this chapter, however. The first is the exactions line of takings decisions that the U.S. Supreme Court has decided over the last few decades. Those cases have not outlawed impact fees and related fees that would internalize the externalities of development, but they have made it more onerous and too challenging for many smaller jurisdictions to perform effectively. The second large cloud is the increasing array of enabling statutes that states have put forth to allow increasingly targeted forms of funding, such as for business improvement districts. In an era of government scarcity, these statutes have permitted districts to assess themselves for services that would not otherwise pass in the jurisdiction as a whole. Yet such districts exacerbate the unequal funding of neighborhoods even within the same jurisdiction. Answers here are not easy, but these statutes must be part of the conversation about inequality and likely need reforming to yield more equitable development.

* * *

Fixer-Upper closes by focusing on methods for building better political coalitions. Schuetz praises the rise of the YIMBY movement and argues that it should remain nonpartisan. She notes some local success stories,

89. Fixer-Upper, *supra* note 1, at 138.
90. *Id.* at 119.
91. *Id.* at 120.
92. *Id.* at 121.
93. *Id.* at 122–23.

including efforts to legalize "missing middle" housing, upzoning near transit, legalizing ADUs, and related measures.[94]

Other structural reforms that she suggests include more land use and rental protections at the federal level. In particular, this means HUD, DOT, and EPA working in closer alliance on policies where they have largely gone it alone on their respective missions but for a few model demonstration programs.[95]

While Schuetz does call on federal and state governments to provide greater resources to local governments, the scope of what she proposes is not certain. Almost every state has a statewide planning agency that provides assistance to local governments, but that help is often anemic. Some of the better agencies are arguably California's Office of Planning and Research and Colorado's Department of Local Affairs, but even these agencies have extremely modest resources relative to the need of local governments. Schuetz's proposals here, while emphasizing a role for government, appear to prioritize nongovernmental actors and nongovernmental coalitions. That emphasis may be fueled by the protectionism of many local governments and the recalcitrance to change perceived by such governments. If I am reading Schuetz correctly, she could not be faulted for exasperation with such foot-dragging in the local government community.

But it is worth thinking about how local governments might be trained to work better and achieve the housing results that we need. As Kellen Zale has written about extensively, many local government elected officials are underpaid, if they are paid at all.[96] That means that many local elected officials are essentially moonlighting in this capacity, while holding down another job. We can hardly hold them accountable for not being on top of every new policy angle out there. Instead, there needs to be a more concerted effort to make it easy for local government officials to have a "path dependency" to do the right thing housing-wise. Structuring those paths takes time, but can be a valuable resource for nonprofits and educational groups. For instance, the University of North Carolina's School of Government, which is funded by the state's local governments and provides expert services to those governments, is a model that seems ripe for replication. Similarly, planners and others that engage with the development process in local government are routinely underpaid, very often making substantially less than police or fire officials in that government. Given the housing crisis, planners need to be professionalized not just in the big cities, but across the board.

Some have characterized the kind of work necessary to meet our housing needs as "un-planning,"[97] and *Fixer-Upper* could be categorized as an un-planning housing proposal. There is little, if any, talk of common planning tools for housing that such a book would have put at the fore

94. *Id.* at 148.
95. *Id.* at 161.
96. Kellen Zale, *Compensating City Councils*, 70 Stan. L. Rev. 839 (2018).
97. David Schleicher, *City Unplanning*, 122 Yale L. J. 1670 (2013).

just a decade or two ago. Community land trusts, public housing, density bonuses, inclusionary zoning, transfer of development rights, and smart growth policies get only passing treatment.

In terms of building a housing movement, it is notable that Schuetz does not expressly mention labor unions, but labor broadly conceived does seem a part of the story. One of the key desires of low-income communities that have sought community benefits agreements with large developers has been first-source hiring agreements to permit the local community to get jobs in the trades that have historically been dominated by white men. Even absent the participation of labor unions, finding ways for communities of color to participate in the housing industry could be a larger part of the housing solution. That means training programs in high schools and community colleges that help students learn trades in the housing industry that is sure to be a source of well-paying jobs for decades to come. Close attention to these programs could also train workers in the kinds of skills that build greener communities, giving advanced skills in new technologies that will help the climate and local economies. The power of such blue-green partnerships should not be underestimated. There may be a reluctance to call on the unions too strenuously here because it is well known that unions have been among those entities that have used the tools of discretionary project review to obtain more favorable labor terms.[98] Be that as it may, labor remains an important constituency in coastal statehouses and can be a constructive role to the extent they are given a means to participate in growth.

The complexity of what Schuetz outlines in *Fixer-Upper* is daunting. In 1934, Catherine Bauer could write *Modern Housing* and unite a movement of "housers" that would focus solely on a public housing movement for decades. That public housing movement ultimately failed amidst political headwinds. It is hard to see how to mobilize a movement to solve an even more pressing—and diffuse—set of housing issues a century later as Schuetz lays it out here.

Nonetheless, a first step in creating that movement is simply defining it, and what Schuetz does best of all in *Fixer-Upper* is create a coherence of purpose around housing that is understandable by a broad audience. *Fixer-Upper* is the book I would hand a to a friend who does not study housing but wants to learn. If it becomes a guidebook to the next housing movement, it will not be because *Fixer-Upper* has all the answers, but because it simultaneously gives the novice a chance to see what is at stake, and the scholar a center around which a whole host of ideas can turn.

98. The unions' role in environmental disputes is hotly contested. For one side of the story, see Christian Britschgi, *How California Environmental Law Makes It Easy for Labor Unions to Shake Down Developers*, Reason (Aug. 21, 2019), https://reason.com/2019/08/21/how-california-environmental-law-makes-it-easy-for-labor-unions-to-shake-down-developers. For the other side of the story, see Richard Toshiyuki Drury, *Rousing the Restless Majority: The Need for a Blue-Green-Brown Alliance*, 19 J. Env't L. & Litig. 4 (2004), https://lozeaudrury.com/wp-content/uploads/2021/03/Blue-Green-Brown-Alliance.pdf.

Some Programs Old, Some Programs New, This Guide Will Help You Navigate Through

*Elizabeth Elia**

The Legal Guide to Affordable Housing Development, Third Edition
Tim Iglesias, Rochelle E. Lento & Rigel Christine Oliveri, eds.
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It has been an eventful decade in the world of affordable housing development. Fortunately, Tim Iglesias, Rochelle Lento, and their new co-editor, Rigel Christine Oliveri, have brought us the third edition of *The Legal Guide to Affordable Housing Development* to help make sense of it all.[1] The Guide will be a go-to reference for practitioners, state and local housing agency employees, affordable housing developers, and tenant advocates looking for a deeper understanding of the mechanisms and processes that drive affordable housing development today, as well as insights into what will shape the affordable housing developments of tomorrow.

As in the previous two editions, the *Guide* is divided into three parts and seventeen chapters, with each chapter written by different contributors. This edition retains much of the core content of the previous two editions, while providing updates, most notably those related to the Department of Housing and Urban Development's (HUD) Choice Neighborhood Program of 2010, the Rental Assistance Demonstration of 2012 (RAD), the Qualified Opportunity Zones program of 2017, and changes to affordable housing policy related to the Fair Housing Act and climate change. Each of these hot topics is discussed in multiple chapters by different contributing authors, providing perspective and context beyond basic explanations.

Part I of the *Guide* addresses the history and regulatory foundation of affordable housing development and contains chapters related to planning, zoning, state and local regulations related to affordable housing, and

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1. The Legal Guide to Affordable Housing Development (Tim Iglesias, Rochelle E. Lento & Rigel C. Oliveri eds., 3d ed. 2022) [hereinafter Guide].

housing and building codes affecting affordable housing. Part II explains the nuts and bolts of affordable housing finance and contains chapters related to Qualified Opportunity Zones, federal regulation of affordable housing finance, as well as federal, state, and local financing tools including mixed financing of public housing. The section concludes with a helpful primer-within-a-primer on structuring mixed-use projects, describing the real estate issues that a developer can anticipate when combining affordable housing development with market rate projects.[2] Part III focuses on housing after it is built and contains chapters related to operations monitoring and enforcement, preservation of affordable housing, relocation assistance, and the future of affordable housing. While this three-part structure has worked well in previous editions of the *Guide*, it may be time to consider some rebalancing. When the first edition of the *Guide* was published in 2006, the LIHTC was in its second decade. Today, nearly forty years and more than 3.44 million units into the LIHTC program,[3] it could be beneficial to explore state and local preservation strategies for LIHTC properties and other privately owned affordable housing that may not be HUD-subsidized.

The majority of the chapter authors are practitioners at leading law firms, development companies, city housing agencies, and consulting firms in the affordable housing industry including Nixon Peabody, Ballard Spahr, Relman Colfax, Faegre Drinker Biddle & Reigh, Applegate & Thorne-Thomsen, Kutak Rock, Telesis Corporation, and Novogradac. These authors, writing from the trenches, are the reason the *Guide* is such a useful reference in explaining the current state of the law and how it functions in practice, while the academic authors bring a broader perspective, comparative analysis, and public policy considerations to their chapters.

Part I: History and Foundations

The first chapter of the book is a pithy and engaging overview of the history of federal affordable housing programs from their inception in the early twentieth century through the current day.[4] In the first two editions of the *Guide*, this chapter was authored by Charles Edson, a partner in Nixon Peabody's Washington, DC office who explains that he participated in the legislative struggles leading to all of the federal housing programs discussed in the chapter except for the 1937 enactment of public housing.[5] In this edition, Nate Cushman, also a partner in Nixon Peabody's

2. Angela M. Christy, *Structuring Mixed-Use Developments: Financing and Real Estate Issues, in* Guide, *supra* note 1, at 427.

3. *See* HUD Office of Pol'y Dev't. & Rsch, Low-income Housing Tax Credit (LIHTC): Property Level Data (Apr. 28, 2022), https://www.huduser.gov/portal/datasets/lihtc/property.html.

4. Nathaniel S. Cushman, *Affordable Housing: An Intimate History, in* Guide, *supra* note 1, at 3.

5. *Id.* at 4.

Washington, DC-based affordable housing practice group, has taken up the baton to contextualize the last decade's developments in federal affordable housing programs and policies with emphasis on HUD's Rental Assistance Demonstration project (RAD). The chapter explains how RAD began as a pilot program in 2012 to leverage Low Income Housing Tax Credit equity to address the $25 billion shortfall in capital improvement funds needed to repair and renovate public housing across the country.[6] The reauthorization and expansion of RAD could result in nearly half of the nation's public housing stock converting to project-based Section 8 housing with capital improvements funded through LIHTC.[7] Chapter 1 stresses a recurring theme, namely that affordable housing policy is almost always a secondary goal ancillary to some other public policy objective like job creation, housing defense workers, resolving social unrest, or economic stimulus.[8] The chapter concludes with predictions about the public-policy objectives that will shape federal affordable housing policy in the future, like health care, energy, and climate change.[9]

Federal housing programs, including affordable housing programs, have developed almost simultaneously with zoning and land use planning in the United States, with both beginning in the early twentieth century. The questions of whether and how the federal government should assist in the provision of housing has always been directly related to the question of where that housing should be located. So it is fitting that Chapter 2 addresses land use and planning issues related to affordable housing development.[10] The chapter is written by Ngai Pindell, Professor of Law at the William S. Boyd School of Law at the University of Nevada, Las Vegas. After a helpful and succinct explanation of comprehensive planning and a state's delegation of authority to municipalities for this purpose, the chapter looks to California and New Jersey state laws as case studies for how states approach implementing planning requirements related to affordable housing.[11] Through the case studies, Pindell argues that, while California's planning statute requires jurisdictions to adhere to extensive procedures to ensure development of careful housing elements in a jurisdiction's comprehensive plan and New Jersey's Builder's Remedy is a useful tool in enabling actual development of affordable housing, neither state's approach has managed to yield careful affordable housing planning that results in the development of actual affordable housing units.[12] The chapter proceeds into the larger topic of growth controls and planning strategies, like smart growth and New Urbanism, and the need to specifically include

6. *Id.* at 7–8.
7. *Id.* at 7.
8. *Id.* at 3, 24.
9. *Id.* at 23–24.
10. Ngai Pindell, *Planning for Housing Requirements, in* Guide, *supra* note 1, at 25.
11. *Id.* at 27–38.
12. *Id.*

planning for affordable housing development.[13] The chapter next offers a brief discussion of state and federal environmental requirements, including the 2020 amendments to National Environmental Policy Act (NEPA) regulations intended to shorten the timeframe for preparation of Environmental Impact Statements and the HUD's Consolidated Plan requirements for Community Development Block Grants, HOME, Housing Trust Fund, and other funding programs.[14] The chapter concludes with a synopsis of the recent history of the Obama administration's efforts to finally enforce the Fair Housing Act's mandate that HUD and other federal agencies affirmatively further fair housing, the Trump administration's unwinding of any attempt to do so, and the Biden administration's early intention to return focus to creating a regulatory process to give teeth to this provision of the Fair Housing Act.[15]

Chapter 3 focuses on exclusionary zoning.[16] The authors, Ken Zimmerman and Noah Kazis, are fellows in NYU's Furman Center for Real Estate and Urban Policy with expertise in fair housing law and civil rights law. The chapter begins by explaining how zoning, since its inception, has been a tool for excluding disadvantaged groups, particularly low- and moderate-income people of color and people with disabilities, from a locality.[17] The chapter explains the limited utility of Fourteenth Amendment due process and equal protection challenges to exclusionary zoning laws[18] before identifying exactions takings challenges to legislative action as an issue to watch in upcoming years. [19] Of particular concern is Justice Thomas's concurrence in the Supreme Court's decision to deny *certiorari* in *California Building Industry Ass'n v. City of San Jose*, problematizing the exemption of legislative action from exactions analysis.[20] The authors explain that inclusionary zoning ordinances, like the ordinance at issue in *California BIA v. City of San Jose*, as well as exclusionary ordinances, could be implicated if legislative action is found subject to exactions takings analysis.[21] The chapter next considers the broad variety of state constitutional approaches to exclusionary zoning and judicial appetite to consider the issue through the use of case studies of the New York, New Jersey, and Pennsylvania constitutions.[22] The chapter goes on to discuss the most effective tool available to

13. *Id.* at 38–48.

14. *Id.* at 48–54.

15. *Id.* at 57–60.

16. Ken Zimmerman & Noah Kazis, *Exclusionary Zoning: Constitutional and Federal Statutory Responses, in* Guide, *supra* note 1, at 61.

17. *Id.*

18. *Id.* at 66–69.

19. *Id.* at 70–71.

20. *See* Cal. Bldg. Indus. Ass'n v. City of San Jose, 136 S. Ct. 928, 928 (2016) (Thomas, J., concurring in denial of certiorari).

21. Zimmerman & Kazis, *supra* note 16, at 70–71.

22. *Id.* at 71–78.

combating exclusionary zoning, the Fair Housing Act, in relative detail.[23] This discussion incudes another recap of the Obama administration's attempt to provide regulations to effectuate the "affirmatively furthering fair housing" requirement of the Act, the Trump administration's roll back of the regulations, and the Biden administration's efforts to reinvigorate the regulations.[24] Finally, the authors provide their insights into emerging topics in fair housing law. They include enhanced protections from discrimination for people who are disproportionately harmed by the War on Drugs by, for example, limiting a landlord's right to impose a blanket prohibition on prospective tenants who have been arrested or convicted of certain drug crimes,[25] community preference policies,[26] and discrimination based on immigration status.[27]

Chapter 4 covers State and Local Regulation Promoting Affordable Housing.[28] The authors of this chapter are Priya S. Gupta, Professor of Law at Southwestern Law School, and Navneet K. Grewal, Litigation Council at Disability Rights California. This chapter follows Chapter 3's discussion of exclusionary zoning with a presentation of a broad range of state and local strategies for countering local exclusionary zoning ordinances. The state strategies discussed include zoning override ("Anti-snob") legislation that allows developers to appeal denials of development proposals that include affordable housing development to state administrative or judicial bodies,[29] and inclusionary zoning laws where developers have the option or requirement of including affordable units in any market-rate housing development.[30] Other state strategies include state fair housing acts, which can include broader and more specific protections than the federal Fair Housing Act. These state strategies include prohibitions regarding discrimination based on a tenant's use of housing subsidies or vouchers,[31] and recent reforms to single-family residential zones—reforms that have been growing in popularity since Oregon's 2019 amendment to zoning laws state-wide to increase density in single-family residential zones in towns of 10,000 people or more.[32] The final state incentive described in the chapter are state waivers or exemptions from regulatory requirements and impact fees offered in exchange for qualifying affordable housing developments.[33] The chapter transitions to discussion of local approaches to counteracting

23. *Id.* at 78.
24. *Id.* at 86.
25. *Id.* at 88.
26. *Id.* at 89.
27. *Id.* at 90.
28. Priya S. Gupta & Navneet K. Grewal, *State and Local Regulation Promoting Affordable Housing*, *in* Guide, *supra* note 1, at 91.
29. *Id.* at 93.
30. *Id.* at 111.
31. *Id.* at 107.
32. *Id.* at 108.
33. *Id.* at 110.

exclusionary zoning with an in-depth discussion of inclusionary zoning laws and jurisdiction-specific variations throughout the country, including state court responses to Constitutional challenges to inclusionary zoning law.[34] The chapter concludes with a miscellaneous but familiar group of strategies for promoting affordable housing used by both states and localities including land banking,[35] community benefits agreements,[36] community land trusts,[37] and rent control, such as recent rent control law updates and amendments in New York City, California, and Oregon.[38]

The chapter uses state and local case studies as models to explain variations in the articulated strategies. This approach is helpful for explaining these strategies, but the chapter frequently omits information about trends in specific strategies across the nation. For example, there is limited information about the number of jurisdictions using or considering rent control, inclusionary zoning, or source-of-income discrimination prohibitions. This lack of nationwide trend information can at times deprive the reader of context in understanding the range of tools described and leave insights about emerging issues underdeveloped.

Chapter 5 focuses on state and local regulation of particular housing types.[39] It is written by Tim Iglesias, co-editor of the *Guide* and Professor at the University of San Francisco School of Law. The chapter provides an overview of the many kinds of affordable housing that are not single family or multifamily units. They include micro-housing, manufactured housing and mobile homes, farmworker housing, accessory units, single-room occupancy housing, condominium conversion regulations, and emergency and transitional housing, including domestic violence shelters.[40] Rather than looking to specific jurisdictions as case studies, the chapter addresses each kind of housing in turn and attempts to define the housing type, explain its role in affordable housing supply, nationwide trends in its use, and legal issues presented by the housing type.

The first housing type considered is the recent innovation of "micro-units," which have appeared in the past decade both as free-standing "tiny homes" and as extremely small units in larger buildings.[41] The chapter devotes a fair amount of time to exploring this intriguing new kind of housing, identifying the various ways that it can satisfy affordable-housing demand, including as transitional housing and group housing, its benefits (lower development costs, smart growth, environmental benefits), as well

34. *Id.* at 111.
35. *Id.* at 124.
36. *Id.* at 126.
37. *Id.* at 128.
38. *Id.* at 131.
39. Tim Iglesias, *State and Local Regulation of Particular Types of Affordable Housing, in* Guide, *supra* note 1, at 135.
40. *Id.*
41. *Id.* at 136.

as its potential drawbacks (regulatory hurdles and possibly increasing overall housing prices). The chapter next addresses mobile homes or manufactured homes as the single largest source of unsubsidized affordable housing in the nation.[42] After some statistical background on the proliferation of manufactured homes, the chapter focuses on problems related to exclusionary zoning;[43] sales of the underlying land in mobile home parks where residents may own their homes, but rent that the land the home sits on without a reasonable and affordable means of moving the home to new land;[44] and the vulnerability of mobile homes during intensifying storms and hurricanes predicted due to climate change.[45] The chapter does not directly address another problem recently identified with the ongoing affordability of mobile home parks—consolidated corporate ownership and price spikes in ground rents.[46] The discussion of farmworker housing briefly touches on the unique problems associated with this type of affordable housing, including the significant harms to some farmworkers' housing security created by U.S. immigration laws, as well as innovative approaches to improving farmworker housing, such as using migrant farmworker housing in the off-season to house homeless families.[47] The chapter next provides a national survey of accessory unit laws and more specifically, recent amendments to local zoning laws to promote greater use of accessory units to alleviate housing supply, affordability, and sprawl problems.[48] The discussion of Single Room Occupancy (SRO) hotels describes the history of these units, including their rediscovery as supportive housing units, ambivalence about this housing type by state and local governments, and takings challenges to SRO preservation laws.[49] The section on condominium conversion is a brief but informative treatment of attempts to protect tenants when an apartment building owner requests permission to convert the building to condominiums.[50] The final type of housing discussed in the chapter is emergency shelters and transitional housing, or "temporary" housing.[51] The section explains that transitional housing is on the decline nationwide as being more expensive than permanent supportive housing, "housing first," and rapid rehousing models.[52] The chapter goes into detail about exclusionary zoning practices and HUD funding,

42. *Id.* at 147.
43. *Id.* at 152.
44. *Id.* at 151.
45. *Id.* at 152.
46. *See* Sheelah Kolhatkar, *Trailer-Park Trades*, New Yorker (Mar. 15, 2021), https://www.newyorker.com/magazine/2021/03/15/what-happens-when-investment-firms-acquire-trailer-parks.
47. Iglesias, *supra* note 39, at 157.
48. *Id.* at 164.
49. *Id.* at 169.
50. *Id.* at 172.
51. *Id.* at 175.
52. *Id.* at 176.

Fair Housing Act, and Religious Land Use and Institutionalized Persons Act supports for transitional housing and emergency shelters.[53]

The final chapter in Part I of the *Guide* addresses federal, state, and local building codes and their effects on affordable housing development.[54] The chapter is written by Ronald S. Javor, the former assistant deputy director of Housing Standards for the California Department of Housing and Community Development and Michael Allen, Partner of Relman Colfax, PLLC. While less attention-grabbing than the policy or finance chapters of the *Guide*, this bricks-and-mortar chapter includes some of the most significant changes to the laws affecting affordable housing development in the past decade. Changes to state and local housing codes reflect overall changes in society related to climate change, population age demographics, technological innovations, public health and the COVID-19 pandemic, and the overall economy. The chapter includes innovations based on environmental concerns, such as Healthy Homes initiatives targeting indoor air quality,[55] lead-based paint,[56] green building codes including renewable energy and energy efficiency initiatives,[57] and other building code revisions related to climate change mitigation and adaptation. The chapter also discusses special federal and local code requirements based on environmental hazards unique to a location, such as wildfires, mudslides, flooding, and hurricanes.[58] The latter half of the chapter helpfully tracks fair housing issues discussed in Chapter 4, including building requirements of Section 504 of the Rehabilitation Act,[59] the Fair Housing Amendments Act,[60] and the Americans with Disabilities Act,[61] as well as building requirements associated with the special housing types discussed in Chapter 5 including manufactured home standards,[62] farmworker housing standards,[63] tiny home requirements,[64] accessory dwelling unit requirements,[65] and emergency shelter requirements.[66]

53. *Id.* at 180.

54. Ronald S. Javor & Michael Allen, *Federal, State, and Local Building and Housing Codes Affecting Affordable Housing, in* Guide, *supra* note 1, at 183.

55. *Id.* at 190.

56. *Id.* at 191.

57. *Id.* at 192.

58. *Id.* at 199.

59. *Id.* at 202.

60. *Id.* at 204.

61. *Id.* at 205.

62. *Id.* at 208.

63. *Id.* at 212.

64. *Id.* at 214.

65. *Id.* at 215.

66. *Id.* at 216.

Part II: A Deep Dive into Affordable Housing Finance

Chapter 7 is an entirely new chapter in the third edition dedicated to the Qualified Opportunity Zone Incentive program created by the Tax Cuts and Jobs Act of 2017.[67] The chapter is written by Glenn Graff, of Applegate & Thorne-Thomsen, and Megan Murphy and Joh Sciarretti of Novogradac & Company. The chapter begins with a succinct and clear explanation of the structure and terminology associated with Opportunity Zone real estate investing (OZ).[68] Quickly, the chapter moves into an overview of pairing OZ with other kinds of tax credits including Low Income Housing Tax Credits (LIHTC),[69] historic rehabilitation tax credits,[70] and New Markets Tax Credits,[71] including the challenges and pitfalls to look out for with each kind of pairing. After discussion of pairing OZ incentives with other tax credits, the chapter contains useful guidance on identification of applicable census tract boundaries for OZ incentives,[72] explanations of applicable terms of art, including "investor" and "eligible gain,"[73] explanations of the tax benefits available to investors in Qualified Opportunity Funds including the use of OZ to eliminate exit taxes in LIHTC transactions.[74] Finally, the chapter provides a useful overview of basic program requirements related to Qualified Opportunity Funds, including an overview of the 90% Investment Test showing that a Qualified Opportunity Fund is actually investing 90% of its assets in Qualified Opportunity Zone Property, and the 70% Tangible Property Standard showing that at least 70% of all property owned or leased by a Qualified Opportunity Zone Business is Qualified Opportunity Zone Business Property,[75] as well as brief mention of COVID-19 adjustments to program requirements, safe harbors, and some welcome illustrative examples.[76]

Chapter 8 introduces a host of federal regulations related to the financing of affordable housing development, as well as synopses of how these regulations have changed in recent years based on economic, legal, and natural phenomena.[77] The chapter is written by Maeve Elise Brown, Executive Director of Housing and Economic Rights Advocates, a California affordable housing advocacy nonprofit. The chapter begins by contextualizing

67. Glenn A. Graff, Megan Murphy & John Sciarretti, *Using the Qualified Opportunity Zone Incentive with Affordable Housing, in* Guide, *supra* note 1, at 221.

68. *Id.*

69. *Id.* at 224.

70. *Id.* at 228.

71. *Id.*

72. *Id.* at 229.

73. *Id.* at 230.

74. *Id.* at 232.

75. *Id.* at 235.

76. *Id.* at 243–45.

77. Maeve Elise Brown, *Federal Regulation of Financing for Affordable Housing*, *in* Guide, *supra* note 1, at 247.

influences on the federal regulations discussed in the chapter, explaining that the foreclosure crisis, the COVID-19 pandemic and the ensuing foreclosure and eviction moratoria, and increasing severity and frequency of natural disasters due to climate change are all influencing housing regulation.[78] The first piece of federal legislation tackled in the chapter is the Community Reinvestment Act (CRA), beginning with its purpose and enforcement, and a brief description of amendments to the Act, its regulations and rules over time.[79] The CRA discussion concludes with analysis of the tension between financial institutions and consumer groups in their efforts to steer the future course of the CRA.[80] The chapter goes on to describe how other federal agencies tasked with oversight of the banking industry regulate affordable housing investment, such as limited amounts of investment into affordable housing in satisfaction of a bank's obligations under Office of the Comptroller of the Currency's Public Welfare Investment Regulation,[81] the regulations of the Federal Reserve Board,[82] and the Federal Deposit Insurance Corporation's Affordable Housing Program.[83] Next, the chapter covers the anti-discrimination protections of the Fair Housing Amendments Act of 1988 as related to housing finance,[84] including the secondary market[85] and LIHTC projects.[86] The chapter makes a brief foray into state fair lending laws and questions of federal preemption[87] before returning to federal regulations in the context of the secondary mortgage market and the roles of Fannie Mae, Freddie Mac, the Federal Housing Finance Agency, and the Federal Home Loan Bank system including Affordable Housing Program funding.[88] The chapter concludes with a section new to the third edition of the *Guide* entitled "Climate Change and Environmental, Insurance, and Construction Considerations."[89] The section discusses the growing profiles of the Environmental Protection Agency and the Federal Emergency Management Agency in the affordable housing space as we confront climate change adaptation challenges, as well changes to HUD programs based on climate change concerns.

The Guide moves from regulation of federal agencies and programs related to affordable housing finance in Chapter 8, to federal sources

78. *Id.* at 248.

79. *Id.* at 251. The chapter briefly and ominously mentions 2020 changes to the CRA, which have since been repealed. 12 C.F.R. pt. 25, Docket No. OCC-2021-0014, RIN 1557-AF12.

80. *Id.* at 258.

81. *Id.* at 260.

82. *Id.* at 261.

83. *Id.*

84. *Id.* at 262.

85. *Id.* at 265.

86. *Id.* at 270.

87. *Id.* at 274.

88. *Id.* at 275.

89. *Id.* at 285.

of affordable housing finance in Chapter 9.[90] The chapter is written by Rochelle Lento, co-editor of all three editions of the *Guide* and member of Dykema Gossett PLLC. The chapter unpacks popular terms like "affordable housing" and "subsidized housing" into the specific federal financing programs used by practitioners and developers to actually build and operate this housing. Rather than describing federal funding programs in chronological order, the chapter takes the refreshing and pragmatic view of beginning with a thorough treatment of the most significant federal housing finance program, the Low-Income Housing Tax Credit (LIHTC).[91] The latter half of the chapter offers brief introductions of a host of other federal affordable housing finance tools. These tools include the HOME program,[92] Community Development Block Grants,[93] revenue bonds including tax exempt revenue bonds paired with 4% LIHTC,[94] supportive housing for the elderly including the substantial revisions to the Section 202 program implemented in 2019 via the Rental Assistance Demonstration,[95] Section 811 Supportive Housing for People with Disabilities,[96] Section 8 project-based rental assistance and tenant vouchers,[97] McKinney-Vento Homeless Assistance Grants,[98] Housing Opportunities for People with AIDS,[99] energy programs including the Brownfield Economic Development Initiative, Lead-Based Paint Grants, and the Energy Star Program,[100] Rural Housing Development programs administered by the U.S. Department of Agriculture including pairings with LIHTC,[101] a variety of homeownership programs including the "sweat equity" program funded by Self-Help Homeownership Opportunity Program (SHOP) grants and Affordable Housing Program (AHP) grants through the Federal Home Loan Bank.[102] The chapter concludes with an understandable lament about the difficulty in updating this chapter when changes to these programs occur so frequently.[103] Nevertheless, the chapter performs a valuable service in explaining important, long-standing federal financing programs and identifying recent changes.

90. Rochelle E. Lento, *Federal Sources of Financing*, *in* Guide, *supra* note 1, at 291.
91. *Id.* at 292. As Lento points out, "Substantially all of the affordable rental housing that has been built since 1986 has been created with the use of low-income housing tax credits." *Id.* at 293 n.11.
92. *Id.* at 310.
93. *Id.* at 313.
94. *Id.* at 315.
95. *Id.* at 316.
96. *Id.* at 319.
97. *Id.*
98. *Id.* at 321.
99. *Id.* at 323.
100. *Id.*
101. *Id.* at 326.
102. *Id.* at 327.
103. *Id.* at 329.

Chapter 10 picks up where Chapter 9 leaves off in understanding sources of funding currently available for affordable housing development: consideration of state sources of funding.[104] This chapter was originally authored by Peter Salsich, Professor Emeritus at Saint Louis University School of Law, and has been updated for the third edition by Carlie J. Boos, Executive Director of the Affordable Housing Alliance of Central Ohio.[105] Given the number of jurisdictions, the authors necessarily describe national trends and innovations in state financing tools. These range from tax-exempt bond revenue that states have used for affordable housing development since the 1930s,[106] to state tax credit programs supplemental to the LIHTC,[107] to creation of state Housing Trust Funds,[108] and various forms of state tax expenditures, including property tax abatement and assessment relief, as well as tax increment financing.[109] The chapter also describes state housing finance agencies[110] and departments of housing and community development[111] as the common state agencies established to administer and distribute federal and state housing funds, including bonds and tax credits. The third edition adds a new subsection on emerging innovations such as alternative loan programs funded by a state's general funds, social impact bonds, shared equity housing, disaster recover funding, and public-private partnerships.[112] The chapter ends with practical guidance contextualizing these state funding programs as supplemental layers added to private and federal sources to make projects pencil out.[113] The authors emphasize a lawyer's role in helping clients determine whether and how requirements for multilayered public and private financing sources are compatible. [114]

Chapter 11 is dedicated to examining the local governmental powers that make state housing finance programs possible.[115] The chapter is written by Barbara Kautz, a land use expert with Goldfarb & Lipman LLP, and Roy Koegen, bond counsel with Kutak Rock. It addresses some of the same state financing programs that are covered in Chapter 10 but from a local

104. Carlie J. Boos with Peter Salsich, *State Sources of Housing Finance, in* Guide, *supra* note 1, at 331.

105. *Id.* at 331 (author's footnote).

106. *Id.* at 338.

107. *Id.* at 343.

108. *Id.* at 348.

109. *Id.* at 352.

110. *Id.* at 336.

111. *Id.* at 335.

112. *Id.* at 356.

113. *Id.* at 359.

114. *Id.*

115. Barbara E. Kautz with Roy J. Koegen, *Local Government Financing Powers and Sources of Funding, in* Guide, *supra* note 1, at 361.

level, such as local housing trust funds,[116] bonds,[117] and local fee waivers and tax increment financing.[118] The chapter also describes forms of assistance that are particularly well-suited to localities, such as in-lieu fees from inclusionary zoning programs,[119] commercial linkage,[120] and land transfer programs.[121] This chapter is built around case studies from various localities and will be most useful for local lawmakers and departments looking for inspiring ways to maximize their resources and authority to tackle affordable housing needs within their jurisdictions.

