Journal of
Affordable Housing
& Community Development Law

VOLUME 32, NUMBER 2
2023

The *Journal of Affordable Housing & Community Development Law* is the official publication of the Forum on Affordable Housing & Community Development of the American Bar Association, with three issues per year. It is targeted toward attorneys and other housing and community development specialists. It provides current practical information, public policy, and scholarly articles of professional and academic interest.

Membership: For information about membership in the Forum, please contact the ABA Service Center, 321 North Clark Street, Chicago, Illinois 60654-7598, 1-800-285-2221, FAX 312-988-5528, or visit americanbar.org.

Back Issues: Back issues are available for $30 per copy, plus $3.99 tax, plus $8.95 shipping and handling charges. Contact ABA Service Center, 321 North Clark Street, Chicago, Illinois 60654-7598, 1-800-285-2221, FAX 312-988-5528, or ShopABA.org.

Member Address Changes: Send your member number and new address to coa@americanbar.org or change online at www.americanbar.org.

Journal of Affordable Housing & Community Development Law (ISSN 1084-2268 (print); ISSN 2163-0305 (online)) is published as a membership benefit by the American Bar Association, 321 North Clark Street, Chicago, Illinois 60654-7598. Attorneys who are not members of the American Bar Association and nonlawyers may contact HeinOnline. mail@wshein.com, (800) 828-7571 (or (716) 882-2600) for digital subscription options and information. **Postmaster:** Send address changes to Affordable Housing Member Records, American Bar Association, ABA Service Center, 321 North Clark Street, Chicago, IL 60654-7598.

From the Editor-in-Chief

Anika Singh Lemar

Anika Singh Lemar

Welcome to our Back-to-School issue! We received excellent submissions to our 2022–2023 student writing competition and decided to publish not just the winner but four of the runners-up. The winning article, by recent Georgetown Law graduate Reuben Siegman, who seeks to understand tensions between environmentalism and housing affordability using two case studies, Minnesota and California. In this issue, you will also find student-authored articles interrogating community input in real estate development plans in Los Angeles; examining NIMBYism in Washington, D.C.; assessing housing codes, building codes, and their relationship to housing affordability; and delving into the right to counsel in evictions cases. The deadline for our next writing competition is coming up later this fall. Please be sure to encourage your interns, summer associates, and students to submit their work. Our selection panel loves reading their work, and I am very glad to have the opportunity to publish it.

Alongside the student articles, this issue brings you our Digest of Recent Literature and a review of *Hyperlocal: Place Governance in a Fragmented World*, published by Brookings in late 2022. We also feature the work of the South Dakota Native Homeownership Coalition, which celebrated its tenth anniversary this past summer.

We welcome your thoughts on future themes and article topics.

From the Chair

Kelly Longwell

Kelly Longwell

Dear Readers and Members of the Forum,

It is an honor to begin my term as Chair of the Forum. Our world has somewhat returned to normal. Our new normal has made us appreciate our connections to the people in our industry. We have been able to reconnect with each other at the various Forum events 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 very successful with attendees returning to our pre-pandemic number. I think that we were all grateful for the time we were able to spend together in person. We are looking forward to more events over the coming year exploring current topics that are shaping our industry.

The 2023 Boot Camp will be held in my hometown, New Orleans, Louisiana. We will build on last year's Boot Camp program with a focus on continuing the development of practitioners from the basics to a more advanced program of Low Income Housing Tax Credits, HUD programs, and Community Economic Development. The State and Local Government Division will co-sponsor our Boot Camp and provide several topics that are relevant to most affordable housing practices.

We have an intentional focus on the new generation of affordable housing practitioners. We strive to educate and encourage these new lawyers to continue the Forum. We continue to be mindful of the barriers to entry to our practice that have existed in the best of times. 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.

In closing, I would like to recognize the amazing work done by the previous Chair, Ian Adams, and all those who served the Forum over the past year. Despite constant challenges, the Forum's publications and programs have been top notch. Our ever-growing programs have explored the intersection of patients who have been prescribed medical cannabis and federally assisted housing, and how conflicting federal and state laws have created second-class citizens out of our nation's poor. Additionally, this *Journal* continued to offer unmatched scholarship on topics ranging from the Federal Housing Administration's new policies to address the racial homeownership gap to addressing housing instability and medical debt.

Thank you to all that have worked tirelessly for the Forum over the past year, especially Ian Adams and Michael Hopkins. Ian and Michael worked

tirelessly to guide the Forum out of the pandemic era. The Forum has come back even stronger under their leadership. I am blessed to have worked with both. Thank you for the honor of serving all of you as chair of the governing committee.

Gratefully,

Kelly Longwell
Longwell Riess, L.L.C.

DIGEST OF RECENT LITERATURE*

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 Alison Lintal at afl2@psu.edu or Keeshea Turner Roberts at keeshea@hotmail.com.

Reimagining Community Planning: A Framework for Transformative Community Land-Use Education

Joseph Schilling, Emily Bramhall, Ananya Hariharan

Urban Institute

(November 2022)

(https://www.urban.org/research/publication/reimagining-community-planning-academies)

How can localities improve existing tools to demystify their land use and increase community participation in the planning process? Authors Joe Schilling, Emily Bramhall, and Ananya Hariharan at the Urban Institute examine this question through a history and overview of the Community Planning Academies (CPAs), make recommendations to improve their programs' ability to address systemic racism, and review the results of their multi-year CPA prototype in Fresno, California.

CPAs are a tool that some residents and localities use to demystify their neighborhood's land-use and planning process. People and communities are frequently shut out of the public planning process because of its complexity or mistrust based on longstanding policies of discrimination. Some local governments, nonprofits, or universities bridge the community planning-accessibility and trust gap by convening CPAs prior to the

* Editor: Emily Blumberg, Klein Hornig LLP. Contributors: Liam Galligan, Law Student at Fordham University School of Law; Kristin Niver, ArentFox Schiff; Erin Lapeyrolerie, Goldfarb & Lipman LLP; Scott Travers, Law Student at The George Washington University School of Law.

comprehensive planning process. The authors summarize the varying types of CPAs and their curricula, which generally include the ins-and-outs of a locality's land-use rules and building its participants' advocacy skills. Many CPAs currently or will soon incorporate sessions based on their local planning processes that perpetuated systemic racism. The authors examine ways that CPAs have attempted to make participants more open to honest discussions around racial equity. Next, the authors review the characteristics of participants in CPAs. Enrolling a population with desired characteristics is essential to meeting the CPAs' goal to make planning more accessible to traditionally disenfranchised communities and to empower new planning leaders.

The authors advocate for more investment in community planning and structural change within the CPA model to better address the effects of systemic racism. Specifically, the authors believe that CPAs should be expanded to include more leaders of color, localities should increase the programs within CPAs that emphasize different curricula under the umbrellas of land-use education and advocacy skill-building, aligned local organizations should provide opportunities for CPA participants to use and build their skills, and CPAs should "elevate structural racism and equitable land-use reforms." These goals may be accomplished through reforming existing CPAs or creating new academies based on the Urban Institute's Fresno, California, prototype. Any change will require more investment. State and federal funding and support from well-resourced non-profits can unlock these reforms and would allow CPAs to create a new national network to share best practices.

Teaching Transactional Law by Preserving Affordable Housing

Carrie L. Hempel, University of California, Irvine School of Law

Robert A. Solomon, University of California, Irvine School of Law

California Legal History, Vol. 17, 2022

(available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4474959)

Should legal education extend beyond doctrinal lectures and the Socratic method to incorporate "experiential learning"? In "Teaching Transactional Law by Preserving Affordable Housing," Carrie Hempel and Robert A. Solomon detail the University of California, Irvine School of Law's ("UCI Law") journey to develop a unique law school curriculum that emphasizes experiential learning for its students. UCI Law requires all students to complete a "core clinic" course. In her role as the founding dean for the clinical education program, Hempel advised that the core clinic courses be structured so that, among other things, (1) the students serve as the primary advocates to the clients served by the clinic; (2) the caseload presents students with various substantive legal challenges that they can address through collaboration with non-legal professionals/graduate students;

and (3) the pro bono services aid clients who would otherwise not be able to afford legal representation.

Hempel and Solomon bring readers behind the scenes of the clinic they teach, the Community and Economic Development Clinic ("CED Clinic"), by presenting two affordable housing case studies. In both case studies, students represent residents of existing mobile home parks. The residents lived in substandard housing conditions. In response to legal challenges to the housing conditions, the owners had to sell the parks, and residents were presented with the opportunity to decide who should own the park. In both cases, the students successfully assisted in the transfer of the parks to new owners and management, but neither case was simple. CED Clinic students faced various hurdles in transferring the property to new owners (including one resident-owned nonprofit corporation) and addressed client issues through litigation, forming non-profit corporations, negotiating contracts, applying for local zoning permits, and applying for project financing.

Throughout the paper, Hempel and Solomon incorporate quotes from former students of their clinic to demonstrate how their clinical experience impacted their law school and professional trajectories. The students' comments reflect the benefit of the opportunities presented to them to practice collaborative, creative lawyering and practice professional judgement under the supervision of licensed California attorneys. While the students in the case studies presented were able to achieve the clients' goals, Hempel and Solomon note that the clinic has not been able to meet all the clients' goals. There is also a lack of uniformity in the set of skills that the students are able to exercise over the semesters. But, through the various issues presented by clients and hurdles presented when trying to resolve the issues, the students have the opportunity to practice working with clients and implementing legal tools to achieve solutions.

Addressing the Legacies of Historical Redlining

Matthew Gerken, Samantha Batko, Katie Fallon, Emma Fernandez, Abigail Williams & Brendan Chan

Urban Institute

(January 2023)

(https://www.urban.org/research/publication/addressing-legacies-historical-redlining)

This report considers the correlations of the legacies of historical redlining to current risk of housing instability and concludes that the relationship is limited and nuanced without a predictable pattern. The authors draw several policy implications based on their analysis, including that redlining has inconsistent and low to moderate correlation with many measures of current housing instability, including eviction filings, and that intentionally targeting redlined areas with emergency rental assistance or

other emergency housing assistance would be an ineffective way of reaching the people most in need. Instead, this working paper suggests that a more impactful policy intervention would be to geographically target emergency rent assistance, and to target emergency rental assistance (ERA) based on data regarding current need using tools such as the ERA Priority Index coupled with additional local data.

Corporate Consolidation of Rental Housing and the Case for National Rent Stabilization

Brandon M. Weiss

Washington University Law Review, Vol. 101, May 2023

(available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4461100)

The terrain has shifted under the feet of American tenants as a result of increasing corporate consolidation of the rental housing market. Corporations, particularly large corporate landlords backed by private equity and large investors, are increasingly displacing individuals as primary landlords in the market. In his forthcoming article in the *Washington Law Review*, Professor Brandon Weiss looks at the new challenges that corporate consolidation poses for tenants and makes the case for national rent stabilization as a necessary tool to protect tenants in this new terrain.

Corporate landlords face unique pressures to rapidly increase profits in order to meet investor-backed expectations. As a result, corporate landlords raise rents, file evictions, and deploy other tactics such as deferred maintenance or tenant harassment more frequently. Further, corporate landlords and investors can also use ownership vehicles such as a Limited Liability Corporations (LLC) or a Real Estate Investment Trust (REIT) to hide their true identity and avoid scrutiny from tenants and the public.

Increasing the supply of homes, particularly by removing cumbersome land-use restrictions, has emerged as the consensus solution to address rising rents and create more affordable housing options across income levels. However, Weiss argues that increasing supply alone will not solve all issues of housing security: new housing units often take many years to build, and short-term solutions to this urgent crisis are necessary. Further, in many gentrifying neighborhoods, new development might displace older and more affordable housing stock with luxury developments that existing tenants could never afford.

Accordingly, Weiss argues rent stabilization must be considered as a necessary complement to increasing development. Of course, according to conventional economic wisdom, rent regulation measures will only undermine property rights, restrict supply, and lead to widespread disinvestment while increasing rents overall. However, Weiss finds in practice that this outcome is far from the case: newer economic research has increasingly found beneficial impacts of rent regulation, while cities and municipalities have carefully tailored new rent regulation policies to encourage new development and ensure that landlords can still receive a fair return.

While cities and municipalities increasingly adopt rent regulation measures to deal with local affordability crises, Weiss suggests that rent stabilization should also be considered at the federal level. The rise of corporate landlords—given their unprecedented scale, anonymous nature, and diversified ownership structure—requires a national solution. Further, local rent regulation has a clear ceiling: more than thirty states explicitly preempt municipalities from passing rent regulations. While rent regulations traditionally fall under the purview of state and local government, Washington has regulated rents in response to emergency inflation conditions during the 1920s (with the Emergency Price Control Act) and 1970s (Economic Stabilization Act). In response to current emergency inflation conditions, tenant organizers have called for Washington to regulate rents once again. Weiss highlights new legislation introduced by U.S. Representative Jamaal Bowman that would authorize the President to impose price controls and regulations on various goods, including housing, for a limited time. However, Weiss believes that federal rent regulations would face a difficult and uphill climb in a divided Congress. Weiss also highlights measures that the Biden administration can take to expand tenant protections without congressional action, particularly by leveraging federal funds to push cities and states to adopt stronger tenant protections. While the Biden administration recently unveiled a "Renters Bill of Rights" Blueprint in January 2023, Weiss finds that the Blueprint includes few concrete protections for tenants and fails to leverage federal funding to expand tenant protections at the local level.

Out of Reach

Andrew Aurand, Mackenzie Pish, Irka Rafi & Diane Yentel

National Low Income Housing Coalition (2023)

(https://nlihc.org/oor)

This report discusses how the nation's lowest-income renters continue to confront significant challenges finding and maintaining affordable housing due to a long-standing trend in which rents have risen faster than wages. Nationally, between 2001 and 2021, median rents increased 17.9%, while median household income only increased by 3.2%. Although the pandemic brought about unprecedented policy measures, including $46 billion in emergency rental assistance (ERA) and a national eviction moratorium, as these emergency resources are being depleted and many of these measures have been phased out, low-income renters are once again facing high rents and increased housing instability, with eviction filing rates reaching or surpassing pre-pandemic levels. The purpose of this working paper is to show how affordable rental homes are out of reach for millions of low-wage workers and to highlight accounts of tenant experiences that speak to the myriad of challenges faced by low-income renters. This report also includes a "Housing Wage" map which is an estimate of the hourly wage full-time workers must earn to afford a modest apartment based on

the U.S. Department of Housing and Urban Development's (HUD) fair market rent without spending more than 30% of their incomes. Addressing the country's long-term housing affordability crisis requires bridging the gap between rents and incomes by expanding Housing Choice Vouchers to all households in need of them. At current funding levels, federal housing assistance is available to only one in four income-eligible households. To be most effective, the authors conclude that universal rental assistance must be paired with the construction and preservation of more affordable homes, an emergency housing stabilization fund to aid renters in crisis, and stronger renter protections.