Chapter 12 explains the essential concepts involved in public housing authorities, together with private entities, combining public housing funds from HUD with other federal, state, and local public and private funding sources to renovate and expand public housing stock.[122] The chapter is written by Amy McClain of Ballard Spahr. The chapter conveys the complexity of layering the many rigid and potentially incompatible financial requirements involved in mixed-finance affordable housing development and why it nevertheless is worth doing. The chapter ends with a new subsection that pithily explains the Rental Assistance Demonstration (RAD) program, which converts public housing units to more flexible Section 8 units, and what it means for mixed-finance development now and in the future.[123]

The final chapter in Part II of the *Guide* is a terrific primer-within-a-primer entitled "Structuring Mixed-Use Developments: Financing and Real Estate Issues."[124] In many copies of the *Guide* sitting on bookshelves five years from now, this chapter may well be the most thumbed-through, tabbed, and dog-eared. The chapter is written by Angela Christy of Faegre Drinker Biddle & Reith LLP. The chapter begins with defining and illustrating the many kinds of developments that are considered "mixed-use" and the ways that affordable housing might be incorporated into such projects.[125] The chapter next discusses common considerations for lawyers working on mixed-use deals, including questions about the compatibility of funding sources, uses, and financing tools.[126] For example, some funding sources may require public bidding, or a form construction contract

116. *Id.* at 363.
117. *Id.* at 384.
118. *Id.* at 391.
119. *Id.* at 377.
120. *Id.* at 369.
121. *Id.* at 383.
122. A.M. McClain, *Mixed-Finance Development of Public Housing*, *in* Guide, *supra* note 1, at 399.
123. *Id.* at 422.
124. Angela M. Christy, *Structuring Mixed-Use Developments: Financing and Real Estate Issues*, *in* Guide, *supra* note 1, at 427.
125. *Id.* at 428.
126. *Id.* at 429.

that will not work for other parts of a development.[127] LIHTC cannot subsidize commercial units, but New Markets Tax Credits can, so financing both residential and commercial uses in the same property may require subdividing the property and creating separate owners for each component of the project.[128] Since dividing the real estate and owner entities is so often required in mixed-use transactions, the chapter smoothly moves into information about ways that a piece of real estate can be divided for mixed-use development.[129] The chapter next tackles the significant challenge of ensuring compatibility of loan and subsidy sources.[130] In doing so, the chapter provides brief descriptions of the federal affordable housing finance tools discussed in Chapters 9, 10, and 11 with special attention paid to compatibility concerns related to projects that use tax credit equity. The chapter analyzes leasing as a means of subdividing property[131] before moving into issues that may arise related to construction.[132] The chapter provides pithy but accurate and helpful comparisons of the various construction methods available such as design/build contracting, construction management, and general contracting, before moving into an overview of the most common construction forms used today and commonly negotiated terms of construction agreements.[133] The chapter next discusses considerations related to operations of a project that a lawyer should consider during the project planning and development stages, including possible nuisance issues, zoning and building requirements, and parking needs.[134] Finally, the chapter ends with brief explanations of the three kinds of insurance associated with construction projects: property, liability, and builder's risk insurance.[135] In future editions of the *Guide*, this topic may deserve more elaboration as the supply chain issues caused by the COVID-19 pandemic and property damage caused by intensifying natural disasters due to climate change seem likely to result in changes to insurance underwriting.

Part III: What Happens After Housing Is Built

The third and final part of the *Guide* is dedicated to what happens after affordable housing is built. The four chapters in this part are brief in comparison to the chapters in the other two parts of the guide. This brevity is unfortunate because the material that these chapters cover—particularly as related to enforcement and preservation of privately owned affordable rental housing—is more important than ever.

127. *Id.* at 430.
128. *Id.*
129. *Id.* at 431.
130. *Id.* at 435.
131. *Id.* at 443.
132. *Id.*
133. *Id.* at 444.
134. *Id.* at 446.
135. *Id.* at 447.

Chapter 14 focuses on how HUD and the Internal Revenue Service (IRS) monitor affordable housing subsidized by each agency and how their program rules are enforced.[136] The chapter was written by Rebecca Simon of Nixon Peabody. The sections of the chapter explain the two departments within HUD—the Departmental Enforcement Center (DEC),[137] and the Real Estate Assessment Center (REAC)[138]—that are responsible for monitoring and enforcing compliance with program requirements across many HUD offices. The chapter explains what is monitored and inspected, how compliance is scored,[139] and what types of enforcement actions HUD might pursue including sanctions,[140] civil, and even criminal actions.[141] The second part of the chapter discusses how the IRS relies on state housing finance authorities to monitor LIHTC program compliance with the IRS's threat of tax credit recapture or disallowance serving as the primary enforcement tool.[142] Unfortunately, the chapter does not address monitoring and enforcement of state or local affordable housing programs, for example in inclusionary zoning, home-ownership programs, or compliance with real covenants and equitable servitudes designed to ensure ongoing affordability.

Chapter 15 addresses the preservation of affordable housing.[143] The chapter was written by Jessie Alfaro-Cassella, Deputy City Attorney at the City and County of San Francisco. The chapter begins with a compelling explanation of the urgency and magnitude of the affordable housing shortage in the United States and how this problem is compounded by the loss of affordable units each year.[144] The chapter moves into a useful explanation about why we are losing affordable housing, attributing it to expiring affordability restrictions, inadequate federal appropriations to maintain the aging housing that already exists, and high-cost housing markets creating incentives for private owners to convert their properties to market-rate units.[145] The bulk of the chapter is devoted to discussing specific HUD programs and options for renewing or replacing subsidy upon expiration with new project-based vouchers or tenant vouchers from HUD, including an informative discussion of the Rental Assistance Demonstration (RAD)[146] and RAD for Project Rental Assistance Contracts (PRAC) which can be

136. Rebecca Simon, *Monitoring and Enforcement in Affordable Housing*, *in* Guide, *supra* note 1, at 451.

137. *Id.* at 452.

138. *Id.* at 453.

139. *Id.* at 454, 456.

140. *Id.* at 456.

141. *Id.* at 458.

142. *Id.* at 461.

143. Jessie Alfaro-Cassella, *Preservation of Affordable Housing*, *in* Guide, *supra* note 1, at 467.

144. *Id.*

145. *Id.* at 470.

146. *Id.* at 473.

used to preserve certain Section 202 projects for the elderly.[147] The chapter emphasizes preservation of HUD-subsidized properties with HUD tools. Two paragraphs at the end of the chapter mention other state and local initiatives that can be used to preserve subsidized affordable housing,[148] but nothing about initiatives to preserve unsubsidized affordable housing at risk due to increasing housing costs, speculation, or gentrification (naturally occurring affordable housing).[149]

Chapter 16 focuses on relocation assistance and housing replacement requirements that an affordable housing developer may confront when acquiring an occupied building.[150] The chapter is written by Karen Tiedemann of Goldfarb & Lipman LLP. The bulk of this chapter is a succinct, step-by-step guide designed to walk practitioners through the requirements of the Uniform Relocation Act with information about how to comply.[151] Along the way, the author helpfully reminds the reader that states and localities are likely to have their own relocation laws that should be investigated early in the project-planning process because relocation obligations can be significant costs in a project budget.[152]

The final chapter in the third edition of the *Guide* addresses the future of affordable housing.[153] Its author is George Weidenfeller of the Telesis Corporation. The chapter takes an expansive view on the forces that are shaping and will continue to shape the landscape of affordable housing in coming years. Beginning with challenges that will influence the need for affordable housing, including the Pandemic,[154] the chapter moves into a list of promising ideas and proposals that may play important roles in addressing this need. The list of possible tools is admirably broad, from enhancements of existing tax credit programs,[155] to preservation of "naturally affordable" housing,[156] to the connection between transportation infrastructure and affordable housing,[157] and the chapter succeeds in priming the reader's imagination to fashion solutions to the affordable housing challenges that lie ahead.

147. *Id.* at 483.

148. *Id.* at 485.

149. *See What Is NOAH?*, Greater Minn. Hous. Fund (2022), https://noahimpactfund.com/impact-investing-affordable-housing-minnesota/what-is-noah.

150. Karen Tiedemann, *Federal Relocation and Replacement Housing Law*, in Guide, *supra* note 1, at 487.

151. *Id.* at 488.

152. *Id.*

153. George L. Weidenfeller, *The Future of Affordable Housing and Community Reinvestment, in* Guide, *supra* note 1, at 507.

154. *Id.*

155. *Id.* at 510.

156. *Id.* at 511.

157. *Id.* at 512.

Final Thoughts on a Welcome Update

As in previous editions, the *Guide*'s ambitious breadth of coverage means that not every topic can be covered with as much detail as the topic deserves. Also, the use of so many different contributing authors results in a broad array of styles and formats between the chapters, which, considering the range of expertise shared by the authors, is a minimal trade-off. While preserving the same structure and themes as in the previous editions, this edition contains significant new content related to the Rental Assistance Demonstration project and its impact on public housing and Section 202 housing for the elderly, on Opportunity Zones, and on how the Pandemic and climate change are affecting affordable housing policy. This structure has worked well, but it may be time for the editors to consider a recalibration to better reflect contemporary issues in affordable housing development. This change would mean greater emphasis on state and local programs and strategies, and more focus on affordable housing preservation independent from HUD programs. Nevertheless, this is a reference book that affordable housing development practitioners and academics are more likely to keep on their desktops than on their bookshelves. In short, it is a welcome update to a valuable reference tool.

ORGANIZATIONAL PROFILE

Legal Aid of NorthWest Texas—Community Revitalization Project

*Adam Pirtle**

Introduction

Founded in February 2017 with seed money from the Texas Access to Justice Fund,[1] the Community Revitalization Project (CRP) is a special division of Legal Aid of NorthWest Texas (LANWT)[2] based in Amarillo, Dallas, Fort Worth, and Lubbock. We use community lawyering to solve systemic problems and injustices and represent community groups and individuals who are seeking to make positive community impact in three areas: Housing Justice, Community Redevelopment, and Environmental Justice. Within those three focus areas, the projects we've worked on are as varied as the communities we serve. In this profile, we delve deeper into our community lawyering philosophy and how community lawyering can create stronger communities. We also highlight some of CRP's projects from across North and West Texas.

Community Lawyering: Providing Community Clients with Additional Tools to Take on Challenges

The Community Lawyering Project, a community lawyering team within Washington D.C.'s longtime legal aid firm, Bread for City, defines "community lawyering" as "using legal advocacy to help achieve solutions to

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1. Monitor of the Bank of America Mortgage Settlement, *Texas Legal Assistance Group to Receive $32.3 Million under Bank of America Mortgage Settlement*, PR Newswire (Apr. 4, 2016), https://www.prnewswire.com/news-releases/texas-legal-assistance-group-to-receive-323-million-under-bank-of-america-mortgage-settlement-300245558.html. (In 2016, the Independent Monitor of Bank of America's 2014 mortgage settlement with the U.S. Department of Justice distributed $32,382,700 to the Texas Access to Justice Fund (TAJF). TAJF funded community redevelopment legal assistance programs throughout the state.)

2. Legal Aid of NorthWest Texas, www.lanwt.org (last visited May 9, 2022).

community-identified issues in ways that develop local leadership and institutions that can exert power to effect systemic change."[3] CRP hews closely to that philosophy. For the last five years, CRP lawyers and staff spent as much time in community centers, churches, and living rooms as we did in the courtroom, providing hands-on support to neighborhood and community groups working to make positive change. We find the following to be key to our community lawyering practice.

- **Showing up and listening is the first step to building strong relationships:** When CRP starts working with an unfamiliar neighborhood or community group, our first objective is to build trust and establish strong relationships with community leaders and residents. The best way we've found to start this process is to show up to community events or create our own and listen to the knowledge and perspective of residents. Trust is built by showing up repeatedly and following through with commitments.

- **Create a community map:** From knowledge gained from community meetings and conversations and from analysis of publicly available data, CRP creates community maps documenting community strengths and available resources, power and leadership structures, allies and opponents, stressors upon the community, and other relevant information.[4] This big-picture view of community allows us to make stronger strategies to reach solutions. Community maps are living documents and evolve as work progresses. Saving this data also makes it easier for new staff members to quickly get up to speed on a case.

- **Community education can be more powerful than a lawsuit:** Knowledge is power. Tenants who understand their rights can ensure that a landlord makes repairs. A neighborhood association that understands Title VI can advocate for their neighborhood to get equal treatment from the city. CRP works to arm our community partners and clients with high-quality legal analysis and knowledge to help them realize their goals. Community education can take many forms from small group information sessions to comprehensive reports like our "In Plain Sight" report discussed later that analyzed industrial facilities' noncompliance with zoning and environmental regulations.

- **Build the client's power:** Although some lawyers like to be the star of the show, an effective community lawyer works to build a client's

3. Taylor Healy & Aja G. Taylor, *Making the Case for Community Lawyering*, Clearinghouse Article (Nov. 2016), https://dredf.org/wp-content/uploads/2019/08/Materials-CommunityLawering-HealyAndTaylor-Clearinghouse-2016Nov.pdf.

4. Our community mapping process is inspired by power maps created for organizing campaigns. For an example, see *Power Mapping 101*, NEAedjustice, https://neaedjustice.org/power-mapping-101/ (last visited May 20, 2022).

power and influence so that it's easier for them to accomplish future goals.[5] In addition to accomplishing a client's objectives, we try not to close a case without ensuring that our client is more equipped to solve other problems in the future.

Notable Cases and Projects

This section highlights a few of the cases and projects CRP has taken on in its three main focus areas: housing justice, community redevelopment, and environmental justice.

1. Housing Justice

Everyone deserves to have a quality home in quality neighborhood. CRP assists individuals and groups in communities to develop and maintain affordable housing, fight housing discrimination at all levels, and ensure that individuals have meaningful housing choice. CRP's activities have included representing a public housing tenant association at Butler Place[6] during its closure due to a Rental Assistance Demonstration[7] or "RAD" conversion, defending tenants in mass eviction cases, and protecting neighborhood residents from gentrification. The following three cases studies provide a more in depth look at some of our work.

a. Standing with the Tenth Street Residential Association to stop the destruction of a neighborhood

The Tenth Street Historic District is the last remaining Freedman's Town in Dallas, Texas; its residents are predominantly Black and Hispanic. Because of its continued significance and importance, the area was declared to be an historic district in 1993 by the City of Dallas, which included protecting the historic homes from being demolished. Then in 2010, the City of Dallas passed an ordinance which made it easier for the City to demolish homes in any historic district that were less than 3,000 square feet.[8] All of the homes in the Tenth Street Historic District were less than 3,000 square feet, whereas many homes in white, non-Hispanic districts surpassed that

5. *See* Joseph Riepenhoff, *A Community Lawyering,* Marquette Univ. L. Sch. Fac. Blog (Nov. 22, 2019), https://law.marquette.edu/facultyblog/2019/11/a-community-lawyering.

6. Christina Rosales, *A Little Louder Episode 20: A Look at RAD Conversion*, Texas Housers (Nov. 22, 2019), https://texashousers.org/2019/11/22/episode-20-a-look-at-rad-conversion.

7. Consolidated and Further Continuing Appropriations Act, 2012, Division C—Transportation, Housing and Urban Development, and Related Agencies Appropriations Act, 2012, Title II, Department of Housing and Urban Development, "Rental Assistance Demonstration," Pub. L. No. 112-55, 125 Stat. 552, 673–75 (Nov. 18, 2011), https://www.govinfo.gov/content/pkg/PLAW-112publ55/pdf/PLAW-112publ55.pdf.

8. Dallas, Tex. City Code § 51A-4501(i) (June 23, 2010).

square footage.[9] Between the time the ordinance passed in 2010 and 2019, when a lawsuit to stop the demolitions was filed, seventeen homes had been demolished in Tenth Street, while only one home was demolished in all six of the majority-white, non-Hispanic historic districts.[10]

CRP and co-counsel Daniel and Beshara, P.C.[11] represented Tenth Street Residential Association (TSRA) in litigation against the City of Dallas alleging that the ordinance violated the Fair Housing Act, 42 U.S.C. § 1982, and the Equal Protection Clause[12] because the unequal provision of services intentionally discriminated on the bases of race or, alternatively, had a discriminatory effect upon Black and Hispanic residents.[13] The lawsuit helped to generate local and national attention. Four months after the suit was filed, the National Trust for Historic Places added Tenth Street Historic District to its eleven Most Endangered Historic Places list.[14] Although the Fifth Circuit Court of Appeals upheld the district court's dismissal on associational standing grounds, residents were ultimately victorious and saw many of their demands met. Responding to political and media pressure generated by the case and the fierce advocacy of TSRA, the City of Dallas halted further demolitions in Tenth Street, allocated $750,000 for targeted rehab of owner-occupied housing, and implemented other measures to revitalize Tenth Street. TSRA completed its own neighborhood plan in September of 2021 and is currently working with the City of Dallas to implement it.[15]

b. Protecting a neighborhood from predatory lending

After two years of litigation, CRP and co-counsel Texas Legal Services Center reached a favorable settlement in a federal fair housing and predatory lending lawsuit against HMK Mortgage, Ltd. on behalf of three West Dallas residents.[16] The suit alleged that, in 2017, HMK sold and financed homes to 140 of its former tenants under predatory terms. In doing so, it violated the

9. Tenth St. Residential Ass'n v. City of Dallas, Texas, 968 F.3d 492, 498 (5th Cir. 2020).

10. *Id.*

11. Daniel and Beshara, P.C., https://www.danielbesharalawfirm.com (last visited May 9, 2022).

12. U.S. Const. amend. XIV § 1.

13. *Tenth St. Residential Ass'n*, 968 F.3d 492.

14. Robert Wilonsky, *Dallas Eyes Ways to Spare the Historic Tenth Street District, Which Is Now on a National Most-Endangered List*, Dallas Morning News (May 30, 2019), https://www.dallasnews.com/opinion/commentary/2019/05/30/dallas-eyes-ways-to-spare-the-historic-tenth-street-district-which-is-now-on-a-national-most-endangered-list.

15. Tenth St. Residential Ass'n, *Tenth Street Historic District: Neighborhood-Led Plan*, ArcGIS StoryMaps (last visited May 19, 2022).

16. Ken Kalthoff, *Settlement in Long Simmering Dallas HMK Housing Controversy*, NBC DFW (June 4, 2020), https://www.nbcdfw.com/news/local/settlement-in-long-simmering-dallas-hmk-housing-controversy/2382950.

federal Truth in Lending Act,[17] the federal Equal Credit Opportunity Act,[18] and the federal Fair Housing Act.[19]

Under the settlement, HMK agreed to amend more than half a dozen provisions in its loan contracts to provide the purchasers with more homeownership rights—not only for CRP's clients but for more than 140 individuals who bought West Dallas homes from HMK in 2017.

The changes made to the mortgage contracts of the homeowners included removal of the following:

- a "due-on-demand clause" that let HMK call the entire mortgage loan at any time for any reason;
- a "right of first refusal" allowing HMK to override the sale of the home with its own purchase;
- a provision that permitted HMK to order an appraisal at any time at the expense of the homeowner;
- a clause letting HMK enter the homeowner's property at any reasonable time for inspection;
- a provision that allowed HMK to make repairs and demand repayment from the homeowner; and
- a clause prohibiting subordinate liens and security interests to be fixed against the properties, which prohibited HMK homeowners from applying for City repair programs.

c. Hillcrest Tenants Union

CRP, LANWT housing attorneys, and the Texas Tenants Union[20] are working with the Hillcrest Tenants Union in Mesquite, Texas, to address widespread and deplorable habitability problems at the Hillcrest Apartments. Problems include mold covering walls, bug infestations, and sewage leaks. Pressure from residents and media led the City of Mesquite to file a lawsuit against the apartment complex, which secured a temporary injunction requiring the landlord to eliminate all violations by June 10, 2022; allows city code enforcement full access to inspect the apartment; and requires the landlord to provide hotels for displaced occupants while repairs are underway.[21] CRP is working to make sure that the landlord follows through with their obligations under the injunction.

17. 15 U.S.C. § 1601 *et seq.*
18. 15 U.S.C. § 1698 *et seq.*
19. 42 U.S.C. § 3601 *et seq.*
20. Texas Tenants' Union, https://txtenants.org (last visited May 9, 2022).
21. Francesca D'Annunzio & Leah Waters, *Tenants Organize to Force Mesquite's Hillcrest Apartments to Fix AC, Get Rid of Sewage, Mold, Bugs*, Dall. Morning News (Apr. 8, 2022), https://www.dallasnews.com/news/courts/2022/04/08/tenants-organize-to-force-mesquites-hillcrest-apartments-to-fix-ac-get-rid-of-sewage-mold-bugs.

2. Community Redevelopment

All neighborhoods deserve equal treatment under law. CRP's community redevelopment activities focus on both combatting the legacy of racist housing policies that targeted communities of color[22] and ensuring that these same communities have power to demand fair and equitable treatment by the government today. Our work also supports neighborhood groups and community development organizations in their efforts to revitalize their communities without fearing displacement. These efforts include doing the legal work of creating innovative community businesses, assisting groups to become effective nonprofits, using administrative complaints and education to demand fair lending practices, and helping neighborhoods as they attempt to undo racist zoning.

a. Establishing the North Heights Linen Service, a worker-owned cooperative

CRP partnered with the North Heights Neighborhood Advisory Committee, a group representing the historically African-American North Heights neighborhood in Amarillo, Texas, to help establish a worker-owned cooperative, the North Heights Linen Service (NHLS). Before NHLS was created, Amarillo area hospitals sent used linens as far away as New Mexico and Oklahoma for sanitation services. The North Heights Advisory Committee was inspired by the work of Evergreen Cooperative Laundry[23] in Cleveland, Ohio, to bring a similar model to their neighborhood in Amarillo. Beginning operations in June 2021, NHLS processes these linens locally while providing good jobs and ownership opportunities for residents of North Heights.[24]

CRP, the UT Law Entrepreneurship and Community Development Clinic,[25] and other pro bono partners worked together to complete the legal research and work needed to get NHLS off the ground, including incorporation assistance, drafting property agreements and loan agreements, and obtaining tax increment reimbursements.[26]

Helping NHLS fit squarely into CRP's mission of using legal advocacy to begin healing damage done by racial discrimination. At one time, banks

22. *See generally* Richard Rothstein, The Color of Law: A Forgotten History of How Our Government Segregated America (2017).

23. Evergreen Coop. Laundry, www.evgoh.com/ecl (last visited May 19. 2022).

24. "Roushell Hamilton, Jr., *North Heights Linen Service Opening Soon, Will Provide Economic Boost to North Amarillo*, KAMR (June 17, 2021), https://www.myhighplains.com/news/local-news/north-heights-linen-service-opening-soon-will-provide-economic-boost-to-north-amarillo.

25. Univ. of Texas Sch. of Law Entrepreneurship & Cmty. Dev. Clinic, https://law.utexas.edu/clinics/ecdc (last visited May 9, 2022).

26. For information regarding cooperative laws in Texas and elsewhere, see CoopLaw.org, www.co-oplaw.org, (last visited on May 19. 2022).

and city leaders redlined North Heights, hindering development.[27] The North Heights Linen Service project brought residents, city leaders, local banks, and other stakeholders together to make an unprecedented investment in the neighborhood. And because its cooperative structure allows for workers to own a part of the business, the community can be assured that NHLS will remain the neighborhood's asset and generate neighborhood wealth and steady jobs for years to come.

b. Advocating for fair banking practices in South Dallas

The Community Reinvestment Act of 1977[28] was enacted by Congress to push banks to loan, locate, and invest in low-income communities. Along with the Fair Housing Act and the Equal Credit Opportunity Act,[29] this legislation was an effort by the federal government to reverse years of racist federal policy that cut off credit to and investment in minoritized communities.[30] Many of the neighborhoods that CRP works for were redlined or suffered subsequent banking discrimination in years past. Despite protections, CRP and our community partners have found that some banks continue to discriminate against neighborhoods today. In Dallas, we represent with Southern Dallas Progress Community Development Corporation (SDP). Under the leadership of former banker James McGee, SDP works to bring "housing, economic development, and community improvement activities" to South Dallas.[31] Central to this mission is calling out and, if necessary, bringing legal action against banks who redline out parts of the communities they claim to serve. Recent reports found that these discriminatory banking practices are rampant in South Dallas.[32]

In 2022, CRP has filed four fair housing complaints on behalf of SDP with the Department of Housing and Urban Development (HUD) against banks who provide financial services in majority white, non-Hispanic areas in Dallas, but fail to loan or locate branches in minoritized, low-income neighborhoods. These complaints are based on analysis of Home Mortgage Disclosure Act data,[33] the bank-designated service areas, and the

27. *Amarillo, TX*, Mapping Inequality, Redlining in New Deal America, https://dsl.richmond.edu/panorama/redlining/#loc=13/35.201/-101.886&city=amarillo-tx (last visited May 9, 2022).

28. 12 U.S.C. 2901 *et seq.*

29. 15 U.S.C. § 1698 *et seq.*

30. Rothstein, *supra* note 22, at 5.

31. *Our Mission,* S. Dallas Progress CDC, https://southerndallasprogress.weebly.com/about.html (last visited May 9, 2022).

32. David Shechter et al. *'They Underestimate What We Can Do': WFAA Finds Banks Exclude Blacks, Hispanics in Southern Dallas from Access to Loans*, WFAA (Nov. 22, 2020), https://www.wfaa.com/article/news/local/investigates/banking-below-30-southern-dallas-cut-off-by-freeway-also-left-off-banking-maps/287-10557dd3-bbf4-44a2-b786-44c6347a6e48.

33. *Home Mortgage Disclosure Act*, FFIEC.gov, https://www.ffiec.gov/hmda/default.htm (last visited May 9, 2022).

locations of banks branches. HUD has not yet reached a decision on any of these complaints.

In addition, CRP continues to conduct extensive community education about banks' fair lending obligations so that communities may use this knowledge as leverage to get increased economic assistance for development projects.

c. Assisting growing, community-based nonprofit and tax-exempt groups

CRP offers a wide range of assistance to nonprofits of all types. Many of our clients are neighborhood associations working to improve the quality of life of low-income individuals by focusing on their needs within the respective neighborhoods. For these new nonprofit clients, CRP assists with creating bylaws, drafting sponsorship agreements, advising on incorporation, filing for federal tax-exempt status, and other legal needs. We also provide education, materials, and instruction to help groups maintain their regulatory filings and status with related governing agencies.

To provide continued support and guidance to community groups, a group of CRP paralegals and attorneys and LANWT's Director of Development, Sam Prince, formed the Nonprofit Coaching Team. The team offers a regular community education workshop series over Zoom so that groups and individuals throughout the LANWT service area may participate. Presentations have covered many topics, including nonprofit formation, creation of program goals and objectives, budget management, and compliance with federal and state requirements. CRP is working to create a video archive of past presentations that will be released later this summer. A few presentations have already been published.[34]

CRP and LANWT strive to provide holistic services to our clients. Assisting our community clients in forming nonprofits or otherwise strengthening the structure of their groups allows them to better take on challenges in the future with or without assistance from CRP.

d. Striving for equity in city planning for North and East Lubbock

When CRP started working in Lubbock in 2017, the city was in the beginning stages of creating its 2040 Comprehensive Plan.[35] While an army of developers were working to influence how the city's future land use map would be drawn in rapidly growing Southwest Lubbock, North and East Lubbock residents lacked a meaningful seat at the table. CRP and partner

34. *See generally* Legal Aid of NorthWest Texas, *501c3 - Governance*, Vimeo (Apr. 27, 2022), https://vimeo.com/703759717.

35. PlanLubbock 2040 Comprehensive Plan, City of Lubbock (Dec. 17, 2018), https://ci.lubbock.tx.us/storage/images/qLXKeIyOZxc7Ke4ByQxiYk8ropy5RPZOoTvyEqC2.pdf. (Cities use comprehensive plans to dictate future land uses. Section 211.004 of the Texas Local Government Code requires a city's zoning ordinances be adopted in accordance with the comprehensive plan.)

Texas Housers[36] worked with East and North Lubbock neighborhood associations to create a series of community education events about what was in the draft 2040 Plan, the comprehensive planning process generally, and Lubbock's history of discriminatory land use. Since 1923, when it passed an ordinance forcing Black residents to live in the southeast side of town, the City of Lubbock used its power to segregate minoritized communities and concentrate undesirable and dangerous industrial uses around those neighborhoods. Unfortunately, the draft comprehensive plan continued this pattern by concentrating future industrial land uses in the north and east sides.

Using funds from a grant with fewer restrictions than traditional Legal Services Corporation dollars, CRP submitted a public comment on behalf of its client, the Alliance of East Lubbock Neighborhood Associations, to the Comprehensive Plan Advisory Committee detailing the neighborhoods' concerns with land use and transit inequities. Armed with education materials from CRP, many residents from East and North Lubbock came to speak at planning meetings, sharing their personal stories about living next to heavy industries like concrete batch plants or cotton oil mills. The activism of these neighborhood groups sparked a broader awareness in the city at large of past racial injustices and put pressure on city leaders to include North and East Lubbock in the planning process.[37]

Ultimately, the 2040 Plan contained a section dedicated to East and North Lubbock, including recommendations that the City fund a neighborhood planning program and capital projects to revitalize the area.[38] In April 2022, the City of Lubbock announced that four East and North Lubbock neighborhoods were slated to begin the neighborhood planning process. The City set aside $250,000 for the planning process and plans to designate an additional $250,000 to complete needed capital improvements identified by residents.

Unfortunately, little progress has been made on changing the city's discriminatory land use. CRP partners—the Lubbock Chapter of the NAACP[39], Texas Housers, and Texas Appleseed[40]—filed a fair housing complaint with HUD in December 2019. This suit was dismissed by the Trump administration's U.S. Department of Justice in 2020. CRP continues to work with community partners on this issue.

36. Texas Housers, https://texashousers.org (last visited May 9, 2022).

37. *See generally* Texas Tech Pub. Media KTTZ, *Beyond the Report, A Plan for Progress*, YouTube. (June 21, 2021), https://tv.kttz.org/local-productions/beyond-the-report.

38. *PlanLubbock 2040 Comprehensive Plan*, *supra* note 35, at 178.

39. Lubbock NAACP Branch, https://www.lubbocknaacp.org (last visited May 9, 2022).

40. Texas Appleseed, https://www.texasappleseed.org (last visited May 9, 2022).

3. Environmental Justice

Throughout North and West Texas, fenceline communities[41] withstand the worst of polluting industries, highway placement, and other environmental injustices. Residents face serious health impacts and do not get to enjoy the same quality of life as those living in neighborhoods without these burdens. CRP works to eliminate toxic nuisances near neighborhoods.

a. Bringing down Shingle Mountain[42]

For two years, Blue Star Recycling Facility, an asphalt recycling operation in the Floral Farms neighborhood in South Dallas, allowed a 70,000-ton, six-story-tall mountain of roof shingles to accumulate in violation of city regulations. The waste product plagued the neighborhood and damaged nearby residents' health. Children were sickened with congestion from the asphalt particulates, causing many to miss school. Several residents reported coughing up black phlegm. Residents were also plagued with noise from trucks as early as 5 a.m. and as late as 10 p.m., inundated with terrible odors from the chipping operations, and suffered frequent flat tires from loose shingle nails falling onto neighborhood streets.

To stop the onslaught from Shingle Mountain, residents living near the facility formed Neighbors United (Vecinos Unidos), led by Marsha Jackson, whose property backed up to the huge mountain of shingles. The group's primary goals were to protect the health of their children and animals, the value of their property, and preserve the natural environment around them. Many of its members have lived in the neighborhood for no fewer than ten years and some for more than five decades. Alleging that the facility was acting outside the scope of its permit to operate, the group cited a rapid decline in residents' respiratory health, the unexpected death of two horses stabled near the operation, and increased flooding in the area, all of which coincide with Blue Star's arrival to the neighborhood.

Representing Neighbors United, CRP attempted to file an amortization petition, a process by which a citizen can request that a harmful nonconforming be phased out because it has an adverse effect on the neighborhood.[43] However, when CRP went to file necessary paperwork to begin the amortization process, the city attorney prevented the documents from being accepted. Under advocacy pressure from Neighbors United and CRP, the City amended a pending lawsuit against the Blue Star operator to allege that the operation was illegal. Following CRP's advocacy, the City of Dallas received a court order forcing Shingle Mountain to shut down.

41. A fenceline community is a neighborhood that is immediately adjacent to an industrial facility or other toxic nuisances.

42. Robert Wilonsky, *Judge: Shingle Mountain Has 90 Days to Disappear from Southeast Dallas*, Dall. Morning News (Apr. 3, 2019), https://www.dallasnews.com/opinion/commentary/2019/04/03/judge-shingle-mountain-has-90-days-to-disappear-from-southeast-dallas.

43. Dallas, Tex., City Code § 51A-4.704.

However, this order was not the end of the battle. After the owner of Blue Star declared bankruptcy, it took another year and continued advocacy from Neighbors United, Downwinders at Risk, Daniels and Beshara, P.C., and CRP for the shingles to finally be removed.

After leading her neighborhood to victory, Marsha Jackson formed her own nonprofit, Southern Sector Rising (SSR).[44] CRP was retained to assist SSR in securing its 501(c)(3) status. SSR works to revitalize the Floral Farms neighborhood. Its motto is "Together We Can Move Mountains."

b. Publishing research and reports to bring attention to environmental injustice

To help shine a light on continued environmental injustice in South Dallas, CRP and Neighbors United published the groundbreaking report, *In Plain Sight*.[45] The report documented the compliance records of industrial property owners in four South Dallas neighborhoods. CRP surveyed every industrial property in the area to determine whether it was in compliance with zoning, certificate of occupancy, and other regulations. The results were damning. Over fifty percent of the industrial sites in three of the four neighborhoods had some type of compliance issue. Forty-three percent of the sites in the fourth neighborhood were noncompliant.

In October 2019, CRP made public the findings of the *In Plain Sight* report at a community environmental justice event, featuring Dr. Robert Bullard, the "Father of Environmental Justice."[46] Professor Bullard currently is Distinguished Professor of Urban Planning and Environmental Policy at Texas Southern University. After a "Toxic Tour" of the industrial sites highlighted in the toolkit, Dr. Bullard attended an event at Paul Quinn College, where he spoke to the trends revealed in the toolkit and shared advocacy strategies with the community participants.

c. Using the permitting process to make a landfill reform

CRP represented two clients in their opposition to a permit request from the City of Denton to the Texas Commission on Environmental Quality that would triple the size of the City's landfill.[47] The clients live in a small mobile home community just south of the landfill. CRP was able to reach a settlement with the City that requires it to take steps to reduce odor and better monitor for odor problems. As a part of the same settlement, the City will plant a new tree line along the southern border of the landfill to

44. S. Sector Rising, https://southernsectorrising.org (last visited May 9, 2022).

45. Robert Wilonsky, *Report Examines Why Shingle Mountain Outlasted Our Outrage—And How Dallas Can Stop the Next One*, Dall. Morning News (Oct. 15, 2019), https://www.dallasnews.com/news/commentary/2019/10/15/report-examines-why-shingle-mountain-outlasted-our-outrage-and-how-dallas-can-stop-the-next-one.

46. Dr. Robert Bullard, https://drrobertbullard.com (last visited May 20, 2022).

47. Sarah Berg, *Denton's Landfill Changes Fuel Concerns for Community Waste and Elections*, Univ. of N. Tex. Mayborn Sch. of Journalism, https://journalism.unt.edu/Sarah-Berg-Story (last visited May 9, 2022).

provide a physical and visual barrier, apply a spray-on dust control product to dirt roads to reduce air pollution, and implement daily litter patrols along the same southern border of the landfill. The landscaping plan for the new tree line was completed in November 2021.

Conclusion

With five years of work behind us, we are hopeful to continue our work and build upon the progress that we have made for many years to come. We have been fortunate to work with strong partners and advocacy groups throughout Texas and the country. If you are interested in learning more about CRP or working with us, please reach out.

> *We've got to understand people, first, and then analyze their problems. If we really pay attention to those we want to help: if we listen to them; if we let them tell us about themselves—how they live, what they want out of life—we'll be on much more solid ground when we start planning "our action," "our programs," than if we march ahead, to our own music, and treat them as if they're only meant to pay attention to us, anyway.*
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> —Dr. Martin Luther King Jr.[48]

48. *See* Lucie White, *From a Distance: Responding to the Needs of Others Through Law*, 54 Mont. L. Rev. 1, 16 (1993) (quoting Dr. Martin Luther King Jr.).

ARTICLES

Just a "Planning Rule": Enforcing the Duty to Affirmatively Further Fair Housing

*Heather R. Abraham, Jason Knight, Russell Weaver & Christopher Holtkamp**

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> *"[T]his rule is a planning rule and not a rule directed to the enforcement of the duty to affirmatively further fair housing. Procedures to receive and investigate complaints, conduct compliance reviews, challenge AFFH certifications, and obtain compliance are already available to HUD under regulations implementing the Fair Housing Act and other civil rights statutes."*
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> —Final Rule, Affirmatively Furthering Fair Housing (2015)

Once again, HUD is deliberating the meaning of "affirmatively furthering fair housing" (AFFH), the concept embedded in the Fair Housing Act that requires federal agencies to take affirmative steps to reduce housing segregation. After the Trump administration repealed a fair housing rule promulgated in 2015, the Biden administration has restored the previous definition of AFFH, but it has stopped short of reinstating any obligatory AFFH procedures for federal grantees. If history is any indicator, HUD's internal stakeholders are currently relitigating the same issues that slowed—and almost doomed—the prior rule. One foundational dispute is whether the AFFH rule is a "planning" rule, or an "enforcement" rule. HUD has declared it a planning rule. Nevertheless, advocates continue to ask HUD to give the forthcoming rule more teeth, such as instituting a complaint process or compliance audits. This article argues that while HUD has reason to stay the course—leaning into its planning rule approach designed to instantiate a long-term compliance norm—HUD can still improve the rule by adding specific enforcement and deterrence elements without negating the underlying character of the AFFH rule as a planning rule.

I. Introduction

President Joe Biden has staked his presidency on a few key initiatives, not least of which is his "whole-of-government" approach to addressing structural racism. His first week in office he issued a series of executive actions on racial inequality in housing, which boldly and unequivocally acknowledged the government's discriminatory housing practices that contributed to today's housing segregation.[1] Executive Order 13895 directed every agency to conduct an "equity assessment" and produce a plan for addressing "any barriers to full and equal participation" in federal programs.[2] A year later, agencies are releasing equity action plans in response. Curiously to fair housing advocates, HUD's Equity Action Plan[3] downplays one of its

1. *See* Exec. Order No. 13,985, 86 Fed. Reg. 7009, 7011 § 9 (Jan. 25, 2021); Mem. on Redressing Our Nation's and the Federal Government's History of Discriminatory Housing Practices and Policies (Jan. 26, 2021), www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-redressing-our-nations-and-the-federal-governments-history-of-discriminatory-housing-practices-and-policies.

2. Exec. Order No. 13985, 86 Fed. Reg. 7009, 7011 § 9 (Jan. 25, 2021).

3. *See* U.S. Dep't Hous. & Urb. Dev., Equity Action Plan 10 (2022), www.hud.gov/sites/dfiles/PA/documents/ HUDEquity508compliant.pdf. HUD's Plan only mentions that HUD "intends to undertake a comprehensive rulemaking to implement the Fair Housing Act's mandate to Affirmatively Further Fair Housing. The public will be

most important racial equity tools—a legal obligation to "affirmatively further fair housing" (AFFH) that requires federal agencies and their grantees to take meaningful steps to reduce housing segregation.[4] This obligation extends to a wide universe of actors. In addition to HUD, it applies to more than 3,700 public housing authorities (PHAs) and 1,200 state and local government grantees (and both PHAs and government grantees are hereinafter referred to as "grantees").[5]

Although the statutory duty to "affirmatively further fair housing" has been codified since 1968,[6] administrative regulations giving it full force have been long in coming and short-lived. For three successive administrations, the definition of AFFH swayed in the political winds as the presidency changed hands. After decades of inaction, HUD promulgated

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given an opportunity to weigh in on any revised AFFH rule to ensure underserved communities will benefit from and grantees understand their obligations under any final regulatory framework." *Id*.

4. 42 U.S.C. § 3608(d) (original statutory language). Consistent with a substantial body of federal caselaw, the Biden administration's regulation interprets AFFH as requiring more than simply nondiscrimination—it requires affirmatives steps to dismantle segregation. Restoring Affirmatively Furthering Fair Housing Definitions and Certifications, 86 Fed. Reg. 30,779, 30,779–82 (June 10, 2021) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903). The rule defines AFFH as:

> taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics. Specifically, affirmatively furthering fair housing means taking meaningful actions that, taken together, address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially or ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws.

24 C.F.R. § 5.151.

5. *See* Press Release, U.S. Dep't Hous. & Urb. Dev., Fact Sheet: On the 54th Anniversary of the Fair Housing Act, HUD Underscores its Commitment and Progress Toward Advancing Fairness and Equity in Housing (Apr. 11, 2022), www.hud.gov/press/press_releases_media_advisories/HUD_No_22_062#:~:text=FACT%20SHEET%3A-,On%20the%2054th%20Anniversary%20of%20the%20Fair%20Housing%20Act%2C%20HUD,the%20federal%20Fair%20Housing%20Act (describing the number of grantees affected by HUD's AFFH Interim Final Rule in 2021).

Moreover, while this Article focuses on HUD's obligations, the duty to affirmatively further fair housing extends to *all* federal agencies that administer housing and urban development programs, from the Department of Treasury to the Environmental Protection Agency. *See* 42 U.S.C. § 3608(d). In fact, the majority of agencies administer some programs related to housing and urban development. For a detailed analysis of the statute's application to other federal agencies, see Heather R. Abraham, *Segregation Autopilot: How the Government Perpetuates Segregation and How to Stop It*, 107 Iowa L. Rev. 1963 (2022).

6. *See* 42 U.S.C. § 3608(d), (e).

its first substantive regulation in 2015 during the Obama administration.[7] However, the Trump administration rescinded the prior regulation shortly after the first set of grantees submitted their fair housing plans.[8] In its place, the Trump administration promulgated the Preserving Community and Neighborhood Choice rule,[9] which eliminated any mandatory AFFH planning process and permitted grantees to satisfy their AFFH obligation by taking "*any action* rationally related to promoting *any attribute* . . . of fair housing. . . ."[10] Since the replacement rule defined "fair housing" to include affordable housing attributes like "safe" and "decent," the Trump rule allowed grantees to satisfy their obligations "with minimal or no action not already required by other non-civil rights statutes and HUD rules, and without doing anything to remedy fair housing issues," according to a subsequent critique by the Biden administration.[11]

One year later, the Biden administration repealed the Trump rule but stopped short of reinstating a mandatory planning process. It issued a rule that "restored" definitions for key terminology like "Affirmatively Furthering Fair Housing and "Segregation," and resumed HUD's technical assistance for grantees seeking to voluntarily engage in fair housing planning, but it stopped there.[12] It also restored previously issued HUD guidance and made available AFFH resources, including the *AFFH Rule*

7. *See* Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272 (July 16, 2015).

8. Affirmatively Furthering Fair Housing: Extension of Deadline for Submission of Assessment of Faith Housing for Consolidated Plan Participant ("AFH Extension Notice"), 83 Fed. Reg. 683, 684 (Jan. 5, 2018) (suspending submission deadlines for most local governments "until their next submission deadline that falls after October 31, 2020"); *see* Ed Gramlich, *Affirmatively Furthering Fair Housing (AFFH), Part 3: Secretary Carson's Challenges to AFFH in 2018*, *2020 Advocates' Guide*, Nat'l Low Income Hous. Coal. 7–28, https://nlihc.org/sites/default/files/AG-2020/7-06_Affirmatively-Furthering-Fair-Housing-(AFFH)-Part-3.pdf (calculating that three-fourths of the 1,200 local jurisdictions would be delayed until 2025).

9. Preserving Community and Neighborhood Choice, 85 Fed. Reg. 47,899 (Sept. 8, 2020) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903).

10. *Id.* at 47,904; *see also* Restoring Affirmatively Furthering Fair Housing Definitions and Certifications, 86 Fed. Reg. 30,779, 30,783 (June 10, 2021) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903).

11. *See* 86 Fed. Reg. at 30,783 (explaining that the rule's expansion of the definition of "AFFH" to include "safe" and "decent" housing, "while laudable and consistent with HUD's mission, [the concepts are] legally distinct from the requirements of the Fair Housing Act's AFFH obligation."). Following HUD's approach under the Trump-era rule, "a jurisdiction taking any steps to meet HUD's programmatic requirements for maintaining the physical condition of federally supported housing, such as ensuring that fire exits are not blocked . . . , could certify compliance under . . . despite taking no steps to stop discrimination that violates the Fair Housing Act, let along any proactive steps of the kind the AFFH statutory mandate requires." *Id.*

12. *See id.* at 30,786.

Guidebook,[13] the AFFH Data and Mapping Tool, and the Assessment Tools for local governments and public housing agencies.[14] HUD described the need for the "interim final rule" as responding to an "urgent need" for HUD to comply with its own AFFH obligations as an agency by giving grantees at least some guidance as to their basic duty.[15]

Essentially, the interim final rule was damage control. HUD temporarily punted on whether to reinstate or revise the Obama-era rule. In the meantime, HUD announced that it would pursue a separate rulemaking to "amend the 2015 AFFH Rule" to achieve two objectives: (1) "burden reduction" and (2) "material positive change that affirmatively furthers fair housing."[16]

As of mid-2022, another year has passed without a more comprehensive rule. On June 15, 2022, HUD transmitted a proposed rule to the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) for review.[17] HUD's rule will not be available to the public until OIRA approves it for public release, which usually takes at least ninety days.[18] Upon release, HUD's Notice of Proposed Rulemaking will typically call for a sixty-day public comment period,[19] meaning the final rule would not go into effect until 2023 or beyond. Soon, it will be five years since HUD has required jurisdictions to engage in any meaningful fair housing

13. U.S. Dep't of Hous. & Urb. Dev., Affirmatively Furthering Fair Housing Rule Guidebook (2015), www.hud.gov/sites/dfiles/FHEO/documents/AFFH-Rule-Guidebook.pdf.

14. *Id.* at 30,789. While HUD said it will continue to monitor baseline AFFH compliance, it conceded that it "only intends to undertake such a review when it has reason to believe the certifications submitted are not supported by the recipients' actions. HUD expects these instances to be rare and will provide all required notice to recipients of any review to be undertaken." *Id.*

15. *See id.* at 30,786 ("Against this backdrop, this interim rulemaking is narrowly focused to meet the urgent need to withdraw the [Trump-era "Preserving Community and Neighborhood Choice"] rule definition, which promotes confusion and noncompliance with the statutory obligation to AFFH, and to reinstate a definition that properly states that duty and is the result of notice and comment rulemaking."). An interim final rule means the regulation is a final rule with the force of law but suggests that the administration intends to issue a more detailed subsequent rule. *See, e.g.*, Office of the Federal Register, A Guide to the Rulemaking Process, www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf (last visited July 11, 2022).

16. *Id.* at 30,789.

17. Office of Information and Regulatory Affairs, Pending EO 12866 Regulatory Review, RIN 2529-AB05, www.reginfo.gov/public/do/eoDetails?rrid=250612.

18. *See* Exec. Order No. 12866, 58 Fed. Reg. 51,735, 51,742 (Oct. 4, 1993); *see also* Office of Information and Regulatory Affairs, About OIRA, https://obamawhitehouse.archives.gov/omb/oira/about (describing OIRA's role in the rulemaking process)(last visited July 11, 2022).

19. *See* 24 C.F.R. § 10.1 (designating a sixty-day public comment window for most notices of proposed rulemakings).

planning.[20] Beyond the interim final rule, HUD has taken some steps indicating it is revising the Obama-era rule. In 2021, it hosted a series of AFFH listening sessions to gather public input on several key topics: the relationship between fair housing plans and other federally required planning documents, such as Consolidated Plans and PHA Plans, community stakeholder engagement, the identification of fair housing impediments and goals, the HUD review process and ongoing compliance, and monitoring between plan submissions.[21] Even so, HUD's most recent public statement on AFFH remains noncommittal on the rule's future,[22] and its new "Equity Action Plan" also downplays the role of a reinvigorated AFFH planning process in HUD's strategy to reduce racial inequity.[23]

This Article considers how HUD can accomplish its stated goals. If HUD has designed the AFFH regulation as a planning rule, what revisions should it make to the Obama-era rule to improve it, without changing its character as a planning rule? By "planning rule," we draw from a distinction offered by some of the rule's architects who describe the rule as one "that centers more on using the AFFH process as a practical *planning tool* rather than one that relies solely on *legal enforcement*."[24] Thus, we conceive of a "planning rule" as a planning process-focused rule whose

20. Affirmatively Furthering Fair Housing: Extension of Deadline for Submission of Assessment of Faith Housing for Consolidated Plan Participant, 83 Fed. Reg. 683, 684 (Jan. 5, 2018) (suspending submission deadlines for most local governments "until their next submission deadline that falls after October 31, 2020"); *see also* Ed Gramlich, *Affirmatively Furthering Fair Housing (AFFH) Under the July 16, 2015 Final Rule: 2019 Advocates' Guide*, Nat'l Low Income Hous. Coal. at 7-15 (2019), https://nlihc.org/sites/default/files/AG-2019/Advocates-Guide_2019.pdf (calculating that three-fourths of the 1,200 local jurisdictions would be delayed until 2025).

21. *See, e.g.*, E-mails from Anne Brewer, Deputy Assistant Sec'y for Pub. Engagement, Dep't of Hous. & Urb. Dev., to author (Oct. 2021) (on file with author).

22. *See* Press Release, U.S. Dep't Hous. & Urb. Dev., Fact Sheet: On the 54th Anniversary of the Fair Housing Act, HUD Underscores its Commitment and Progress Toward Advancing Fairness and Equity in Housing (Apr. 11, 2022), www.hud.gov/press/press_releases_media_advisories/HUD_No_22_062 ("HUD is consulting extensively with stakeholders during its process of designing a final rule, to more comprehensively implement the AFFH requirement.").

23. *HUD's Incomplete Racial Equity Plan*, Poverty & Race Research Action Council Update (Poverty & Race Research Action Council, Washington, DC, Apr. 21, 2022). ("HUD's plan focuses on equity in procurement, increased funding for HUD's fair housing office, the racial homeownership gap, and reducing homelessness. These are all important racial equity goals, but aside from briefly mentioning the planned reinstatement of the AFFH rule, the Action Plan appeared to sidestep one of HUD's core civil rights obligations, to reduce racial segregation and promote racial integration, including in the administration of its own programs.").

24. *See* Raphael W. Bostic, Katherine O'Regan, and Patrick Pontius, with Nicholas F Kelly, *Fair Housing from the Inside Out, in* Furthering Fair Housing: Prospects for Racial Justice in America's Neighborhoods 74, 85 (Justin P. Steil, Nicholas F. Kelly, Lawrence J. Vale, and Maia S. Woluchem, eds. 2021) (emphasis in original).

embedded theory of change is to give planners a tool that they find useful and therefore adopt as a matter of routine, which is anticipated to have the long-term effect of reducing barriers to fair housing and decreasing housing segregation over decades. In Section III, drawing on HUD's theory of change, we illustrate how the AFFH rule operates as a planning rule. By contrast, an "enforcement" or "compliance" rule emphasizes a grantee's compliance or noncompliance with legal requirements and uses the federal government's enforcement power to compel state and local grantees to change their behavior.

We recognize, however, that there is middle ground on the spectrum between a planning rule and an enforcement rule. This Article explores that middle ground. Informed by the HUD's published notices, public comments, and observations from HUD insiders who worked on the Obama-era rule, this Article focuses on two potential strategic improvements to the rule: (1) increasing stakeholder understanding of the rule, and (2) increasing its enforcement elements without negating its nature as a planning rule. This Article begins by reviewing the arduous, consensus-building process of developing the original Obama-era rule. Then, with this context, this Article evaluates and offers recommendations on how HUD could accomplish these two strategic improvements.

II. HUD's "Civil War Project"

In their essay "Fair Housing from the Inside Out," a group of HUD insiders in the Obama era described the "glacial" six-year process of designing the original AFFH rule.[25] Describing the process as "consensus building of the highest order," they even gave the project a nickname to reflect the magnitude of the internal debate—"the Civil War Project"—because "even within the agency, this issue brought out great passion and opposition."[26] The complexity of the process was exacerbated by the number of HUD departments with input in the process, including Fair Housing and Equal Opportunity (FHEO), Community Planning and Development, Public and Indian Housing, Office of General Counsel, and Policy Development and Research.[27] The essay authors described several challenges that slowed the process. Two interrelated challenges that continue to undercut the rule revision process are (1) limited resources, which "foster[] a zero-sum view, wherein every dollar spent in one area is simply seen as a dollar not spent in another,"[28] and (2) the intrinsic difficulty of the task at hand—how to design a process that would address problems that "went back generations" despite that "the amount of money we controlled in this process was small and dwindling."[29]

25. Bostic et al., *supra* note 24, at 85.
26. *Id.* at 77.
27. *Id.* at 77.
28. *Id.*
29. *Id.* at 78.

III. "A Planning Tool with Some Teeth"

The first phase of building consensus was deciding what "AFFH" means—"is it a compliance or a planning process?"[30] After prolonged debate, internal stakeholders made the strategic decision to design the rule as a "planning tool with some teeth for enforcement." Once they reached that initial consensus, they built out the rule's design from there. Describing HUD's tools as a carrot and a stick, they saw the AFFH rule as HUD's primary carrot, whereas enforcement and compliance would be the stick. They saw the AFFH rule as an opportunity to "lift up the carrot to convey the agency's recognition that positive things could happen if we pursued strategies to advance fair housing and to signal that HUD wanted to help communities do that."[31] By contrast, HUD has already "devoted substantial resources to the stick side, so communities have been largely reluctant to engage in these conversations."[32] In another article, policy experts summarized HUD's planning rule design as casting "HUD as a partner, rather than as an enforcer."[33]

Ultimately, proponents of a planning rule won out. Their theory of change was that grantees would be most likely to learn and respond if they found the tool useful and came to expect that fair housing principles are a part of comprehensive planning.[34] The cycle would go like this: First, grantees would use the Assessment of Fair Housing (AFH) to identify barriers to fair housing and develop goals to overcome those barriers. Second, they would incorporate concrete strategies into their subsequent planning documents to address those AFH goals. Third, they would assess their progress in future AFHs. Finally, they would start the cycle over again. Thus, as a planning rule, the "ideal outcome" for the AFFH regulation was to create a planning "conversation" or an "incremental layer" that functioned as an invitation to discuss what was working and what was not.[35]

HUD anticipated "it might not be until the third or fourth planning cycle—perhaps as far as twenty years down the road—when some communities would start seeing the [segregation] needle really move."[36] Even if it took decades to routinize fair housing in planning—and thereby reduce

30. *Id.*

31. *Id.* at 79.

32. *Id.* at 78–79.

33. Raphael Bostic & Arthur Acolin, *The Potential for HUD's Affirmatively Furthering Fair Housing Rule to Meaningfully Increase Inclusion*, *in* A Shared Future: Fostering Communities of Inclusion in an Era of Inequality 236, 241 (Christopher Herbert, Jonathan Spader, Jennifer Molinsky & Shannon Rieger eds., 2018), www.jchs.harvard.edu/sites/default/files/A%20Shared%20Future_Final_102918.pdf (describing the benefits of positioning HUD as a partner, not an enforcer and strategic "permissiveness" in exercising jurisdiction in early rule implementation).

34. Bostic et al., *supra* note 24, at 78–79.

35. *Id.* at 79.

36. *Id.* at 79–80.

segregation—HUD reasoned that "communities would gain a very clear, transparent entry into what had been a hidden process bogged down by the baffling language of consultants during the [Analysis of Impediments or "AI"] era."[37] The final rule HUD promulgated in 2015 largely reflected this narrative of HUD's internal thinking. In particular, HUD's responses to multiple public comments emphasize that the regulation is a planning rule, not an enforcement rule.[38]

As an illustration of how the AFFH rule operates as a planning rule, consider a large metropolitan municipal grantee. In preparation of its first AFH, the city analyzes data supplied by HUD and supplemental data the grantee identifies independently. In its AFH, the city identifies several barriers to fair housing, including land use policies that make it difficult to build affordable housing in certain predominantly white areas of the city.[39] To address this barrier, it identifies a goal of removing barriers to building affordable housing "by streamlining the development process, including in high-opportunity neighborhoods to decrease segregation and increase integration of protected classes (e.g., people with disabilities)."[40] In the drafting process, the city consults HUD for technical assistance, which offers material improvements to help the city to add specific examples of how it will accomplish this goal. In response, the city includes in its final AFH that it will update the relevant community plans by a specified date before its next AFH is due to HUD to "streamline" approvals of certain developments, remove barriers in city-wide land use policies, and adopt a "Value Capture Ordinance," among other specific "metrics, milestones, timeframe[s] for achievement."[41] After it completes its AFH the city then incorporates these fair housing goals into its Comprehensive Plan and the public housing authority incorporates them into its PHA Plan, as required by the AFFH regulation. When the city's subsequent AFH is due in approximately five years, the city reviews the previously identified barriers to fair housing and evaluates its progress in accomplishing the fair housing goals it established in the preceding AFH.[42] When it submits its new AFH

37. *Id.* at 80.

38. *See, e.g.*, Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272, 42,313 (July 16, 2015).

39. For an example, see Assessment of Fair Housing Plan 2018-2023, City of Los Angeles & Hous. Authority of City of Los Angeles (2018), at 383, 388–89 https://housing.lacity.org/wp-content/uploads/2020/05/city_of_la_afh_plan.pdf?download=1 (Fair Housing Goals and Priorities 1.4) (removing barriers to producing affordable housing by streamlining the development process and updating all 35 community plans by 2024 to focus on zoning reform that removes land use policies that operate as barriers to building affordable housing).

40. *See id.* at 383. This example uses language from the City of Los Angeles and Housing Authority of City of Los Angeles's AFH from 2018.

41. *See id.*

42. *See, e.g.*, Nicholas F. Kelly, Maia S. Woluchem, Reed Jordan, and Justin P. Steil, The Promise Fulfilled?, *in* Furthering Fair Housing: Prospects for Racial Justice in

to HUD, HUD reviews the city's progress, evaluating whether the city has complied with its duty to affirmatively further fair housing as described in the rule. Ultimately, at a minimum—and regardless of whether HUD takes any enforcement action against the city for any reason—the rule's architects anticipated that if the tool is useful to city planners, the planners will repeat this process, thereby deepening their commitment to fair housing and increasing the likelihood that they will see positive results through achieving their stated goals. In other words, planners will continue to identify barriers to fair housing, propose policy goals, incorporate those fair housing goals into their other routine planning processes like their Consolidated Plans, take steps toward achieving those goals, and essentially engage in affirmatively furthering fair housing as a day-to-day practice.[43]

IV. A Rational Choice

HUD's approach has mystified some fair housing advocates because it seems to fall short of the rule's full potential and HUD's authority.[44] But there is another way to look at it. HUD simply made a rational—and probably politically expedient—choice among its options. It weighed a number of risks associated with an "enforcement" rule. Among the risks were local backlash (with grantees fighting HUD at each step or opting out of HUD funding altogether), stretching HUD's limited capacity too thin, and issuing a hyper-partisan rule that would be ignored or repealed by a future administration. It is also possible that HUD had misgivings about the full extent of its legal authority. Measured against those risks, HUD gambled that a planning rule stood a better chance of reducing segregation in the long term. It therefore cast the rule as a teaching tool—a way to introduce communities to new data and a process by which that data could reveal barriers to housing choice in their neighborhoods. Ultimately, HUD determined that a planning rule had a chance of shaping local decisionmaking

America's Neighborhoods 93, 99–102 (Justin P. Steil, Nicholas F. Kelly, Lawrence J. Vale, and Maia S. Woluchem, eds. 2021) (discussing the measurability of AFH metrics).

43. A fundamental challenge to this long-term approach is that it will take successive presidential administrations to enforce a planning-focused rule. In other words, if the AFFH rule continues to change between successive administrations, as it did between the Obama and Trump administrations, grantees may be unlikely to comply. As long as "AFFH" is defined in the regulation, as opposed to the statute, this risk remains. On how Congress could amend the Fair Housing Act to remedy problem, see Heather R. Abraham, *Fair Housing's Third Act: American Tragedy or Triumph?*, 39 Yale L. & Pol'y Rev. 1, 51–56 (2021).

44. *See, e.g.*, *id.* ("Commenters stated that, based on the proposed rule, program participants are their own monitors, and that is the case under the current AI system—program participants essentially operate in a system of voluntary compliance with their duty to affirmatively further fair housing and that HUD's rule does nothing to change this system by not including concrete enforcement mechanisms in the rule. The commenters stated that transparent enforcement and true accountability is paramount to successful rules and regulations.").

in the long term by cultivating local buy-in, as opposed to using an aggressive enforcement approach that would engender public revolt, similar to HUD Secretary George Romney's approach in the early 1970s.[45]

At a minimum, we must acknowledge that HUD made a rational choice, and one that was "accessible" from its institutional posture.[46] The decision is especially sensible if HUD's planning-rule approach is combined with other enticing carrots, which seem to be the Biden approach. In its FY2023 budget proposal, for instance, the Biden administration proposed $10 billion in new funding to incentivize local and state governments to remove regulatory barriers to building affordable housing, with a particular focus on local regulations and zoning policies.[47] In addition to reducing transactional costs to increase housing supply, giving communities new funding to overhaul land use policies has significant fair housing benefits.[48] Zoning laws, particularly single-family zoning, minimum lot sizes, and parking requirements for multifamily buildings, operate as barriers to low-income people and people of color moving into otherwise predominantly white communities with better amenities like well-funded schools.[49] Indeed,

45. *See, e.g.*, Charles M. Lamb, Housing Segregation in Suburban America Since 1960: Presidential and Judicial Politics 26–35 (2005) (describing the Open Communities program under HUD Secretary Romney). It is noteworthy that HUD nevertheless experienced public backlash to its more modest, planning-focused approach. This raises questions about whether such backlash was unavoidable, and whether that unavoidable backlash cautions in favor of a more modest approach, or whether its inevitability means HUD should take care not to negotiate against itself.

46. *See generally* Ian S. Lustick et al., *Institutional Rigidity and Evolutionary Theory: Trapped on a Local Maximum*, 2 Cliodynamics 2, 5 (2011) ("The idea of 'accessibility' here reflects whatever laws are governing the behavior of relevant entities so that once relevant elements are configured in a particular way, a subset of possible successor states exists that includes the state that actually materializes. As a social or political institution or practice changes over time, slowly or rapidly, it can be imagined to be exploring a particular, and, in all likelihood, relatively small, portion of the state space it inhabits.").

47. *See* Fact Sheet: The American Jobs Plan, White House (Mar. 31, 2021), www.whitehouse.gov/briefing-room/statements-releases/2021/03/31/fact-sheet-the-american-jobs-plan. The Biden administration has also released a Housing Supply Action Plan to incentivize the building of more affordable housing, which proposes a system to "reward jurisdictions that have reformed zoning and land-use policies" by assigning higher scores in some federal grant processes. See President Biden Announces New Actions to Ease the Burden of Housing Costs, White House (May 16, 2022), www.whitehouse.gov/briefing-room/statements-releases/2022/05/16/president-biden-announces-new-actions-to-ease-the-burden-of-housing-costs.

48. *Id.*

49. *See id.*; *see also* Kery Murakami, *Biden Is Doubling Down on a Push to Roll Back Single-Family Zoning Laws*, Route Fifty (Apr. 12, 2022), https://www.route-fifty.com/infrastructure/2022/04/bidens-10-billion-proposal-ramps-equity-push-change-neighborhoods-cities/365581 (describing how revising old zoning codes can be resource-intensive, but federal funds "can incentivize cities like that to undertake a wholesale rewrite"). On zoning as a barrier to fair housing, see generally The Case Against Restrictive

researchers studying the effects of the Obama-era AFFH regulation have focused on zoning reform as one metric of the rule's success.[50]

V. The Path Forward as a Planning Rule

After vigorous debate, HUD chose a planning rule. Although relatively little has changed in HUD's risk calculation, HUD appears to be struggling to release a replacement rule. Publicly, it has announced its intention to create a rule that modifies the Obama-era rule in two ways: reducing the burden on grantees and achieving "material, positive change" that, presumably, would reduce segregation over time.[51]

Assuming that HUD stays the course, we suggest that HUD should focus on improving two elements when it promulgates a final AFFH rule. First, HUD should make the regulation easier for grantees and the broader public to understand. Second, HUD should enhance the rule's compliance and deterrence features without disturbing the rule's underlying character as a planning rule.

A. Stakeholder Comprehension

HUD has underscored the importance of an AFFH regulation that makes sense to local officials who will be responsible for following it. Grantees should understand their obligations if they are going to satisfy them, but the principle goes beyond this consideration. Understanding is likely to improve a jurisdiction's AFFH learning curve and employ HUD's resources more effectively. Comprehension also translates into better outcomes. The rule's ultimate goal—whether a planning rule or an enforcement rule—is reducing segregation. This section explores how HUD might improve the AFFH rule in a way that improves grantee comprehension, including residents in the grantee's region. HUD should take two key steps to improve grantee comprehension in its forthcoming rule. First, HUD should streamline the Assessment Tool and related guidance. Second, it should encourage and assist grantees to engage the public more effectively with the goal of increasing stakeholder comprehension and effective implementation.

There are at least three layers to a grantee's understanding of the rule. First, it must understand its overarching legal obligations and responsibilities—*e.g.*, what obligations come with HUD funding and how are those duties assessed? Second, grantees must understand the AFH planning process itself—*e.g.*, the concrete steps, how to use the data, and how to get technical assistance from HUD. Third, grantees must understand why

Land Use and Zoning, NYU Furman Center (Jan. 2022), https://furmancenter.org/files/publications/The_Case_Against_Restrictive_Land_Use_and_Zoning_Final.pdf.

50. *See, e.g.*, Nicholas F. Kelly, Maia S. Woluchem, Reed Jordan, and Justin P. Steil, *supra* note 42, at 99–102.

51. 86 Fed. Reg. at 30,789.

affirmatively furthering fair housing matters, at least to some extent. This means a grantee should be able to understand how the AFH process can translate into positive benefits in its community. The frustrating truth, however, is that HUD does not know the answers to these questions at this early stage. HUD can articulate a grantee's basic legal obligations, but it cannot necessarily explain how a grantee will be assessed. This will take time. HUD has more control over the concrete elements of the planning process, which it can streamline and simplify in response to public input. Where HUD does not have clear answers, it seems to have leaned into the ambiguity to avoid scaring jurisdictions away from tough conversations.[52] This is the answer that HUD should continue to embrace, at least in the early life of the rule.