FROM THE READING ROOM

The Promise and Peril of Place Governance

Sarah L. Swan[*]

Hyperlocal: Place Governance in a Fragmented World
Jennifer S. Vey & Nate Storring, eds.
Brookings Institution Press (2022)
270 pages; $28.58 (paper); $27.99 (ebook)

From homeowners associations to business development districts, the last few decades have marked the monumental rise of a layer of entities variously called "sublocal," "microlocal," or—as here—"hyperlocal."[1] These formal and informal entities take governance down one layer below even local government, governing specific, discrete sites, like neighborhoods, parks, or downtowns. The sheer quantity of them is astonishing. Homeowners associations hover over "nearly 60 percent of recently built single-family houses, and 80 percent of houses in new sub-divisions"[2] and special districts, a particularly ubiquitous form of these entities, have ballooned to an estimated 50,000 across the nation.[3] An overwhelming plethora of additional entities and organizations including park conservancies, community development corporations, community land trusts, neighborhood councils, tenant associations, chambers of commerce, main-street organizations,

[*] Professor of Law, Rutgers Law School (Newark).

1. *See, e.g.*, Richard Briffault, *The Rise of Sublocal Structures in Urban Governance*, 82 Minn. L. Rev 503, 508 (1997) describing "enterprise zones, tax increment finance districts, special zoning districts, and businesses improvement districts" as "sublocal"); Nadav Shoked, *The New Local*, 100 Va. L. Rev. 1323, 1327–29 (2014) (describing "the indirect expressions of local governance that sit below cities, counties, and special districts," as micro-local, "in contrast with sublocal institutions that have a unitary decision-making body"); Daniel B. Rosenbaum, *A Legal Map of New Local Parkland*, 105 Marq. L. Rev. 721, 736 n.62 (2022) (noting the differing nomenclature used at this level).

2. Sheila R. Foster, *Who Governs? Public, Private, Community, Civic, and Knowledge Actors in Place Governance*, *in* Hyperlocal: Place Governance in a Fragmented World 68 (Jennifer S. Vey & Nate Storring eds., 2022) [hereinafter Hyperlocal].

3. Michael Maciag, *Number of Local Governments by State*, Governing (Sept. 14, 2012), https://www.governing.com/archive/number-of-governments-by-state.html.

development authorities, advisory neighborhood commissions and community boards round out this growth.

The motley crew of organizations and entities existing at this sublocal level is the subject of *Hyperlocal: Place Governance in a Fragmented World*. The book valiantly attempts to wrangle these entities into some kind of orderly form through a series of collected essays. The *Introduction: Defining Place, Defining a Field*, authored by Tracy Hadden Loh and Jennifer S. Vey, along with the concluding essay, *Frontiers of Place Governance* by Tracy Hadden Loh and Nate Storring, frame the book's animating argument: that despite their seemingly disparate attributes, these diverse entities "share DNA in their missions, their governance, their strategies, and the ways they are overseen by government," such that they are best understood as a "coherent, integrated regime."[4]

As might be expected given the sheer size and complexity of this hyperlocal layer of place-based governance, significant portions of the book are devoted to offering differing ways of categorizing or sorting these entities into some kind of functional taxonomy. The first substantive chapter, Alexander Von Hoffman's *Improvising and Innovating: A History of Place Governance in North America*, provides the historical backdrop to the contemporary kaleidoscope of entities, with the author describing the origin stories of various contemporary forms of hyperlocal governance and introducing an elite/democratic classification system to assist with understanding this sublocal layer. This chapter explains how, in early America, place governance occurred primarily through formally recognized elite entities established by the individuals and institutions holding wealth and power at the time. For example, when New Haven, Connecticut, was founded in 1638, wealthy proprietors retained title to "the marketplace" at the center of it. They collaborated with town officials to manage the square "as a site for community institutions, including a school, prison, and three churches, one of whose successors sits there even now."[5] This practice has a modern analogue in many contemporary American cities, where business corporations have "created and managed plazas, squares, and mini-parks adjacent to high-rise buildings."[6]

Elites weren't the only ones doing governance, however. There was also a competing undercurrent of informal democratic governance coming from local residents; these residents engaged in alternative forms of place governance alongside the elite governance.[7] For example, in Boston in the early 1700s, when elite merchants and town officials established food markets and regulated which purveyors could occupy which stalls,

4. Tracy Hadden Loh & Nate Storring, *Frontiers of Place Governance, in* Hyperlocal, *supra* note 2, at 225, 249.

5. Alexander Von Hoffman, *Improvising and Innovating: A History of Place Governance in North America, in* Hyperlocal, *supra* note 2, at 21.

6. *Id*. at 30.

7. *Id.* at 24.

loose affiliations of citizens who opposed the markets voiced their dissent in town meetings and physically protested the regulated space. The contemporary counterpart to this assertion of governance can be seen in independent grassroots organizations like the Franklin Park Coalition, which arose in 1974 in Boston, Massachusetts, to block the redevelopment of a historically significant park offering much-needed greenspace in a majority-minority neighborhood.[8]

In the next chapter, *Who Governs? Public, Private, Community, Civic, and Knowledge Actors in Place Governance*, legal scholar Sheila R. Foster maintains the importance of distinguishing top-down from bottom-up governance, but layers on a slightly different taxonomy in which the diverse cast of hyperlocal entities can be usefully understood according to where they fall on a spectrum from private to public governance. Something like a gated community lands at the furthest pole of private governance. Moving toward the more public end of the spectrum, the next notch belongs to public-private partnerships (public partnering with industry), followed by public-community partnerships (public partnering with people). Finally, there is the category of public-private-community (plus) partnerships, which are complex "multi-stakeholder collaborative place governance arrangements that involve some mix of public officials, private sector actors, neighborhood civic organizations, residents, and often major anchor institutions typically operating at a large scale in the core of major cities."[9]

In mapping the terrain in this way, Foster highlights how state entities can support or thwart various community organizations. Specifically, when the state facilitates and supports bottom-up place governance, it can encourage the "opportunity for more robust participation from historically marginalized populations while helping these populations overcome structural and fiscal constraints that are a consequence of systemic racial injustice."[10] Seattle, Washington, assigning a decommissioned fire house and funding to the Africatown Land Trust to create a community center in a historically black neighborhood is offered as an example of this.[11]

But even with the categorizational help from these first two chapters, "today's place governance is messy,"[12] and the remaining chapters reveal some of the factors that contribute to the difficulties faced in mapping the field. First, as Juliet Mosso notes in chapter four, *Power and Legitimacy in Place Government Ecosystems: A Comparative Analysis*, all categorizations at this level of governance are inherently unstable, and variations in the structure and legal capacities of these entities across states and jurisdictions make it difficult to confidently generalize about them.

---

8. *Id*. at 45.

9. Sheila R. Foster, *Who Governs? Public, Private, Community, Civic, and Knowledge Actors in Place Governance, in* Hyperlocal, *supra* note 2, at 82.

10. *Id*. at 93.

11. *Id*. at 92.

12. Loh & Storring, *supra* note 4, at 228.

Second, although place governance is typically targeted at a discrete site like a neighborhood or park, the place governance of each site invariably has spill-over externalities that impact surrounding sites as well. For example, the traditional place governance response to homelessness has mainly been one of exclusion. While using various mechanisms to exclude unsheltered persons from a particular area might reduce the number of homeless persons there, those individuals do not suddenly become sheltered as a result of the exclusion. Rather, they are simply moved along, and the next neighborhood instead then is tasked with the same issue. The fragmentation of local government makes this pattern of pushing along as opposed to actually addressing the concern an often appealing and easy path which does nothing to resolve the underlying problem.

Third, multiple entities often interact over governance of the same site. For example, when describing the homelessness problem in Atlanta, Georgia, Elena Madison and Joy Moses note in chapter six, *How Should Place Governance Support People Experiencing Homelessness?* that in downtown Atlanta, public spaces are governed by a multitude of entities, "each having different rules and approaches to addressing conflicts."[13] The overlapping jurisdictions are also evident in the description of the many actors who factor into the place governance problem of homelessness in Los Angeles. Multiple entities like business improvement districts (BIDs), which "tend to coalesce around protection of commercial interests"; neighborhood councils which tend to "play a mediating role" assuaging the fears of residential property owners; and community land trusts which tend to focus on "promoting common good development in the face of high and rapidly increasing land values"[14] interact with the traditional bodies of local governance, including one of the ninety-nine neighborhood councils that make up the city of Los Angeles, which are in turn part of the eighty-eight cities that make up Los Angeles County.[15] Chapter seven, Nancy Kwak's *What Can the United State Learn from the Rest of the World About the Stewardship of Place*, also emphasizes some of the challenges arising from the multiple major stakeholders involved with complex megaprojects.

Such place governance ecosystems create their own complexities. For example, when exploring the role of place governance entities in reducing homelessness, Madison and Moses note how programs that initially appear promising face difficulty from uncoordinated governance. Entity efforts like implementing "inclusion by dilution" (the idea that each public space can handle a certain number of unsheltered persons before any perceived negative impact will result) and workforce development programs (presenting unhoused individuals with work or volunteer opportunities)

13. Elena Madison & Joy Moses, *How Should Place Governance Support People Experiencing Homelessness?*, *in* Hyperlocal, *supra* note 2, at 182.

14. Juliet Musso, *Power and Legitimacy in Place Government Ecosystems*, *in* Hyperlocal, *supra* note 2, at 106–07.

15. *Id*. at 107.

appear to have potential, but coordination problems between overlapping entities and between the larger local government are often obstacles.[16] In fact, the authors suggest that hyperlocal entities may actually be inherently ill-equipped to address a problem like homelessness, unless they are supported by "a citywide strategy that incorporates both social service providers and place managers" and the relevant "resources and cross-sector coordination."[17]

Fourth and finally, the interactions of governance within these complicated multi-party frameworks influence the actions of the entities themselves. Within this complex context, entities do not stay static; they "shapeshift" throughout governance processes, taking on different roles as they interact in the complicated ecosystem of place governance. This amorphous aspect makes it "challenging empirically to generalize regarding their goals, structures, and impact."[18] For example, in chapter five, *Who Benefits from Place Governance and Who Is Accountable for Its Oversight? The Case of Business Improvement Districts*, Jill Simone Gross offers an example of how a business improvement district (BID) changed over time through a case study of the Fulton Mall Improvement Association (FMIA). The growth it initially generated created both internal conflict within the entity and external conflict between the BID and the broader community. The BID was created in 1976 with the goal of bringing "the middle-class shopper back to Brooklyn."[19] A mall was built a year later, with most of the businesses serving "Brooklyn's thriving hip-hop culture," and the area became "a center of commerce for Brooklyn's burgeoning working and middle-class communities of color."[20] However, over the ensuing decades, BID stakeholders began to believe this was an underutilized asset, eventually facilitating razing the mall and instead erecting a "1.5 million-square-foot high-rise, mixed-use development that has become home to big box retail stores, restaurants, and the like."[21] Whether this change constituted a beneficial "improvement" depended on who was asked: the area became "the most expensive . . . commercial space in Brooklyn," at the cost of the almost complete erasure of a previously thriving cultural neighborhood hub.[22]

Despite these notable challenges for researchers, the many case studies interspersed throughout the book illuminate how institutional elements of place governance entities affect whether these entities can achieve their sometimes differing place management goals. The case studies also reveal a familiar paradox: the growth of place governance in urban areas offers

16. Madison & Moses, *supra* note 13, at 177.

17. *Id*. at 192.

18. Musso, *supra* note 14, at 107.

19. Jill Simone Gross, *Who Benefits from Place Governance and Who Is Accountable for its Oversight? The Case of Business Improvement Districts*, *in* Hyperlocal, *supra* note 2, at 133.

20. *Id*. at 134.

21. *Id*. at 135.

22. *Id*.

both promise and peril. This duality is evident even in the historical antecedents to the contemporary forms of place governance:"[a]t their best, [historical] elite modes brought financial resources and professional skills to the problems of making and running places in ways that benefited the city at large."[23] On the other hand, "[a]t their worst, they became too centralized and insular, and exacerbated inequalities of class or race."[24] Democratic entities had a similar duality: at their best, they "identified local needs and celebrated local cultures"; at their worst, they "represented only segments of their communities or lacked stable structures that could sustain places over time."[25]

In the contemporary iterations of these entities, similar concerns and hopes remain. Potential perils of place governance include concerns about exclusions, erasures, punitive policing of particular populations, and a singular goal of economic or commercial advancement at the expense of other laudable goals. Another overarching concern is that "this new form of governance" simply "formalizes another phase of decline of the public sector," and the "privatization of public services and the creation of hyperlocal funding" will devolve into yet another "form of hoarding that serves narrow interests, diverts dollars from under-resourced neighborhoods, and creates wealth-based disparities in the provision of public services."[26] There is significant risk that place governance will exacerbate wealth-based inequities, heighten negative spillover effects between neighborhoods, and imperil "the well-being of vulnerable populations and citizens at large."[27] The prominent role that property owners in particular play in many place-governing entities exacerbates such concerns.

Yet, despite these concerns, virtually all of the contributors to this collected volume agree that there is simultaneously significant promise associated with these entities. On this view, place governance can redirect and redistribute resources towards neglected locations, thus promoting equity. Place governance can potentially support "inclusive growth," combining "economic development and social justice" and empowering local stakeholders "in proactively determining desired outcomes for their place and the strategies and investments needed to achieve them."[28] Place governance may give community stakeholders "a structure through which to share their vision and ideas, voice their concerns, advocate for investments, and codesign plans and strategies with others both inside and outside their

23. Von Hoffman, *supra* note 5, at 53.

24. *Id*.

25. *Id*. at 54.

26. Tracy Hadden Loh & Jennifer S. Vey, *Introduction: Defining Place, Defining a Field*, *in* Hyperlocal, *supra* note 2, at 9.

27. *Id*.