Another wrinkle is that the rule has more than one target audience. These audiences include government officials like local planners, consultants, local residents, and HUD employees. Some jurisdictions have their own planners and attorneys with a more sophisticated understanding of the planning process and grantee legal obligations. Some jurisdictions will complete fair housing planning in-house with technical assistance from HUD, whereas other grantees may hire consultants. Beyond grantees, other stakeholders need to understand the fundamental concepts of the rule, among them community members who could benefit from effective AFFH planning. Additionally, and often overlooked, are federal technocrats like HUD employees. The rule needs to be user-friendly enough that HUD employees can internalize and communicate the requirements to provide technical assistance that invites grantees into conversation, rather than isolating or threatening them.[53]

Accordingly, we make the following recommendations:

Streamlining the Assessment Tool. First, HUD should streamline the Assessment Tool[54] and related guidance. This topic has dominated the AFFH conversation in recent years, as the initial cohort completed

52. *See, e.g.*, Raphael Bostic & Arthur Acolin, *The Potential for HUD's Affirmatively Furthering Fair Housing Rule to Meaningfully Increase Inclusion*, *in* A Shared Future, *supra* note 33, at 236 (describing the benefits of positioning HUD as a partner, not an enforcer, and strategic "permissiveness" in exercising jurisdiction in early rule implementation).

53. *See, e.g.*, *id.* ("Few jurisdictions cherish the opportunity to engage in fair housing issues. In part, this is because their only experiences with fair housing involve threats of litigation or actual lawsuits. As a consequence, there is distressingly little proactive pursuit of fair housing strategies . . . .").

54. "The Assessment Tool is a series of questions designed to help local governments [or other user] identify racially and ethnically concentrated areas of poverty, patterns of integration and segregation, disparities in access to opportunity, and disproportionate housing needs." Nat'l Low Income Hous. Coal., HUD Publishes Final AFFH Assessment Tool, and Other AFFH Resources (Jan. 11, 2016), www.nlihc.org/resource/hud-publishes-final-affh-assessment-tool-and-other-affh-resources; *see also* U.S. Dep't Hous. & Urb. Dev., Affirmatively Furthering Fair Housing, www.hud.gov/AFFH (last visited

Assessments of Fair Housing (AFH). Commenters from fair housing advocates to city planners to AFFH consultants have offered HUD a variety of suggestions for ways to streamline and shorten the Assessment Tool without undermining the quality of the ultimate AFH.[55] Rather than repeating commenter suggestions, this section looks at the purpose behind these suggestions—what do stakeholders need to understand and why—as this role informs priorities.

In 2021, HUD gathered additional public comment at listening sessions.[56] It heard from people and organizations with highly divergent views on the federal government's role in local planning. Commenters found common ground on the need to revise the Assessment Tool itself to make it less redundant and more user friendly while producing a better product. On reducing redundancy, commenters explained that the template should streamline general narrative descriptions of data, which tended to be duplicative, and reduce the frequency with which grantees were asked to describe data and existing policies.[57] For example, the *Guidebook* describes redundant analysis of each contributing factor after each data section, whereas each factor could be discussed once by explaining how it contributes to the fair housing impediments at issue.[58]

Commenters offered several promising ideas for improving outcomes. For instance, to help grantees more effectively identify specific targeted goals and actions, HUD should restructure the "contributing factors" to segregation to encourage grantees to draw connections between specific policies and practices that reinforce contributing factors. Relatedly, HUD should ask grantees to identify existing policies and practices that could be used to improve contributing factors. For example, a jurisdiction may not have a fair housing law prohibiting source of income discrimination, or, it may have passed a law five years ago but not invested sufficient resources to train and monitor landlords on voucher discrimination or hired staff to implement and enforce the law. Requiring grantees to draw tighter connections between contributing factors and policies helps with impediment identification and specific goals and metrics to overcome those impediments.

Public Engagement. HUD should also take steps to improve public understanding of the AFFH rule. If HUD helps grantees to engage the public more effectively, it could both improve the information the grantee

July 11, 2022) (providing links to three Assessment Tools, one for local governments, one for public housing agencies, and one for "states and insular areas.").

55. *See, e.g.*, Reviving and Improving HUD's Affirmatively Furthering Fair Housing Regulation: A Practice-Based Roadmap, Poverty & Race Research Action Council (Dec. 2020), https://prrac.org/pdf/improving-affh-roadmap.pdf.

56. *See supra* note 21.

57. Public Comments, HUD Listening Session (Oct. 18, 2021, Nov. 8, 2021) (notes on file with author).

58. *Id.*

gathers—from resident needs to fresh ideas for achieving fair housing goals—and to help educate the public on the purpose of the AFFH rule. Why does this matter? At a minimum, the public can contribute better and more useful information if it understands the purpose of fair housing planning. However, it is also a critical accountability mechanism because the AFFH rule contemplates a highly decentralized planning process that varies widely from one community to another.[59]

Local decisionmakers may seek to avoid public scrutiny. However, HUD can anticipate this concern, framing its guidance as a service to local decisionmakers to prepare for and adapt its practices to gather and distill public engagement in a meaningful way. The focus must be on the value of public input, even if input generates tension. Tension in public engagement most often signals a lack of clarity. Accessible public fair housing education can help to reduce tension, inviting democratic exploration and participation. Too often, preference for conflict avoidance in planning works to mask underlying problems, the neglect of which produces less efficacious strategies and recommendations. By contrast, anticipating and embracing tension frequently unearths actionable information.[60]

B. Enhancing Enforcement

Another difficult question is how to enhance enforcement without negating the rule's emphasis on planning, procedure, and local decisionmaking. Commenters have offered several recommendations to give the AFFH rule more teeth.[61] During HUD listening sessions, fair housing advocates promoted some foundational requirements that were hallmarks of the Obama-era rule, designed to improve the weak Analysis of Impediments (AI) process. Among these were the basic requirement that grantees submit

59. On how effective public engagement can reduce the "Not in My Backyard" (NIMBY) phenomenon, see generally Peter Salsich, Jr., *Affordable Housing: Can Nimbyism Be Transformed into Okimbyism*, 19 St. Louis Univ. Pub. L. Rev. 453 (2000) (describing efforts "to overcome barriers to [building affordable] housing while still retaining the family-oriented status of their land use policies," and drawing on case studies of the Montgomery County, Maryland, inclusionary zoning ordinance, the Santa Fe Community Housing Trust, the California mandatory planning statute, and the "dialogue between the Building Better Communities Network and the National League of Cities").

At the same time, we recognize that public engagement can undermine progress toward racial equity, like thwarting affordable housing development designed to reduce residential segregation. For more on how public engagement can contribute to building racial equity, see Katherine Levine Einstein and Maxwell Palmer, Representation in the Housing Process: Best Practices for Improving Racial Equity (June 2022), www.tbf.org/-/media/tbf/reports-and-covers/2022/june/final-representation-in-the-housing-process-report-20220615.pdf.

60. *See generally* Ted J. Rau & Jerry Koch-Gonzalez, Many Voices One Song: Shared Power with Sociocracy (2018).

61. *See, e.g.*, Affirmatively Furthering Fair Housing, 80 Fed. Reg. at 42,278–42,347 (summarizing public comments).

plans to HUD for review at regular intervals (prior to the Obama rule, AIs were not submitted to HUD), that deadlines be staggered to avoid a deluge of submissions that might overwhelm HUD staff, and that HUD increase hiring and staff training to improve its capacity to provide technical assistance as well as monitoring. The majority of comments, however, were directed at procedures to improve the effectiveness of the Obama-era rule, such as requiring grantees to submit annual updates on their progress. This section considers three enforcement-related recommendations, which HUD can implement without disturbing the regulation's underlying character as a "planning rule." The three suggestions are (1) random and predictive audits, (2) a public complaint process, and (3) incremental sanctions for noncompliance.

Random and Predictive Audits. A recurring suggestion is random, and even predictive or weighted, audits. Like predictive searching, predictive audits would target fact patterns or other circumstances that present the greatest risk factors in undermining the AFFH planning process. Risk factors could include a jurisdiction's demographic patterns, such as unusually high residential segregation or frequent fair housing complaints or litigation.[62] Commenters contend that audits would supplement and improve HUD's internal review capacity.[63] In 2015, in response to a variety of com-

62. *See, e.g.*, Reforming HUD's Regulations to Affirmatively Further Fair Housing, The Opportunity Agenda 14 (Mar. 2010), https://opportunityagenda.org/sites/default/files/2017-03/2010.03ReformingHUDRegulations.pdf (explaining that HUD should target jurisdictions with three attributes: "(a) significant levels of demographic segregation or exclusivity; (b) significant barriers to fair housing choice (like exclusionary zoning or a lack of affordable housing; and/or (c) a history of fair housing complaints or noncompliance.") [hereinafter Opportunity Agenda]; *see also id.* at 14–15 (discussing "post-approval investigations").

63. *See, e.g.*, *id.* at 3 (recommending "a rigorous system of periodic, unannounced audits of a subset of applicants and recipients to be chosen through random selection and other factors"); Thomas Silverstein, Lawyers' Committee for Civil Rights Under Law, Comments at HUD Listening Session (Oct. 18, 2021) (notes on file with author); Affirmatively Furthering Fair Housing, 80 Fed. Reg. at 42,313 (July 16, 2015) (summarizing public comments suggesting that HUD build in "a real auditing function, not unlike the Internal Revenue Service . . . . [S]ome taxpayers will meet their obligations because it would never occur to them not to, while others are committed to evading their obligations unless and until caught.").

In its Equity Action Plan, HUD emphasizes its effort to increase its staffing levels. Equity Action Plan, *supra* note 3, at 11. ("As aggressive measures are administered to increase FTEs, FHEO will use benchmarks and track its hiring rates. FHEO also will institute measures to increase retention rates. The capacity to pursue Secretary-initiated complaints, as measured through staffing and resources metrics, is another important indicator of HUD's ability to address discriminatory activities at a larger level. For purposes of implementing the AFFH Interim Final Rule, HUD will track the technical assistance provided to members of the public, HUD funded grantees, and stakeholder organizations.").

ments calling for an audit-based approach, HUD "decline[d] to add to performance review and monitoring that are already in place under the consolidation plan and applicable public housing and Section 8 regulations. . . . Procedures to receive and investigate complaints, conduct compliance reviews, challenge AFFH certifications, and obtain compliance are already available to HUD. . . ."[64] Since the original rule was short-lived, it is possible that HUD would have eventually instituted an auditing process. Regardless, HUD now has an opportunity to use audits to strengthen the planning process.

Commenters have explained that audits are especially useful because HUD expects a deluge of submissions from grantees at the same time. Even with staggered deadlines under the 2015 rule, HUD would receive plans from approximately 4,947 jurisdictions (including state and local governments and public housing authorities receiving one or more HUD grants) every five years. Audits would augment HUD's ability to monitor jurisdictions because, even if HUD cannot provide extensive feedback to every jurisdiction, HUD can rotate which jurisdictions get heightened attention. It also increases deterrence among grantees that are less inclined to engage in the AFFH planning process, thus reinforcing the underlying goals of the rule as a planning rule.

Audits are the least threatening option to enhance enforcement without undermining the rule's character as a planning rule. Audits are a tool to target jurisdictions and keep them on alert. Auditing would not alter the planning process, but would simply remind jurisdictions that HUD is likely to do exactly what the rule contemplates—review and monitor submissions and progress. Audits are unlikely to change HUD's characterization—or grantee perception—of the rule as a planning rule. HUD can justify them as verification tools, as opposed to federal meddling in the planning process. Predictive audits, in particular, have a chance to extend HUD's capacity and are consistent with HUD's message that it already has authority to monitor and audit grantees.

Complaint Process. A second recurring suggestion is a public complaint process for reporting grantees if they fail to satisfy their AFFH obligations.[65] Commenters have framed the complaint process as another way

64. 80 Fed. Reg. at 42,313.

65. *See, e.g.*, *id*. HUD summarized comments as raising concerns that the "rule inexplicably includes no provisions that set forth the right of community members to complain about compliance with the duty. . . . The commenters stated that this was especially disappointing because in recent years HUD has developed an internal process for accepting third party complaints alleging violations of the duty to affirmatively further fair housing that details how to handle and investigate such complaints."

HUD investigations during the Obama administration (under the Analysis of Impediments or "AI" rubric) illustrate the factual basis that might support a complaint. For instance, in 2014, the Metropolitan Interfaith Council on Affordable Housing (MICAH) and various municipalities in Minnesota filed a complaint with HUD, on behalf of

to supplement and enhance HUD's own internal review and monitoring. This makes particular sense in the context of a legal schema like the Fair Housing Act,[66] which places substantial responsibility on private enforcement. As such, the enforcement system that has grown out of the law is a network of nongovernmental watchdogs, many of them dedicated to monitoring specific geographies, including more notoriously exclusionary communities that have shown bad faith in complying with their fair housing obligations.

In 2015, HUD declined to create an explicit or transparent complaint process, insisting that it "maintains a complaint process of any fair housing matter," and "nothing in the proposed rule or in this final rule prohibits a member of the public from notifying or filing a complaint with HUD that a program participant has violated a statutory or regulatory requirement, whether such requirement is the duty to [AFFH] or another program requirement."[67] Similarly, HUD "decline[d] to add to performance review and monitoring that are already in place under consolidation plan and applicable public housing and Section 8 regulations." Indeed, although HUD has defended the AFFH rule as a planning rule, it has never abandoned its position that HUD has legal authority and the necessary tools to enforce the AFFH rule, presumably by denying jurisdictions federal funding if they fail to comply. As it stated in the final rule, "Procedures to receive and investigate complaints, conduct compliance reviews, challenge AFFH certifications, and obtain compliance are already available to HUD under regulations implementing the Fair Housing Act and other civil rights statutes."[68] The only enforcement-related process mentioned in the text of the now-repealed regulation is HUD's authority to challenge

themselves and a broader group of aggrieved residents, against the state of Minnesota, Minnesota Housing Finance Agency, and the Metropolitan Council of the Twin Cities. *See* MICAH, MICAH Fair Housing Complaints to HUD (2020), https://www.micah.org/hud-complaint. In 2015, MICAH and three neighborhood associations filed another complaint against the cities of Minneapolis and Saint Paul. *Id.* These complaints alleged that HUD grantees "failed to comply with all of HUD's civil rights requirements, including the obligation to affirmatively further fair housing." *Id.* Specifically, the 2014 complaint alleged that the respondents took a series of government actions that had the "purpose and effect of excusing compliance with affordable housing goals by predominantly white, higher-opportunity suburbs, and prioritizing more affordable housing in communities that are already characterized by minority concentration and poverty." Administrative Complaint, MICAH v. State of Minnesota (2014), at 7, *available at* https://static1.squarespace.com/static/5852af6a579fb39b66b50478/t/5c33c456c2241be9e3375c73/1546896471300/ComplaintFinal_Filed_2014_11_10.pdf. In May 2016, HUD announced settlement agreements with the cities of Minneapolis and Saint Paul resulting from the 2015 complaint. *Id.*

66. 42 U.S.C. §§ 3601–3619.

67. 80 Fed. Reg. at 42,315.

68. 80 Fed. Reg. at 42,313.

grantee AFFH certifications, which is a cross-reference to the regulations governing Consolidated Plans and PHA plans.[69]

If HUD has plenary enforcement authority, why do advocates insist on a complaint process? The primary issue is one of public accountability and transparency. A formal AFFH complaint process would look similar to an administrative complaint for violation of the antidiscrimination provisions of the Fair Housing Act. The complainant would receive a case number, the matter could be reviewed, there would be a designated file and paper trail that could later be reviewed, and there is less likelihood that the complaint would be dismissed without due diligence. Regrettably, civil rights advocates cannot assume that federal agencies will document and investigate complaints, even under a more civil-rights-friendly administration. Fair housing advocates therefore seek at least some distinct process by which a grantee's intransigence can be documented and monitored. This is particularly true in the AFFH context, where there is not a universally recognized private cause of action against grantees to enforce their AFFH obligations. With some exceptions, advocates must rely on HUD to enforce the law against grantees.[70]

The complaint process could take many forms. During HUD listening sessions, one commenter testified that HUD should consider replicating the complaint process previously available under Section 3 of the Housing and Urban Development Act of 1968, a program that fosters local economic development and self-sufficiency by giving priority consideration to low- and very-low income persons residing in the community in which HUD

69. *See* 24 C.F.R. 5.166(b) (now repealed) ("Procedure for challenging the validity of an AFFH certification. . . . For consolidated plan program participants, HUD's challenge to the validity of an AFFH certification will be based on procedures and standards specified in 24 CFR part 91."). The relevant certifications require a grantee to confirm it "will affirmatively further fair housing, which means that it will take meaningful actions to further the goals identified in the AFH conducted in accordance with the requirements of 24 CFR 5.150 through 5.180, and that it will take no action that is materially inconsistent with its obligation to affirmatively further fair housing." 24 C.F.R. 91.255; *see also* 24 C.F.R. 903.7(o); 903.15(d).

70. For a discussion of private AFFH enforcement, see Robert G. Schwemm, *Overcoming Structural Barriers to Integrated Housing: A Back-to-the-Future Reflection on the Fair Housing Act's 'Affirmatively Further' Mandate*, 100 Ky. L.J. 125, 144 & n.115 (2012) (citing cases); see also Heather R. Abraham, *Fair Housing's Third Act: American Tragedy or Triumph?*, 39 Yale L. & Pol'y Rev. 1, 28–29 & n.105 (2020) (discussing legal theories and calling on Congress to add an explicit private cause of action in the Fair Housing Act). In 2008, a bipartisan National Commission on Fair Housing and Equal Opportunity recommended that Congress amend the Fair Housing Act to allow a private cause of action against the government and its grantees. Nat'l Comm'n on Fair Housing & Equal Opportunity, The Future of Fair Housing, 73–74 (Dec. 2008), www.nationalfairhousing.org/wp-content/uploads/2017/04/Future_of_Fair_Housing.pdf.

funds are spent.[71] Until 2020, HUD had a complaint process for public housing residents and income-qualified people who live in the relevant areas.[72] Another complaint process that could serve as a model (that is not codified) is the Rental Assistance Demonstration (RAD) external stakeholder complaint.[73] RAD is a program that allows public housing agencies and private HUD-assisted housing to "leverage Section 8 rental assistance contracts in order to raise private debt and equity for capital improvements."[74] According to HUD, the complaint process is designed for use by any RAD housing "[r]esidents and their advocates or other stakeholders."[75] HUD's complaint protocol identifies the relevant HUD office tasked with processing the complaint and states that the complainant will receive both HUD's confirmation of receipt and an explanation of the next steps in the process.[76] The protocol also describes the investigation process with specificity and unequivocally states that HUD will issue a written response to the complaint that "includes a summary of the issues, the outcome of the investigation, actions that have been taken and a description of the recommended next steps."[77] While HUD's protocol lacks deadlines and a user-friendly online complaint form, it is still better than the so-called AFFH complaint process. The AFFH complaint process is undefined and not well advertised by HUD, suggesting that HUD does not welcome AFFH complaints.[78] Like the Section 3 and RAD models, HUD should have a standard protocol for accepting, acknowledging, investigating, and issuing written responses to complaints.

71. *See* Ed Gramlich, Nat'l Low Income Housing Coalition, Comments at HUD Listening Session (Oct. 18, 2021) (notes on file with author) (discussing Section 3 complaints); *see also* Economic Opportunities for Low and Very Low Income Persons; Interim and Final Rules, 59 Fed. Reg. 33,886 (June 30, 1994) (discussing the HUD's stakeholder complaint process pursuant to Section 3 of the Housing and Community Development Act of 1992, 12 U.S.C. § 1701u; 24 C.F.R. Part 135; HUD Form 958.

72. *See* Enhancing and Streamlining the Implementation of Section 3 Requirements for Creating Economic Opportunities for Low- and Very Low-Income Persons and Eligible Businesses, 85 Fed. Reg. 61,524, 61,554, 61,567 (Sept. 29, 2020) (eliminating Complaint Form 958 and removing Part 135).

73. *See* Ed Gramlich, Nat'l Low Income Housing Coalition, Comments at HUD Listening Session (Oct. 18, 2021) (notes on file with author).

74. *See* Ed Gramlich, *Rental Assistance Demonstration*, Nat'l Low Income Housing Coal. 2021 Advocates' Guide, at 4-40 (Sept. 13, 2021), https://nlihc.org/resource/hud-posts-rad-complaint-process-residents#:~:text=HUD's%20Office%20of%20Recapitalization%20(Recap,%2DBased%20Rental%20Assistance%20(PBRA).

75. U.S. Dep't Hous. & Urb. Dev., RAD External Complaint Process (2021), *available at* www.hud.gov/sites/dfiles/Housing/documents/RAD_External_Complaint_Process_2021-09-21.pdf.

76. *Id.*

77. *Id.*

78. Past complainants have simply directed their complaints to HUD and issued public statements to draw attention to their grievances. *See, e.g.*, *supra* note 65 (MICAH complaints).

Grantees may find complaints moderately more threatening than audits. For instance, public comments suggest that some grantees are fearful of defending their planning process at any stage, responding not only to HUD but to complaints by third parties.[79] But, if we take HUD at its word, it already has a complaint process. HUD has stated that "nothing in the [AFFH rule] prohibits a member of the public from notifying or filing a complaint with HUD that a program participant has violated a statutory or regulatory requirement."[80] If so, having a more transparent complaint process would not fundamentally alter the planning rule. Accordingly, instituting a more explicit, accessible complaint process would offer HUD another tool to increase grantee engagement without undermining the rule's character as a planning rule.

Intermediate Sanctions. Finally, commenters have consistently urged HUD to adopt more explicit, incremental sanctions that illustrate the available sanctions for uncooperative grantees. Such sanctions have been a common theme of public comments, even preceding the Obama-era rule.[81] The purpose of intermediate sanctions is to take the guesswork out of the process, therefore deterring noncompliance. A spectrum of concrete and ratcheted sanctions tells jurisdictions that HUD has tools to compel compliance. It also frees HUD from its past trap of deciding between no sanctions or a "nuclear option"—denying federal funding (or perhaps clawing it back through litigation).[82] Grantees are more likely to respond if HUD

79. Some public comments in response to HUD's Notice of Proposed Rulemaking (2013) illustrate grantee concerns about the complaint process. *See, e.g.*, 80 Fed. Reg. 42,315 (July 16, 2015) (summarizing comments urging HUD not to add an appeal or complaint process for the public).

80. 80 Fed. Reg. at 42,315.

81. *See, e.g.*, The Future of Fair Housing, *supra* note 70, at 45–46 (bipartisan commission recommending sanctions to enforce the AFFH duty); 80 Fed. Reg. at 42,312–13 ("Commenters stated that HUD needs to specify that it has a range of sanctions available to use for failure to affirmatively further fair housing, including something HUD has still not done . . . which is to bring a False Claims Act claim against jurisdictions that make false or fraudulent representations"; "Other commenters recommended that HUD consider sanctions other than withholding a program participant's HUD funds if the participant is unwilling or unable to submit an acceptable AFH."); Silverstein, *supra* note 63 (proposing intermediate sanctions during HUD listening session).

82. If HUD determined that a jurisdiction falsely certified to the federal government that it had taken steps to affirmatively further fair housing, HUD may challenge the validity of the certification. *See* 24 C.F.R. § 5.166; 24 C.F.R. § 903.15 ("If HUD challenges the validity of a PHA's certification . . . HUD may . . . undertake further investigation, or pursue other remedies available under law."). One way that HUD might challenge the jurisdiction's false certification is litigation. See 80 Fed. Reg. at 42,313 (emphasizing its "authority to enforce [the AFFH] statutory obligation [under the] Fair Housing Act, title VI of the Civil Rights Act, section 504 of the Rehabilitation Act, and the Americans with Disabilities Act" and regulations). It is also possible that HUD or the Department of Justice could seek damages through the False Claims Act, 31 U.S.C. §§ 3729–3733.

has an appropriate proportional tool to compel action. Intermediate sanctions might include public letters stating the jurisdiction has failed to meet its obligations; mandatory performance plans paired with intensive technical assistance and specific deadlines; and other options. During intermediate sanctions, HUD might temporarily withhold federal funds. For instance, a policy paper by the Opportunity Agenda recommends temporarily suspending federal funding for specific projects when HUD investigates a jurisdiction.[83] Ultimately, if the grantee fails to comply with the conditions of intermediate sanctions, HUD could withhold funds entirely, or take action such as a lawsuit to claw back funds or seek damages, with interest and attorney's fees.

Unlike audits and a complaint process, intermediate sanctions go to the heart of the planning-rule-versus-enforcement-rule debate. Although sanctions are the most direct manner to force compliance, they also risk altering the rule's character as a planning rule. One framework for evaluating whether HUD should explicitly incorporate intermediate sanctions is how they would influence the majority of jurisdictions. Policy experts Raphael Bostic (also a former HUD official) and Arthur Acolin argue that HUD's planning-rule design is centered on the prevailing belief that "the vast majority of jurisdictions would try to fulfill their responsibilities in good faith."[84] This belief was born out of field-testing of the AFH rule with local government officials during its development.[85] They suggest there are three types of jurisdictions: (1) those that will embrace the rule and produce high-quality plans; (2) those that will rebuff any and all efforts to engage in the process; and (3) the vast majority that are somewhere between these extremes.[86] Most jurisdictions are likely to demonstrate an "acceptance of the need to comply with the specific requirements of the Rule to get federal funds," but also show "a lack of understanding or willingness to develop a plan to actually address the problems."[87] If HUD is correct that the majority of jurisdictions are willing to engage in good-faith planning—if given appropriate support and resources—HUD should be concerned that some sanctions could be counterproductive.

In its forthcoming rule, HUD must grapple with striking a balance: it can take some steps to broadcast to grantees that it has legal authority

83. *See, e.g.*, Opportunity Agenda, *supra* note 62, at 15, 18 (discussing withholding or temporarily suspending federal funding).

84. Raphael Bostic & Arthur Acolin, *The Potential for HUD's Affirmatively Furthering Fair Housing Rule to Meaningfully Increase Inclusion*, *in* A Shared Future, *supra* note 33, at 236, 244.

85. *Id.*

86. *Id.* at 241 (comparing this three-category framework to the four types of grantee responses predicted by Elizabeth Julian, former HUD Assistant Secretary of Fair Housing and Equal Opportunity); *see* Elizabeth Julian, *The Duty to Affirmatively Further Fair Housing: A Legal as well as Policy Imperative*, *in* A Shared Future, *supra* note 33, at 268, 272.

87. *Id.*

and tools at hand to respond swiftly to intransigence. But at what cost? If HUD is convinced that the best way to make long-term traction in its anti-segregation goals is to teach grantees how to incorporate fair housing principles in the planning process, HUD risks isolating at least some jurisdictions if it wields its stick too fervidly. Moreover, the more threatening the process, the higher the risk that a future administration would roll back the regulation. Thus, HUD should consider each sanction one by one, asking whether grantees are likely to perceive the sanction as a "verification" tool like an audit, or a coercion tool that risks undermining HUD's paradigm of "HUD as a partner, rather than as an enforcer." Ultimately, the question is to what extent HUD can take at least some steps to broadcast to grantees that it has the tools at hand to respond to grantees who do not produce adequate plans. Since HUD has designed the AFFH as a planning rule, it needs to proceed cautiously during the early years of a new rule, affirming "local primacy" and "err[ing] on the side of permissiveness" to increase grantee buy-in and build momentum.[88] It may be able to accomplish this goal with the vast majority of jurisdictions with a few intermediate sanctions, or maybe none at all.

VI. Conclusion

As HUD deliberates how best to affirmatively further fair housing at the local level, it has options. It could stay the course, issuing a planning rule that reflects its approach during the Obama administration, or it could revise the rule to emphasize enforcement. HUD's early pronouncements during the Biden administration suggest that it plans to tweak the Obama-era rule. If so, as it deliberates how to make the rule more effective as a planning rule, it can take steps to improve stakeholder understanding and add some compliance-related elements as a backstop. HUD has reason to stay the course—leaning into the procedural nature of the rule to instantiate a new fair housing mindset at the local level—but it can still improve the rule by adding specific compliance elements without undermining the rule's underlying nature as a planning rule.

88. *Id.* at 242–43 (describing local primacy and permissiveness among nine conditions that will impact the rule's success).

Don't Let the Reefer Blow the Roof Off: Challenges and Guidance Surrounding Medical Marijuana Patients in Federally Assisted Housing

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One of the most fascinating aspects of cannabis[1] law in America is that, despite marijuana being illegal at the federal level, almost every state allows for its legal use in some form or fashion. As of this writing, thirty-seven states, Washington, D.C. and four U.S. territories[2] have laws authorizing the medical use of cannabis. An additional ten states allow for low-THC medical cannabis, but these state programs are so restrictive that they are typically not considered legal medical states. This conflict raises a number of issues with respect to criminality, banking and business considerations. Layer on top of that the unique issues that have arisen since the passage of the 2018 Farm Bill, which federally legalized hemp though it comes from the same plant species as marijuana (*Cannabis sativa L.*), the

1. Cannabis encompasses both marijuana and hemp. In this article, we refer to marijuana when discussing cannabis that is above 0.3% delta-9 tetrahydrocannabinol.

2. The four U.S. territories allowing medical cannabis are Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands.

only differentiating factor—for purposes of controlled substances law criminal legality—being the level of THC concentration.

Even though the majority of states have legalized marijuana for medical use, families and individuals living in affordable housing across the nation risk losing their homes because the substance remains federally illegal, with no patient protections in places. Until this federal/state conflict is addressed, property owners—including public housing authorities—are left having to carefully navigate satisfying resident medical needs while remaining federally compliant. This article discusses state medical marijuana laws against the backdrop of federal affordable housing requirements, calls attention to the many issues surrounding this tension, and offers strategies for success going forward.

I. Cannabis Law: Rapidly Changing and Incredibly Complex

A. Federal Laws

At the federal level, marijuana is still completely illegal, save for a very limited number of registrants approved by the Drug Enforcement Administration for research purposes.[3] It is classified as a Schedule I drug, making it one of the mostly highly regulated substances in the United States—one with "no currently accepted medical use and a high potential for abuse."[4] Such drugs can only be legally possessed to conduct federally approved studies.[5] Marijuana has been classified as a Schedule I drug since the passage of the Controlled Substances Act of 1970 (CSA), despite the overwhelming amount of research showing a myriad of medical benefits, from treating seizures and chronic pain to alleviating the side effects of chemotherapy.[6] A consistent push has been made over the last few years to either legalize or decriminalize marijuana at the federal level,[7] but nothing has passed yet. Various legislative proposals to de-schedule marijuana have been offered by both Democrats[8] and Republicans,[9] including sweeping reform bill S.4591 "[t]o decriminalize

3. 21 U.S.C. § 841 (2020); U.S. Drug Enforcement Admin., Drug Scheduling, https://www.dea.gov/drug-information/drug-scheduling (last visited June 6, 2022).

4. Joanna R. Lampe, Cong. Rsch. Serv., R45948, The Controlled Substances Act (CSA): A Legal Overview for the 117th Congress (Feb. 5, 2021), *available at* https://www.everycrsreport.com/files/2021-02-05_R45948_947eb3c52b068a17dc7c223301e9d048aef26164.pdf.

5. *Id*.

6. *Id*.; Andrew J. Boyd, Medical Marijuana and Personal Autonomy, 37 J. Marshall L. Rev. 1253, 1272-1278 (2004).

7. Isack Cole, *A Brief History of the Marijuana Legalization Movement*, Greendorphin Media (Apr. 13, 2008), https://greendorphin.com/history-of-marijuana-legalization-movement.

8. Marijuana Opportunity Reinvestment and Expungement Act, H.R. 3617 117th Cong. (2022), https://www.congress.gov/bill/117th-congress/house-bill/3617 (proposing to de-schedule, decriminalize and tax cannabis, in addition to expunging prior convictions).

9. States Reform Act, H.R.5977, 117th Congress (2021), https://www.congress.gov/bill/117th-congress/house-bill/5977 (proposing to decriminalize cannabis and defer to state authority over legalization in addition to regulating and taxing it like alcohol).

and deschedule cannabis, to provide for reinvestment in certain persons adversely impacted by the War on Drugs, to provide for expungement of certain cannabis offenses, and for other purposes."[10] However, industry insiders believe that the only chance of movement this year might be in the form of piecemeal proposals such as protections for banking institutions and insurers servicing marijuana businesses that will get attached to larger bills with momentum, such as the America Competes Act.[11]

B. State Laws

Laws concerning cannabis vary from state to state. As mentioned previously, thirty-seven states have some form of a medical use program for marijuana, a number which does not take into account the additional ten states that allow low-THC/CBD medical cannabis in limited circumstances, bringing the total count to forty-seven states that recognize the medical benefits of cannabis and provide some patient access, though significantly restricted.[12] Nineteen of those states, Washington D.C., and two U.S. territories (Northern Mariana Islands and Guam) also permit and regulate adult use for nonmedical purposes (i.e., recreational use).[13] Even among the states with adult use laws, there is a wide range of policy and regulation. For example, some legislation provides for record expungement of those with prior marijuana arrests or convictions before it was legalized, while others do not act retroactively or address past convictions at all.[14] New marijuana legislation is also being passed quite frequently.[15] Voters in Mississippi passed a medical use ballot initiative in 2020, but it was subsequently overturned by the state supreme court, and then lawmakers passed legislation in early 2022. Voters in four states legalized marijuana for adult-use via ballot referendum in the 2021 election alone (Arizona, Montana, New Jersey, South Dakota), and five more states took legislative action to do the same (New Jersey, New York, Virginia, New Mexico, Connecticut). The South Dakota measure was subsequently overturned by the state supreme court. These frequent changes make cannabis law incredibly difficult to keep track of, and even more challenging to reconcile.

C. Hemp

Per the 2018 Farm Bill,[16] cannabis plants and products that come from such plants, which do not exceed 0.3% delta-9 THC, are deemed hemp and have

10. Cannabis Administration and Opportunity Act, 117th Congress (2022), https://www.congress.gov/bill/117th-congress/senate-bill/4591.

11. Kyle Jaeger, *Major Financial Institutions Push House to Approve Marijuana Banking in Defense Bill*, Marijuana Moment (July 13, 2022), https://www.marijuanamoment.net/major-financial-institutions-push-house-to-approve-marijuana-banking-in-defense-bill.

12. Nat'l Conf. of State Legislatures (May 27, 2022), https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx.

13. *Id*.

14. *Id*.

15. *Id*.

16. Hemp Production, Pub. L. No. 115-334, § 297A, 132 Stat. 4908 (2018), https://uscode.house.gov/statviewer.htm?volume=132&page=4908.

been removed from control under the federal CSA. All fifty states have followed suit, each with its own specific laws regulating hemp. Like marijuana laws, these differ from state to state. Hemp plants can often look and smell the same as marijuana plants, the only legally differentiating factor being the THC concentration level.[17] The scope of this article does not cover hemp use, but it is worth pointing out that hemp can easily be confused with marijuana but does not carry the same criminal law violation concerns, though there are still other state/federal law conflicts, including those related to food/drug and public safety regulations.

D. Federal Supremacy

The Supremacy Clause of the U.S. Constitution states the Constitution "shall be the supreme Law of the Land,"[18] so where conflict exists between federal and state law, federal law supersedes. This conflict arises frequently in the area of cannabis law, but often only in theory. In 2013, the Department of Justice released an official memorandum outlining its policy of nonenforcement concerning federal marijuana law in cases where state law permits the use of marijuana.[19] It essentially decided to allow states to regulate marijuana the way they see fit, even if their policies technically violate federal law. While the subsequent administration formally rescinded the memorandum, lack of enforcement largely remains. However, this nonenforcement becomes complicated when federal funds are brought into the picture. Programs and organizations that are federally subsidized or funded must follow federal law, even when not aligned with the laws of the state in which they are based. This article specifically delves into issues that arise with respect to federally assisted housing programs and medical cannabis use by tenants.

II. Affordable Housing Programs Come in Many Forms

There are various affordable housing programs across the country, some of which are funded directly by federal initiatives while others are financed by state and local programs and even private developers and nonprofits, some of which derive from federal funds. Often, affordable housing is funded using a combination of federal, state and local resources.[20] This article will focus on certain types of federally assisted housing programs.

17. Livvy Ashton, *Hemp vs Marijuana—Differences Between CBD from Hemp Oil and Cannabis Oil*, CFAH (Mar. 2, 2022), https://cfah.org/hemp-vs-marijuana.

18. Legal Info. Inst., Supremacy Clause: Current Doctrine, Art. VI.C2.1.1.3, https://www.law.cornell.edu/constitution-conan/article-6/clause-2/supremacy-clause-current-doctrine (last visited June 6, 2022).

19. U.S. Dep't of Justice, Justice Department Announces Update to Marijuana Enforcement Policy (Aug. 29, 2013), https://www.justice.gov/opa/pr/justice-department-announces-update-marijuana-enforcement-policy.

20. *See* U.S. Dep't of Hous. & Urb. Dev't., HOME and the Low-Income Housing Tax Credit Guidebook (2009), *available at* https://webcms.pima.gov/common/pages/UserFile.aspx?fileId=24417.

It is worth noting that housing funded by the Low-Income Housing Tax Credit (LIHTC) program is often not subject to rules that explicitly apply to other forms of federal assistance. Note, however, that LIHTC projects often benefit from additional layers of financing that will implicate the rules discussed in this article. Federally assisted housing programs are typically overseen by the U.S. Department of Housing and Urban Development (HUD), which provides federal funding to private landlords and local public housing authorities (PHAs) to operate and manage housing at the local level.[21] A brief overview of some of these programs follows.

A. Low-Income Housing Tax Credits

With more than 3.5 million affordable units built, the LIHTC program is the most used resource to develop, rehabilitate, and maintain affordable housing in the United States.[22] While most federally assisted housing programs are regulated by HUD, allocations of LIHTCs come from the Internal Revenue Service and are doled out to states based upon population. Though created by Congress, LIHTC housing is not deemed "federally assisted" in and of itself (but could fall under that category depending on other sources of funding that may be combined with the LIHTCs). The LIHTC program is often incredibly competitive for developers and provides a dollar-for-dollar federal tax liability reduction in exchange for investor equity used to fund the construction/rehabilitation of housing expressly reserved for rent to low-income tenants.[23] LIHTC housing usually takes the form of apartment complexes, but single-family rentals are also possible.[24] Each state sets its own guidelines within the federal framework, allowing states wide discretion in setting their own housing priorities and incentives.[25] LIHTC program applicants are typically private for-profit developers, but nonprofits and PHAs participate as well. In fact, the LIHTC program requires ten percent of each state's allocation to be set aside for projects owned by qualified nonprofits materially participating in their operation and development.[26] LIHTC projects owned by private entities typically have more discretion in approving tenant applicants and lease termination policies

21. U.S. Dep't of Hous. & Urb. Dev't, HUD's Public Housing Program, https://www.hud.gov/topics/rental_assistance/phprog (last visited May 19, 2022); Mass. L. Reform Inst., *Differences Between Public and Subsidized Housing*, MassLegalHelp.org (Dec. 2009), http://www.masslegalhelp.org/housing/public-subsidized-differences.

22. *Affordable Housing Credit Study*, CohnReznick (Nov. 15, 2021), https://www.cohnreznick.com/insights/affordable-housing-tax-credit-study-report-2021.

23. *See* Urban Institute & Brookings Institution, Tax Policy Center, What Is the Low-Income Housing Tax Credit and How Does It Work? (updated May 2020), https://www.taxpolicycenter.org/briefing-book/what-low-income-housing-tax-credit-and-how-does-it-work.

24. *Id*.

25. *Id*.

26. A.J. Johnson, *Nonprofit Set-Aside Issues for LIHTC Properties*, A.J. Johnson Consulting Servs., Inc. (Jan. 2, 2014), https://www.ajjcs.net/paper/main/2014/01/02

than those where ownership or funding involves PHAs or HUD. However, some households that live in LIHTC developments may also be recipients of federal housing assistance, further complicating the requirements expected of tenants and property owners.[27] When LIHTC properties or tenants also receive federal subsidies, federal laws often apply.

B. Section 8 Assistance

Colloquially known as "Section 8"—named after the section of the Housing Act of 1937 in which low-income housing support provisions were introduced—this program is the most common form of federally subsidized housing and perhaps the one that most frequently comes to mind when laypersons think of affordable housing. Section 8 housing programs have evolved over time and encompass several forms of assistance, but typically in the form of a voucher program or project-based rental assistance. Section 8 assistance allows a household to pay thirty percent of its adjusted income towards rent, with the remaining rent being subsidized by HUD.[28]

Project-based Section 8 rental assistance is a form of federal assistance tied to a multifamily property and usually operated by a private owner under contract with HUD. These housing units are rented to eligible low-income tenants earning no more than eighty percent of the area median income (AMI), with forty percent of them being reserved for those earning at or below thirty percent AMI.[29] The rent amount is set by HUD and tenants pay an income-based contribution towards it, with HUD paying the owner the difference. HUD stopped entering into new contracts with private landlords in the mid-1980s, but there are still approximately one million units existing under these project-based rental assistance contracts, which remain renewable.[30]

Section 8 housing choice vouchers are also funded by HUD, but administered by a local PHA, with the PHA paying the subsidy to the landlord. Section 8 vouchers are "tenant-based" but can also be "project-based," with tenant-based vouchers allowing low-income families to rent privately owned homes that meet program guidelines and bring the subsidy with them anywhere in the country should they move.[31] Project-based

/nonprofit-set-aside-issues-lihtc-properties/#:~:text=IRC%20%C2%A742(h)(,aside%20for%20a%20nonprofit%20pool.

27. Lauren Loney & Heather Way, *Strategies and Tools for Preserving Low Income Housing Tax Credit Properties*, 28 J. Afford. Hous. & Cmty. Dev. L. 255 (2019).

28. Ctr. on Budget & Policy Priorities, Policy Basics: Section 8 Project-Based Rental Assistance (Jan. 10, 2022), https://www.cbpp.org/research/housing/section-8-project-based-rental-assistance.

29. Maggie McCarty, Libby Perl & Katie Jones, Cong. Rsch. Serv., RL34591, Overview of Federal Housing Assistance Programs and Policy (2019), https://crsreports.congress.gov/product/pdf/RL/RL34591.

30. *Id*.

31. Ctr. on Budget & Policy Priorities, Policy Basics: Section 8 Project-Based Rental Assistance, *supra* note 28.

vouchers are instead tied to a unit in a multifamily development (either privately owned or owned by a PHA) and are not transferable with the tenant. Eligibility for Section 8 is determined by the local PHA based on income. The vast majority of housing choice vouchers (seventy-five percent) are reserved for applicants with incomes up to the poverty line or thirty percent AMI, whichever is higher, with the remainder reserved for those whose incomes do not exceed eighty percent AMI.[32]

There are also several specialized forms of Section 8 vouchers, such as tenant protection vouchers (to assist tenants being displaced from other HUD programs) and VASH vouchers (for homeless veterans suffering from mental health or substance abuse). Other Section 8 programs set income restrictions at thirty percent, fifty percent, or eighty percent AMI, in accordance with HUD requirements. Local PHAs can prioritize certain households based on extreme circumstances such as homelessness or involuntary displacement.[33] While Section 8 assistance is highly effective to mitigate housing costs, it suffers from capacity problems, with waitlist times extending up to eight years in some cases.[34]

C. Public Housing

Though public housing is not the most common form of federally subsidized housing (serving under one million households),[35] it is often incorrectly interchanged with the term "Section 8," though they are separate programs with different practical implications. Public housing developments are owned and operated by local PHAs using federal funds provided by HUD.[36] The history of public housing in America is complicated and, much like the history of cannabis prohibition, has been shaped in large part by politics of the moment, such as race and socio-economics.[37]

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32. Ctr. on Budget & Policy Priorities, Policy Basics: The Housing Choice Voucher Program (Apr. 12, 2021), https://www.cbpp.org/research/housing/the-housing-choice-voucher-program.

33. U.S. Dept. of Hous. & Urb. Dev't, Housing Choice Vouchers Fact Sheet, https://www.hud.gov/topics/housing_choice_voucher_program_section_8 (last visited May 20, 2022).

34. Sonya Acosta & Erik Gartland, *Families Wait Years for Housing Vouchers Due to Inadequate Funding*, Ctr. on Budget & Policy Priorities (July 22, 2021), https://www.cbpp.org/research/housing/families-wait-years-for-housing-vouchers-due-to-inadequate-funding.

35. Ctr. on Budget & Policy Priorities, Federal Rental Assistance Fact Sheets (Jan. 19, 2022), https://www.cbpp.org/research/housing/federal-rental-assistance-fact-sheets#US.

36. Mass. L. Reform Inst., *Differences Between Public and Subsidized Housing*, MassLegalHelp.org (Dec. 2009), http://www.masslegalhelp.org/housing/public-subsidized-differences.

37. *See A Brief Historical Overview of Affordable Rental Housing*, Nat'l Low Income Hous. Coal. 1–7 (2015), http://nlihc.org/sites/default/files/Sec1.03_Historical-Overview_2015.pdf; *see also* Sarah Simmons, *Medical Marijuana Use in Federally Subsidized Housing:*

As part of the recovery effort from the Great Depression,[38] known as the New Deal,[39] public housing was created in the 1930's[40] as a tool to boost jobs, clear slums, and improve the quality of housing that had become dilapidated.[41]

Public housing serves only eligible residents whose household income does not exceed eighty percent AMI, which varies based on location and family size.[42] At least forty percent of these units are restricted to families with incomes no more than thirty percent AMI or the poverty line, whichever is higher.[43] Tenants generally pay thirty percent of their adjusted income for rent and utilities, with the remaining costs being subsidized.[44] Individuals and families apply for assistance with their local PHA, which then determines eligibility based on income, age/disability/familial status, and citizenship. However, just because an applicant qualifies for public housing does not mean that the applicant will receive it. Households stay on public housing waitlists for a median of nine months, with at least a quarter waiting for eighteen months or more, and many waitlists are often closed to new applicants for years at a time.[45]

The Argument for Overcoming Federal Preemption, 48 Univ. Balt. L. Rev. 117, 123 (2018), https://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=2045&context=ublr.

38. The Great Depression is generally considered to be "the worst economic downturn in the history of the industrialized world," taking place during the ten-year period between 1929–1939, resulting from the stock market crash of 1929 and during which time almost half of the nation's banks failed. *Great Depression History*, History.com (2022), https://www.history.com/topics/great-depression/great-depression-history.

39. The New Deal vastly expanded the federal government's role in a myriad of industries through several initiatives aimed at restoring economic stability and providing immediate relief to everyday Americans who had suffered greatly due to the downturn of the Great Depression. *New Deal*, History.com (Oct. 5, 2021), https://www.history.com/topics/great-depression/new-deal#:~:text=The%20New%20Deal%20was%20a,to%20those%20who%20were%20suffering; *see New Deal*, Encyclopaedia Britannica, https://www.britannica.com/event/New-Deal/FDRs-Fireside-Chats-the-role-of-Eleanor-Roosevelt-and-crucial-New-Dealers (last visited May 20, 2022). Interestingly, one of the first actions taken by President Roosevelt as part of these initiatives was to end alcohol prohibition, a move subsequently made permanent through the 21st Amendment to the U.S. Constitution. *Id*.

40. 42 U.S.C. § 1437f (2020).

41. *Supra* note 37.

42. U.S. Dep't of Hous. & Urb. Dev't, HUD's Public Housing Program, https://www.hud.gov/topics/rental_assistance/phprog.

43. Ctr. on Budget & Policy Priorities, Policy Basics: Public Housing (June 16, 2021), https://www.cbpp.org/research/public-housing.

44. *Id.*

45. Nat'l Low Income Hous. Coal., Closed Waiting Lists and Long Waits Await Those Seeking Affordable Housing, According to New NLIHC Survey (Oct. 11, 2016), https://nlihc.org/news/closed-waiting-lists-and-long-waits-await-those-seeking-affordable-housing-according-new-nlihc.

Through HUD's Rental Assistance Demonstration program, introduced in 2012, a concerted effort is being made to convert public housing to Section 8 assisted projects as a method to preserve long-term affordability while incentivizing private investment to assist with rehabilitating outdated and dilapidated developments.[46]

D. Section 202 Supportive Housing for the Elderly

Created as part of the National Housing Act of 1959, the "Section 202" federal housing program is exclusively for low-income elderly households (defined as those where one or more persons are age sixty-two or older).[47] The owner (typically a nonprofit developer or a limited partnership owner with a nonprofit general partner) contracts with HUD to provide units to eligible seniors with incomes that do not exceed fifty percent AMI. This program evolved significantly since its inception and many of these contracts with HUD are governed under rules applicable at the time the development was built.[48] While HUD has not funded the construction of new developments under this program since 2011, rental assistance continues to be appropriated by Congress for those already in existence.[49]

E. Supportive Housing for Persons with Disabilities

Often referred to simply as "Section 811," the Cranston-Gonzalez National Affordable Housing Act created the Section 811 Supportive Housing for Persons with Disabilities Program in 1990 for adults with disabilities.[50] Housing assisted under this program includes group homes, independent living facilities, multifamily rentals, condominiums, and cooperative housing.[51] Similar to Section 202 assistance (from which the Section 811 concept stemmed), this program has evolved over time, with key changes enacted in 2010 as part of the Frank Melville Supportive Housing Investment Act. Developers of Section 811 units are required to provide supportive services to help the tenants live independently. Where the program used to provide grants to help fund construction, it now provides only rental assistance and is often provided to housing financed in combination with other sources of

46. U.S. Dep't of Hous. & Urb. Dev't, Rental Assistance Demonstration (RAD), https://www.hud.gov/rad (last visited June 7, 2022).

47. Maggie McCarty, Libby Perl & Katie Jones, Cong. Rsch. Serv., RL34591, Overview of Federal Housing Assistance Programs and Policy (2019), https://crsreports.congress.gov/product/pdf/RL/RL34591.

48. *Id*.

49. *Id*.

50. "Disability" is defined as "having a physical, mental, or emotional impairment that is expected to be of long-continued or indefinite duration, substantially impedes the ability to live independently, and could be improved by suitable housing; or (2) a developmental disability." 42 U.S.C. §8013(k)(2).

51. Libby Perl, Cong. Rsch. Serv., RL34728, Section 811 and Other HUD Housing Programs for Persons with Disabilities (Mar. 7, 2016), https://crsreports.congress.gov/product/pdf/download/RL/RL34728/RL34728.pdf.

funding, such as LIHTC, HOME funds, Community Development Block Grant (CDBG) funds, or other public or private sources.[52] Residents must have income that does not exceed either thirty percent AMI or fifty percent AMI (depending on the fiscal year in which the funds were appropriated), and the tenant portion of the rent is limited to the greater of thirty percent of their adjusted income or ten percent of their gross income.[53]

F. Housing for Moderate Income and Displaced Families

Commonly known as the "Section 221(d)(3) Below Market Interest Rate Program" or simply "Section 221(d)(3)" loans, this program was enacted as part of the Housing Act of 1961, codified at 12 U.S.C. §1715l. This program was designed to incentivize public developers, housing cooperatives, governmental entities, and nonprofits to create affordable housing by providing FHA-insured loans with below-market interest rates. Units financed under this program are often also layered with rental assistance from HUD provided under separate programs, and many have converted to Section 8 assistance programs. Funding for this program ended in 1968 but many of these properties are still active due to the continuation of their affordability restrictions.

G. Rental and Cooperative Housing for Lower Income Families

This program, enacted as part of the Housing and Urban Development Act of 1968, codified at 12 U.S.C. §1715z-1 and commonly referred to as "Section 236," was intended to replace the Section 221(d)(3) and Section 202 programs. Loans under the Section 236 program were made to private and nonprofit developers and subsidized by the government in a manner to effectively reduce the mortgage interest payments to not more than one percent, but was eventually cut short after President Nixon declared a moratorium on new construction of subsidized housing.[54] Like Section 221(d)(3) loans, many of these properties are still operating under their affordability restrictions and are typically layered with other forms of HUD rental assistance, and many of the original subsidies have converted to Section 8 assistance. Rent and income restrictions apply.

H. Insurance of Loans for Housing and Related Facilities for Domestic Farm Labor

Funded by the United States Department of Agriculture (USDA), Section 514 Farm Labor Housing loans are available to nonprofits, certain limited partnerships with a nonprofit general partner, Native American tribes, and governmental entities. This program was created by the Housing Act of 1949 and is codified at 42 U.S.C. §1484. Section 514 loans seek to increase

52. *Id*.

53. *Id*.

54. Libby Perl, Cong. Rsch. Serv., RL33508, Section 202 and Other HUD Rental Housing Programs for Low-Income Elderly Residents (Mar. 7, 2016), https://crsreports.congress.gov/product/pdf/download/RL/RL33508/RL33508.pdf.

housing for domestic farm laborers by incorporating below-market interest rate loans to develop or rehabilitate housing rented to farm workers and are often coupled with grants and rental assistance that layer in income and rent restrictions.[55]

I. Housing and Related Facilities for Elderly Persons and Families or Other Persons and Families of Low Income

Also created by the Housing Act of 1949, and codified 42 U.S.C. §1485, this USDA-funded housing program, referred to as "Section 515," provides long-term, low-interest rate loans to limited-profit and nonprofit developers for constructing or rehabilitating rural rental and cooperative housing for the elderly, low-income families, and persons with disabilities.[56] These loans are typically used in conjunction with the Section 521 Rental Assistance program and/or Section 8 project-based assistance to facilitate rent and income restrictions.[57]

J. Other Federally Assisted Housing

A multitude of other federal assistance housing programs exist but for purposes of what this article refers to as "federally assisted housing" the term applies only to public housing, Section 8 assistance, Section 202, Section 811, Section 221(d)(3), Section 514 and Section 515 programs. Nonetheless, all structures of federally subsidized housing incorporate certain federally mandated restrictions, which include barring drug use like medical marijuana regardless of conflicting state law.[58]

III. The Issue: Medical Marijuana Patients Face Housing Application Rejections and Evictions

The structure of federally subsidized housing in the United States remains complicated, as do the rapidly evolving laws surrounding cannabis. Intersection of the two is inevitable, as federally assisted housing is required to be operated in compliance with federal law. As part of large-scale public housing reform, the Quality Housing and Work Responsibility Act of 1998 (QHWRA) was enacted, which generally governs various aspects of HUD's public housing and tenant-based Section 8 housing assistance

55. Leslie R. Strauss, *USDA Rural Rental Housing Programs*, Nat'l Low Income Hous. Coal. (2019), https://nlihc.org/sites/default/files/AG-2019/04-13_USDA-Rural-Rental-Housing-Programs.pdf.

56. Maggie McCarty, Libby Perl & Katie Jones, Cong. Rsch. Serv., RL34591, Overview of Federal Housing Assistance Programs and Policy (2019), https://crsreports.congress.gov/product/pdf/RL/RL34591; Tadlock Cowan, Cong. Rsch. Serv., RL31837, An Overview of USDA Rural Development Programs (Feb. 10, 2016), https://crsreports.congress.gov/product/pdf/RL/RL31837/30; Strauss, *supra* note 54.

57. Tadlock Cowan, Cong. Rsch. Serv., RL31837, An Overview of USDA Rural Development Programs (Feb. 10, 2016), https://crsreports.congress.gov/product/pdf/RL/RL31837/30.

58. Simmons, *supra* note 37, at 124.

programs.[59] At that time, only California had begun to creep out of prohibition after voters approved the nation's first medical marijuana legalization law (post-prohibition) in 1996. Voters in Washington, D.C., Oregon, Alaska, Washington, and Nevada did the same in 1998, only weeks after President Clinton signed QHWRA into law. Since then, most of the rest of the states have followed suit to some degree.

QHWRA sought to reduce poverty concentration of public housing, protect housing assistance for the neediest families, support transitioning from welfare to work, raise PHA standards, revitalize aging communities funded by federal assistance, and consolidate/streamline/deregulate assistance programs to increase efficiencies.[60] Though the QHWRA generally applies to public housing and Section 8 assistance, the provisions relating to applicant screening and tenant terminations based on illegal drug use were expressly extended to the additional assistance programs described above (with the exception of LIHTC housing).[61] PHAs and other owners of federally assisted units are required to adopt policies related to the illegal use of a controlled substance. Recall that despite broad legalization in states across America, marijuana remains controlled as a Schedule 1 substance under the federal CSA. Thus, a resident in a federally assisted unit can simultaneously be authorized by the state to treat an ailment using the same substance that could be cause for eviction, and would have no protection despite the medical aspect.

A. "Illegal Drug Use" Is Treated Differently: Applicants v. Current Tenants

The QHWRA added new requirements applicable to the use of marijuana in federally assisted housing, but they impacted applicants and current tenants differently. For *applicants*, if the PHA or private landlord determines any member of the household is an illegal user of a controlled substance, such determination will bar admission to the housing:

> IN GENERAL.—Notwithstanding any other provision of law, a public housing agency or an owner of federally assisted housing, as determined by the Secretary, shall establish standards that **prohibit** admission to the program or admission to federally assisted housing for any household with a member— (A) who the public housing agency or owner determines is illegally using a controlled substance; or (B) with respect to whom the public housing agency or owner determines that it has reasonable cause to believe that such household member's illegal use (or pattern of illegal use) of a controlled substance, or abuse (or pattern of abuse) of alcohol, may interfere with the

59. U.S. Dep't of Hous. & Urb. Dev't, Public Housing Reform Overview, https://www.hud.gov/program_offices/public_indian_housing/phr/about (last visited June 7, 2022).

60. *Id*.

61. The term "federally assisted housing" is specifically defined in 42 U.S.C. § 13664 (2020).

> health, safety, or right to peaceful enjoyment of the premises by other residents (emphasis added).[62]

While this provision only applies to *applicants* for federally assisted housing (rather than current tenants), it is strict, as it completely bans admission for any marijuana use—even when the patient's medical use complies with state law. However, a subsequent provision does leave room for bureaucratic discretion when considering applicants that may have a "pattern of illegal use," as it allows for case managers to consider whether an individual has completed a treatment program and is no longer illegally using the substance.[63] The statute also leaves it up to the PHA/owner to devise its own policy for determining illegal use, the application of which is individualized and fact-specific.[64]

The law with respect to terminating the lease of a tenant already residing in federally assisted housing uses different language:

> IN GENERAL.—Notwithstanding any other provision of law, a public housing agency or an owner of federally assisted housing (as applicable), shall establish standards or lease provisions for continued assistance or occupancy in federally assisted housing **that allow the agency or owner (as applicable) to terminate** the tenancy or assistance for any household with a member— (1) who the public housing agency or owner determines is illegally using a controlled substance; (2) whose illegal use (or pattern of illegal use) of a controlled substance, or whose abuse (or pattern of abuse) of alcohol, is determined by the public housing agency or owner to interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents (emphasis added).[65]

This section, applying only to tenants already in the program, is much more lenient. It allows PHAs and owners to evict tenants who are marijuana users, but it does not require that they do so. This flexibility means that residents may be able to start using marijuana while living in public housing and have some leeway, with the level of leniency being entirely up to the PHA/owner, though the lease provisions still may not affirmatively permit such occupancy.

It is worth reiterating that these illegal drug use provisions also encompass state-legal medical marijuana, meaning that patients using it for health conditions in compliance with state law are technically prohibited from being admitted to federally assisted housing in the United States, and current tenants who become medical marijuana patients are at the mercy of the PHA or owner as to whether they can to remain in their homes. Further,

62. 42 U.S.C. § 13661 (2020).

63. Memorandum from Sandra B. Henriquez, Ass't Sec. for Public and Indian Housing, U.S. Dep't of Hous. & Urb. Dev., Medical Marijuana Use in Public Housing and Housing Choice Voucher Program (Feb. 10, 2011), https://www.hud.gov/sites/documents/MED-MARIJUANA.PDF.

64. *Id*.

65. 42 U.S.C. § 13662 (2020).

neither circumstance is protected under federal disability laws given the Schedule 1 status of marijuana. It is also worth pointing out some of these housing programs are targeted specifically towards the elderly and those with disabilities, populations which are more likely to suffer from conditions that are alleviated by the medical use of marijuana.[66]

IV. Real Life Application: Case Studies

A. California (federal court)

As of 2021, California has both an adult use and medical marijuana program.[67] Medical marijuana was first legalized in California in 1996, making it the first state to do so in the United States. Currently, Californian medical marijuana patients must be over the age of eighteen.[68] In 2018 it became legal for individuals over the age of twenty-one to purchase marijuana, though cannabis may be banned by landlords and is not permitted on federal land.

In 2016, Emma Nation of Arcata, California was threatened with eviction after a maintenance worker said they saw cannabis in her federally subsidized dwelling.[69] She fought the eviction for two years, but her landlord eventually did remove her from her housing. Nation then filed in the U.S. District Court for the Northern District of California in *Nation v. Trump,* claiming discrimination.[70] The district court dismissed the suit, and Nation appealed in the Ninth Circuit Court of Appeals, which affirmed the lower court's dismissal of the case.[71] The 2020 appellate court's affirmation of the dismissal was based on lack of jurisdiction, as the court claimed Nation had not exhausted all administrative remedies prior to pursuing court action, specifically that she should have petitioned the Drug Enforcement Administration to reclassify the federal control status of marijuana. While the court did not technically rule on the use of marijuana in federally subsidized housing in this case, even a very marijuana-friendly state like California did not protect the rights of this cannabis user to remain in affordable housing.

66. Marc E. Agronin, MD, *The Age of Cannabis Has Arrived: Issues for Older Adult*s, Psychiatric Times (Mar. 26, 2021), https://www.psychiatrictimes.com/view/age-cannabis-has-arrived-issues-older-adults.

67. Barry Weisz & Michael Rosenblum, *Cannabis State-by-State Regulations*, Thompson Coburn LLP (Aug. 2021), https://www.thompsoncoburn.com/docs/default-source/blog-documents/ranking-of-state-cannabis-regulations.pdf.

68. Cal. Dep't of Public Health, Let's Talk Cannabis: What's Legal (Nov. 17, 2017), https://www.cdph.ca.gov/Programs/DO/letstalkcannabis/Pages/legal.aspx.

69. Dan Squier, *Arcata Woman Evicted from Subsidized Housing for Using Medical Cannabis*, Eureka Times-Std. (July 14, 2018), https://www.times-standard.com/2018/07/14/arcata-woman-evicted-from-subsidized-housing-for-using-medical-cannabis.

70. Nation v. Trump, 395 F. Supp. 3d 1271 (N.D. Cal. 2018), *aff'd*, 818 F. App'x 678 (9th Cir. 2020).

71. Nation v. Trump, 818 F. App'x at 681.

B. New York (state court)

Medical marijuana has been legal in the state of New York since 2014, and an adult use program was legalized in March 2021, and is currently under development.[72] Marijuana may be smoked anywhere that tobacco smoking is allowed, though there are limits on the amount of marijuana an individual may possess at any time.[73]

In 2018, seventy-eight-year-old John Flickner of Niagara Falls, New York, was evicted after staff at his housing complex found marijuana in his home.[74] The company that owned the unit had a zero-tolerance policy for marijuana, so the find resulted in a call to the police and the beginning of eviction procedures. The police did not press charges, as Flicker was using medical marijuana (legal in the state of New York), but the developer still pushed the case to eviction court. Flickner was evicted, but after backlash the developer reassessed their marijuana policies and allowed Flickner to return to his residence.[75] Here we see a clear example of a housing provider utilizing the discretion allowed by federal law to work *with* a resident patient taking medication in compliance with state law, even though the owner initially had policies that were stricter than necessary.

C. Pennsylvania (state court)

Medical cannabis has been legal in Pennsylvania since 2016, though the state has been slow on the uptake as its program is still in the process of being fully implemented.[76] However, medical cannabis is legal there and is available to people (including individuals under the age of eighteen) who are approved by their doctor.[77]

In an egregious case, Mary Cease, a Navy veteran earning less than thirty percent AMI in Indiana County, Pennsylvania, was denied housing when she moved there in 2018 after escaping an abusive spouse.[78] Cease

72. Weisz & Rosenblum, *supra* note 67, at 11.

73. New York State, Office of Cannabis Management, Marihuana Regulation and Taxation Act (MRTA), https://cannabis.ny.gov/marihuana-regulation-and-taxation-act-mrta (last visited June 7, 2022).

74. Thomas J. Prohaska, *78-Year-Old Evicted from HUD Housing After Medical Marijuana Laws Collide*, Buffalo News (Dec. 7, 2018), https://buffalonews.com/2018/12/10/evicted-medical-marijuana-user-may-return-to-niagara-falls-apartment.

75. Thomas J. Prohaska, *Evicted Tenant Welcomed Back as Landlord Revisits Medical Marijuana Policy*, Buffalo News (Dec. 10, 2018), https://buffalonews.com/2018/12/10/evicted-medical-marijuana-user-may-return-to-niagara-falls-apartment.

76. Pa. Dep't of Health, Pennsylvania Medical Marijuana Program (2022), https://www.health.pa.gov/topics/programs/Medical%20Marijuana/Pages/Medical%20Marijuana.aspx.

77. Pa. Dep't of Health, Patients and Caregivers (2022), https://www.health.pa.gov/topics/programs/Medical%20Marijuana/Pages/Patients.aspx.

78. Sam Ruland, *'I've Always Been a Warrior': Navy Vet on Medical Marijuana Fights Over Subsidized Housing*, USAToday (Feb. 29, 2020), https://www.usatoday.com/story/news/nation/2020/02/29/medical-marijuana-user-denied-federal-housing/4911781002.

had previously received federal housing support in a different county, so it was unclear if she was being treated as a new applicant or an existing tenant, complicating her case. Cease had no prior criminal record and was transparent in her application with the local PHA about her doctor-authorized medical use of cannabis in the treatment of her post-traumatic stress disorder and chronic back pain. After years of litigation stemming from the PHA's refusal to approve her housing application, she was victorious in February 2021 when the Pennsylvania Commonwealth Court found the term "illegally using a controlled substance" to be ambiguous where the resident's use was prohibited by federal law but permitted under state law.[79] The court went on to reason that "the pertinent provisions of QHWRA are based on the obsolete and scientifically flawed premise [of the federal Controlled Substances Act] that marijuana 'has no currently accepted medical use in treatment in the United States' and that 'there is a lack of accepted safety for use of marijuana under medical supervision.'"[80] The Pennsylvania Supreme Court denied further appeal, though the housing authority could still appeal to the federal court.