28. *Id*.

place," and ultimately allow community movements to manage capital in ways that "democratize the right to the city."[29]

But whether it is the peril or the promise of hyperlocal place governance that will eventually win the day largely depends on issues of institutional design. The book's editors suggest three key questions that should guide institutional design considerations: to whom is the entity accountable, who actually holds and exercises power, and who benefits from the entity's activities.[30] These are indeed important questions, and pairing them with insights from recent legal scholarship may offer additional nuance as well. For instance, in *The Institutional Design of Community Control*, K. Sabeel Rahman and Jocelyn Simonson explore whether shifts towards "community control" through things like neighborhood councils for police activities, and community group participation in land-use development decisions should be understood as normatively desirable or not.[31] These two authors suggest "three key dimensions along which to analyze the potential for power-shifting and contestation" in these sorts of sublocal arrangements: the nature of authority given to community participants and, in particular, whether it involves mere input or a more muscular form of control; the composition of the governing body and whether traditionally disempowered constituencies are represented; and finally whether the moment of potential intervention occurs early or late in the overall policy-making process.[32] In their view, a "weak form of community involvement: only providing input, so late in a process that it affects relatively little, through a body that does not prioritize participation by the historically disempowered" will likely do little to counteract existing inequalities, whereas community participation that involves "exercising real power, significantly upstream to affect a wide range of policy decisions, through a representative body independent of those already in power" holds significantly more potential.[33]

Similarly, in *The New Local*, Nadav Shoked explores what he calls the "micro-local" level.[34] He lists a series of developments that sound very similar to "place governance" issues: a neighborhood in Chicago that is voting to determine whether it should offer enhanced mental health services to its residents and raise property taxes to fund that initiative; a neighborhood in Park Slope that sued New York City for putting in a bike lane; the ability of neighborhoods in Arizona to petition for juvenile curfews there; and community representatives in San Francisco studying whether a temporary street closure had a positive impact such that the street should

29. *Id*. at 12.

30. Loh & Storring, *supra* note 4, at 226.

31. K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 Calif. L. Rev. 679 (2020).

32. *Id*. at 683.

33. *Id*. at 727.

34. Nadav Shoked, *The New Local*, 100 Va. L. Rev. 1323 (2014).

be permanently converted to an open air plaza, for example.[35] He argues that four questions can help determine whether such forms of micro-local governance are desirable or not, including whether the devolution of policymaking to the micro-level of governance actually gives "real decision-making powers to residents"; whether participation is encouraged through diversity within the community or through differing opinions regarding the area of governance in question; whether the community members participating are voicing self-interest or more "public" concerns; and whether the will of the community can actually manifest or whether numerous factors will create distortions.[36]

In addition to their nuanced explorations of institutional design that may be of benefit as the study of place governance develops, reading these articles in conjunction with *Hyperlocal: Place Governance in a Fragmented World* reveals some of the challenges associated with defining the field. Pulling from the examples Shoked uses to illustrate micro-level governance, the bike lane and the open-air plaza conversion seem squarely within the "place governance" world, as does Rahman and Simonson's example of a community center development. But the example of the neighborhood in Chicago, North River, voting on whether to provide additional mental health services for residents of that neighborhood through levying additional property taxes on themselves is trickier. The book's authors devote some of their concluding chapter to the issue of "legal neighborhoods," describing how Minneapolis had a Neighborhoods 2020 process in place prior to the killing of George Floyd, and exploring the significance of a subgroup of one neighborhood council in Los Angeles seeking to secede and form their own council, and they count these as place governance.[37] But legal neighborhoods are often engaged in general policy-making activities that are less directly tied to physical changes to place, and it is not always clear where the line between a kind of generic sublocal policymaking and a more specific hyperlocal place governance lies, or even if such a line exists. Most of the book's case studies are about actual land management and discrete sites being physically managed, but at various points the definitions of place governance in the book seem broad enough to encompass virtually all policymaking concerning a unit smaller than a locality, and it is sometimes difficult to tell whether "place governance" and the more generic sounding "sublocal" or "micro-level governance" are simply synonymous, or where the overlap might begin or end.

So, place governance is indeed messy. The book offers useful case studies and insights and important historical and comparative perspective, but more work remains to be done definitionally as well as substantively. Indeed, the authors conclude by noting that this field of study is still just

35. *Id*. at 1327.

36. *Id*. at 1389.

37. Loh & Storring, *supra* note 4, at 270; *see also* Stephen R. Miller, *Legal Neighborhoods*, 37 Harv. Env't L. Rev. 105 (2013).

beginning, and they call for further research, data, and exploration into hyperlocal place governance.[38] The authors urge, first, that states conduct "a simple audit of existing legislation, jurisdictions, and relationships" of hyperlocal governance and create a "comprehensive map of every overlapping place governance jurisdiction."[39] But questions like whether the neighborhood of North River choosing to add additional mental health services for residents would or should go into such an audit will likely need to be answered first. As these definitional and research foundations begin to be laid, the best practices for managing this growing mode of governance, and its potential promise and peril, may yet emerge. There is certainly no shortage of work remaining in both defining and mapping this landscape as it continues to develop, but the book offers a useful beginning step for this process. The authors note that "working across organizations, fields, sectors, and cultures is the only way to move place governance forward in today's increasingly fragmented cities and regions," and the book provides a fine entry point to begin these conversations.[40]

38. Loh & Storring, *supra* note 2, at 251.
39. *Id*.
40. Hyperlocal, *supra* note 2, at x.

ORGANIZATIONAL PROFILE

The South Dakota Native Homeownership Coalition: Celebrating Ten Years of Impact

*Sharon Vogel**
*Leslie Newman***

In June 2023, the South Dakota Native Homeownership Coalition (Coalition) celebrated its tenth anniversary. When stakeholders first came together for an exploratory session ten years earlier, in June 2013, no one could have imagined where the Coalition would be today, what it would accomplish, and what its future goals would look like. Today, the Coalition is comprised of approximately 100 diverse stakeholders, working together to promote homeownership for Native American families across the state of South Dakota. With the support of the Coalition, Coalition member organizations have assisted 253 families to achieve homeownership, deploying over $31 million in mortgage loans and subsidies.[1]

Background

South Dakota is home to nine Native American tribes, which are sovereign nations based in reservation communities around the state.[2] These reservations were created by treaties with the United States government in the late 1800s, as part of the country's westward expansion.[3] Much of the land on these reservations is held in trust by the federal government, which has a fiduciary duty to manage the land. The trust land status limits alienation

* Sharon Vogel is Executive Director of the Cheyenne River Housing Authority on the Cheyenne River Indian Reservation in South Dakota and Chairwoman of the Board of the South Dakota Native Homeownership Coalition.

** Leslie Newman, JD, is a managing partner of Seven Sisters Community Development Group, a small, women-owned and majority Native-owned consulting firm focusing on community development around the country. She has worked to support the South Dakota Native Homeownership Coalition since its creation in 2013.

1. 1 South Dakota Native Homeownership Coalition Impact Report (June 2023), https://www.sdnativehomeownershipcoalition.org.

2. The Tribes of South Dakota, South Dakota Department of Tribal Relations, https://sdtribalrelations.sd.gov/tribes/nine-tribes.aspx (last visited Aug. 8, 2023).

3. National Congress of American Indians, Tribal Nations and the United States: An Introduction (Feb. 2020), https://www.ncai.org/tribalnations/introduction/Indian_Country_101_Updated_February_2019.pdf.

of the land and prevents the land itself from being used as collateral for a mortgage. For mortgages on trust land, a leasehold interest in the land and the improvement on the land (the home) is used as collateral for the loan. These land transactions must be approved by tribal governments and the Bureau of Indian Affairs of the U.S. Department of Interior.[4] Bureaucratic delays often impact the mortgage process. These delays, combined with uncertainties about the foreclosure process, often result in lenders' hesitation to originate loans on trust land.

As part of its treaty obligations, the federal government has provided housing assistance to tribal communities through the U.S. Department of Housing and Urban Development (HUD).[5] Until the passage of the Native American Housing Assistance and Self-Determination Act (NAHASDA) in 1996, much of this assistance focused on the provision of affordable rental housing. One of the primary goals of NAHASDA was to encourage the leveraging of other funds to promote homeownership.[6]

Economic opportunities in reservation communities are often limited, and these communities are some of the most impoverished in the country. According to 2021 5-Year Census data, for example, the average per capita income on the Pine Ridge Reservation is $11,900 (less than one third of the national average), and the median household income is $34,542, approximately one half of the national average.[7] With limited incomes, tribal members often are vulnerable to predatory lenders, impacting credit scores and credit histories. A lack of housing stock in many tribal communities frequently means that tribal members must relocate or commute long distances to access employment. In many cases, multiple generations live in one unit, creating overcrowded and rundown housing conditions.[8]

Against this challenging backdrop, there are mortgage products designed to promote Native American homeownership. Under HUD's Section 184 program, for example, HUD guarantees 100% of a mortgage loan originated by private lenders.[9] The Native American Direct Loan (NADL) of the U.S. Department of Veterans Affairs targets Native American veteran borrowers.[10] Designed for low-income families in rural areas,

4. *Id.*

5. Tribal Leaders Handbook on Homeownership (Fed. Res. Bank of Minneapolis 2018), https://www.minneapolisfed.org/indiancountry/resources/tribal-leaders-handbook-on-homeownership.

6. U.S. Dept. of Hous. & Urb. Dev., NAHASDA, www.hud.gov/program_offices/public_indian_housing/ih/codetalk/nahasda (last visited Aug. 8, 2023).

7. *Pine Ridge Reservation*, U.S. Census Rep. (2021), https://censusreporter.org/profiles/25000US2810-pine-ridge-reservation.

8. Tribal Leaders Handbook on Homeownership, *supra* note 5.

9. U.S. Dept. of Hous. & Urb. Dev., Section 184 Indian Home Loan Guarantee Program, www.hud.gov/program_offices/public_indian_housing/ih/homeownership/184 (last visited Aug. 8, 2023).

10. U.S. Dept. of Veterans Affairs, Native American Direct Loan (Mar. 23, 2023), www.va.gov/housing-assistance/home-loans/loan-types/native-american-direct-loan.

the U.S. Department of Agriculture/Rural Development's 502 Direct Loan Program has direct and guaranteed loan products that are potential products for Native American families in reservation communities.[11] Yet despite the existence of these products and programs, mortgage lending in Native communities has been extremely limited.

The Coalition's Creation

In 2013, under the leadership of Elsie Meeks, State Director of the U.S. Department of Agriculture (USDA) Rural Development in South Dakota, USDA organized a one-day convening to explore the possibility of creating a statewide coalition to increase Native American homeownership in South Dakota.[12] Meeks and her team recognized that USDA was not deploying available 502 direct mortgage funds to Native American families in South Dakota, but also realized that the USDA could not address this issue or solve this problem alone. Collaboration with other stakeholders—both Native American and non-Native, from both the private and public sectors—would be necessary. The South Dakota Housing Development Authority (SDHDA)[13] co-hosted the gathering with USDA, inviting approximately fifty-five stakeholders around the state to participate. These participants represented a variety of different organizations and agencies, including tribal governments, HUD, tribal housing authorities, private lenders, and Native and non-Native nonprofit organizations. The agenda included sharing results of a survey on homeownership needs, examples of best practices, and discussions on the possibility of starting a new coalition and what it could tackle. By the end of the day, stakeholders were unanimous in their commitment to and excitement about starting a new coalition.

From the outset, Lakota Funds,[14] a nonprofit organization on the Pine Ridge Reservation, has served as the Coalition's fiscal sponsor. A Native American Community Development Financial Institution (CDFI)[15] or community loan fund, Lakota Funds' track record with funders and the Native community, as well as its commitment to asset building has been critical to the success of the Coalition.

Once stakeholders agreed on the creation of the Coalition, one of their first steps focused on strategic planning. Through this one-day session, participants developed the Coalition's vision and mission statements, and

11. U.S. Dept. of Agric. Rural Development, Single Family Housing Programs, www.rd.usda.gov/programs-services/single-family-housing-programs (last visited Aug. 8, 2023).

12. S.D. Homeownership Coal., Month: October 2015 (2023), www.sdnativehomeownershipcoalition.org/2015/10.

13. S.D. Hous., What Is South Dakota Housing? (2023), www.sdhda.org.

14. Lakota Funds, 2021 Annual Report (2023), www.LakotaFunds.org.

15. U.S. Dept. of the Treasury, What Are CDFIs?, www.cdfifund.gov/sites/cdfi/files/documents/cdfi_infographic_v08a.pdf (last visited Aug. 8, 2023).

discussed the barriers to homeownership in Native communities. These barriers included the following:

- Lenders' hesitancy to originate mortgages on trust land;
- A lack of housing infrastructure (including water, wastewater, and roads) in tribal communities;
- Limited available housing stock for purchase;
- Lack of information about funding and financing for homebuyers and homeownership programs;
- Few trained homebuyer counselors;
- A lack of awareness about homeownership opportunities (as the "homeownership dream" is not on the radar of many tribal members); and
- Policy barriers to lending and homeownership.

Typically, describing these challenges to homeownership in Native communities is where the discussion ends. These barriers are significant and can seem overwhelming. But during the Coalition's strategic planning process, the discussion about challenges was just the beginning, as Coalition members formed working committees to address these challenges, developing concrete milestones to guide their work. Initially, stakeholders formed five working committees:

- Funding and Finance;
- Homebuyer Readiness;
- Physical Issues (including land and housing stock);
- Education and Capacity Building; and
- Policy

Harnessing Coalition members' volunteer time and energy, these working committees have played a critical role in the success of the Coalition, ensuring that they are effectively meeting members' needs.

Cornerstones of the Coalition's Work

Guided by its working committees, the South Dakota Native Homeownership Coalition has worked to develop and deliver robust programming that can effectively result in increased homeownership for Native families across the state. This programming now includes the following:

- **Annual Visits to Tribal Communities**
  Early on in the Coalition's work, members realized the value of meeting on reservations, in the tribal communities that lie at the heart of its work. While statewide convenings are typically conducted in

cities or towns (Rapid City, Sioux Falls, Pierre), Coalition members made a commitment to site visits in tribal communities. For many non-Native Coalition members, this has been the first time they have visited a reservation, and, for Native members, it is often the first time they have visited a reservation beyond their own. The visits highlight homeownership efforts in tribal communities and have included seeing subdivisions under development, visiting a low-income housing tax credit (LIHTC) project during the conversion to homeownership, and meeting with tribal partners. Each visit ends with an interview with homeowners, who discuss the challenges they faced in achieving homeownership, the benefits they experience as homeowners, and advice for potential homebuyers. The visits are tremendously impactful, both for the host community that have the opportunity to share their work, and visitors who are inspired by what they witness.