D. Maryland (state court)

Marijuana has been legal for medical use in Maryland since 2013.[81] The Natalie M. Laprade Medical Cannabis Commission is responsible for implementing programs for medical cannabis to be available for qualifying patients.[82] Though not legal yet for adult-use (a ballot initiative will go before voters in 2022), Maryland no longer "punishes the possession of less than ten grams of marijuana as a crime," classifying such possession as a civil offense.[83]

In *Chateau Foghorn LP v. Hosford,* two exterminators were in Wesley Hosford's apartment in Baltimore, Maryland and saw a marijuana plant in the bathtub.[84] The exterminators reported this to the police, which resulted in a criminal citation against Hosford (for possession of less than ten grams) that was later dismissed.[85] However, Hosford's landlord subsequently served a notice of lease termination and filed an eviction for breach of the drug-free provision required under his lease.[86] Maryland law provides that a court should find in favor of the landlord only if "the court determines that the tenant breached the terms of the lease and that the breach was substantial and warrants an eviction."[87] After a local circuit court ruling in favor of the

79. Cease v. Hous. Auth. of Ind. Cnty., 247 A.3d 57, 61 (Pa. Commw. Ct.), *appeal denied*, 263 A.3d 243 (Pa. 2021).

80. *Id*.

81. Weisz & Rosenblum, *supra* note 67, at 15–16.

82. *Id*.

83. Chateau Foghorn LP v. Hosford, 168 A.3d 824 (Md. 2017).

84. *Id*. At 828.

85. *Id*.

86. *Id.* at 829.

87. *Id.* at 830 (quoting Md. Code Ann. Real Prop. § 8-402.1).

landlord and a reversal by the Court of Special Appeals appealed by the landlord, the Court of Appeals found that Congress intended for evictions to be conducted by bringing an eviction action in state or local court, subject to state landlord-tenant law.[88] It determined that the landlord's argument that Congress intended to give housing providers the power to evict tenants strictly based on prohibited conduct was erroneous.[89] It reasoned that Congress only intended to give landlords the power to bring evictions for such conduct, which would then be determined according to state law.[90] Therefore, the landlord's eviction under Maryland's "substantial and warrants an eviction" standard did not properly take into consideration all the circumstances relevant to Hosford's case, and the court ruled Hosford's eviction could not proceed without allowing recourse under state law.

E. What Can We Take from These Cases?

While the federal court case referenced above was not favorable to the tenant, the state court cases eventually worked out for the tenants, but only after drawn out battles that very likely put the tenants in the unstable and terrifying position of not having certainty as to whether they had safe, decent, and stable housing secured. While the academic exercise of reading about and analyzing various real-world examples may drum up empathy for these tenants, the level of stress, anxiety, and hopelessness that often arises when there is no assurance of having a safe place to call home cannot truly be understood without experiencing it. To think that peace of mind can be denied or taken away simply for using state-legal medication to prevent suffering from diagnosable ailments is an abomination of justice that harms the most vulnerable communities.

One of the greatest injustices in this state/federal conflict is the creation of a second class of citizens when it comes to the legal use of cannabis. The wealthy do not need to access federal assistance for housing or other basic needs such as healthcare, freeing them to follow the state laws without fear of losing their homes. Meanwhile, the poor face severe penalties for using the same medicine, creating a new world of illegality that only applies to certain sects of our population. Under current laws, cannabis is functionally illegal for low-income individuals in federally assisted housing, even in states where it is legal for others. Citizens most in need cannot benefit from certain healthcare treatment options available to those with deeper pockets, despite such activities being sanctioned by medical professionals and state law.

88. *Id.*
89. *Id.*
90. *Id.* at 856-67.

F. A Proposed Solution—The Marijuana in Federally Assisted Housing Parity Act

Recognizing the great harm the state/federal cannabis law conflicts cause to the nation's most needy citizens, Rep. Eleanor Holmes-Norton (D-DC) has three times filed legislation that would amend the QHWRA to expressly prohibit landlords and PHAs from establishing policies barring admission to federal housing programs where a household member is using medical cannabis in compliance with state law. The proposed legislation would clear the ambiguity found in the Cease case by explicitly stating the term "illegal use of a controlled substance" does not include "the use, distribution, possession, sale, or manufacture of marihuana (as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802)) that is in compliance with the law of the state in which such use, distribution, possession, sale, or manufacture takes place."[91] This bill was introduced in May 2021 but has not yet been heard in committee. Prior versions of the bill introduced in 2018 and 2019 similarly did not gain traction. There was a moment of hope earlier this year in July when two measures from Rep. Norton on an appropriations bill would have barred HUD from using its funds to enforce the federal prohibition on medical and recreational cannabis use or possession in federally assisted public housing. However, those measures were withdrawn just prior to a House Rules Committee hearing and have not shown up anywhere else, yet.[92]

G. Other Bills in the Federal Pipeline

While the bill discussed above would be the most direct solution to the disparity between federal and state cannabis law, there are a few other pieces of proposed legislation that could affect affordable housing tenants or applicants. The Fair Chance in Housing Act of 2019, proposed by then-Senator Kamala Harris (with companion bill filed in the House by Rep. Ocasio-Cortez), would amend the QHWRA to add (among other provisions) a ban on drug and alcohol testing for both applicants and current tenants, as well as provide a carve-out for low-level drug offenders, preventing them from being denied housing or evicted.[93] While this policy represents an important step that would likely help limit application rejections and evictions for marijuana use by making said use less likely to be discovered, it does not provide the legal protection that cannabis users need. Additionally, no action has been taken on this bill since it was referred to committee after

91. Marijuana in Federally Assisted Housing Parity Act of 2021, H.R. 3212, 117th Cong (1st Sess. 2021).

92. Kyle Jaeger, *House Will Not Vote on Marijuana Amendments for Veterans and Public Housing Residents After Committee Snag*, Marijuana Moment (July 18, 2022), https://www.marijuanamoment.net/house-will-not-vote-on-marijuana-amendments-for-veterans-and-public-housing-residents-after-committee-snag.

93. Fair Chance at Housing Act of 2019, S. 2076, 116th Cong (1st Sess. 2019); Fair Chance at Housing Act of 2018, H.R.3685, 116th Cong (1st Sess. 2019).

being introduced in 2019. However, several bills have been introduced in the current Congress (2021-2022) that could impact affordable housing. The Affordable HOME Act, introduced by Rep. Ilhan Omar in 2021, would protect tenants from eviction for the "manufacture of a cannabinoid extract," as long as they have the proper licensure.[94] However, while this bill might allow for tenants to make their own medical tinctures, it would also still allow eviction for the *use* of any controlled substance, which would include cannabis. Less directly related but still potentially impactful is The Eviction Prevention Act of 2021, which would provide local governments with grants to help pay for the right to counsel for low-income individuals in eviction proceedings.[95] This could give tenants evicted for cannabis use the resources to fight their evictions in court, potentially leading to a case setting precedent for ending such evictions. Also worth noting is the Housing PLUS Act of 2021, which would require that HUD not prohibit or limit funding to housing programs that require sobriety.[96] This would limit HUD's discretionary power in this issue area, though it would likely not apply to most forms of affordable housing. All of these bills are currently in the very early stages of development, so it is unclear which, if any, will be passed. What is clear is that none of them would address the issue of unfair treatment of cannabis users who need affordable housing as well as the Marijuana in Federally Assisted Housing Parity Act.

V. Other Questions Raised

A. Quality of Life: How Does the Federal/State Conflict Affect Medical Marijuana Patients?

For many patients, medical marijuana is a miracle drug that alleviates symptoms that no other medication can safely address.[97] Unfortunately, under current federal drug laws, some patients are forced to choose between their medication or their home.[98] Neither is a safe option. While federal legalization may seem like a straightforward resolution, that framework has yet to be adopted, but other steps can be taken. Under the Fair Housing Act, property owners are allowed to ask about disabilities to determine if someone is illegally using a controlled substance, but they are not required to do so.[99] In states that allow the use of medical marijuana, it

94. Affordable HOME Act, H.R. 5385, 117th Cong (1st Sess. 2021).

95. Eviction Prevention Act of 2021, H.R. 3580, 117th Cong (1st Sess. 2021).

96. Housing PLUS Act of 2021, H.R. 6018, 117th Cong (1st Sess. 2021).

97. Peter Grinspoon, *Medical Marijuana*, Harv. Health Blog (Apr. 10, 2020), https://www.health.harvard.edu/blog/medical-marijuana-2018011513085.

98. Sam Ruland, *Navy Vet Got off Opioids and onto Medical Marijuana; and Now She's Denied Federal Housing*, York Daily Rec. (Feb. 27, 2020), https://www.ydr.com/story/news/2020/02/27/medical-marijuana-navy-veteran-denied-federal-housing-pennsylvania/4787969002.

99. U.S. Dep't of Just., Joint Statement of the Department of Housing and Urban Development and the Department of Justice *Reasonable Accommodations Under the Fair*

may even be a violation of state or local disability laws to prevent someone from accessing housing due to their medication. While not asking about marijuana use is a simple step that can be taken, PHAs and property owners can also implement policies that do not permit termination based on the use of a prescription medication. Such policies would have to be carefully written so as not to completely prevent termination for marijuana use (as federal law requires some avenues for termination in this front), but well drafted policies could be a straightforward approach to provide some assurances for medical marijuana patients.

B. Negative Report Scores: What Consequences May Arise for PHAs That Are Cannabis-Friendly?

HUD conducts regular inspections of public housing projects and scores the developments in four categories, the most heavily weighted being physical condition.[100] As a part of the physical assessment, reviewers are required to rate the safety and "neighborhood environment."[101] Drug use on the property may result in negatives scoring in these categories. If a development has low scores, it may lose funding opportunities and be subject to more oversight, including more frequent inspections.[102] This loss of autonomy may prevent a PHA from providing cannabis-friendly services or policies and further limit its ability to manage its properties in a manner best suited for the local demographics. Again, it is crucial to carefully craft policies that permit tenants to have reasonable options in forms that will not disturb others and will still maintain a safe environment.

C. What About Consumable Hemp?

HUD guidance has been clear and consistent on the issue of whether allowing the use of medical marijuana is a reasonable accommodation under the Fair Housing Act, Section 504 of the Rehabilitation Act (Section 504), and Title II of the Americans with Disabilities Act (ADA), and that answer is a resounding no.[103] Interestingly, compliant consumable hemp products,

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Housing Act (May 14, 2004), https://www.justice.gov/crt/us-department-housing-and-urban-development.

100. U.S. Dep't of Hous. & Urb. Dev't, Understanding Public Housing Assessment System (PHAS), https://www.hudexchange.info/sites/onecpd/assets/File/PHA-Lead-the-Way-Understanding-PHAS.pdf#:~:text=Scores%20of%2090%20points%20or%20above%20result%20in,with%20the%20score%20for%20the%20Fiscal%20Year%20evaluated (last visited June 7, 2022).

101. U.S. Dep't of Hous. & Urb. Dev't, Public Housing Assessment System (PHAS): Physical Assessment Subsystem 4 (Feb. 18, 2011), https://www.hud.gov/sites/documents/PASS02182011.PDF.

102. Barbara Murray Grein & Stefanie L. Tate, *Monitoring by Auditors: The Case of Public Housing Authorities*, 86 Acct. Rev. 1289 (2011).

103. Memorandum from Helen R. Konovsky, General Counsel, U.S. Dep't of Hous. & Urb. Dev., Medical Use of Marijuana and Reasonable Accommodation in Federal Public and Assisted Housing (Jan. 20, 2011), https://www.fairhousingnc.org/wp-content

which may include products such as tinctures, capsules, topicals, edibles, beverages, gummies, vapes, and smokable flower, are not controlled substances under the CSA after hemp was expressly carved out from the definition of marijuana per the 2018 Farm Bill. A patient with a disability might be able to successfully challenge a failure to reasonably accommodate the use of such legal hemp products.

It is worth noting, however, that housing providers are permitted to ban all forms of smoking on their properties (even with federally legal products like tobacco and smokable hemp).[104] Private individuals may also complain about the scent or smoke of hemp affecting their living conditions. They may even sue, or otherwise draw unwanted attention to the property or its tenants. The use of other consumption methods may be more innocuous and likely not impact anyone other than the consumer. Thus, consumption methods of hemp that do not interfere with the health, safety, or peaceful enjoyment of the property by other residents might be required to be reasonably accommodated.

VI. Considerations, Guidance and Conclusions

A. Outdated Cannabis Laws Are Unjust

Centuries of racism and an intense history of racial discrimination have put minorities (Black people in particular) in a position to be disproportionately likely to require housing assistance.[105] Black people are also more likely to be arrested for marijuana use (while not being more likely to partake in cannabis consumption).[106] Additionally, while bureaucratic discretion can be useful, it also allows for human prejudices and unconscious/implicit bias to affect the housing process. All these factors mean that marijuana use can bar someone from affordable housing and can be used as a weapon against minorities to prevent them from accessing the services that they need and are entitled to. If policies were more standardized and cannabis-friendly, individuals would not be forced to rely on their own biased perceptions to decide whether to allow medical marijuana patients to stay in their homes, and possible determining factors like arrest records

/uploads/2015/01/HUD-Kanovsky-Memo-re-Medical-Marijuana-and-RA-in-Public-Assisted-Housing-1-20-2011.pdf.

104. Pub. Health L. Ctr. Marijuana in Multi-Unit Residential Settings (Aug. 2019), https://publichealthlawcenter.org/sites/default/files/resources/Marijuana-in-Multi-Unit-Residential-Setting-2019-1.pdf.

105. Habitat for Humanity, The Role of Housing Policy in Causing Our Nation's Racial Disparities—and the Role It Must Play in Solving Them (Aug. 2020), https://www.habitat.org/sites/default/files/documents/Racial-Disparities-and-Housing-Policy-.pdfhttps://www.habitat.org/sites/default/files/documents/Racial-Disparities-and-Housing-Policy-.pdf; Nat'l Low Income Hous. Coal., Racial Disparities Among Extremely Low-Income Renters (Apr. 15, 2019), https://nlihc.org/resource/racial-disparities-among-extremely-low-income-renters.

106. Racial Disparity in Marijuana Arrests, NORML (2022), https://norml.org/marijuana/fact-sheets/racial-disparity-in-marijuana-arrests.

may be less unequal in the first place. Unfortunately, despite Biden's Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government that required all federal agencies to assess areas of improvement for institutional equity, HUD has not taken note of the issues of cannabis injustice.[107] Its report on equity does not mention any form of substance use.[108]

B. Bureaucratic Discretion Can Be Used to Support Cannabis Patients

The benefits of the lax phrasing of the QHWRA are that PHAs have leeway with respect to their admission and occupancy policies. Unfortunately, most PHAs currently use this power to make them harsher on medical marijuana patients than necessary, some requiring drug testing to secure admission or immediate lease termination after discovery of any use of cannabis.[109] However, PHAs can develop policies that may provide flexibility on this issue, though they must be incredibly careful in crafting these so as not to explicitly permit federally illegal activities. Policies that aim to protect tenants and applicants using medical marijuana should be considered, including the following:

- prohibit drug testing of applicants for cannabis or altogether
- exclude medical marijuana from applicant inquiries on drug use
- provide for reasonable restrictions on smokables to reduce potential complaints from other tenants, or even implement smoke-free housing policies
- allow for discretion with respect to discovery of cannabis use by existing tenants
- prohibit lease terminations based on the use of medication authorized in accordance with state law

We urge housing providers to use discretion with respect to terminating leases and to develop practices that empower their employees to do so. While the law does require particular methods to terminate housing for users of marijuana, it does not require that this authority be acted on in every instance. PHAs must again have caution when developing and communicating these policies, and making it especially important to consult an individual with extensive knowledge of both cannabis and affordable housing law to help implement policies that will help the most people while still having the PHA operate within the law. HUD itself can also use

107. Exec. Order No. 13985, 86 FR 7009 (Jan. 25, 2021)

108. U.S. Dep't of Hous. & Urb. Dev't, Equity Action Plan (Apr. 14, 2022), https://www.hud.gov/sites/dfiles/PA/documents/HUDEquity508compliant.pdf.

109. Mariah A. Curtis, Sarah Garlington & Lisa S. Schottenfeld, *Alcohol, Drug, and Criminal History Restrictions in Public Housing*, 15 Cityscape: J. of Pol'y Dev't & Rsch. 37 (2013).

bureaucratic discretion to create equity for cannabis users. It has the power to implement new rules that address problems it finds in programs under its purview (which does not include LIHTC), as long as they do not conflict with congressional legislation. That means that any of the above policies could theoretically be implemented at the federal level without need for Congress to act, either through rulemaking or internal directives, as long as they were carefully worded and developed. However, these policies could only ever serve as workarounds until the QHWRA is changed.

C. Change Is Possible at Many Levels

As discussed, PHAs have a wide degree of discretion in drafting policies that provide flexibility. Owners of LIHTC housing and other forms of affordable housing not deemed "federally-assisted housing" have even greater freedom. Housing providers must carefully examine all of their policies to make them as effective as possible. Until state and federal laws explicitly protect cannabis patients, it is up to PHAs and private owners to adopt policies that do so.

While state policies on marijuana obviously vary from state to state, some steps can be taken to help marijuana patients access housing. The most obvious is to legalize marijuana at the state level. However, it is crucial that records are expunged as a part of the legalization process. Many individuals who have criminal convictions struggle to access social services due to minor infractions that are now no longer illegal. Harsh sentencing promoted by the War on Drugs disproportionately affected low-level offenders, who are often forced to deal with the aftermath of one arrest for years. By not expunging records, states perpetuate the inequalities in the criminal justice system and transfer them into welfare programs like affordable housing.

States and local governmentss can also put in place certain laws or ordinances that support tenant and applicant protections, such as prohibiting landlords from making certain inquiries of housing applicants about participation in the state's medical cannabis program. Another option could be to prohibit landlords from terminating tenancy based on the use of state-legal medication taken in accordance with state law. As with PHA policies, any laws, ordinances, and local policies would need to be meticulously drafted due to the inherent conflict between state and federal law.

Cannabis must be rescheduled or de-scheduled at the federal level, as the current federal-state policy gap is untenable. Citizens have overwhelmingly shown in poll after poll they support legalization, and that support continues to grow. Schedule I classification is entirely inappropriate for a substance with the myriad health benefits formally acknowledged by ninety-four percent of the states. By allowing cannabis to remain illegal, the federal government blocks low-income patients from being able to access their medicine without fear of losing their housing. While there are workarounds on an individual level, people who are taking medication that their doctor prescribed should not be forced to hope for leniency with

no guarantee of stable housing. Additionally, poor people should not be banned from using state-legal medicine that helps them just because they cannot afford unsubsidized housing. The current housing system is unjust when it comes to cannabis use, and this issue must be addressed.

Perhaps 2022 will be the year we see some forward progress with cannabis laws at the federal level in some aspect, though it is highly doubtful that comprehensive reform is likely any time soon. In the meantime, individuals and companies or organizations can advocate for the passage of the Marijuana in Federally Assisted Housing Parity Act (and cannabis reform generally) by reaching out to their legislators in Congress.

Helping the Good Cause: Building a Better Anti-Eviction Scheme Through Local Innovation

Thomas McCarthy[†]

Abstract

Cities and States across the United States are facing unprecedented housing challenges in the form of large rental price increases, short supply of housing units, and rising evictions. Policymakers are in need of new tools to address the ongoing housing crisis. In 2021, the City of Albany, NY, enacted the very first "Good Cause Eviction Law" in New York State. In doing so, Albany now prohibits evictions unless the landlord can show a "good cause," as defined in the law. As the first jurisdiction in the state to enact this law, Albany's model will be—and already has been—looked to as a guide for other municipalities and housing advocates around the state and nation. This essay compares Albany's law to other good cause laws around the United States and highlights the unique and important contributions of each of those laws. Then, the essay proposes a new model that builds on the traditional good cause scheme but offers stronger and more intuitive protections, and addresses criticisms of both traditional good cause and the new approach proposed here.

Contents

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I. Introduction

In recent years, good cause eviction statutes have garnered considerable attention across the United States, including in New York State.[1] Such measures have drawn intense support and opposition from stakeholders, including tenant advocates, progressive activists, legislators and policymakers, landlords, and scholars.[2] In the present economic and political climate, drastically rising rents and heightened interest in tenants' rights have pushed local, state, and national policymakers to consider new and different solutions to these problems, from pandemic-era rent relief funding to good cause eviction laws.

Recently, Albany, New York, became the first jurisdiction in New York State to enact a good cause eviction law,[3] setting off a cascade of good cause debates in other small upstate cities.[4] The occasion has provided a chance to examine the state of good cause laws around the country generally and the implications of Albany's new law specifically.

Good cause laws have as their premise the idea that a landlord cannot evict a tenant for no reason.[5] Under a good cause regime, a landlord must present some "good cause" that warrants the tenant's eviction, and the natural expiration of a lease term does not count as "good cause."[6] In alignment with that scheme, this essay uses "eviction" to include instances where a lease term expires and the landlord refuses to renew the lease for

1. Colin Kinniburgh, *A Wave of Upstate Cities Could Ban Eviction Without "Good Cause,"* N.Y. Focus (July 16, 2021), https://www.nysfocus.com/2021/07/16/upstate-cities-good-cause-eviction (describing the robust statewide debate in New York being had on the state and local levels).

2. *Id.*; N.Y. State Ass'n of Relators, Protect Albany Tenants, https://protectalbanytenants.com/ (last visited Dec. 17, 2021) (anti-good-cause campaign website); Florence Wagman Roisman, *The Right to Remain: Common Law Protections for Security of Tenure: An Essay in Honor of John Otis Calmore*, 86 N.C. L. Rev. 817 (2008) (arguing for a common law right to good cause); Andrea B. Carroll, *The International Trend Toward Requiring Good Cause for Tenant Eviction: Dangerous Portents for the United States?*, 38 Seton Hall L. Rev. 427 (2008) (warning against the dangers of good cause).

3. Steve Hughes, *Albany Common Council Passes 'Good Cause' Eviction Law*, Albany Times Union (July 19, 2021, 9:44 PM), https://www.timesunion.com/news/article/Albany-Common-Council-passes-good-cause-16325433.php.

4. *See* Kinniburgh, *supra* note 1.

5. Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 Cornell L. Rev. 517, 535 (1984).

6. *Id.*

whatever reason. Landlords may refuse to renew a lease for many reasons, some of which have nothing to do with the tenant. Under a good-cause regime, the landlord's attempt to evict is only permissible if the jurisdiction has enshrined the eviction's purpose as a "good cause" in its statute.[7] To some, this concept seems simple and necessary to a stable rental housing market, but to others it represents a radical departure from long-established property law values. This essay enters the debate around good cause laws with the goal of examining the mechanics of such laws, particularly by comparing the specific choices of jurisdictions that have enacted good cause statutes and offering suggestions on the most effective scheme for a good cause law.

Part II of the essay presents a historical overview of good cause legislation by showing the slow and steady innovations to the good cause scheme that different jurisdictions have implemented over the years. Part III dives deeper into the good cause laws of four jurisdictions with notable good cause laws to highlight the innovations that they have contributed to the concept. Part IV looks toward the future and recommends improvements to the good cause scheme that future jurisdictions around the country should consider implementing.

II. A Brief History of Good Cause

While there is no doubt much to say about the historical development of good cause legislation and accompanying case law, in this section I seek only to offer a brisk jaunt through the pages of history to sketch the relevant context that has led to the modern state of the law as discussed in this essay.

At common law, a landlord could evict a tenant for any reason or no reason at all.[8] Leases conveyed merely an interest in land, subject to the doctrine of *caveat lessee*, and that interest ended at the end of a lease term.[9] But by the twentieth century, leases were typically deployed as contracts to secure housing in busy industrial cities, which at that time were plagued by overcrowding, poverty, and poor living conditions.[10] This led to major reforms in landlord-tenant law, including the warranty of habitability,[11] prohibitions against retaliatory evictions, and use of statutory summary

7. *Id.*

8. *Id.* at 534 ("At common law, a landlord could evict a tenant after the lease terminated for any reason or for no reason."); *see also* Roisman, *supra* note 2, at 835 (At common law, "the well-behaved, respectful, law- and lease-abiding tenant can be evicted . . . no matter how long she has lived in the premises, how much she has improved the premises, or how attached she is to her home.").

9. Nicole Summers, *The Limits of Good Law: A Study of Housing Court Outcomes*, 87 U. Chi. L. Rev. 145, 154 (2020).

10. *Id.* at 154–55.

11. *Id.* at 155–59.

eviction proceedings.[12] This revolution in landlord-tenant law stopped short, however, of granting security of tenure when the lease comes to its natural end.[13] Thus, the common law rule persisted—and still persists today—in most American jurisdictions.[14]

But, as far back as one hundred years ago, there were glints of the promise of secure and stable housing. In 1919, Washington, D.C. enacted a right to be free from eviction despite the end of a lease in an effort to combat a declared housing emergency brought on by soldiers returning from World War I.[15] Landlords sued, and the U.S. Supreme Court upheld the law, holding that protection from eviction during an emergency was not an unconstitutional taking, provided that the law still assured landlords a reasonable rent.[16]

The next advancement of a concept resembling "good cause" came in the early 1970s, in the context of publicly subsidized housing.[17] As struggling public housing agencies attempted to expel problem tenants, courts forged a new line of cases holding that proof of good cause was required to satisfy due process before a person may be deprived of property.[18] In this context, the analysis did not yet focus on security of tenure, but instead on due process and deprivation of property. Then, in 1974, the state of New Jersey enacted a first-in-the-nation law which guaranteed protection from eviction without good cause, even if a lease had expired or never existed.[19] Applying good cause to all tenants uniformly was a sharp pivot from the traditional summary proceeding, which in nearly every state permitted no-cause evictions.[20] This development flipped the public subsidy takings analysis on its head: private landlords began to sue jurisdictions that enacted good cause laws, claiming that the law devalued their property and deprived them of beneficial uses.[21] This argument failed in New Jersey,

12. *See* Lauren A. Lindsey, *Protecting the Good-Faith Tenant: Enforcing Retaliatory Eviction Laws by Broadening the Residential Tenant's Options in Summary Eviction Courts*, 63 Okla. L. Rev. 101, 103 (2010).

13. Roisman, *supra* note 2, at 819.

14. *Id.* at 835–36.

15. Block v. Hirsh, 256 U.S. 135, 154 (1921).

16. *Id.* at 157.

17. *See* Marc Jolin, *Good Cause Eviction and the Low Income Housing Tax Credit*, 67 U. Chi. L. Rev. 521, 531–32 (2000) (describing the shift in the early 1970s from "unchecked power" of public housing authorities with respect to landlord-tenant relations to routine application of goo cause provisions to publicly subsidized housing).

18. *See* Goldberg v. Kelly, 397 U.S. 254 (1970) (good cause required for deprivation of welfare benefits); Escalera v. N.Y.C. Hous. Auth., 425 F.2d 853 (2d Cir. 1970) (procedural due process required to evict a public housing tenant); Joy v. Daniels, 479 F.2d 1236 (4th Cir. 1973) (good cause required before terminating public housing tenancy).

19. N.J. Stat. Ann. § 2A:18-61.1, .2–.3.

20. *See* Jolin, *supra* note 17, at 522 n.7 ("All but a few state landlord-tenant statutes allow no cause eviction").

21. *See* Stamboulos v. McKee, 342 A.2d 529 (N.J. Super. Ct. App. Div. 1975).

with courts holding that "[p]rivate property rights are always subject to the reasonable exercise of the state's police power"[22] and that legislatures have latitude to act in a manner they see fit to address an issue of health, safety, or general welfare.[23] Since those early cases, New Jersey courts have embraced the concept of a "perpetual tenancy."[24] New Jersey's statutory scheme and subsequent court decisions forged a path for future good cause laws to exist in a legal landscape that recognizes their legitimacy. The present moment's campaign for good cause in New York State stands on the shoulders of New Jersey's action nearly fifty years ago.

The 1980s brought another wave of good cause enactments, including the state of New Hampshire, New York City's Rent Control program, the District of Columbia, and the City of San Francisco.[25] The ensuing decades saw occasional expansions of good cause protections in places such as Oakland, California.[26] Each of these laws has, in its own way, added innovations that have contributed to the body of legislation guaranteeing good cause. Those contributions inform both the modern wave of good cause legislation and the proposal for a "next generation" law that appears in this essay.

That brings us to the modern day, in which good cause is a hotly debated policy topic amidst ongoing social reckonings, COVID-19 eviction moratoria, and a polarized political climate. Tenants are frustrated by large rental cost inflation across the United States spurred by COVID-19 market shifts;[27] meanwhile, eviction rates in 2022 were far above pre-pandemic levels in many areas as government aid was disappearing.[28] The push for

22. *Id.* at 532.

23. *Id.* A good cause eviction law could, in theory, also be sustained on the grounds that a court order and a sheriff's marshal are required to carry out an eviction, and as government actors they may not deprive a tenant of their property rights without due process, although the author knows of no case so holding. *Cf.* Shelley v. Kraemer, 334 U.S. 1 (1948).

24. *See, e.g.*, Ctr. Ave. Realty, Inc. v. Smith, 624 A.2d 996, 999 (N.J. Super. Ct. App. Div. 1993) ("The effect of [the Anti-Eviction] Act is to create a perpetual tenancy, virtually a life interest, in favor of a tenant of residential premises covered by the Act as to whom there is no statutory cause for eviction . . . . Thus, the effective term of the lease is for as long as the tenant wishes to remain, provided he [or she] pays the rent, whose increases may, moreover, be limited by rent levelling ordinances . . . .").

25. N.H. Rev. Stat. Ann. § 540:2 (1985); N.Y. Unconsol. Law § 26-408 (McKinney 1985); D.C. Code § 42-3505.01 (1985); S.F. Admin. Code § 37.9 (1980).

26. Oakland, Cal., Mun. Code § 8.22.300–.390 (2003).

27. Jon Leckie, *Rent Report May 2022*, Rent.com (May 13, 2022), https://www.rent.com/research/average-rent-price-report/ ("More than 93 percent of state-level markets have seen significant increases in rent prices for" one- and two-bedroom apartments).

28. *Id.*; Jennifer Ludden, *Eviction Filings Are Up Sharply as Pandemic Rental Aid Starts to Run Out*, NPR (May 4, 2022, 8:00 AM), https://www.npr.org/2022/05/04/1095559147/eviction-filings-are-up-sharply-as-pandemic-rental-aid-starts-to-run-out.

good cause has energized tenant advocates[29] and raised the haunches of landlords.[30] The frontier has seen a mix of successes and disappointments. In recent years, Boston and Philadelphia adopted watered-down good cause bills that fall far short of comprehensive protections,[31] and New York State endured a bitter public battle that resulted in major housing reforms, but no good cause law.[32] In contrast, San Francisco has expanded its ordinance to cover all tenancies,[33] Oregon and California have enacted joint good cause and rent-ceiling statutes,[34] and, back in New York, the City of Albany and a host of small cities are ushering in a wave of locally driven good cause ordinances.[35]

Good cause will likely continue to be a relevant and polarizing policy tool for the foreseeable future. Its history has been one of fits and starts, at times showing great promise as a solution to America's chronic eviction problem, but never garnering the attention of more radical solutions like rent control and subsidized housing programs. The remainder of this essay seeks to illuminate the various strains of good cause legislation currently operating around the United States and expand the potential of the concept from a simple protection against eviction to a guarantee of security.

29. David Brand, *NYC Tenants Reignite Push for 'Good Cause' Eviction Protections, Despite Landlord Opposition*, City Limits (N.Y.C., Oct. 20, 2021), https://citylimits.org/2021/10/20/nyc-tenants-reignite-push-for-good-cause-eviction-protections-despite-landlord-opposition/ (describing tenant urgency and landlord opposition surrounding good cause).

30. *Id.*; *see also* Ryan Vienneau, *Albany NY Good Cause Eviction Bill—Everything a Landlord Needs to Know*, Veno Properties: Prop. Mgmt. Blog (July 21, 2021), https://www.venoproperties.com/blog/albany-ny-good-cause-eviction-bill-everything-a-landlord-needs-to-know.

31. Boston City Council, *Council Passes the Jim Brooks Stabilization Act*, City of Boston (Oct. 6, 2021), https://www.boston.gov/news/council-passes-jim-brooks-stabilization-act (Boston's new law merely provides notice and informs tenants of their rights during an eviction—which do not include the right to good cause—and creates a cause of action for damages.); Julia Terruso, *Watered-down 'Good Cause' Eviction Bill Now Philly Law*, Phila. Inquirer (Jan. 22, 2019), https://www.inquirer.com/news/eviction-good-cause-philadelphia-displacement-gentrification-20190122.html (Philadelphia's law only applies to tenancies of less than one year.).

32. Luis Ferré-Sadurní et al., *Landmark Deal Reached on Rent Protections for Tenants in N.Y.*, N.Y. Times (June 11, 2019), https://www.nytimes.com/2019/06/11/nyregion/rent-protection-regulation.html.

33. San Francisco, Cal., Ordinance 296-19 (Dec. 20, 2019).

34. *See* Nat'l L. Ctr. on Homelessness & Poverty, Housing Not Handcuffs: Ending the Criminalization of Homelessness in U.S. Cities 103 (2019), https://homeslaw.org/wp-content/uploads/2019/12/HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf.

35. Kinniburgh, *supra* note 1.

III. Comparing Albany's Statute to Other Jurisdictions

With that understanding of the context of the historical and modern good cause eviction movement, I now set out to provide detail on Albany's good cause law and compare the specific provisions of Albany's law to other jurisdictions.

Numerous jurisdictions in the United States have versions of good cause laws[36] that currently cover millions of Americans.[37] Many statutes are passed at the state level, but only apply to certain types of housing, such as mobile homes[38] or rent controlled units,[39] or only to certain types of tenants, such as elderly tenants.[40] A growing number of local governments have enacted good cause at the local level.[41] In this section, I have chosen a few particularly interesting or relevant statutes to analyze in comparison to Albany's new law. New Jersey, Washington, D.C., and Oakland, California, can each provide lessons for local jurisdictions in New York and elsewhere. Each is considered in turn.

A. Albany, N.Y.

Albany's new good cause law is the first locally enacted good cause law in New York State. It represents an alternative strategy for tenant advocates who have fought, with minimal results, to enact a statewide good cause eviction bill in New York.[42] Since Albany's enactment, the cities of Hudson,

36. *See, e.g.*, N.J. Stat. Ann. § 2A:18-61.1, .2–.3 (1974) (generally applicable); N.H. Rev. Stat. Ann. § 540:2 (1985) (generally applicable); N.Y. Unconsol. Law § 26-408 (McKinney 1985) (New York Rent Control Act); D.C. Code § 42-3505.01 (2001) (generally applicable); Conn. Gen. Stat. § 21-80 (2019) (mobile homes); Fla. Stat. Ann. § 723.061 (West 1984) (mobile homes); Oakland, Cal., Mun. Code § 8.22.300–.390 (2003) (local ordinance generally applicable); Albany, N.Y., Code § 30-324–331 (2021) (local ordinance generally applicable); *see also* Carroll, *supra* note 2, at 465 n.245 (collecting statutes).

37. Federal subsidy programs subject to good cause protections alone cover over six million Americans. As of November 30, 2021, 1,586,469 million Americans are living in public housing, and another 4,424,020 people utilize some form of federal voucher. HUD Resident Characteristics Report, https://hudapps.hud.gov/public/picj2ee/Mtcsrcr?category=rcr_housesize&download=false&count=0 (last accessed Dec. 15, 2021, 10:35 AM); HUD Resident Characteristics Report, https://hudapps.hud.gov/public/picj2ee/Mtcsrcr?category=rcr_housesize&download=false&count=0 (last accessed Dec. 15, 2021, 10:40 AM). In addition, New Jersey, California, Oregon, and New Hampshire apply good cause laws to most tenants, and a large number of states apply good cause to manufactured housing tenants. *See supra* note 36.

38. *See* Carroll, *supra* note 2, at 472 n.299. *See, e.g.*, Conn. Gen. Stat. §§ 21-80, 47a-23c (2019); Fla. Stat. Ann. § 723.061.

39. *See, e.g.*, N.Y. Unconsol. Law § 26-408.

40. Conn. Gen. Stat. § 47a-23c.

41. *See, e.g.*, Just Cause for Eviction Ordinance, Oakland, Cal. Mun. Code § 8.22.300–.390 (2003); Prohibition of Eviction Without Good Cause Law, Albany, N.Y., Code § 30-324–331 (2021).

42. Kinniburgh, *supra* note 1; Gwynne Hogan, *Tenants' Hopes Dashed As 'Good Cause' Eviction Bill Meets Albany Chopping Block*, Gothamist (June 3, 2022) https://gothamist

Poughkeepsie, and Newburgh have enacted similar laws, and legislation is pending in several more.[43] Thus, Albany's law has served as a model for the rest of New York State. But recently, Albany's law was struck down in a legal challenge, raising important legal issues for the future of good cause.[44] In this section, I dive into the specific provisions of Albany's law and explain how they might work in practice.

First, it is important to understand which tenancies this law applies to. The statute provides:

> This article shall apply to all housing accommodations except:
>
> A. Owner-occupied premises with four or less units;
>
> B. Premises sublet pursuant to § 226-b of the Real Property Law or otherwise, where the sublessor seeks in good faith to recover possession of such housing accommodation for their own personal use and occupancy;
>
> C. Premises where the possession, use or occupancy of which is solely incident to employment and such employment is being lawfully terminated; and
>
> D. Premises otherwise subject to regulation of rents or evictions pursuant to state or federal law to the extent that such state or federal law requires "good cause" for termination or nonrenewal of such tenancies.[45]

From this, we see four clear exceptions. The most important one is in subsection A, exempting certain owner-occupied premises from the law. Philosophically, this exemption can be grounded in the same theory that supports good cause: all people have a personal attachment to property, and that attachment is greatest when the person occupies the property.[46]

.com/news/tenants-hopes-dashed-as-good-cause-eviction-bill-meets-albany-chopping-block (describing the political fight to enact a New York State-level good cause bill (Bill n. S3082/A5573) in 2022, which ended with no legislation being passed).

43. Roger Hannigan Gilson, *Hudson Passes 'Good Cause' Eviction Law More Radical Than Its Neighbors*, Albany Times Union (Nov. 23, 2021, 3:35 PM), https://www.timesunion.com/hudsonvalley/news/article/Hudson-passes-Good-Cause-eviction-law-more-16631032.php (City of Hudson, N.Y.); *Common Council Passes Good Cause Eviction Law*, Hudson Valley Press (Nov. 24, 2021) https://hudsonvalleypress.com/2021/11/24/common-council-passes-good-cause-eviction-legislation (City of Poughkeepsie, N.Y.); *Council Passes Good cause Eviction Law*, Hudson Valley Press (Oct. 27, 2021), https://hudsonvalleypress.com/2021/10/27/council-passes-good-cause-eviction-law (City of Newburgh, N.Y.); Jillian Forstadt, *While Ithaca Common Council Awaits AG Opinion on 'Good cause Eviction,' Residents Urge Action*, WSKG (Feb. 21, 2022), https://wskg.org/while-ithaca-common-council-awaits-ag-opinion-on-good-cause-eviction-residents-urge-action (City of Ithaca, N.Y.).

44. Pusatere v. City of Albany, Index No. 909653-21 (N.Y. Sup. Ct. June 30, 2022).

45. Albany, N.Y. Code § 30-326 (2021).

46. *See* Roisman, *supra* note 2, at 824–26.

Accordingly, the law provides a less restrictive eviction process for small owner-occupied buildings.

The second exception exempts sublets in cases in which the sublessor seeks "in good faith" to recover possession for their own use. This is a relatively small but necessary exemption. One can imagine a tenant who sublets their apartment for a few weeks or months with every intention of returning to their home, only to encounter a sublessee who refuses to leave. In this situation, both parties are tenants, and the prime tenant is attempting to return to the only home that she[47] has. Both parties likely had an understanding that the arrangement was temporary. These differences distinguish this situation from the traditional rental arrangement in which the landlord is agreeing to turn over its own property, often as a for-profit business, and the tenant acquires a vested interest in remaining there by virtue of personal attachment to property.[48] Note that good cause still applies to sublets other than ones where the original tenant seeks to recover possession.

The third exception applies only to rentals in which the housing was provided in relation to employment, and that employment has ended. The fourth exception exempts tenants who are protected from good cause through other laws. This would include public housing tenants, housing voucher recipients, and manufactured housing tenants.[49] This last exemption is in part an attempt to avoid concerns about preemption, which are discussed in Part V-B-iii. The effect of the third and fourth exemptions is to limit applicability to private market landlords renting to tenants at arm's length.

For all "housing accommodations" not exempted, the law forbids eviction, even at the end of a lease term, unless one of ten good causes arise.[50] The following is an abbreviated, plain language list of the ten causes:

1. The tenant has failed to pay rent. Nonpayment is a valid cause for eviction *unless* the court determines, pursuant to factors enumerated in the law, that nonpayment resulted from an "unconscionable" rent increase. A rent increase of more than five percent carries a rebuttable presumption that it is unconscionable.

47. Throughout this essay, the pronoun "she" refers to tenants, and the pronoun "it" to refers to landlords, except where context dictates that the landlord is a natural person, in which case "he" is used for the landlord. This usage reflects the fact that many vulnerable tenants are women (or nontraditional gender identities) and many landlords are corporate entities. *See* Gerald S. Dickinson, *Towards a New Eviction Jurisprudence*, 23 Geo. J. Poverty L. & Pol'y 1 (2015) (discussing the special burdens and challenges that households headed by women, especially women of color, face before, during, and after an eviction).

48. *See* Roisman, *supra* note 2, at 824–26.

49. *See* N.Y Real Prop. Law § 233(b).

50. Albany, N.Y. Code §§ 30-327, -328.

2. The tenant is violating a reasonable obligation of their tenancy, other than the obligation to surrender possession. This cause can only be invoked after written notice of the violation.
3. The tenant is creating a nuisance or damage to the property.
4. The property is subject to a vacate order. When the City issues an order to vacate due to dangerous conditions, an eviction may occur when absolutely necessary.
5. The tenant is using or permitting the housing accommodation to be used for an illegal purpose.
6. The tenant has unreasonably refused the landlord access to the housing accommodation for legitimate purposes, such as making necessary repairs.

7&8. The landlord seeks to use to property as their own personal residence or as the residence of a family member.

9. The landlord has sold the property on the condition that tenants be evicted before sale.[51]
10. The tenant has refused in bad faith to enter into a written lease that has been offered in good faith by the landlord. This provision comes with significant protections, in the form of affirmative defenses, to ensure this provision is not abused.[52]

These ten grounds cover a wide swath of situations that might arise in the course of a tenancy. Generally, the grounds speak to either common sense obligations of a tenancy that a tenant must follow or safeguards to protect a property owner's interests, or both. The bulk of the controversy arises from grounds (1) and (10). Both of these provide only a qualified ground for eviction because eviction is subject to the condition that the lease was not unconscionable.[53] This "unconscionability" limitation is one of the main sources of concern for landlords challenging Albany's law.[54]

51. Note that this provision was excluded from the City of Hudson's good cause after much debate and an initial veto from the mayor, who supported the revised version. *See* Gilson, *supra* note 43. Hudson is seeking to limit gentrification through good cause, and this provision was seen as a loophole that would permit wealthier buyers to displace longtime tenants. *Id.*

52. Albany, N.Y. Code § 30-328(A)(1)–(10).

53. The tenth ground provides further affirmative defenses that bar an eviction if, among other things, the lease offer was "substantially" different than the expiring lease, notice requirements were not complied with, or the landlord has refused to negotiate in good faith. *See* Albany, N.Y., Code § 30-328(A)(10).

54. *See* Complaint at 107, Pusatere v. City of Albany, No. 909653-21 (N.Y. Sup. Ct. Albany Cnty., filed on Nov. 16, 2021) [hereinafter *Pusatere* Compl.]. Landlords argue that (1) the provision is preempted because it interferes with New York's comprehensive scheme of rent regulation, and (2) it creates uncertainty at the time of the lease signing whether the lease is unconscionable or not.

Here is how it works. As an affirmative defense, the unconscionability provision is not invoked until some controversy arises. One result is that it leaves both tenant and landlord guessing as to whether it might become a viable defense should the situation arise.[55] In any case, once the defense is invoked, the court will analyze five factors to determine unconscionability.[56] The factors attempt to balance the tenant's interest in affordable and adequate housing against market forces that the landlord seeks to take advantage of. There is no bright-line test; the decision will depend on the individual tenant and the rental housing market at the time of the lease.[57] The tenant appears to have the burden of presenting evidence supporting unconscionability, which is itself a barrier to successfully asserting it.[58]

On top of this, the statute adds one more wrinkle to the unconscionability analysis. Any rent increase of more than five percent carries a presumption of unconscionability, which the landlord may rebut.[59] This showing shifts the burden back to the landlord to show that the rent increase was not "unconscionable or imposed for the purpose of circumventing the intent of this article."[60]

This scheme is designed to incentivize good faith and fair dealing, encourage written leases, and ultimately reduce evictions and displacement by limiting the power of landlords to evict unless actually warranted. Some promising data indicates that good cause laws are effective at reducing evictions.[61] As shown by the remainder of this section, other

55. A landlord can easily avoid this uncertainty by simply offering a reasonable lease and staying away from any gray area. A tenant, however, will face this question when, for example, she is considering whether to reject a lease offer and proceed as a holdover. If the lease offer is unconscionable, she is protected from eviction, but if it is not then she may be evicted under § 328(A)(10). Such uncertainty may discourage tenants from exercising their rights under the law. However, even this flaw is mitigated because the tenant believed in good faith that the lease was unconscionable, even if the judge rules otherwise, she is still protected from eviction because good cause does not arise unless the tenant "has refused *in bad faith*" to sign the renewal.

56. The factors are "(i) the rate of the increase relative to the tenant's ability to afford said increase, (ii) improvements made to the subject unit or common areas serving said unit, (iii) whether the increase" resulted from landlord retaliation tactics, "(iv) significant market changes relevant to the subject unit, and (v) the condition of the unit or common areas serving the unit." Albany, N.Y., Code § 30-328(A)(1).

57. Hudson amended the factors to reduce the relevance of the market on unconscionability. *See* Gilson, *supra* note 43.

58. Nicole Summers, *The Limits of Good Law: A Study of Housing Court Outcomes*, 87 U. Chi. L. Rev. 145, 163 (2020).

59. Albany, N.Y., Code § 30-328(A)(1).

60. *Id*.

61. Julieta Cuellar, *Effect of "Just Cause" Eviction Ordinances on Eviction in Four California Cities*, Princeton U. J. Pub. & Int'l Affs. (May 21, 2019), https://jpia.princeton.edu/news/effect-just-cause-eviction-ordinances-eviction-four-california-cities (reporting the results of a study that showed statistically significant reductions in evictions after

jurisdictions with similar goals have tailored their good cause laws to fit the specific needs of their communities.

B. New Jersey

New Jersey's good cause statute[62] was enacted as part of the Anti-Eviction Act of 1974.[63] At that time, and still today, the law was a landmark in that it applied to nearly every landlord and tenant, regardless of public subsidy, type of residence, or type of tenancy.[64] This broad applicability is similar to Albany's approach.[65] Today, New Jersey's statute lists eighteen enumerated reasons by which a landlord may lawfully evict a tenant.[66] Many of those eighteen reasons are related or duplicative: several address nonpayment of rent,[67] several address tenant behavior[68] or criminal or civil liability,[69] and several address permanent demolition or conversion of a residence.[70]

In many ways, Albany's statute is a refined, modern approach to New Jersey's pioneering model. Both statutes create a scheme that institutes a perpetual right to possession until a good cause arises, but Albany's language is more explicit about this right. New Jersey law states that "No landlord may evict or fail to renew any lease of any premises covered by . . . this act except for good cause . . . ."[71] One potential reading of this suggests something very close to an affirmative right to a renewal lease[72]—"No landlord may . . . fail to renew any lease"—but New Jersey courts have typically held that the law only creates a perpetual tenancy

four California cities enacted good cause laws, as compared to similar cities without good cause laws).

62. N.J. Stat. Ann. § 2A:18-61.1, .2–.3.

63. *See* Carroll, *supra* note 2, at 468.

64. N.J. Stat. Ann. § 2A:18-61.1 ¶ 1 (stating that no tenant "may be removed by the Superior Court from any [residence] leased for residential purposes, other than (1) owner-occupied premises with not more than two rental units or a hotel [or guesthouse with transient tenants] . . . except upon establishment of one of the following grounds as good cause").

65. *See* Albany, N.Y., Code § 30-326. New Jersey's coverage is slightly more expansive than in Albany.

66. N.J. Stat. Ann. § 2A:18-61.1(a)–(r).

67. *Id.* § 2A:18-61.1(a), (f), (j).

68. *Id.* § 2A:18-61.1(b)–(e).

69. *Id.* § 2A:18-61.1(n)–(r).

70. *Id.* § 2A:18-61.1(g)–(h), (k)–(l).

71. I*d.* § 2A:18-61.3.

72. *See* Morristown Mem'l Hosp. v. Wokem Mortg. & Realty Co., 469 A.2d 515, 515 (N.J. Super. Ct. App. Div. 1983) ("If the tenancy is encompassed by the act, then the landlord is, by virtue of N.J.S.A. 2A:18–61.3, *obliged to continuously renew the . . . leases* except for good cause as defined by N.J.S.A. 2A:18–61.1. In effect, then, the [tenant]'s lease . . . would be, at its option, virtually in perpetuity . . . .") (emphasis added); *see also* 25 Fairmount Ave., Inc. v. Stockton, 326 A.2d 106, 111 (N. J. Dist. Ct., Bergen Cnty. 1974) (explaining that the Anti-Eviction Act "requires a landlord to renew a lease for a tenant whose lease expires unless it can be established that 'good cause' sufficient to dispossess exists").

essentially on month-to-month terms.[73] New Jersey law makes no other reference to the implied right to holdover, except that, by not listing holdover as a "good cause," the New Jersey courts have derived the perpetual right to possession.[74]

Albany's law avoids such ambiguity. While it repeats similar failure-to-renew language,[75] the phrasing does not suggest an affirmative right to a renewal lease; it merely states that not renewing a lease is not a basis for removal of a tenant. Albany's law also states clearly, "No landlord shall remove a tenant from any housing accommodation, or attempt such removal or exclusion from possession, notwithstanding that the tenant has no written lease or that the lease or other rental agreement has expired or otherwise terminated, [absent good cause]."[76] This provision is essentially an affirmative right to holdover, which improves upon New Jersey's holdover rights, which are merely implied. Albany's model provides clarity and answers legal questions about evictions before they arise in practice.

A second area where Albany differs from New Jersey concerns notice provisions. Because there is little mention of notice in Albany's law, Albany appears to default to the notice required by New York State's summary eviction proceedings law.[77] Thus, once a good cause arises, the landlord can begin a proceeding and serve the tenant.[78] No notice of intention to commence an eviction proceeding is needed. In New Jersey, however, the law requires notice to the tenant before commencing a proceeding, ranging from three days' notice to three years' notice, depending on the reason for the eviction.[79] Notice provides tenants one final opportunity to cure their violation, allow some time to find new housing, and keep their record clear of evictions. Like many provisions of good cause statutes, notice provisions are highly customizable. Clear and strong notice requirements provide an important buffer between the tenant and an imminent eviction.

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73. *See, e.g.*, Newark Hous. Auth. Wynona Lipman Gardens v. Murphy, No. A-2327-17T1, 2019 WL 1111259 (N.J. Super. Ct. App. Div. Mar. 11, 2019) (citing *Morriston Mem'l Hosp.* for only the proposition that the Anti-Eviction Act "protects residential tenants from eviction absent a showing of good cause"). *But see supra id.*

74. *See, e.g.*, Ctr. Ave. Realty, Inc. v. Smith, 624 A.2d 996, 998 (N.J. Super. Ct. App. Div. 1993) ("It is well settled that when a tenancy for a stated term of a year or more is converted to a holdover month-to-month tenancy by reason of expiration of a written lease without execution of a renewal lease, the holdover tenancy is ordinarily subject to all the terms and conditions of the written lease other than its durational term.").

75. Albany, N.Y., Code § 30-327 (2021) ("No landlord shall, . . . by failure to renew any lease, . . . remove any tenant from housing accommodation except for good cause. . . .").

76. Albany, N.Y., Code § 30-328(A).

77. Albany's Code only requires notice of eviction in "compli[ance] with any and all applicable laws governing notice to tenants." *Id.* § 30-329. Another provision requires tenants be provided with written notice of lease renewal offers twice before an eviction. *Id.* § 30-328(A)(10)(a); *see also* N.Y. Real Prop. Acts. art. 7.

78. *See* N.Y. Real Prop. Acts. § 731.

79. *See* N.J. Stat. Ann. § 2A:18-61.2.

C. Washington, D.C.

Washington, D.C.'s eviction law[80] shares many characteristics of the New Jersey and Albany laws. But it is unique among the statutes discussed in this essay for two important reasons. First, it is applied uniformly to all tenants and does not exempt small buildings or landlords from coverage, as do Albany and New Jersey.[81] Second, and most importantly, is that, in D.C., "good cause" is not merely an additional statute tacked on to an existing evictions framework. In D.C., the good cause scheme is the overarching legal structure from which all other eviction-related provisions flow. As shown through the provisions below, D.C. successfully keeps all its eviction provisions in one place, structured within a legal framework that presumes a tenant has a right to possession unless a good cause arises. This is in contrast to traditional eviction statutes, which often operate under the common law presumption that a landlord can evict a tenant simply because they have no written lease.[82]

In contrast to New Jersey, Washington, D.C.'s law is notable not only for the history it carries, but for the modernizations that it has just recently brought to the good cause scheme. Since the beginning of the coronavirus pandemic in March 2020, the District has amended its good cause law six times.[83] Perhaps the most interesting provision born out of the pandemic is D.C. Code § 42-3505.01(b-1), which allows landlords to begin an eviction proceeding for nonpayment of rent only when (1) the tenant owes more than $600 in arrears, (2) the tenant has failed to obtain sufficient emergency rental assistance and/or fallen behind on a repayment plan, and (3) the landlord has provided a notice to the tenant informing them of the proceeding and of their rights to remain in the unit, as well as option for financial assistance and legal help.[84] This provision is a creature of the pandemic and may be allowed to expire as scheduled.[85] However, I submit that limiting nonpayment of rent evictions to only those in which $600 or more is owed is an innovation that should be considered for permanent enshrinement in law, especially when coupled with D.C.'s permanent provision prohibiting

80. D.C. Code § 42-3505.01.

81. *Compare* D.C. Code § 42-3505.01(a)(1) ("[N]o tenant shall be evicted from a rental unit, notwithstanding the expiration of the tenant's lease or rental agreement, so long as the tenant continues to pay the rent to which the housing provider is entitled . . . ."), *with* Albany, N.Y., Code § 30-326(A) *and* N.J. Stat. Ann. § 2A:18-61.1.

82. *See supra* notes 8–9 and accompanying text.

83. D.C. Law 23-72, § 2(b), 67 D.C. Reg. 2476 (Apr. 16, 2020); D.C. Law 23-172, § 2, 67 D.C. Reg. 13236 (Dec. 23, 2020); D.C. Law 23-255, § 2, 67 D.C. Reg. 13959 (Mar. 16, 2021); D.C. Law 23-269, § 501(y)(6), 68 D.C. Reg. 1490 (Apr. 5, 2021); D.C. Law 24-9, § 404(b), 68 D.C. Reg. 4824 (June 24, 2021); D.C. Act 24-125, § 5(b)(1), 68 D.C. Reg. 7342 (July 24, 2021). Note that not all of these amendments are related to the coronavirus pandemic.

84. D.C. Code § 42-3505.01(b-1).

85. Oct 27, 2021, D.C. Law 24-39, § 3(t), 5(b)(1), 68 D.C. Reg. 9487 (setting an expiration date of 225 days after the effective date).

late fees from constituting a basis for eviction.[86] The provision was likely instituted to triage a predicted wave of evictions expected as COVID-19 eviction moratoriums were lifted, but the triage effect would be beneficial for courts on a permanent basis. The judicial resources devoted to small-dollar nonpayment cases are not being spent efficiently, because the harm caused by a displaced tenant is almost certainly worse than the harm to a landlord who is shorted less than $600.[87] Often, tenants who fall behind in small amounts just need some time to catch up. This provision would build in a buffer zone in which tenants remain responsible for their rent but are not vulnerable to the harms of eviction.

One other provision in D.C.'s eviction law merits discussion here: "[N]o [landlord] shall evict a tenant (1) On any day when the National Weather Service predicts at 8:00 a.m. that the temperature . . . will fall below 32 degrees Fahrenheit or 0 degrees Celsius; (2) When precipitation is falling at the location of the rental unit; or (3) During a period of time for which the Mayor has declared a public health emergency. . . ."[88] The code also sets forth exceptions for illegal actions by tenants, severe nuisances, and abandonment by tenant.[89] This provision makes strides toward eliminating one of the most harmful aspects of displacement: the weather. A provision like this one would surely reduce shelter visits, emergency room visits, and improve human dignity during an eviction.[90] While this provision is not strictly part of a good cause scheme,[91] it is easy to see how implementing a structure that presumes a tenant's right to possession would more easily facilitate the enactment of a provision like this one. Under traditional property law, an owner's right to control its property trumps the rights of a tenant, especially a tenant facing eviction. But in D.C., the law operates from the position that the tenant cannot be kicked out unless certain conditions are present, and this provision simply adds a condition about the weather. D.C.'s law creates an understanding, which overtime might become the norm in the community, that tenants are entitled to possession regardless of a landlord's arbitrary willingness to renew a lease, and this norm might create a space for jurisdictions to more easily enact further protections like this one.

86. D.C. Code § 42-3505.01(a)(1).

87. *See generally* Matthew Desmond, Evicted (2016) (chronicling the harm caused by evictions, many for small dollar amounts, in Milwaukee).

88. D.C. Code § 42-3505.01(k).

89. *Id*. § 42-3505.01(k-1).

90. Note that, although the provision begins "no [*landlord*] shall *evict* a tenant," the law no doubt intends that no tenant shall be removed from possession by sheriff's marshals during times of cold or wet weather (as opposed to, e.g., a landlord filing for an eviction proceeding). D.C. Code § 42-3505.01(k) (emphasis added).

91. Because this is not part of a good cause scheme, I have not addressed it in Part V. Despite that, jurisdictions would be wise to appreciate the powerful impact such a law could have on those facing evictions.

D. San Francisco and Oakland, Cal.

For an example of good cause laws on a local level, San Francisco and Oakland provide interesting case studies. A significant number of California cities have enacted "just cause" eviction laws, often (but not always) in conjunction with local rent-control ordinances.[92] The state of California has also recently enacted a statewide good cause law, known as AB 1482, which requires good cause and caps rent increases at five percent annually.[93] As San Francisco's ordinance amendments make clear, in California a local just-cause ordinance may supersede state law under the parameters set out in the Costa–Hawkins Rental Housing Act of 1995[94] when the local law offers greater protection for renters.[95] For policymakers seeking to empower local jurisdictions to protect renters, California's scheme may be a guide.

San Francisco has had a good cause ordinance for decades, but until 2020 it applied only to buildings built before June 13, 1979.[96] Likewise, Oakland's law only applies to buildings constructed in 1995 or earlier.[97] While part of the reason for including only older buildings may be related to the requirements of state law,[98] conceivably valid policy reasons exist for exempting recently constructed buildings. Among them are a belief that tenants in newer buildings are less likely to be evicted because newer buildings are typically less susceptible to gentrification and displacement due to their young age. Another reason might be to avoid dissuading new construction, which is important to alleviating housing shortages. Real estate developers want assurances that they can receive a profitable return on investment, and developers and landlords often perceive good cause as a threat to that profit. While such a provision could conceivably

92. David Brown et al., The California Landlord's Law Book: Rights and Responsibilities 93 (2017) (listing cities with just cause laws). In California, the term "just cause" is normally used, but there is no meaningful difference between "just cause" and "good cause."

93. *See* Nat'l L. Ctr. on Homelessness & Poverty, Housing Not Handcuffs: Ending the Criminalization of Homelessness in U.S. Cities 103 (2019), https://homelesslaw.org/wp-content/uploads/2019/12/HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf.

94. Cal. Civil Code § 1954.50–.535.

95. *See* San Francisco, Cal., Ordinance 296-19 § 1(a) (Dec. 20, 2019) (finding that the local ordinance could supersede state-level just cause law because "this ordinance is *more protective*" and "*further limits* the reasons for termination of a residential tenancy").

96. Press Release, San Francisco Rent Board, New Ordinance Amendments Extending Eviction Controls to New Construction and Sub Rehab Units (Jan. 21, 2020), https://sfrb.org/article/new-ordinance-amendments-extending-eviction-controls-new-construction-and-sub-rehab-units; *see also* S.F., Cal., Ordinance 296-19 (Dec. 20, 2019).

97. Oakland, Cal., Mun. Code § 8.22.350(I) (2003).

98. Cal. Civil Code, § 1954.52(a)(1) (exempting buildings constructed after February 1, 1995, or earlier if the local ordinance was enacted before that date, as is the case in San Francisco).

make sense, it would also create confusion among tenants regarding which buildings are covered and what rights they have; moreover, it might create a sense of inequity between tenants living in buildings of different ages. Because of these issues, San Francisco acted to eliminate the age distinction entirely and now applies a blanket good cause law.[99]

The substance of San Francisco and Oakland's "good causes" are similar to Albany's. However, a few notable grounds for eviction are either much broader or drastically more specific. An example of a much broader ground is nonpayment of rent in San Francisco. Not only is nonpayment a valid reason to terminate a tenancy, but so is habitually late payments and frequently bounced rent checks.[100] Further, the provision does not contain an unconscionability defense like the one found in Albany's law. This broadness is a policy choice suggesting an unwillingness to shift some of the cash flow burdens that tenants face onto landlords. But permitting more situations that can give rise to an eviction increases the chance that a landlord with ulterior motives could legally secure an eviction. This possibility dilutes the effectiveness of the statute.

At the other end of the spectrum, both Oakland and San Francisco delineate highly detailed processes for recovery of possession for the owner's immediate use.[101] The Bay Area laws contain several provisions that add requirements absent from Albany's law. For one, an owner must make the unit his residence for at least thirty-six months[102] and, in the case of San Francisco, attest that he is actually living there under penalty of perjury.[103] This requirement is presumably to ensure that landlords actually intend to live in the unit and do not use this ground as a pretext for an eviction.[104] Oakland does not permit an eviction to recover for the owner's use as a just cause if the tenant is elderly or disabled, but this provision only applies if the tenant has lived in the unit for more than five years.[105] However, Oakland adds that a "catastrophically ill" tenant who has been residing in the unit for five years or more is also protected from eviction, regardless of age or ability.[106] Lastly, San Francisco and Oakland each take

99. S.F., Cal., Ordinance 296-19.

100. S.F. Admin. Code § 37.9(a)(1).

101. *See* S.F. Admin. Code § 37.9(a)(8); Oakland, Cal., Mun. Code § 8.22.360(A)(9).

102. S.F. Admin. Code § 37.9(a)(8); Oakland, Cal., Mun. Code § 8.22.360(A)(9)(a).

103. S.F. Admin. Code § 37.9(a)(8)(v), (vii).

104. In Albany, the law provides for a cause of action for "[actual] damages, declaratory, and injunctive relief" when the landlord makes a fraudulent statement invoking the personal use grounds, but this requires the tenant to prove fraud. Albany, N.Y. Code § 30-328(B). San Francisco's approach seeks to catch fraud before it occurs and documents the fraudulent statement, lowering the tenant's burden to recover.

105. Oakland, Cal., Mun. Code § 8.22.360(A)(9)(e)(i); *compare* Albany, N.Y. Code § 30-328(A)(8)–(9) (placing no length-of-tenancy requirement on eviction protection for elderly and disabled tenants, but only protecting them when the building has more than five units).

106. Oakland, Cal., Mun. Code § 8.22.360(A)(9)(e)(ii).

different tack regarding relocation costs when an owner seeks to recover the unit for personal use. On the one hand, San Francisco, like Albany, does not appear to provide relocation costs when the landlord evicts for personal use.[107] Oakland, on the other hand, has enacted a detailed mechanism for paying relocation costs in this scenario.[108] Tenants there are entitled to increasing relocation costs based on length of the tenancy,[109] and the law provides a cause of action to recover against landlords who fail to pay in a timely manner.[110] It can even result in a criminal infraction or misdemeanor for the landlord.[111]

E. Application

Ultimately, good cause laws work best when the specific structure and provisions are tailored to the housing goals of the state or locality enacting the law. The context in which the statute arises—rent decontrol, rampant gentrification, or general tenant dissatisfaction—can and should dictate the specifics of the statute. The highly customizable nature of this regime gives policymakers an opportunity to draft a law that responds directly to the concerns of constituents. For example, Hudson, New York, recently enacted good cause amid widespread concern over rising rent and gentrification, including "flipping" rental properties, which are long-term trends in Hudson exacerbated by housing market upheaval during the COVID-19 pandemic.[112] The drafters used Albany's law as a model, but, to address Hudson's specific housing situation, the City Council adapted the "unconscionable increase" provision so that it does not allow the judge to consider "significant market changes" in the unconscionability determination. Hudson also removed one of the permissible causes of an eviction, which as enacted in Albany and other upstate cities allows for evictions when the landlord sells the building. But to discourage "flipping" units at the expense of tenants, Hudson drafted the law so that the tenant's right to possession survives a sale.

The ability to particularly target specific causes and symptoms of the eviction crisis through good cause laws is valuable to advocates and policymakers. It also fosters a powerfully democratic lawmaking process in which the public and specific constituent groups (tenants, landlords, etc.) can see results from responsive representatives. These virtues apply equally to state legislation as well as local laws. States enacting good cause laws should empower local governments to supplement the law with

107. San Francisco does require relocation costs when the tenant is displaced due to demolition, capital improvements, rehabilitation, or lead abatement. S.F. Admin. Code § 37.9(a)(10)–(12), (14).

108. *See* Oakland, Cal., Mun. Code § 8.22.850.

109. Oakland, Cal., Mun. Code § 8.22.850(C).

110. Oakland, Cal., Mun. Code § 8.22.850(D)–(E).

111. *See* Oakland, Cal., Mun. Code § 8.22.860.

112. *See* Gilson, *supra* note 43.

provisions that will address local needs. This means having a statewide preemption dynamic that allows local governments to adjust the state policy to target their own social and economic situations.[113]

Part III has sought to show illustrative examples of a few important statutes around the United States, and Part IV adds to the conversation by proposing additional provisions that jurisdictions considering good cause legislation may find beneficial.

IV. A New Model: Grounding Good Cause in an Affirmative Right

This section proposes a new model that moves the concept of good cause from merely an eviction prevention doctrine to a guarantee of rights. This option would make the law even more effective at reducing evictions and also give tenants security and bargaining power.

While a successful good cause law in the vein of the Albany model can reduce evictions and keep tenant secure in their homes, the model could be significantly strengthened by the addition of a key provision: an affirmative right to a renewal lease. In Albany, news outlets covering the legislation reported that the bill did include this right,[114] but the statutory language merely says that a landlord may not evict without good cause "notwithstanding that the tenant has no written lease or that the lease or other rental agreement has expired or otherwise terminated."[115] At best, this wording creates a right to holdover and legitimizes holdover tenancies, which I argue is inferior to an affirmative right to a renewal lease pursuant to the model statute in Appendix A. In this section, I illustrate some of the shortcomings of Albany's current law and contrast these shortcomings with an affirmative rights model and discuss improved outcomes under an affirmative right to renew.