- **Homeownership Track at State Housing Conference**
  In 2014, the Coalition developed the first-ever Native homeownership track at the South Dakota Housing Development Authority's Annual Housing Conference. Since then, the track has become a feature of the conference, increasing Native participation at the conference from nine participants in 2011 to over seventy-five participants each year. While the Native homeownership track was initially very separate from other conference workshop opportunities, with most Coalition members attending the special track and most other conference attendees electing other workshops, over time the Native track (and Coalition members) have become truly integrated into the conference. Many Coalition members attend other conference workshops, while the Native homeownership track has offered some of the most popular conference sessions.

- **Housing Needs Assessments**
  With support from the South Dakota Housing Development Authority, the Coalition has completed housing needs studies in four tribal communities.[16] Conducted in partnership with local tribal organizations, these assessments provide critical data on potential homebuyers needed to ensure that homeownership projects are designed to meet these needs.

- **Policy Advocacy**
  Policy advocacy has also been a critical component of the Coalition's work since its creation: identifying impediments to Native homeownership, and designing solutions to address them. One of the Coalition's most significant policy achievements is the USDA 502 Native CDFI Relending Demonstration, through which two Native CDFIs

16. S.D. Homeownership Coal., Housing Needs Assessments (2023), www.sdnativehomeownershipcoalition.org/housing-needs-assessments.

in South Dakota each borrowed $800,000 from USDA to relend to eligible homebuyers. Building on the successful pilot, Congress has appropriated $7.5 million to expand the relending demonstration nationwide.[17]

- **Construction Internship Program**
  While the focus of the Coalition's work is homeownership, stakeholders have taken a broad perspective on what is needed to see more Native homebuyers. Recognizing that the lack of housing stock is often a barrier to homeownership, the Coalition held a series of focus groups to with residential contractors to identify why they were not building more homes. Contractors explained that, while there are high unemployment rates in many tribal communities, many tribal citizens may not be workforce ready. In response, the Coalition developed its "Construction Internship Program," placing building trades students at tribal colleges with local contractors for the summer. The Coalition raises funds for intern stipends, providing required financial education classes that cover money management, and ensuring that each intern opens a bank account. Contractors commit to providing hands-on training for the interns and to considering the interns for full time employment should the contractors have an open position. This way, interns gain valuable work experience, while contractors are able to "test out" potential employees in a risk-free environment. According to the Coalition's records, since the inception of the program in 2017, 152 interns have completed the program, and 74 participants (nearly 50%) have received job offers.

- **Certification Trainings for Homebuyer Practitioners**
  Building the capacity of homebuyer practitioners who are working directly to support homebuyers has been a primary focus of the Coalition's work since its inception. The Coalition hosts regular instructor certification trainings on the different curricula designed for Native homebuyers, including the *Pathways Home*[18] homebuyer education

17. In 2018, the U.S. Department of Agriculture (USDA) and two Native community development financial institutions (Native CDFIs) in South Dakota—Four Bands Community Fund on the Cheyenne River Indian Reservation and Mazaska Owecaso Otipi Financial on the Pine Ridge Indian Reservation—implemented a successful $2 million demonstration, pursuant to 7 C.F.R. § 3550.7, which sought to improve the deployment rate of the 502 direct program in Native communities in South Dakota. The pilot made Native CDFIs eligible borrowers under the 502 direct loan program and enabled them to relend to qualified families for the construction, acquisition, and rehabilitation of affordable housing on tribal land. Through this demonstration, the two Native CDFIs in partnership with USDA made nineteen loans totaling $2.4 million, nearly double the volume of loans on these two reservations than USDA deployed on its own on the same two reservations during the previous ten years.

18. NAIHC, Pathways Home: A Native Homeownership Guide, naihc.net/pathways-home (last visited Aug. 8, 2023).

curriculum, the *Building Native Communities*[19] financial education curriculum, post-purchase program development, and financial coaching. In addition to providing valuable information and tools for practitioners, these trainings also provide the opportunity for practitioners, often working with small organizations in isolated communities, to come together and build a cadre of instructors focusing on Native homeownership across the state.

- **"Native Homeownership Is Possible" Video Series**
  As part of the Coalition's work to show that "Native Homeownership Is Possible," it has developed a series of short videos to showcase homebuyer success stories from different tribal communities.[20] These videos highlight what it took to achieve homeownership and obstacles that were overcome, as well as what it means for the homeowners and their families—the benefits of homeownership.

One Member's Perspective

Sharon Vogel, the Executive Director of the Cheyenne River Housing Authority in Eagle Butte, South Dakota, serves as Chairwoman of the Coalition's Board of Directors. She has been actively involved in the Coalition's work since its initial meeting in 2013, and she has emphasized how the Coalition has benefitted her organization in many ways, on multiple levels: "Over the past ten years, our engagement in the Coalition has enhanced our development capacity, expanded our networking efforts, and created new opportunities for our organization. Members of my staff have greatly benefitted from certified instructor trainings, peer learning, and leadership development activities."[21] Sharon also notes the power of the Coalition in amplifying the voice of its members: "We can communicate our needs individually as the Cheyenne River Housing Authority, but it's more powerful to be part of a collective voice. Working with the Coalition has opened my eyes to the power of advocacy and policy development."[22] In speaking about the Coalition's policy wins, Sharon mentions the success of the 502 relending pilot, input on state housing issues, and potential reform of the VA's Native American Direct Loan program.

Ingredients for Success

Looking back on the Coalition's work over the past ten years, what are the reasons for its success? While the Coalition's context may look different from the environment that many other affordable housing and community

19. Oweesta Corp., Financial Skills for Families (2020), www.oweesta.org/native-cdfi-resources/building-native-communities-toolkit/financial-skills-for-families.

20. Homeownership Is Possible for You, S.D. Native Homeownership Coal. (2018), nativehomeownership.com/#stories.

21. Interview with Sharon Vogel, Exec. Dir., Cheyenne River Hous. Auth. (June 2023).

22. *Id.*

development organizations are working in, many of these ingredients for success are applicable in other settings:

- **Inclusive, diverse membership**
  While many other organizations and coalitions have limited, focused membership, the Coalition's broad membership has been key to its success. From the initial meeting in June 2013, the invitation list was broad and diverse and included both Native American and non-Native organizations. Stakeholders are from tribal, state, and federal agencies as well as the private and nonprofit sectors. Native CDFIs have played an important role, paving the way to streamline the mortgage lending process on Native American reservations, and initiating collaborations with the traditional players in the mortgage lending industry. This bridge-building and cross-sector education has been critical to the work of the Coalition.[23]

- **Responsiveness and ability to pivot**
  The Coalition's ability to respond to member needs is also critical. While veterans' homeownership was not the focus of an initial working committee, for example, once Coalition members recognized its importance, and the need to focus on the specific needs and resources for veterans, it created an additional committee. The original Funding and Finance Committee evolved into the Coalition & Member Sustainability Committee. At the outset of the Covid-19 pandemic, the Coalition quickly raised funds for the "Native Homeownership Protection Plan" to ensure that Native homebuyers could retain their homes.[24]

- **Broad, long-term approach to homeownership**
  To increase homeownership opportunities, the Coalition recognizes the need to support and strengthen the Native American residential construction industry. In addition to developing the Construction Internship Program, the Coalition conducts inspector certification trainings to increase the number of construction inspectors, offers a course on "appraising residential property in tribal communities" to boost the capacity of appraisers willing to conduct appraisals in tribal communities, and conducts an annual Contractors' Workshop to provide training and networking to support and strengthen

23. S.D. Native Homeownership Coal., Kola Members (2023), www.sdnativehomeownershipcoalition.org/our-members.

24. *Now Accepting Applications from Coalition Member Organiztions for Mortgage and Small Business Relief*, S.D. Native Homeownership Coal. (2023), www.sdnativehomeownershipcoalition.org/news/coalition-news/nhpp-applications-open.

Native contractors' operations.[25] While this is a long-term approach to addressing the availability of housing stock, it is also part of the systemic change the Coalition is seeking to achieve.

- **Membership structure tailored to member needs**
  The Coalition instituted a membership dues structure after five years of operations. Following its clear value proposition, the Coalition designed a structure where member organizations elect a dues level based on their ability to pay, ranging from $250 to $10,000, with corresponding benefits. This dues structure helps to diversify the Coalition's funding base, and reflects the support of members for their Coalition.

On the Horizon

Looking ahead, the South Dakota Native Homeownership Coalition is poised to build on the strong foundation that it has created over the past ten years, to formalize its structure, to develop new programming, and to ensure its long-term sustainability.

After working with the Lakota Funds as its fiscal sponsor since its creation, the Coalition is now working to become an independent 501(c)3 organization. As an independent organization, it now has its own board of directors, articles of incorporation, bylaws, and staff.

The Coalition is also rolling out two new statewide programs: a homeownership program and a workforce development program. Through the new homeownership program, the Coalition will offer a statewide down payment assistance program and continue to provide homebuyer education instructor training and technical assistance. Through the new workforce development program, the Coalition will continue its work to build the residential construction industry in South Dakota, creating one hundred new jobs over a three-year period.

The Coalition is also developing a "Housing Development Subsidiary" to support member organizations' development efforts. Charging market rate for its services, the Coalition's subsidiary will be able to generate income to contribute to the overall sustainability of the Coalition.

Conclusion

Ten years ago, while stakeholders were united in their commitment to working together through a statewide coalition, they could not have imagined what this coalition would accomplish. In addition to supporting member organizations and homebuyers in South Dakota, it has become

25. *Workshop Attracks over 100 Attendees in Effort to Increase Housing Stock on Indian Reservations*, S.D. Native Homeownership Coal. (2023), www.sdnativehomeownershipcoalition.org/news/workshop-attracts-over-100-attendees-in-effort-to-increase-housing-stock-on-indian-reservations.

a model for other Native American homeownership coalitions around the country. Although many of the issues that it works to address are unique to tribal communities in South Dakota, many of its core operating values and its comprehensive approach can serve as a model for housing and community development efforts in communities across the nation. In the words of Sharon Vogel,

> *We are proud to belong to the Coalition. While we didn't set out to be national model, and we are focused on increasing homeownership for Native families in South Dakota, our impact has grown far beyond the individual families we serve.*[26]

26. Interview with Sharon Vogel, *supra* note 21.

When Affordable Housing Comes Up Against Environmentalism: Legal Lessons from Minnesota and California

Reuben Siegman[†]

Table of Contents

Two of the most important issues that the country is facing often find themselves at odds with each other: the way that the country balances environmental protections and affordable housing.[1]

Environmentalism and the climate are increasingly important to voters as we face a changing world due to the risk from global warming.[2] Moreover, the Biden administration has prioritized these issues, including passing the largest climate law in the history of the country in the Inflation Reduction Act.[3]

Affordable housing is another important policy area, with a plurality of Americans saying it is a major issue, with those who are younger, and those

[†] Reuben Siegman is a 2023 graduate of the Georgetown University Law Center. This Article won the ABA Forum on Affordable Housing and Community Development's 2023 Law Student Writing Competition.

1. Jerusalem Demas, *Not Everyone Should Have a Say*, Atlantic (Oct. 19, 2022), https://www.theatlantic.com/ideas/archive/2022/10/environmentalists-nimby-permitting-reform-nepa/671775; Katherine Schaeffer, *A Growing Share of Americans Say Affordable Housing Is a Major Problem Where They Live*, Pew Rsch. Ctr. (Jan. 18, 2022) https://www.pewresearch.org/fact-tank/2022/01/18/a-growing-share-of-americans-say-affordable-housing-is-a-major-problem-where-they-live/#:~:text=A%20majority%20of%20adults%20living,it%20is%20a%20major%20problem.

2. John Schwartz, *Climate Is Taking on a Growing Role for Voters, Research Suggests*, N.Y. Times (Aug. 24, 2020), https://www.nytimes.com/2020/08/24/climate/climate-change-survey-voters.html.

3. Joseph Winters, *Biden Signs The Inflation Reduction Act into Law*, Grist (Aug. 16, 2022), https://grist.org/politics/biden-signs-the-inflation-reduction-act-into-law.

who live in urban areas in particular, believing it is a significant issue.[4] While national policy impacts housing affordability, many important decisions are left to municipalities, and substantial advocacy takes place at the city level.[5] Policies that favor affordability often involve producing more affordable housing—which involves building.[6] And any environmentalist will probably tell you that when you build, you must think about the impacts on the environment and comply with environmental regulations.

Many states have their own state version of the National Environmental Policy Act (NEPA), often referred to as "Little NEPAs."[7] These laws are generally similar to the federal version of the law, but may vary slightly on a state-by-state basis.[8] Though some are action forcing (e.g., California and New York), most are procedural and state that when state or local governments take a major action that could significantly impact the environment, they must complete an environmental review.[9] Importantly, this requirement usually includes local or municipal agencies that conduct zoning, land use and site-approval decisions, and permitting, all of which may be subject to environmental reviews.[10] These environmental regulations may increase costs for developers, create uncertainty around projects, and can result in delays for projects.[11] Recently, NIMBYs[12] have used these environmental protections (often in bad faith) to stop or delay housing projects through litigation or the threat of litigation.[13] One study in California found that challenging housing projects, and especially higher density housing, is the most frequently challenged type of private sector project under the California Environmental Quality Act (CEQA).[14]

---

4. Schaeffer, *supra* note 1.

5. Owen Minott & Julia Selby, *Ten Actions Cities Can Take to Improve Housing Affordability*, Bipartisan Pol'y Ctr. (Aug. 10, 2022), https://bipartisanpolicy.org/blog/10-actions-to-housing-affordability.

6. Press Release, White House, Biden-Harris Administration Announces Progress in Implementing Its Housing Supply Action Plan (Oct. 7, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/10/07/biden-harris-administration-announces-progress-in-implementing-its-housing-supply-action-plan.

7. David Sive & Mark A. Chertok, "*Little NEPAs" and Their Environmental Impact Assessment Procedures*, SU 044 ALI-CLE 1115 (June 2013).

8. *Id*.

9. *Id*.

10. *Id*.

11. John Randolph et al., Effects of Environmental Regulatory Systems on Housing Affordability 4 (2007).

12. NIMBY stands for "not in my backyard" and describes people who do not want any increase in building or density near where they live.

13. Ashley Archibald, *Roadblocks to Housing: How NIMBYs Use Environmental Review Processes to Stall Affordable Housing*, Real Change (Apr. 4, 2018), https://www.realchangenews.org/news/2018/04/04/roadblocks-housing-how-nimbys-use-environmental-review-processes-stall-affordable.

14. Jennifer L. Hernandez & David Friedman, *In the Name of the Environment: Litigation Abuse Under CEQA*, Holland & Knight (Aug. 2015), https://www.hklaw.com/en/insights/publications/2015/08/in-the-name-of-the-environment-litigation-abuse-un.

To build more housing to increase affordability (and density, helping climate goals), projects go through these "Little NEPAs," which NIMBY groups have often used to delay or block projects.[15] Importantly, the states that have the strongest environmental protections are often the states that also face the biggest shortages of affordable housing and are home to popular metropolitan areas.[16] States like California, Massachusetts, and New York are considering reforming these environmental laws to make it easier to build more housing.[17] This possibility has created a significant tension between urbanism and environmentalism: the need to build more affordable housing quickly, while balancing the level of environmental protections that states and municipalities should have, which often slow, delay, or increase the cost of building.

In this paper, I will examine this tension between urbanism and environmentalism. I will use this tension to examine the limits of municipalities acting alone to address affordable housing, and why coordination with state legislatures is needed, as environmental laws can slow down or prohibit building more housing. Additionally, I will look at how efforts at reform are difficult with such competing interests. To do this, I will compare two examples: Minneapolis, which has been widely lauded for its 2040 plan, and California, which has been lamented for its inability to provide enough affordable housing to its residents and has recently passed many different reforms.

First, I will look at Minneapolis, which in 2019 passed its 2040 plan, a guide for how the metropolitan area plans to grow and develop.[18] This plan included a package of zoning reforms, culminating in Minneapolis becoming the first major city to eliminate single-family zoning.[19] Since passing, much of the reforms, however, have been held up in the court system due to Minnesota's state environmental laws (and eventually the plan was struck down).[20] I will contrast this approach with California's plan, a state that is known for its affordable housing crisis.[21] Critics point to the

15. Ben Bradford, *Is California's Legacy Environmental Law Protecting the State's Beauty or Blocking Affordable Housing?*, Cal Matters (June 23, 2020), https://calmatters.org/environment/2018/07/is-californias-legacy-environmental-law-protecting-the-states-beauty-or-blocking-affordable-housing.

16. Sive & Chertok, *supra* note 7; *How Much Do You Need to Earn to Afford a Modest Apartment in Your State*, Nat'l Low Income Hous. Coal. (2023), https://nlihc.org/oor.

17. Rich Campbell, *State Housing Affordability Initiatives and Environmental Protection: Can They Work Together*, 35-WTR Nat. Res. & Env't 26, 26 (2021).

18. Minneapolis, Minneapolis 2040—The City's Comprehensive Plan (2019), https://minneapolis2040.com.

19. Erick Trickey, *How Minneapolis Freed Itself from the Stranglehold of Single-Family Homes*, Politico (July 11, 2019), https://www.politico.com/magazine/story/2019/07/11/housing-crisis-single-family-homes-policy-227265.

20. Liz Navratil, *Minneapolis Can Enforce 2040 Plan—For Now*, Star Trib. (July 26, 2022), https://www.startribune.com/minneapolis-can-enforce-2040-plan-for-now/600193146.

21. Conor Dougherty, *The Californians Are Coming. So Is Their Housing Crisis*, N.Y. Times (Oct. 8, 2021), https://www.nytimes.com/2021/02/12/business/economy/california-housing-crisis.html.

abuse of the state environmental protection law, CEQA, as a key reason for its inability to build more affordable housing.[22] In recent years, the state legislature has taken steps to try and remedy this problem.[23] I will look at how this approach has played out. Finally, I will conclude by comparing how the efforts at reform for each have played out and the importance of the role of the state government in approaches to solve the tension between urbanism and environmentalism in the push to expand affordable housing.

I. Minneapolis 2040

A. What the 2040 Plan Is and How It Came to Be

Minneapolis provides an important lens to look at the tension between access to environmental review and rapid expansion of affordable housing, and what happens when a city attempts to make reforms on its own. After becoming the first major city to abolish single-family-home zoning, many started looking at the city as a case of successful pro-housing advocacy.[24] However, most national media looking at Minneapolis overlooked key context—primarily the fact that the plan was mired in a lawsuit before the city council even voted on it.[25] This aspect, which created significant uncertainty around the plan and its implementation, while often unmentioned in national media coverage, is worth further examining to understand how Minneapolis has failed to combat the NIMBY forces that used Minnesota's environmental review statutes to slow the expansion of affordable housing, something far from unique to Minneapolis.

In Minnesota, all cities have a comprehensive plan that must be updated every decade.[26] These are policy documents that often go unnoticed by the public, with cities primarily receiving input from neighborhood associations.[27] In Minneapolis, a movement of progressives gained power in the city council, resulting in the city asking for feedback at more diverse forums and hearing from different constituencies.[28] From this input, the city created a draft version of its next planning document, the 2040 plan, that included many policies focusing on creating more affordable housing.[29] The most notable policy to come from this draft (and ultimately stay

22. Hernandez & Friedman, *supra* note 14.

23. Annelise Bertrand, *Proxy War: The Role of Recent CEQA Exemptions in Fixing California's Housing Crisis*, 53 Colum. J.L. & Soc. Probs. 413, 416 (2020).

24. Richard D. Kahlenberg, *How Minneapolis Ended Single-Family Zoning*, Century Found. (Oct. 24, 2019), https://tcf.org/content/report/minneapolis-ended-single-family-zoning/?agreed=1.

25. Miguel Otárola, *Judge Hears Lawsuit over Minneapolis 2040 Plan*, Star Trib. (Jan. 31, 2019), https://www.startribune.com/judge-to-rule-on-lawsuit-over-minneapolis-2040-plan/505156872/?refresh=true.

26. Trickey, *supra* note 19.

27. *Id*.

28. *Id*.

29. *Id*.

in the final document) was eliminating single-family-home zoning to allow duplexes and triplexes anywhere in the city.[30] Attracting a notably diverse coalition of supporters, the plan passed the council, and Minneapolis soon became known as the first city to abolish single-family-home zoning.[31]

Upon its passage, the 2040 plan, and particularly the policy to end single-family-home zoning drew widespread praise, ranging from Ben Carson (Trump's HUD Secretary at the time) to many progressive leaders.[32] Advocates believed that this change would allow construction of greater density, increasing supply in the market to better meet demand and lower prices in part by providing smaller units, which are more affordable than single-family homes.[33] Soon other political bodies were looking at Minneapolis as an example of how to address affordable housing.[34] While the details of the plan go beyond simply ending single-family-home zoning, this is certainly what grabbed attention, as well as the diverse and somewhat unlikely coalition that came together to support the plan: labor groups, racial justice supporters, business interests, climate advocates, as well as some libertarians.[35]

B. Legal Implications

Even though it gained a wide net of supporters, the plan was still controversial and plenty of groups advocated against its passage and fought to ensure that it did not get implemented.[36] Their opposition culminated in a lawsuit to stop the vote from happening three days before the scheduled vote by Smart Growth Minneapolis, a NIMBY organization formed in the wake of the 2040 plan, along with the Audubon Chapter of Minneapolis and Minnesota Citizens for the Protection of Migratory Birds.[37] While the lawsuit did not stop the scheduled vote, it continued after the vote, claiming that Minneapolis had violated the Minnesota Environmental Rights Act (MERA).[38] After Smart Growth lost at the district and appellate levels in state court, the Minnesota Supreme Court took up the issue in early 2021.[39] That court faced two primary questions: (1) "whether the rule exempting comprehensive plans from environmental review under MEPA [Minnesota Environmental Protection Act] also exempts comprehensive plans from actions brought under MERA"; and (2) "whether Smart

30. *Id*.
31. *Id*.
32. *Id*.
33. *Id*.
34. *Id*.
35. Kahlenberg, *supra* note 24.
36. *Id*.
37. State by Smart Growth Minneapolis v. City of Minneapolis, 954 N.W.2d 584, 586–87 (Minn. 2021).
38. *Id* at 588–89.
39. *Id* at 589.

Growth's complaint 'sets forth a legally sufficient' claim for relief."[40] The court walked through the history of Minnesota's multiple different statutes that collectively cover its environmental review and protection process, explaining that MERA is the broadest, and that exemptions for review under MEPA do not close off MERA review requirements.[41] In its answer to the second question, the court stated that Smart Growth's complaint was a legally sufficient claim based on the fact that comprehensive plans set the zoning rules and land-use plans and the allegation that a buildout of the plan would "likely cause the pollution, impairment, or destruction of the air, water, land or other natural resources located in the state."[42] This ruling meant the claim could advance and that the case would be remanded back to district court.[43] The case then wound its way back up the court system as the courts decided if Smart Growth had passed the MERA burden-shifting framework of creating a prima facia case that "a defendant's conduct 'has, or is likely to cause the pollution, impairment, or destruction of the air, water, land or other natural resources located within the state' [by showing] '(1) [a] protectable natural resource,' and (2) . . . 'any conduct which materially adversely affects or is likely to materially adversely affect the environment.'"[44]

When the district court took up the case, it resulted in significant chaos, as the plan faced serious legal jeopardy. That time, the court found for the plaintiffs, stating that a full buildout of the plan could result in 150,000 new units (which, while unlikely, is what was authorized), which would cause adverse environmental effects.[45] The plaintiffs cited examples such as increasing hard surfaces, soil erosion, runoff, and increased utilization of storm and sewer systems.[46] The judge then barred the city from enforcing the plan and required the city to revert back to the Minneapolis 2030 plan by August 15 (less than a month from the ruling) unless the city met the MERA requirements or established an affirmative defense.[47] Understandably, this ruling caused confusion over what was going to happen, what projects could continue and, as the city argued, would require significant staff time and resources to bring land-use ordinances back to what

40. *Id* at 590, 94.

41. *Id* at 592–93.

42. *Id* at 594–97.

43. *Id* at 597.

44. *Id* at 594.

45. Susan Du & Liz Navratil, *Court Order Minneapolis to Cease Implementation of 2040*, Star Trib. (June 15, 2022), https://www.startribune.com/court-minneapolis-ordered-to-cease-implementation-of-2040-plan/600182511.

46. *Id*.

47. Falza Mahamud, *Minneapolis Seeks Injunction Halting Court Decision Blocking It from Implementing 2040*, Star Trib. (June 23, 2022), https://www.startribune.com/minneapolis-seeks-injunction-halting-court-decision-blocking-it-from-implementing-2040-plan/600184700.

they were before.[48] It also potentially exposed the city to lawsuits from aggrieved parties who relied on the new ordinances.[49] Seeing this chaos, the city successfully sought an injunction from the district court staying the order while it was being appealed.[50] The judge reasoned that, while there is risk to letting the city continue with a plan that is seemingly in violation of MERA, it is riskier to be potentially switching back and forth between plans since, at its current stage, the plan is not actively harming the environment and projects still faced individual review.[51] Eventually, in April 2023, the Minnesota Supreme Court rejected the city's appeal to have the matter reviewed and allowed the appellate court's December 2022 ruling against the city to stand, thus putting the final nail in the coffin for the 2040 plan.[52]

C. What the Future Holds and Lessons Learned

The situation created significant confusion as Minneapolis continued the legal battle for nearly five years. Even though not many duplexes and triplexes have been built since the law went into effect (as it did not go in effect until January 2020), the legal battle put their situation into peril and created uncertainty for developers and owners who built them—pushing to fulfill the city's goals under the new plan, but who faced the older zoning going back into effect.[53] Additionally, having the legal status of the 2040 plan up in the air for the last few years may have contributed to this lack of development of many duplexes and triplexes, stymying the city's goals.[54] The legal challenges that the plan faced will only make developers and builders more skeptical of building the type of housing the city wants to produce whenever the city puts out a new plan encouraging denser development. In short, the lawsuit set the city back, by years, in its ambitious goals to restructure how the city looks and to increase access to affordable housing.[55] This process took years of work, incorporated feedback from diverse communities, and had countless hours of public meetings,

48. *Id*.

49. *Id*.

50. State by Smart Growth Minneapolis v. City of Minneapolis, No. 27-CV-18-19587, 2022 WL 3209832, at *2–3 (D. Minn. July 26, 2022).

51. *Id*.

52. *Minnesota Supreme Court Declines to Hear Minneapolis Appeal of 2040 Plan Ruling*, KSTP (Apr. 26, 2023), https://kstp.com/kstp-news/local-news/minnesota-supreme-court-declines-to-hear-minneapolis-appeal-on-2040-plan-ruling.

53. Justin Fox, *What Happened When Minneapolis Ended Single-Family Zoning*, Bloomberg (Aug. 20, 2022), https://www.bloomberg.com/opinion/articles/2022-08-20/what-happened-when-minneapolis-ended-single-family-zoning?leadSource=uverify%20wall.

54. *See id*.

55. Bill Lindeke, *'Alarming' Court Decision on Minneapolis 2040 Puts a Halt on Expansion, Growth*, Minn Post (June 23, 2022), https://www.minnpost.com/cityscape/2022/06/alarming-court-decision-on-minneapolis-2040-puts-a-halt-on-expansion-growth.

yet failed to meet the necessary legal requirements.[56] The city now needs to go back and conduct an environmental review, which, because of the radical nature of the plan and potential to authorize an increase of almost 150,000 residential units, could take years.[57] This process will significantly delay what at one point was the country's most promising push to revamp housing development.

Potential solutions could speed things up. In its initial decision, the Minnesota Supreme Court pointed out that the state legislature has previously exempted conduct from a MERA action and could have done so here.[58] This ruling is extremely important and speaks to the power that state legislatures have to modify environmental protections to make it easier for cities to act. So far there has not been any new legislation that addresses this concern, but the legislature could pass an exemption for city plans and zoning to match the exemptions that have already been promulgated for MEPA. Even if they could not address this situation retroactively, this could help proactively prevent this situation from happening in the future and reassure nervous developers. This option, however, would water down some of Minnesota's environmental protections, even if it was a limited exemption. Minnesota was one of the first states to pass a comprehensive state environmental protection package and has been noted by legal experts as having some of the most effective environmental rights in the country, in large part due to MERA and MEPA, and a reform would potentially threaten that reputation.[59]

Moreover, even though the lawsuit uses environmental laws to advance NIMBY goals, there are valid reasons why it may be important to conduct an environmental review for a whole plan rather than a project-by-project basis. As the judge in the district court order reasoned, a project-by-project basis could result in construction allowed until the city is "one project away from—or even one step beyond the point of no return from—material and adverse environmental impacts."[60] Additionally, looking at environmental reviews on an individual basis, instead of as a whole group, may fail to capture some of the cumulative impacts a group of multiple projects might have, both on a specific area and on the city as a whole. Another reason to have a broader environmental review is because it allows planners and the community to analyze who is getting the environmental benefits and burdens of

56. *See id.*

57. *See id.*

58. State by Smart Growth Minneapolis v. City of Minneapolis, 954 N.W.2d 584, 592 (Minn. 2021).

59. Stephanie Hemphill, *Protecting Minnesota's Natural Resources in Law*, MN Hist. Mag. (2019), http://collections.mnhs.org/MNHistoryMagazine/articles/66/v66i04p164-176.pdf.