In a perfect world, Albany's current law protects a tenant who has no lease from eviction. But holdover status leaves the tenant in legal limbo, clinging to bare possession without a written lease until and unless (1) the landlord offers a renewal or (2) the tenant becomes vulnerable to eviction because some good cause arises. Technically, the statute provides holdover tenants with all the rights that a leased tenant would have and in any case leaves landlords with little incentive to not offer renewals. But without a right to renew, the law leaves the door open for unsavory landlord tactics that might take advantage of tenants who do not fully understand their rights. For example, a landlord could send a tenant a letter stating, "I will not be offering you a renewal at the end of your lease term," leaving the

113. *Compare* San Francisco, Cal., Ordinance 296-19 § 1(a) (Dec. 20, 2019) (finding that the state-level eviction statutes were a "floor" above-which localities can regulate evictions), *with Pusature* Compl., *supra* note 54 (arguing that New York State's Summary Eviction Statute is a "ceiling" preventing localities from strengthening eviction protections); *see also* discussion *infra* Part V-B-iii.

114. Hughes, *supra* note 3.

115. Albany, N.Y., Code § 30-328(A) (2021).

tenant who does not fully know her rights to believe that she must vacate by the end of the lease or risk eviction as is typical in traditional eviction schemes. In such a case, the landlord is taking advantage of information asymmetry to turnover tenants contrary to the intent of the law. But, under Albany's current law, such a letter would not be unlawful and would have no consequences for the landlord as long as the landlord does not attempt to evict the tenant.[116]

To remedy this situation, I propose enacting an affirmative right to a renewal lease for all tenants as the anchor of any good cause legislation. This right is akin to the one that exists in New York City Rent Stabilized apartments.[117] Appendix A contains a model statute, designed to be a part of Albany's good cause law, that creates this affirmative right.

The model statute provides two pathways to a renewal lease: affirmative and default. Under the first pathway, the landlord has a duty to provide a written renewal offer, subject to certain notice and timing requirements, and that offer cannot be unconscionable, substantially different than the existing lease, or made in bad faith. The second pathway is triggered when the landlord fails to meet its obligations under the first pathway. It provides for a "constructive offer" on the same terms as the expiring lease. The tenant may proactively accept the constructive offer by notifying the landlord in writing and demanding an executed copy of the lease; absent that, the constructive lease will simply take effect at the end of the expiring lease, providing full protection from eviction and other negative outcomes. Further, the constructive lease does not prevent a tenant from vacating the leased premises at their option and leaves the parties free to contract around the constructive lease by negotiating a written lease, thus leaving in place an incentive for written, negotiated leases. One way to conceptualize the constructive lease is that it changes the default unwritten lease from a periodic month-to-month lease to a fixed term tenancy.[118]

I contend that this scheme provides superior protection for tenants and adds more clarity and certainty to a good cause law. Under an affirmative rights model, it is more likely that the tenant would know about the landlord's duty to offer a renewal because such a right is familiar, easy to

116. Even if the landlord did attempt to evict the tenant, the court (assuming this action is not an illegal self-help eviction) would simply stay the eviction permanently, leaving the landlord in the same place that it was before it sent the letter—collecting rent from a law-abiding tenant under a month-to-month lease.

117. N.Y. Comp. Codes. R. & Regs. tit. 9, § 2523.5 ("[E]very owner . . . shall notify the tenant named in the expiring lease not more than 150 days and not less than 90 days prior to the end of the tenant's lease term, by mail or personal delivery, of the expiration of the lease term, and offer to renew the lease or rental agreement . . . .").

118. Of course, the parties are free to contract for a month-to-month lease on whatever terms they negotiate. Tenants, however, will have little incentive to do so since the model statute provides that they may exit a constructive lease at any time with no negative consequences. In the absence of such an agreement, the constructive lease controls.

understand, and easy to invoke.[119] Framing rights in an easily communicated way fosters greater knowledge of those rights amongst tenants and helps to close the information gap between tenants and landlords.

Consider what would happen under an affirmative renewal right statute when the tenant receives the letter referenced above, stating, "I will not be offering you a renewal at the end of your lease term." The tenant could be fairly sure, despite the letter, that she will receive a written lease offer at least ninety days before the current lease ends, so she is less likely to be harmed by the letter. If the landlord does not, in fact, offer the renewal, the tenant can demand a written copy of a new lease on the current terms, or do nothing and still be protected. It is still possible, of course, that the tenant would not know her rights and would take the letter at face value and assume she has to move out. But this outcome is less likely under the affirmative right model than under the unintuitive holdover model.

Further, unlike under existing law,[120] the landlord suffers real consequences when it fails to make a renewal offer. Once the offer period has passed, the tenant can elect to accept a constructive lease on the same terms as the existing lease. Thus, the landlord has forfeited its right to offer a lease on its terms, including one with a rent increase.[121] By not offering a renewal, the landlord has locked itself into a lease that it, presumably, did not want to be in. Landlords have a strong incentive to avoid such an outcome. The affirmative right would lead to more leases being written down and being offered in a predictable, reliable manner. This would further secure tenants' rights and reduce confusion, deception, and litigation.

Lastly, the affirmative renewal right model strengthens other rights that Albany's current good cause law attempts to secure but fails to do so clearly. Namely, the model statute incorporates the provisions of Albany's § 328(A)(10)(a)–(d)[122] into the affirmative renewal right. In doing so, those provisions are transformed from permissible defenses in an eviction proceeding to legally enforceable rights that tenants could invoke and that landlords have a duty to follow.

This transformation can easily be seen by way of example. Under the existing law, when a landlord offers, for example, an unconscionable lease,[123] the typical tenant could either (1) reject the offer and vacate, giv-

119. *See infra* Part V-A (further discussing the advantages of a rights-based approach).

120. *See supra* note 116 and accompanying text (explaining that the landlord suffers no consequences under current law when they send a deceptive letter like the one being discussed).

121. While a renewal lease must have "substantially" similar terms as the existing lease, see Appendix A, proposed § 30-327-A(A)(4)(ii), this provision does not preclude reasonable increases in rent or changes to terms "rationally related to the regulation of" nuisance activities, such as "no smoking."

122. The provisions include, among other things, a requirement that written notice of a lease offer be given to a tenant and a prohibition of "unconscionable" leases.

123. Albany's law presumes that a rent increase of more than five percent is unconscionable, but unconscionability could also be found through unfair terms such as exorbitant

ing the landlord what it wants; (2) reject the offer and holdover, which would be protected by a typical good cause law; or (3) accept the offer, also a desirable outcome for the landlord because it gets its terms and increases the likelihood that an eviction could occur later if the tenant breaches the arduous terms. Under options (1) and (3), the landlord gets an outcome that it seeks. Option (2) requires a tenant with the knowledge and confidence to proceed as a holdover, which will not be every tenant.

In contrast, consider the same unconscionable lease under an affirmative rights scheme. Options (1) and (3) still exist, but, it is hoped, would occur less often, due to increased knowledge about tenant's rights as discussed above. Option (2) would become a constructive lease, not a holdover, and the tenant could secure a written lease on existing terms by operation of law.[124]

In addition, a fourth option would become available: reporting the violation of rights to a tenant's rights group, a legal services organization, or to city government. Taking this course may very well resolve the issue before the tenant's housing is imminently jeopardized.

This fourth option is entirely futile under the current scheme because it is perfectly legal to offer an unconscionable lease, as long as the landlord does not try to evict a tenant on grounds of not complying with such a lease. There is no prohibition against unconscionable leases, no guarantee of a written lease offer, and no protection against bad-faith lease offers.[125] The only form of protection comes on the back end, during an eviction proceeding, at which time a tenant may raise these issues as a defense against eviction. This places the burden on the tenant to raise these issues and prove them. An affirmative right to renewal would shift that burden to the landlord, who would have to prove that the lease is not unconscionable, rather than the tenant having to prove that it is. This shift properly places the burden on the party who typically has greater financial resources and greater access to the facts.

In addition to all these benefits, an affirmative right also creates a pathway for a tenant to recover damages for violations of these rights. A tenant who accepted an unconscionable lease offer only to later learn that the offer was unconscionable could sue for damages to recoup the ill-gotten gains pursuant to that lease. While this exercise is subject to the constraint

late fees, unreasonable tenant responsibilities, contracting around basic landlord responsibilities, etc., pursuant to enumerated factors. Albany, N.Y., Code § 30-328(A)(1) (2021).

124. Note also that the tenant does not have to do anything to secure the constructive lease. Under the model statute in Appendix A, the constructive lease automatically takes effect until the tenant no longer desires to live at the premises. Importantly, this structure means that the tenant is protected even if she does not know her rights.

125. Except to the extent that state or federal laws may require these or other protections. *See, e.g.*, N.Y. Real Prop. § 226-c (requiring written notice of rent increases of five percent or more).

of legal resources available to tenants, the threat of it will likely ensure more compliance with the law in the first place.

V. Advantages and Criticisms of Good Cause

A. Advantages of the Affirmative Rights Scheme

There are several important benefits to the affirmative right approach, as opposed to the approach adopted by Albany. The first is that it is a rights-based approach to tenant stability. Rather than merely securing possession until the landlord brings an eviction proceeding, the approach suggested here creates an affirmative right that would be undeniable in the minds of tenants, landlords, policymakers, courts, law enforcement, and the public at large. The affirmative right remains supplemented by the eviction protections created under the Albany model, but stands for more than the bare right to not be evicted.

The right to a renewal lease is a more straightforward statement of law that would aid tenants with limited education, English skills, or other comprehension issue such as a learning disability. Most people in the United States understand the concept of state-sponsored rights. Far fewer, however, have the legal confidence to proceed as a holdover tenant with no written lease or assurance of stability. Even though Albany's law protects such an action, decades of ingrained social knowledge about the consequences of eviction, landlord retaliation tactics, and our natural inclination to abide by the contracts that we enter may prevent tenants from taking advantage of the protections afforded by the Albany model.

Further, a scheme of affirmative rights is known to have a normative effect on social and political beliefs.[126] Over time, the public becomes comfortable with the idea that the right exists and that they and their fellow citizens can and should assert the right. This process can shift attitudes around tenant rights and set new expectations regarding the balance of power between landlord and tenant. Tenants may feel more empowered to defend their home and more comfortable calling their house a home. This security is essential to dignified living situations for every person. To the extent that policymakers are seeking to address social attitudes through this legislation, they should not discount this normative dimension.

Another key benefit of a rights-based model is the guarantee of stability that it provides. Under the Albany model, tenants who do not receive a renewal offer are left in legal limbo. They receive the right of possession, the ability to end the tenancy whenever they want, and protection from eviction without good cause, but they do not receive a lease memorializing those rights or stating any other terms of the tenancy. Without a lease, tenants are left without any document to point to that says *I live here*. This is

126. *See* Roisman, *supra* note 2, at 824–26 (discussing how greater personal attachment to property, caused in part by security of tenure, leads to greater impulse to defend one's home).

problematic because tenants often do not know their rights.[127] Landlords often have the leverage, resources, and institutional knowledge to force out a tenant when they want to—whether it be by brains or brawn. Without a lease, some tenants will still succumb to "shadow evictions," which are just as harmful as court-ordered evictions.[128]

Lastly, as mentioned in Part IV, enacting an affirmative right provides a stronger incentive for landlords to offer written leases. Once a constructive lease is entered into under the model statute, the landlord forfeits its right to raise the rent for the period of the constructive lease. This provides a strong incentive to offer a written lease that is fair and in good faith.

B. Responding to Criticisms of Good Cause and the Affirmative Rights Scheme

Good cause, especially one grounded in an affirmative right to renewal, has attracted criticism from landlords and observers. This section examines three common criticisms of good cause in general and the affirmative rights scheme in particular.

i. Unconstitutional Taking

The Fifth Amendment to the U.S. Constitution provides that "private property [shall not] be taken for public use without just compensation."[129] Some commentators have argued that good cause eviction and the right to a renewal violate this clause.[130] In 2021, a group of landlords sued the city of Albany, New York, claiming, among other things, that the city's new good cause law is an unconstitutional taking.[131] In analyzing whether these claims have merit, courts will analyze the statute as both a "physical taking" and a "regulatory taking."[132] Guiding this analysis is a great deal of

127. *See, e.g.*, Paula A. Franzese, *The Implied Warranty of Habitability Lives: Making Real the Promise of Landlord/Tenant Reform*, 69 Rutgers U. L. Rev. 1, 5 (2016) (finding that a startlingly low percentage of tenants invoked the warranty of habitability as a defense during eviction proceedings).

128. *See, e.g.*, Patrick Lohmann, *Shadow evictions: Illegal Lockouts Rise in NM During the Pandemic Despite a State Law Aimed at Preventing Them*, Source New Mexico (Sept. 27, 2021, 6:02 AM), https://sourcenm.com/2021/09/27/shadow-evictions. "Shadow evictions" refer to evictions undertaken by landlords that do not use the required court processes. These can be illegal self-help evictions or less obtuse means of leverage, such as refusing to renew a lease. *Id.*

129. U.S. Const. amend. V, cl. 4.

130. Ruddick C. Lawrence, Jr., Note, *Bright Lines in the Big City: "*Seawall*," Tenant Succession Rights, and the Jurisprudence of Takings*, 91 Colum. L. Rev. 609, 644–45, 650–52 (1991).

131. *Pusatere* Compl., *supra* note 54, at 146–60

132. *See* Bldg. & Realty Inst. of Westchester & Putnam Cntys., Inc. v. New York, No. 19-CV-11285, 2021 WL 4198332 (S.D.N.Y. Sept. 14, 2021) (applying both the physical and regulatory takings analyses).

precedent giving significant deference to the state's police power over the landlord-tenant relationship.[133]

Under governing Supreme Court precedent, a physical taking occurs where governmental action compels an owner to endure a "permanent physical occupation" of its property.[134] But case law instructs that rent regulation simply does not constitute a physical taking.[135] Nor is the regulation of evictions considered a physical taking.[136] Landlords are in the business of renting out apartments, and good cause does not deprive them of that use.[137] The tenants are not an "unwanted physical occupation" when landlords have invited them to lease the property and are free to evict them whenever good cause arises.[138] Thus, good cause laws cannot be found to be a physical taking.

Similarly, good cause is not a "regulatory taking" under current jurisprudence. A regulatory taking is determined by the test from *Penn Central Transportation Co. v. New York City*,[139] which sets forth three factors.[140] First, the court asks whether the property owner is harmed economically. In the case of Albany's good cause law, no economic viability is lost at all. This is particularly true considering that *Penn Central* looks to the existing usage of a property, not a hypothetical usage.[141] Landlords are still permitted to charge market rent, and tenants are still required to pay rent if they choose to holdover—in other words, the business of renting can proceed as envisioned by the owner.

Second, the court evaluates whether the regulation interferes with investment-back expectations so as to constitute a taking.[142] It is very likely

133. *See, e.g.*, Fed. Home Loan Mortg. Corp. v. N.Y. State Div. of Hous. & Cmty. Renewal, 83 F.3d 45, 47–48 (2d Cir. 1996) (summarizing caselaw on physical and regulatory takings and holding that a particular application of New York's Rent Stabilization program was not a taking).

134. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982).

135. *See Fed. Home Loan Mortg. Corp.*, 83 F.3d at 47–48; *see also* Yee v. City of Escondido, 503 U.S. 519, 529 (1992). Albany's good cause law places no restrictions whatsoever on rent, per se. While it creates a presumption that rent increases of more than five percent are unconscionable, this presumption only affects whether good cause is present, not whether the landlord may charge that rent in the first place. Albany, N.Y. Code § 30-328(A)(1), (10).

136. Sobel v. Higgins, 590 N.Y.S.2d 883, 885 (App. Div. 1992), *appeal dismissed*, 613 N.E.2d 970 (N.Y. 1993).

137. *See Yee*, 503 U.S. at 526–28 (holding that good cause and rent control for manufactured home tenants was a mere restriction on usage, not a physical taking); *see also* Block v. Hirsh, 256 U.S. 135, 157 (1921).

138. *Yee*, 503 U.S. at 527–28, 530; *see also Fed. Home Loan Mortg. Corp.*, 83 F.3d at 48.

139. Penn Cent. Transp. Co. v. New York City. 438 U.S. 104 (1978).

140. *See* Bldg. & Realty Inst. of Westchester & Putnam Cntys., Inc. v. New York, No. 19-CV-11285, 2021 WL 4198332, *34 (S.D.N.Y. Sept. 14, 2021) (applying the *Penn Central* test in a challenge to eviction limitations).

141. *Penn Cent.*, 438 U.S. at 125.

142. *Id.* at 127–28; *Bldg. & Realty Inst.*, 2021 WL 4198332, *24.

that good cause does not. By now it is clear that the good cause law does not materially impact the rent that a landlord could charge. Even a landlord who, for example, made improvements to the property with the hope of raising rent is not prohibited from doing so. The only potential limitation in Albany's law is the presumption of unconscionability attached to any rent increase of five percent or more,[143] but this minor limitation does not work a taking because it would not prevent the landlord from charging a reasonable rent.[144] Although the affirmative right proposed by this essay goes somewhat further to create a duty to avoid unconscionable leases, the same logic applies and no taking would occur.

Third, the court evaluates the character of the government action.[145] This first entails looking to whether to government has appropriated property for some uniquely governmental use, such as using private airspace for military planes.[146] "[T]he relevant inquiry for the courts is whether a law 'arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones' . . . ."[147] In the case of good cause, the law applies for the benefit of the public generally, not the government itself.[148] It is nothing more onerous than "some public program adjusting the benefits and burdens of economic life to promote the common good."[149] The landlord is still free to charge market rent or sell the building at any time. Even the affirmative right to renew would not so burden the owner as to work a taking, because the ability to evict tenants and charge rent is not more burdened than under Albany's current law, and so the right to exclude is not further limited.

For these reasons, takings challenges to good cause laws are unlikely to succeed. The compelling state interest in reducing evictions and securing stable housing for all residents weighs heavily against a finding that a taking has occurred.

ii. Impairing the Obligation of Contracts

A second criticism of good cause is that it further limits landlords' freedom of contract. The criticism may be particularly salient against the rights-based approach proposed in this essay, because the approach says, essentially, *if you won't sign the contract, the law will enforce a legal fiction that deems you to have signed it anyway*. The landlord is not given a choice in whether to

143. Albany, N.Y. Code § 30-328(A)(1) (2021).

144. *See* Fed. Home Loan Mortg. Corp. v. N.Y. State Div. of Hous. & Cmty. Renewal, 83 F.3d 45, 48 (2d Cir. 1996) (collecting cases holding that housing regulations are not a taking even if they result in landlord collecting below-market rents).

145. *Penn Cent.*, 438 U.S. at 128, 135; *Bldg. & Realty Inst.*, 2021 WL 4198332, *24.

146. *Penn Cent.*, 438 U.S. at 128 (citing United States v. Causby, 328 U.S. 256 (1946)).

147. *Bldg. & Realty Inst.*, 2021 WL 4198332, *24 (quoting *Penn Cent.*, 438 U.S. at 132).

148. *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 488–89 n.18 (1987).

149. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539 (2005) (quoting *Penn Cent.*, 438 U.S. at 124).

renew the lease contract.[150] In constitutional terms, so the argument goes, a right to a renewal "impair[s] the Obligations of Contracts"[151] because it means that the tenant is not obligated to vacate the premises at the end of the term. But at least two responses negate a suggestion that freedom of contract is unduly impaired by this scheme.

First, although some have decried good cause eviction laws' implications on contractual freedom,[152] no one would suggest that freedom of contract—or any rights relevant to this discussion—is absolute. Policymakers are engaged in a balancing of the rights of adverse parties, ideally looking out not just for the parties, but the interests of society as a whole. Justice Holmes articulated the supremacy of society's interests when he said:

> The reservation of essential attributes of sovereign power is . . . read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worth while,—a government which retains adequate authority to secure the peace and good order of society.[153]

The fact that some topic of legislative interest is also the subject of private contracts does not mean the legislature is powerless to address the topic.[154] States—or, in this case, local governments—may impair a contract if it furthers a legitimate societal interest and is reasonably designed to address that interest.[155] In short, the compelling interest government has in securing safe and stable housing for its citizens surely warrants some impairment of lease contracts, particularly ones that do not negatively affect a landlord's finances.[156]

Second, the affirmative rights model impairs freedom of contract no more than the traditional good cause model. Under both schemes, the landlord is constrained by the tenant's right to possession after a lease term ends. It is true that the landlord would be prevented from re-renting the unit and can only negotiate with the incumbent tenant. Nevertheless, the

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150. This result leads to the corollary that the landlord cannot enter into a lease with any other party for the premises covered by the right to a renewal.

151. U.S. Const., art. I, § 10, cl. 1.

152. *See* Vienneau, *supra* note 30 ("For hundred[s] of years, leases have been contracts entered into by consenting adults for the right to use someone else's personal property, with the understanding that upon the expiration of that contract, either party had the mutual right to choose to discontinue the arrangement. Now in Albany, leases are no longer mutual agreements, and to rent a property to a tenant is to effectively hand every property right over to that tenant, potentially *forever*, in exchange for nothing more than 1 month's rent as security.").

153. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 435 (1934).

154. *Id.* at 436–38.

155. *Id.* at 438; *see also* Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978).

156. If the landlord is receiving rent payments and no other terms of the lease are being broken, it should make no difference which particular tenant is occupying the unit. At such time when a problem arises, the good cause provisions still allow a landlord to commence an eviction.

landlord is not prohibited from offering a lease with market-value rent, which should mollify any notion that good cause reduces the consideration received by the landlord in the contract. Thus, this right is abridged only as far as it would be under the traditional model.

iii. Preemption

Local governments considering good cause legislation should also be aware of preemption considerations. When state governments enact good cause laws, they are exercising a well-recognized aspect of the state's police power. But when local governments do so, there is the possibility that their action is preempted by state law. This analysis will vary state by state, and this essay does not attempt to answer any specific issues that may arise in a preemption analysis.

I will, however, briefly point to a highly relevant example of a preemption challenge in Albany. In *Pusatere v. City of Albany* the complaint laid out the roadmap argument for challenging a New York State good cause law on grounds that the local law is preempted by doctrines of express, conflict, and field preemption.[157] The complaint cited seemingly arcane sections of old rent control statutes that are still on the books as evidence that the "objective of state policy" is to promote the "normal market of free bargaining between landlord and tenant."[158] The plaintiffs in *Pusatere* argued that the various eviction and rent regulations scattered throughout New York law make up a scheme of regulation that preempts the field of landlord-tenant law.[159]

On June 30, 2022, the trial court struck down Albany's law, accepting the plaintiff's argument that the law was preempted.[160] The court first rejected the field preemption argument, holding that Albany's law was not a rent control law and therefore is not preempted by rent regulation statutes.[161] But when it turned to conflict preemption, the court held that Albany's law directly conflicts with New York States summary eviction proceeding statute, which allows evictions when the tenant holds over after the end of

157. *See Pusatere* Compl., *supra* note 54, at 103–138.

158. *Id.* at 116.

159. *Id.* at 115. They argued more specifically that the Emergency Tenant Protection Act requires that a locality conduct a vacancy study and set up a Rent Guidelines Board before restricting rents. *Id.* at 115–22.

160. Pusatere v. City of Albany, Index No. 909653-21 (N.Y. Sup. Ct. June 30, 2022).

161. *Id.* slip op. at 4–5 (N.Y. Sup. Ct. June 30, 2022). The court correctly recognized that Albany's law provides tenants with a defense against eviction that their lease or lease offer was "unconscionable," as judged by a factor test in the statute, but this is not equivalent to rent regulation of the type contemplated by the state statute. Albany, N.Y. Code §§ 328(A)(1), 328(A)(10)(e)(5).

a lease term without permission.[162] The City of Albany has filed its notice of appeal and the law's future is unresolved as of this writing.[163]

There is good reason to disagree with the court's analysis. First, the court failed to conduct its analysis under a strong presumption that the statute was valid. This is necessary because many cases, including *Zorn v. Howe*, have held that "[l]egislative enactments, including local ordinances such as the one at issue here, carry a strong presumption of validity, imposing a burden on the challenger to prove unconstitutionality beyond a reasonable doubt."[164] This burden is nearly impossible to meet in this case, given the Third Department precedent in *Zorn* that holds local government may modify the summary eviction statute by adding grounds for evictions in addition to those provided by state law.[165] There is no reason that the inverse—negating a cause for eviction provided in the state statute—could not also be valid. The state statute can easily be read as merely permitting—but not requiring—the availability of evictions during a holdover situation.[166] When these competing interpretations of the statute are brought to light and subjected to the *Zorn* standard, courts must recognize a reasonable doubt that the law is preempted.[167]

In addition to *Zorn*, a number of cases emphasize the narrow scope of preemption doctrine in New York. In one such case, the New York County Supreme Court summarized the governing law,

> The Court of Appeals in [*People v.*] *Judiz,* also quoted its earlier decision in *People v. Cook*, holding that "unless preemption is limited to situations where the intention is *clearly to preclude the enactment of varying local laws*, the power of local governments to regulate would be illusory." The court also differentiated these decisions from a seemingly contradictory holding in *Wholesale Laundry Board of Trade, Inc., v. City of New York*, stating "The mere fact that a local law may deal with some of the same matters touched upon by State law does not render the local law invalid. It is only when the State

162. *Id.* at 5.

163. Notice Of Appeal, Pusatere v. City of Albany, No. 909653-21 (N.Y. Sup. Ct. Albany Cnty., filed on July 11, 2022).

164. Zorn v. Howe, 716 N.Y.S.2d 128, 132 (App. Div. 2000) (holding that a city could make changes to the grounds for a summary proceeding without conflicting with state law) (citing People v. Judiz, 38 N.Y.2d 529, 531 (1976); Metro. Package Store Assn. v. Koch, 457 N.Y.S.2d 481, 485 (1982)).

165. *Id.*

166. The statute reads, "A special proceeding *may* be maintained under this article upon the following grounds: . . . ." N.Y. Real Prop. Acts. § 711. Two readings are plausible here. The first is, as the plaintiff's contended, that the statute means that an eviction *may always* be maintained against a holdover tenant. The second is that the statute permits holdover evictions as a default term, over which a local government is free to further restrict eviction-eligible situations.

167. *See Zorn*, 716 N.Y.S.2d at 132.

> has evidenced a desire or design to occupy an entire field to the exclusion of local law that the city is powerless to act."[168]

Thus, under existing precedent there are strong legal reasons to construe preemption doctrines narrowly and adhere to a presumption of validity absent a clear statutory mandate.

Pusatere, in conjunction with *Zorn*, also creates an unfortunate public policy blockade. *Zorn* established that the state's summary eviction statute was a baseline on top of which local government could regulate evictions. *Pusatere* distinguishes *Zorn* by holding that while that local law can allow for additional grounds for eviction, they can never mandate fewer grounds for eviction. Put another way, it invites local governments to tip the scales toward landlords, but forbids any law that aids tenants.[169] Not only is this a questionable interpretation of the statute, it is utterly unsound public policy. Courts must recognize that such a policy will only serve to increase evictions and displacement, reduce tenant's bargaining power, and provide little to no public benefit. Without an unequivocal directive from the legislature, such a policy should be avoided at all costs.

In short, the preemption analysis will depend on the specific doctrines developed in different jurisdictions. In New York, unanswered questions may soon be determined by courts addressing the current wave of local good cause laws.

VI. Conclusion

Good cause has its origins in protecting tenants from unfair and harmful eviction practices. Today, more than ever, we recognize the personal attachment that people develop to the place they live and the vested interest that they have in remaining there.[170] The affirmative right to a renewal proposed here would recognize that interest within the law and make it easier to exercise a tenant's right to remain in their home.

In general, when considering good cause legislation—of the negative or affirmative variety—policymakers should think carefully about the problem that they are trying to solve. Good cause is likely an effective tool at reducing evictions,[171] combatting gentrification, reducing displacement, providing tenants peace of mind, and shifting cultural norms around eviction. It may or may not, however, be a good tool to address high prices in

168. McDonald v. N.Y.C. Campaign Fin. Bd., 965 N.Y.S.2d 811, 826 (Sup. Ct. 2013), *aff'd as modified*, 985 N.Y.S.2d 557 (2014) (emphasis added) (citations omitted).

169. *Pusatere*, Index No. 909653-21, slip op. at 5 ("Unlike the ordinance in *Zorn v. Howe* which merely expanded upon the remedies available under existing State law, . . . [Albany's] Local Law F places an impediment upon landlowners' free access to the courts and limits the remedies provided in [the summary eviction statute]."). *But see supra* notes 94–95 and accompanying text (noting California's preemption scheme requires local laws to protect tenants, not landlords).

170. *See* Roisman, *supra* note 2, at 824–26.

171. *See* Cuellar, *supra* note 61.

the rental market or a shortage of rental housing. Good cause is an adaptable model that can complement existing eviction law or serve as the basis for a new framework. Good cause shows promise as a model that can be fitted to address differing needs of society and reduce the pain of housing insecurity for all.

APPENDIX A

This appendix proposes a model statute that jurisdictions could enact to incorporate an affirmative right to a renewal lease into their good cause statutes. This model is based on the existing Albany, N.Y., good cause law, but could be modified for any existing or new good cause legislation.

§ 30-327-A – **Requirement for a renewal lease.**

(A) Every landlord shall notify tenants named in the expiring lease of the expiration of the lease term, and offer to renew the lease, subject to the following:

(1) Such notice and offer shall be in writing and be communicated not more than 150 days and not less than 90 days prior to the end of the tenant's lease term.

(2) The proposed written lease must have been offered to the tenant in writing on at least two occasions at least two weeks apart, and such written offer must include:

(a) An original and one copy of the proposed written lease, executed by the landlord or their designee;

(b) Notice of the landlord's right to pursue eviction within 120 days pursuant to N.Y. Real Prop. art. 7 if the tenant rejects in bad faith the proposed written lease and/or does not enter into said lease within 45 days of the initial offer;

(c) Clear instructions to the tenant concerning the manner in which the tenant is to communicate to the landlord acceptance or rejection of the written lease; and

(d) Notice of any proposed increase equal to or greater than 5% shall be provided in compliance with N.Y. Real Prop. § 226-c.

(3) The proposed written lease shall not supersede an existing, active lease to which the landlord and the tenant are parties.

(4) The terms of the proposed written lease may not:

(a) Be unconscionable and/or mandate or proscribe activities not rationally related to the regulation of activities which would create a nuisance at the property or cause discomfort to the tenants or occupants of the same or adjacent buildings or structures as described at subsection A(3) of § 30-328;

(b) Substantially alter the terms any of any existing lease; or

(c) Be offered in bad faith or for the purposes of circumventing this article.

(B) Failure on the part of the landlord to comply with the requirements of subsection (A) will constitute a constructive offer, subject to the following:

(1) A constructive offer and acceptance under this section shall commence immediately upon the expiration of the existing lease and shall not affect the operation of the expiring lease. The new constructive lease shall be on the exact same terms, including rent amount and length of tenancy, as the expiring lease, except as provided by subdivision (4).

(2) Such offer may be accepted by the tenant by (i) providing written notice to the landlord of the tenant's intention to accept any time after landlord has failed to comply with the requirements of subsection (A), including any time after the expiration of the existing lease, or (ii) if no written notice is provided by the tenant to the landlord, the tenant shall be deemed to have constructively accepted the constructive offer immediately upon expiration of the existing lease until and unless the provisions of subdivision (4) are invoked.

(3) At any time after landlord has failed to comply with the requirements of subsection (A), the tenant may demand a written copy of the constructive lease executed by the landlord.

(4) Notwithstanding the other provisions of subsection (B), no constructive lease shall come into existence or, if in existence by operation of this section, shall immediately be cancelled with no consequence for the tenant, if (i) the tenant vacates the unit either at the expiration of the existing lease or sometime after such expiration, regardless of notice to the landlord, or (ii) the landlord and tenant negotiate terms of a new lease, in which case such terms may, if the parties agree, override the constructive lease.[172]

172. Regarding negotiations, once a constructive lease takes effect, a tenant is at liberty to demand a written copy and accept the constructive lease or to negotiate a new lease. This provides the tenant with new bargaining power, because the tenant is protected from eviction and the landlord will likely be more willing to bargain over non-price terms in exchange for an increase in rent. This dynamic may empower tenants to negotiate over issues like maintenance and improvements since they no longer fear the threat of eviction. The landlord can always avoid a constructive lease by making a good faith renewal offer as required by the proposed law. If a good faith written renewal offer is made, the tenant is obligated to accept (or negotiate terms) or end the tenancy. If they do not, the tenant opens themselves up to eviction under the proposed amendments to § 30-328(A)(10).

(5) Failure to offer a renewal lease pursuant to this section shall not deprive the tenant of any protections or rights provided by this Code or any other applicable state or federal law and the tenant shall continue to have all the same rights as if the expiring lease were still in effect.

In addition, § 30-328(A)(10), which enumerates the final "good cause" allowed under Albany's statute, would be amended to read, "Where the tenant has refused in bad faith to enter into a written lease which has been offered in good faith to the tenant by the landlord pursuant to § 30-327-A, subject to the following: . . ." Then strike subdivisions (a)–(d) and renumber (e) and (f) as (a) and (b).[173]

173. This is done because the provisions of (a)–(d) have been incorporated into the model statute.