60. *Judge Halts Minneapolis 2040 Zoning Plan amid Environmental Questions*, MPR News (June 16, 2022), https://www.mprnews.org/story/2022/06/16/judge-puts-halt-to-minneapolis-2040-plan-over-environmental-concerns.

new projects and allows the community to give feedback on how those benefits and burdens should be shared. Perhaps there is a reason that most states that have a "Little NEPA" do not exempt local or municipal agencies or their zoning power; California, New York, Washington, and Massachusetts all command their agencies and governments to do environmental reviews, while only North Carolina, Georgia, and Indiana do not.[61]

Another solution is not to reform the law, but to integrate the environmental review into the development process of a comprehensive plan to prevent situations like what happened in Minneapolis. Other options for policymakers include not creating a full exemption, but rather an expedited review system for municipal plans. A similar idea could be allowing these decade-long plans that are passed to be effective while an environmental review is being conducted, as very little of such a large comprehensive plan can be built so quickly as to cause immediate irreparable environmental damage—as the stay in the current order indicates—and because this sort of review takes a long time to create.

Minnesota's 2040 plan was tremendously important as the first major city to end single-family-home zoning, leading to a wave of other jurisdictions from Massachusetts to Oregon following.[62] It was not just symbolic, but a major political win for affordable housing advocates that took years to accomplish.[63] However, the city overlooked the significant legal challenge the plan now faces. In a state with strong environmental protections NIMBY advocates were able to use those laws to potentially stop and significantly delay the plan.[64] While using the environmental laws might be in bad faith, the suit in Minneapolis raised valid issues about how to balance the importance of development with the need for environmental protections. Minneapolis's approach demonstrated the risk when cities go at it alone and assume that bad-faith uses of environmental protections will be dismissed by the courts. As these types of lawsuits present real problems, they require real action, action that often requires coordination with the state legislature that controls the statewide environmental protection laws. While there is not one solution to avoid these lawsuits, coordination with the state legislature would allow cities to avoid these problems in a way that still balances important environmental protections.

61. Sive & Chertok, *supra* note 7.

62. Kahlenberg, *supra* note 24.

63. Trickey, *supra* note 19.

64. Susan Du, *Minneapolis Asks Appeals Court to Reverse Ruling That Halted Its 2040 Plan*, Star Trib. (Oct. 13, 2022), https://www.startribune.com/minneapolis-asks-appeals-court-to-reverse-ruling-that-halted-its-2040-plan/600215481/?refresh=true.

II. California's Attempt at Reform

California is well known for its decades-long struggle to provide enough affordable housing to its residents.[65] Many believe that CEQA is a major factor in preventing the production of enough affordable housing to meet the needs of its residents.[66] Specifically, critics point out that the law's easy access to litigation has allowed it to be abused, and, instead of protecting environmental interests, it serves instead to prevent building more housing.[67] In this section, I will first examine CEQA, why it currently is a problem, and the effects it has had on development of affordable housing. I will then look at two different sets of reforms to the law; the first focused on the demand side and putting pressure on local governments, and the second focused on the supply side and incentivizing local government to increase supply. I will conclude by looking at what can be gleaned from these two types of reforms and more generally from California's attempt to reshape its foundational environmental law.

A. CEQA: What It Is and Its Impact

CEQA is the premier "Little NEPA" in the country, as it is one of the broadest and most comprehensive in the nation.[68] There are three elements that a project must meet to fall into CEQA's purview: a project must require "discretionary approval from a public agency; conducted or supported by a public agency, or require a permit from a public agency; and have the potential to physically change the environment."[69] The first element, discretion, simply means that there is a choice by the agency on whether the project or permit is approved rather than simply receiving a rubber stamp.[70] In each of the five most expensive housing markets in California, the local government has discretionary review for housing projects with more than four units, putting them squarely in the aims of CEQA.[71] The second element is always met, as in California "new construction must obtain permits from a public agency," and any project that has any public funding would meet this element.[72] The third element is whether the project could change the environment, something that the state interprets to include direct, indirect, and future "reasonably foreseeable" impacts.[73]

65. Conor Dougherty, *The Californians Are Coming. So Is Their Housing Crisis*, N.Y. Times (Oct. 8, 2021), https://www.nytimes.com/2021/02/12/business/economy/california-housing-crisis.html.

66. *Linking CEQA to California's Housing Crisis*, Holland & Knight (2018), https://www.hklaw.com/en/case-studies/linking-ceqa-to-californias-housing-crisis.

67. *Id*.

68. Bertrand, *supra* note 23, at 419–20.

69. *Id* at 420.

70. *Id*.

71. *Id*.

72. *Id* at 421.

73. *Id*.

These impacts can include population growth, density, and economic impact, as well as concerns of aesthetics, noise, and neighborhood composition.[74] If a project has "any significant impacts or 'possible environmental effects which are individually limited but cumulatively considerable,'" the project must go through an environmental impact report (EIR).[75]

Almost all housing projects fall under CEQA and require an EIR. This becomes a problem because these reviews are lengthy and expensive and because California allows easy access to litigation for those who want to challenge a project.[76] EIRs can total hundreds of pages, require experts, and must pass through a minimum of three rounds of public comments and administrative proceedings before a project can get approved.[77] This process can take one to two years and can cost (factoring in litigation) $300,000 as a baseline and an additional cost of approximately $1,500 per unit.[78] Additionally, the law allows a single party to bring a citizen suit against a project where they believe there was something defective in the initial study or EIR, and that party may do so anonymously.[79] The bar to reverse the pre-approval is extremely small, as plaintiffs only have the burden of proving a single error in an analysis that can span hundreds of pages and discuss many different environmental issues.[80] Then there is the litigation itself, which can take between three and five years for an ordinary case and can include potential appeals, significantly delaying development.[81] Further, there is not a ban on duplicative suits against the same project, allowing repeated suits and "a war of financial attrition."[82] In total this means years and significant costs added to any project, which can put the funding of the project at risk.[83] As this is widely known in California, it also serves as a significant deterrent to developers—meaning there could be thousands of projects that were considered, but never reached fruition because of the fear that the CEQA process and litigation would make a project an unprofitable bureaucratic headache.[84] The use of the law in this way seems far from the purpose that the law was intended to serve.[85] CEQA's easy access was meant to help disadvantaged communities that would otherwise not have a voice in the process to have a say when big developers

74. *Id* at 421–22.
75. *Id* at 420.
76. *See id* at 424–27.
77. *Id* at 423–24.
78. *Id*.
79. *Id* at 424–25.
80. *Id*.
81. *Id*.
82. *Id* at 426; *Linking CEQA to California's Housing Crisis*, *supra* note 66.
83. Bertrand, *supra* note 23, at 423–24.
84. *Id.* at 424.
85. *Id.* at 426.

plan to change communities—not to allow NIMBYs to extort developers and stifle *any* development.[86]

To get a sense of the impacts of CEQA abuse in recent years, two studies of CEQA lawsuits by Holland & Knight have outlined how CEQA is worsening the affordable housing crisis.[87] These are two three-year studies from 2010 to 2012 and 2013 to 2015 of statewide CEQA litigation.[88] Both found housing projects as the most popular target of CEQA suits, with the trend only getting worse.[89] Private-sector housing projects were the top target, accounting for a quarter of all lawsuits.[90] Other key findings include that sixty-four percent of suits were by "associations," most of which did not have any background in environmental advocacy, making them likely to be NIMBY-focused groups.[91] The vast majority of CEQA litigation is also in cities and urban areas, with the Bay Area and Los Angeles region totaling fifty-eight percent of all lawsuits.[92] Eighty-seven percent of all CEQA litigation was focused on infill projects in existing communities, demonstrating how the litigation is very focused on preventing urban areas from developing and increasing density.[93]

In response to this noted problem, the California state legislature has proposed many ideas aimed at reforming the system and has enacted a few.[94] Often, different proposals base their solutions on the specific challenges the sponsoring legislator's home district faces, seeking to implement different schemes and approaches based on what local challenges they face.[95] These challenges can be divided into two categories: reforms focused on taking away authority from local governments that are not compliant with their affordable housing goals, and reforms aimed at incentivizing local governments to meet their goals.[96]

B. SB 35 and Related Reforms

SB 35 uses the strategy of penalizing local governments, and it was the first successful major reform aimed at curbing excessive CEQA litigation, passing in 2017.[97] The focus was on local governments that were not meeting their housing goals, as per California's Department of Housing and Com-

86. *See id*.
87. *Linking CEQA to California's Housing Crisis*, *supra* note 66.
88. *Id*.
89. *Id*.
90. Hernandez & Friedman, *supra* note 14.
91. *Id*.
92. *Linking CEQA to California's Housing Crisis*, *supra* note 66.
93. *Id*.
94. Chelsea Maclean et al., *California's 2023 Housing Laws: What You Need to Know*, Holland & Knight (Oct. 10, 2022), https://www.hklaw.com/en/insights/publications/2022/10/california-2023-housing-laws-what-you-need-to-know.
95. *See* Bertrand, *supra* note 23, at 428–29.
96. *Id*.
97. Campbell, *supra* note 17, at 26, 27.

munity Development.[98] Because of California's severe lack of affordable housing, this meant almost ninety-eight percent of local governments fell into this category.[99] The law permitted multifamily developments with at least two units to skip CEQA review and conditional-use permits in these jurisdictions, provided that the project commits to a certain amount of the units as affordable.[100] SB 35 focuses on one of California's core problems that CEQA lawsuits are aimed at urban infill.[101] This reform narrowly focuses on increasing urban infill by adding other qualifications needed to avoid CEQA review, including that the development must be "in an urban area where seventy-five percent of the site's perimeter has already been developed" as well as being already zoned for residential or mixed-use, but not be a site where there has been a tenant in the last ten years.[102] This limit translates to producing density in areas that cities have already planned to be denser and where they have been previously unable to put housing even though they have wanted it, urban infill.[103] There are also exemptions to the law, so that even projects that fit the criteria cannot skip CEQA review if they are located in areas like "coastal zone[s], fire hazard areas, or a hazardous waste site," areas where it is extra important to be aware of environmental concerns.[104] Additional tweaks include limiting agency review to 180 days and placing a limit on how much parking can be required.[105] In an effort to preserve respect for local governments, projects still must meet zoning, subdivision, and design standards that communities already have in place as long as the standards are "objective" (not enforced through subjective judgment).[106] Finally, SB 35 requires the project developer to pay "prevailing wages" and employ a skilled and trained workforce, which in California means the "hourly rate paid on public

98. *Id*.

99. Bertrand, *supra* note 23, at 429.

100. *State Housing Affordability Initiatives and Environmental Protection: Can They Work Together*, 35-WTR Nat. Resources & Env't 26, 27 (2021).

101. Bertrand, *supra* note 23, at 430.

102. *Id*.

103. This is a strategy of focusing on urban infill and building housing near jobs, schools, and transit has been further boosted by other proposed bills such as AB 68 that is, as of the time of this writing, gaining steam in the summer legislative session. This bill puts together urbanist and environmentalist by placing housing near transit and walkable neighborhoods, and away from fire and flood risks, and is sponsored by both California YIMBY and the Nature Conservancy. It also seeks to address some of the SB 35 waivers that were difficult to implement. *AB 68—The Housing and Climate Solutions Act*, California YIMBY, https://cayimby.org/housing-and-climate-solutions-act (last visited July 29, 2023).

104. *Id*.

105. *Id*.

106. Bertrand, *supra* note 23, at 431.

works projects to a majority of workers engaged in a particular craft, classification or type of work within the locality and in the nearest labor market area."[107]

As this was a major change in California law, and there have already been amendments to ensure its effectiveness. This includes AB 831 which amends SB 35 to also limit local government review of "offside improvements, that is, roads and utility lines, necessary for development of housing and mixed-use developments."[108] Without this amendment, these projects could otherwise be slowed down by forcing the same lengthy review process for needed "offside improvements."[109] In the previous legislative session in 2022, AB 2668 was passed as a "cleanup" of SB 35 to clarify some language and restate its method of taking control away from local governments.[110] This was in reaction to some of the first litigated victories by advocates of the law, where courts interpreted the law's intent broadly in allowing CEQA exemptions.[111]

AB 2011 was another major housing law that was passed in the 2022 legislative session.[112] This legislation built on the ideas of SB 35 and similarly provides a CEQA exemption to build affordable housing.[113] This law goes further than SB 35 in that it allows multifamily residential projects to be built on *commercially* zoned land for affordable housing and bypass CEQA provided the project meets certain affordable housing targets and other qualifications (similar to those provisions in SB 35) like paying prevailing wages.[114] The law was created with SB 35 in mind as a model for streamlining, signifying that the legislature saw SB 35 as a success.[115]

C. Incentive-Based Reforms

On the other side of the coin are incentive-based reforms.[116] The two main reforms that focused on this are AB 73 and SB 540 that offer financial incentives to local governments rather than take away their authority.[117]

SB 540 created "Workforce Housing Opportunity Zones" (WHOZ) that allow for streamlined approval, and no CEQA review for the next five years

107. *Id*.
108. Campbell, *supra* note 17, at 26, 28.
109. *See id.*
110. Maclean et al., *supra* note 94.
111. *See id.*
112. *Id*.
113. Daniel R. Golub et al., *California Legislature Creates Pathways for Residential Development on Commercially Zoned Land*, Holland & Knight (Sept. 1, 2022), https://www.hklaw.com/en/insights/publications/2022/09/california-legislature-creates-pathways-for-residential-development.
114. *Id*.
115. *See id.*
116. Bertrand, *supra* note 23, at 428–30.
117. *Id*.

for projects in the zone.[118] To gain the ability to create these zones, local governments must find land that can support a set amount of housing, create a detailed plan for development of the land, go through a process involving public hearings and feedback, and then produce a single EIR encompassing the planned development of that zone.[119] Since it is expensive to create such a detailed plan, go through this process, and do such a large EIR, the key part of the law is that the California Department of Housing and Community Development offers grants and no-interest loans to local governments that want to implement these WHOZs.[120] Once completed, projects can be accepted into the zone as long as they fit the development plan and have some amount of affordable housing.[121] Only projects that are for above-moderate income and do not reserve at least ten percent of units for lower-income affordability would require a separate EIR.[122]

AB 73 takes a similar approach, but instead offers "Housing Sustainability Districts."[123] This utilizes a similar design where the state funds local governments for the cost of creating these districts, but takes a slightly different approach to the exact mechanisms of the financing.[124] Another subtle difference is that it is focused more on preserving affordable housing rather than building more.[125] It also narrows the type of land that is eligible to be turned into one of these zones, as half of the zone must already be zoned for residential use.[126] A final difference is that if the local authority does not decide on the project application within 120 days, it is automatically approved.[127]

D. Lessons Learned from the California Approach

Since these reforms are incredibly recent, including laws that have yet to or have just gone into effect (AB 2011), some that have only seen their full effects after successful litigation in last few years (SB 35) and lack any studies on their effectiveness means that it is difficult to fully extrapolate on their effects.[128] California has passed many different housing reforms in the last few years, so even once studies have been commissioned it may be difficult to isolate the individual effects of each law. For example, understanding whether the laws focusing on penalizing or incentivizing local governments work better may be a challenger.

118. *Id* at 433–35.
119. *Id*.
120. *Id*.
121. *Id*.
122. *Id*.
123. *Id* at 435–37.
124. *Id*.
125. *Id*.
126. *Id*.
127. *Id*.
128. Maclean et al., *supra* note 94.

Additionally, California has not stopped reforming. For the summer 2023 legislative session, Governor Newsom has released eleven bills focused on reforming CEQA through a variety of measures, such as increased coordination, limiting time courts have to examine challenges, better funding agencies that do reviews, reducing what reviews require, and creating more exemption for certain types of projects.[129] Further, at the time of this writing, forty-five bills in the summer legislative session address CEQA, look at new reforms, and attempt to sharpen previous efforts at reform.[130] This speaks to the culture in California of pushing many different efforts at reform and seeing what sticks in a piecemeal approach, rather than a total rewrite of CEQA. It has its benefits as it allows constant innovation and experimentation, but it also has flaws, requiring so many different reforms to tackle such an encompassing piece of legislation that touches nearly everything that is built in California, and smaller bills may not be as effective at solving such a large problem.

One clear lesson can be learned from the example of California, and that is the importance of the power of state governments. It is notable that when the first landmark reform, SB 35, was litigated, proponents of the law won, and that to clarify any confusion and prevent any further litigation, the legislature stepped up to "clean up" the law—demonstrating both the effectiveness and flexibility of California's piecemeal approach.[131] Moreover, as the state is a much larger unit of government, it can simultaneously institute many different reforms to see what works best, or simply because different reforms might be suited to better to different parts of the state. Importantly, as of January 1, 2022, single-family zoning in most places in Californian has essentially been eliminated with the implementation of SB 9, which allowed parcels to be divided into two lots with two homes on each lot (creating fourplexes)—demonstrating the capacity of the legislature to enact large-scale change.[132] Finally, as the body that creates the laws, it is easier for the state legislature to fix or modify any law as they see how it plays out once in effect, an advantage to California's piecemeal approach.

III. Conclusion

The examples of Minneapolis and California provide an excellent lens to examine two progressive governments that have identified affordable housing as a major issue, seen state environmental laws as a significant

129. Ben Chirstopher, Alastair Bland, Julie Cart & Alejandro Lazo, *Gavin Newsom Wants to Make It Easier to Build Roads, Dams and More. What's in His Plan?*, Cal Matters (May 19, 2023), https://calmatters.org/environment/2023/05/gavin-newsom-ceqa-reform.

130. *Bill Search: CEQA*, Cal. Legis. Info., https://leginfo.legislature.ca.gov/faces/billSearchClient.xhtml?session_year=20232024&keyword=CEQA&house=Both&author=All&lawCode=All (last visited July 29, 2023).

131. *Id*.

132. California YIMBY, SB 9 (Sept. 16, 2021), https://cayimby.org/sb-9.

blockade, and passed major housing reforms. They also offer contrasting tactics, with Minneapolis passing a major change in eliminating single-family zoning in their 2040 plan.[133] While potentially a revolutionary reform, the city overlooked the potential for litigation from NIMBY groups eager to use state environmental laws to prevent development.[134] This led to uncertainty about whether the 2040 plan would still be in place, and eventually the plan was struck down by the courts.[135] The city may need to ask the state legislature to amend some of the environmental laws in order to be more effective in implementing the zoning and development changes that it wants to make in the future. This example demonstrates the weakness of cities going at it alone. Cities exist within the structure of state governments and therefore must be aware of what state laws restrict them. Changes made at the local level must conform to state laws. It is thus imperative that cities and local governments work with their state legislatures to make changes to ensure their reforms around affordable housing are implemented.

California offers a contrasting example, where many changes have been made on a statewide basis by the legislature.[136] Unlike Minnesota, these laws have not experienced any setbacks in litigation.[137] Instead of putting all of their goals in one reform, California has established a culture of attempting piecemeal reforms that take different approaches and has amended them to adapt to the real world conditions.[138] This process has allowed California to become a dynamic policymaker that has been effective in trying to balance its reputation as having some of the best environmental protections while also working to address the significant lack of affordable housing. In each of the last few years it has had legislative sessions that focus significantly on passing housing-related reforms.[139]

While California often is criticized for its affordable housing woes, and Minneapolis has been heavily praised for the significance of passing its 2040 plan, it is worth looking further at how these two contrasting approaches have played and what results they will have in a few years. Advocates can learn from these examples both how imperative it is to pay attention to environmental laws when considering making changes in laws related to housing, and the need to work with state legislatures to implement these types of changes to ensure they are effective and will not face legal setbacks.

133. Trickey, *supra* note 19.
134. Du, *supra* note 64.
135. *Id*.
136. Bertrand, *supra* note 23, at 417.
137. Maclean et al., *supra* note 94.
138. *See* Bertrand, *supra* note 23, at 417; Campbell, *supra* note 17, at 26, 28.
139. Maclean et al., *supra* note 94.

Institutionalizing Community Control: A Community Benefits Ordinance for Los Angeles

Raymond Fang[†]

Table of Contents

I. Introduction

Housing is the one of the most pressing issues facing Los Angeles today. One of the most expensive rental markets in the United States, Los Angeles is in a severe housing crisis, facing a shortfall of nearly 500,000 affordable housing units.[1] As a result, seventy-three percent of Los Angeles residents are "rent burdened," spending more than thirty percent of their income on

[†] Raymond Fang, Yale Law School, JD '23, is a Skadden Fellow at the Legal Aid Foundation of Los Angeles. His work focuses on safeguarding Los Angeles Chinatown and other low-income neighborhoods of color in Los Angeles from speculation-driven gentrification and displacement by fostering community control and collective ownership of housing. A special thank you to Anika Singh Lemar, Matthew Rossman, Samuel Moyn, Chinatown Community for Equitable Development, Los Angeles Chinatown Community Land Trust, and my wife, sister, and parents for their support.

1. Los Angeles County 2021 Affordable Housing Needs Report 1 (2021), https://chpc.wpenginepowered.com/wp-content/uploads/2021/05/Los-Angeles_Housing_Report_2021-HNR-1.pdf.

rent and utilities.[2] Renters, who make up sixty-three percent of residents, need to work over eighty hours per week at minimum wage to afford the average rent of $1641 a month.[3] These unsustainable conditions cause widespread homelessness. Los Angeles has the most people experiencing homelessness in the United States—nearly 70,000 people on a given night.[4]

Not only is there not enough affordable housing in Los Angeles, but existing affordable housing is also disappearing. Subsidized affordable housing in Los Angeles is typically established through time-limited affordability covenants. When covenants expire, landlords raise rents up to market rate—a two-fold or three-fold increase. Low-income tenants cannot afford the increased rent, so the rent increases generally lead to eviction. With rental prices rising across low-income communities of color, residents are often unable to find an affordable unit in their community and are displaced or experience homelessness. Los Angeles will lose at least 10,000 such affordable housing units by 2030.[5] Naturally occurring affordable housing, in which unsubsidized rents are nevertheless affordable as a result of aging, low-quality housing stock, benevolent landlords, or market conditions, is also in jeopardy. For example, as small longtime landlords retire, the buildings are targeted by property flippers for acquisition, renovation, and resale for profit.[6] Because low-income tenants are unable to afford the higher rents in renovated units, they are also displaced or made homeless.

Housing precarity has also been exacerbated by the COVID-19 pandemic, as a wave of evictions occurred when the city's eviction moratorium expired at the end of March 2023.[7] As a result, housing is more precarious

2. *Rent Burden: How Do Renters Cope with Unaffordability?* USC Price Center for Soc. Innovation (last visited Feb. 17, 2020), https://socialinnovation.usc.edu/rent-burden.

3. *Los Angeles City Quickfacts*, U.S. Census Bureau (2022), https://www.census.gov/quickfacts/losangelescitycalifornia.

4. *2022 Homeless Count Results*, L.A. Cnty. Homeless Initiative (2022), https://homeless.lacounty.gov/news/2022-homeless-count-results.

5. Anna Scott, *Thousands of Angelenos Will Have Fewer Affordable Housing Options as 'Covenants' Will Expire*, KCRW (Apr. 12, 2021), https://www.kcrw.com/news/shows/greater-la/affordable-housing-manhattan-beach-restitution-oc/rent-covenants-expiring-la.

6. For example, tenants at one six-unit apartment building in Los Angeles Chinatown have been fighting off waves of property flippers since their prior mom-and-pop landlord retired and sold their building in 2019. Josie Huang, *Vandalism Is Latest Hit for Tenants Fearing Eviction in Pandemic*, LAist (Aug. 7, 2020), https://laist.com/news/vandalism-tenants-eviction-pandemic-chinatown-coronavirus-everett-street. A 2017 report found that Los Angeles house flippers sold nearly 40,000 homes between 2014 and 2017, and frequently gained net profits in excess of $100,000. Elijah Chiland, *How Much Do House Flippers Make Selling in LA?*, Curbed Los Angeles (Nov. 19, 2018), https://la.curbed.com/2018/11/19/18098963/los-angeles-house-flip-profit-how-much.

7. A postdoctoral eviction researcher at UCLA estimated that eviction filings in Los Angeles County had increased to over 4,000 per month as of March 2023—the highest in

than ever for low-income Asian, Latinx, and Black communities across Los Angeles. Meanwhile, thousands of luxury market-rate apartments are popping up in these neighborhoods.[8] These developments charge rents that many existing residents cannot afford and can change the fabric of a neighborhood. These communities are vital sources of affordable housing, culturally appropriate businesses, and social bonds for people of color. However, with little control over development, they face serious threats of

the county since March 2015. David Wagner, *LA's Expiring COVID Protections Raise Fears of an Eviction Crisis. For Many Renters, the Crisis Is Already Here*, LAist (Mar. 30, 2023), https://laist.com/news/housing-homelessness/las-expiring-covid-protections-raise-fears-of-an-eviction-crisis-for-many-renters-the-crisis-is-already-herelos-angeles-county-eviction-covid-pandemic-protections-moratorium-landlord-renter-housing-homelessness. The same expert projected further eviction rate increases to 5,000 per month after eviction protections expired in April 2023. Paloma Esquivel, *Inside One Woman's Fight to Stave Off Homelessness as Eviction Cases Flood Courts*, L.A. Times (Mar. 8, 2023), https://www.latimes.com/california/story/2023-03-08/los-angeles-county-eviction-court-homelessness.

8. For example, Los Angeles Chinatown alone has seen at least 3,047 luxury market-rate housing units built or planned since 2014. Already-built units include 280 units from Jia Apartments (2014), 189 units from Blossom Plaza (2016), 284 units from La Plaza Village (2019), and 318 units from Llewellyn Apartments (2021). Eddie Kim, *With Jia, Chinatown Gets a $93 Million Apartment Complex*, Downtown L.A. News (Mar. 3, 2014), http://www.ladowntownnews.com/news/with-jia-chinatown-gets-a-million-apartment-complex/article_9fc95a96-a0d4-11e3-b308-0019bb2963f4.html (noting that Jia Apartments will include 280 units); Jeff Wattenhofer, *Blossom Plaza, Chinatown's New Apartment Complex, Rents from $1,925*, Curbed L.A. (Sept. 1, 2016), https://la.curbed.com/2016/9/1/12754612/blossom-plaza-apartments-open-chinatown (noting that Blossom Plaza will include 189 market-rate units); Bianca Barragan, *Big, Colorful Apartment Complex Near Chinatown Officially Opens*, Curbed L.A. (Sept. 12, 2019), https://la.curbed.com/2019/9/12/20859592/chinatown-el-pueblo-la-plazavillage-murals (noting that La Plaza Village will include 284 market-rate units); Steven Sharp, 318-Unit Apartment Complex Breaks Ground in Chinatown, Urbanize L.A. (May 20, 2019), https://la.urbanize.city/post/318-unitapartment-complex-breaks-ground-chinatown (noting that Llewellyn Apartments will include 318 units). Planned units include 178 units from Harmony Project, 153 units from 211 Alpine, 920 units from Elysian Park/Buena Vista Lofts, and 725 units from Chinatown Station. Steven Sharp, Proposed 27-Story Tower Next to Chinatown Station Moves Forward, Urbanize L.A. (Jan. 3, 2019), https://la.urbanize.city/post/proposed-27-storytower-next-chinatown-station-moves-forward (noting that Harmony Project will include 178 units); Steven Sharp, Developer Retools Chinatown Project with TOC Guidelines, Urbanize L.A. (Aug. 14, 2018), https://la.urbanize.city/post/developer-retools-chinatown-project-toc-guidelines (noting that 211 Alpine will include 153 units); Bianca Barragan, A Closer Look at the Long, Skinny Project That Would Bring 920 Units to Chinatown, Curbed L.A. (Nov. 3, 2017), https://la.curbed.com/2017/11/3/16603224/la-chinatown-development-elysianpark-lofts (noting that Elysian Park/Buena Vista Lofts will include 920 units); Bianca Barragan, Chinatown Activists Sue over Big College Station Development—And Its Lack of Affordable Housing, Curbed L.A. (May 9, 2019), https://la.curbed.com/2019/5/8/18535838/chinatown-college-station-lawsuit-atlas-capital-cced (noting that Chinatown Station will include 725 units).

displacement, homelessness, and associated negative health, educational, and employment outcomes. The challenge, then, is to find ways to establish community control of real estate development to ensure that such development occurs with the needs of the local community front and center.

I became interested in these questions through my work with tenant organizers in Los Angeles Chinatown, during the first year of my anthropology PhD program. As part of my preliminary research, I joined a grassroots, all-volunteer tenant organizing group in LA Chinatown as the co-chair of the research committee. Active in the neighborhood since 2012, this group challenges inequitable real estate development and organizes Chinatown tenant "site fights" against evictions, landlord abuse and neglect, and illegal rent increases.

We were meeting on a balmy Southern California weeknight at our rented co-working space in Chinatown to discuss whether to file a lawsuit against the City of Los Angeles and a New York-based real estate developer. There were roughly twelve of us arranged around a table in that dreary, windowless, fluorescently-lit conference room. Even though Chinatown is one of the lowest-income neighborhoods in Los Angeles, and despite consistent appearances from our organizers and tenants at city planning meetings where we advocated for affordable housing, a 725-unit development, "Chinatown Station," had sailed through the city planning process with no affordable housing and received a stamp of approval from LA City Council. The median monthly household income in Chinatown is $3,400;[9] a two-bedroom apartment in one of these luxury developments can rent for as much as $3,700 a month.[10] The presence of Chinatown Station, we feared, would raise rents throughout the neighborhood and push out working-class Asian and Latinx residents, possibly even into homelessness.[11] After the building's approval by city council, a local land-use and real estate attorney had approached us asking if we would like to sue to try to get some affordable housing in this development. None of us were lawyers, we did not have the funds to pay for a lawsuit, and we *definitely*

9. Neighborhood demographic data is drawn from 2020 Census data for census tracts 1977, 2071.01, 2071.02,

2071.03, and 2060.10.

10. For example, a two-bedroom apartment in Jia Apartments, a luxury development in Los Angeles Chinatown, rents for up to $3,700 a month as of February 2023. *Jia Apartments*, Equity Apartments (last visited Feb. 17, 2023), https://www.equityapartments.com/los-angeles/chinatown/jia-apartments##bedroom-type-section-2.

11. While there is fierce and unsettled debate in the academic literature on the effect of new market-rate housing development on rents in low-income neighborhoods, one paper analyzing Minneapolis neighborhoods found that "lower-priced rental housing close to new construction had 6.6 percent higher rents" after new market-rate housing was constructed. Anthony Damiano & Chris Frenier, *Build Baby Build? Housing Submarkets and the Effects of New Construction on Existing Rents* (Ctr. for Urb. & Reg'l Affs. Working Paper, Oct. 16, 2020), https://www.tonydamiano.com/project/new-con/bbb-wp.pdf.

did not know what a lawsuit would entail. Needless to say, it was a stressful decision.

In the conference room that warm California weeknight, we went around the table, each person sharing their questions and concerns about filing the lawsuit. When it was my turn, I said: "I have a bunch of questions. I'm definitely not an expert, but these questions come out of the work I did with a law professor. First of all, we need to know what jurisdiction we would file the lawsuit in. That would determine what causes of action we would claim, and then what remedies we could request." I rattled off my list of questions, imagining myself in conversation with the law professor I had worked for, drawing on the hours and hours I had spent combing through initial complaints at my previous job. The whole process felt surprisingly natural to me. Then, a brief silence as everyone absorbed the information. "Well," our facilitator said, "I think Raymond should definitely talk to the lawyer for us." After I spent a difficult two weeks emailing and video calling with the lawyer, and meeting with organizers to share the information, we voted to move forward with the lawsuit. Although the organizers ultimately lost the case in trial court and failed to win the appeal,[12] my exposure to this land-use lawsuit sparked an enduring curiosity about how to create upstream community control of the real estate development process to prevent situations like this before they begin.

Towards that end, this paper investigates one possibility for creating structural community control of the real estate development process in Los Angeles: the community benefits ordinance (CBO). Broadly speaking, a CBO requires that developers of real estate projects that have a cost above a defined threshold or that receive public subsidies over a certain amount negotiate a legally binding community benefits agreement (CBA) with community members, who would have standing to enforce the agreement through litigation.[13]

I argue that a CBO could serve as a "non-reformist reform" in service of a democratic political economy that builds "a state and society where we have a real say over the shape of our lives and our communities, on the streets, at home, and at work."[14] Rather than entrenching the status quo of extractive, carceral, and imperial racial capitalism,[15] non-reformist reforms

12. Chinatown Cmty. for Equitable Dev. v. City of Los Angeles, 2021 WL 5709507 (Cal. Ct. App. Dec. 2, 2021).

13. Daniel Kravetz, Fighting for Equity in Development: The Story of Detroit's Community Benefits Ordinance 8 (2017), https://www.detroitpeoplesplatform.org/wp-content/uploads/2021/05/Fighting-for-Equity-in-Development-The-Story-of-Detroits-Community-Benefits-Ordinance.pdf.

14. Amna Akbar, *Demands for a Democratic Political Economy*, 134 Harv. L. Rev. 90, 117 (2020).

15. Racial capitalism refers to scholar Cedric Robinson's theorization of capitalism in which "capitalism emerged within the feudal order and flowered in the cultural soil of a Western civilization already thoroughly infused with racialism. Capitalism and racism, in other words, did not break from the old order but rather evolved from it to

"advance a radical critique and radical imagination" of social transformation to meet human needs, "draw from and create pathways for building ever-growing organized popular power," and "are centrally about an exercise of power by people over the conditions of their own lives."[16] The concept of non-reformist reforms have most often found traction in present-day police and prison abolitionist movements,[17] but I believe the concept also has salience in the community development context. By institutionalizing community control of real estate development, a CBO would begin to tilt the balance of power towards low-income communities of color, who are too often ignored in the real estate development process.

This paper (1) evaluates existing community input and development policy in Los Angeles; (2) reviews the nation's first and only CBO in Detroit; and (3) considers whether and how a CBO could work in Los Angeles. I conclude that (1) Los Angeles' existing community input policy fails to establish meaningful community control; (2) community organizers' original vision for Detroit's CBO provides a powerful model for Los Angeles; and (3) a similar CBO in Los Angeles could be legally implemented through a ballot measure and could serve as an important non-reformist reform in institutionalizing community control of real estate development for low-income communities of color in Los Angeles.

II. Existing Community Input and Development Policy in Los Angeles

Existing policy in Los Angeles provides few to no avenues for low-income communities of color to control the real estate development process in a meaningful way. There are three primary avenues through which low-income communities of color currently attempt to influence the development process: (1) participating in neighborhood councils; (2) attending administrative hearings; and (3) filing appeals and litigation under the California Environmental Quality Act (CEQA). However, each of these methods occurs too far downstream in the development process, after

produce a modern world system of 'racial capitalism' dependent on slavery, violence, imperialism, and genocide." Robin D.G. Kelley, *What Did Cedric Robinson Mean by Racial Capitalism?*, Bos. Rev. (Jan. 12, 2017), https://www.bostonreview.net/articles/robin-d-g-kelley-introduction-race-capitalism-justice. Racial capitalism has been further theorized by abolitionist scholars like Ruth Wilson Gilmore, Angela Davis, and Mariame Kaba. *See* Ruth Wilson Gilmore, Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California (2007); Angela Davis, Are Prisons Obsolete? (2003); Mariame Kaba, We Do This 'Til We Free Us: Abolitionist Organizing and Transforming Justice (2021). Recently, scholars and practitioners have made a call for abolitionist analyses of racial capitalism to be taken up in the housing justice context. *See* Sophie House & Krystle Okafor, *Under One Roof: Building an Abolitionist Approach to Housing Justice*, N.Y.U. J. Legis. & Pub. Pol'y, (Nov. 1, 2020), https://nyujlpp.org/quorum/house-okafor-building-abolitionist-approach-housing.

16. Akbar, *supra* note 14, at 103-106.

17. *See* Kelley, *supra* note 15; Gilmore, *supra* note 15; Davis, *supra* note 15; Kaba, *supra* note 15.

all major decisions have been made, to substitute for a meaningful community engagement process and to have any serious effect on the development. These processes are also not designed to handle residents' and organizers' concerns over affordability, gentrification, and displacement, such that attempts to use these forums to channel these concerns becomes like trying to fit a square peg into a round hole. This section considers each of these aforementioned avenues in turn.

A. Neighborhood Councils

Los Angeles neighborhood councils were established through an amendment to the Los Angeles City Charter in 1999.[18] The goal of the councils is to "promote more citizen participation in government and make government more responsive to local needs."[19] The councils provide non-binding advisory input into City Council and city agency decisions regarding issues like "homelessness, housing, land use, emergency preparedness, public safety, parks, transportation, and sustainability."[20] Councils may also issue official Community Impact Statements, which represent the council's consensus on a particular issue, and are delivered to the City Council and/or the relevant city agency.[21] Community Impact Statements are added to official records and files of ongoing matters, including proposed real estate developments, but they are merely advisory and non-binding.

Neighborhood councils are managed through the City's Department of Neighborhood Empowerment, which is led by a mayor-appointed board of seven commissioners. Each neighborhood council is composed of volunteer board members who are elected for set terms by anyone with specified ties to the community that the council serves, such as property ownership, employment, residence, or participation in local non-profit community organizations.[22] Although each council has its own board structure, this flexibility is a constant throughout. Council board members are considered public officials and are bound by relevant local, state, and federal regulations for such officials.[23] Each council receives $32,000 of public funding each year from the city government. To date, there are 99 neighborhood councils in Los Angeles, each representing about 40,000 constituents.[24]

Although neighborhood councils represent an attempt to incorporate greater citizen participation in the city's decision-making, the councils have been criticized for their lack of binding decision-making authority, for

18. *Neighborhood Councils*, City of L.A. (last visited Feb. 17, 2023), https://lacity.gov/government/neighborhood-councils.

19. L.A. City Charter, art. IX, § 900.

20. *About Neighborhood Councils*, L.A. Dep't of Neighborhood Empowerment (last visited Feb. 17, 2023), https://empowerla.org/about-neighborhood-councils.

21. *Id.*

22. L.A. Admin. Code §22.801.1.

23. *About Neighborhood Councils*, *supra* note 20.

24. *Id.*

their distance from City Council and the Mayor's office—where real city authority lies—and for not being paid positions, which makes it difficult for working class people to participate.[25] Though some progressive organizers are admirably attempting to use the councils to advance a progressive agenda through "fund[ing] community projects, delay[ing] unwanted developments, [and] embarrass[ing] public leaders,"[26] the councils ultimately do not have direct decision-making authority and are unable to provide binding and upstream community control of real estate development. Any non-binding advisory input that a neighborhood council submits to City Council and city agencies about a particular real estate development occurs too far downstream in the planning process to have an appreciable effect on the development. As such, neighborhood councils are inadequate venues in themselves to fully address the challenges facing low-income communities of color in Los Angeles.

B. Administrative Hearings

Participation in administrative hearings is another avenue that organizers and residents in low-income communities of color often use to attempt to influence the real estate development process. In Los Angeles, the City Planning Department frequently holds public hearings to "solicit community feedback" before deciding whether to approve a variance, conditional use, or site plan for a particular real estate development.[27] At public hearings, attendees are able to sign up on a list and speak before a panel of Planning Department commissioners concerning a particular development. Although language accessibility for non-English speakers at these hearings is often insufficient, community attendance and participation in these hearings can nevertheless provide a powerful venue for organizers and residents to look planning commissioners in the face and speak truth to power by voicing their concerns over affordable housing, gentrification, and displacement. The moment of confrontation alone can serve as a powerful focal point for community organizing and power-building in low-income communities of color.

As admirable and powerful as participation in such administrative hearings may be, their ability to actually win residents' desired changes to a development frequently falls short. Written and oral comments submitted during a public planning hearing are advisory and non-binding.[28] As

25. Josh Rosen, *Will LA's Activist Left Take over the Neighborhood Councils?*, Knock L.A. (Mar. 11, 2021), https://knock-la.com/los-angeles-neighborhood-councils-elections-progressive-candidates-35df9dcd160d.

26. *Id.*

27. *Hearings*, L.A. City Planning (last visited Feb. 17, 2023), https://planning.lacity.org/about/hearings.

28. Rules 6.0 and 7.0 of the Los Angeles City Planning Commission's Rules and Operating Procedures, governing Public Comment and Public Hearings, respectively, do not specify that public comments are binding. Rule 8.1 leaves the ultimate decision on commission actions up to a majority vote of the commissioners. L.A. City Planning

such, planning commissioners are not mandated to take such comments into account when making their final decisions on a development. Such comments can serve as the basis for judicial review of agency action, but are not in themselves determinative of agency action.[29] The City Planning Department's public comment and hearing procedures depart from federal agency notice and comment period in critical way: unlike federal agencies governed by the Administrative Procedure Act, the City Planning agency is not obligated to provide reasoned responses to every submitted comment.[30] With these severe shortcomings, the City Planning Department's public hearing and comment procedures cannot serve as an adequate vehicle for low-income communities to exert control over the real estate development process.

C. CEQA Appeals and Litigation

CEQA appeals and litigation offer a powerful avenue for community groups to challenge inequitable real estate development in administrative proceedings and in court. CEQA is a California state statute enacted in 1970 that institutes a statewide policy of environmental protection.[31] The statute and its associated regulations prescribe specific environmental review processes that local and state agencies must complete before a development project may begin. CEQA administrative appeals and lawsuits against specific developments typically allege that some part of the agency's CEQA-mandated environmental review process was performed incorrectly and must be revised.

In the decades since its passage, CEQA has become notorious for its widespread use in anti-development, Not-in-My-Backyard (NIMBY) lawsuits to stop, delay, or win concessions from real estate developments. Studies have found that up to eighty-five percent of groups that file CEQA lawsuits have no prior record of environmental advocacy;[32] four of five CEQA lawsuits target infill development projects;[33] and delays the start of construction for housing projects by two and a half years.[34] Indeed,

Commission, Rules and Operating Procedures (Aug. 10, 2000), https://planning.lacity.org/StaffRpt/InitialRpts/Revision%20to%20CPC%20ROPs.pdf.

29. L.A. City Planning, Commissions, Boards, and Hearings, https://planning.lacity.org/about/commissions-boards-hearings (last visited Feb. 17, 2023).

30. 5 U.S.C. §553 requires federal agencies to engage in notice and comment periods before promulgating rules through informal rulemaking. The promulgation of the final rule must include a preamble responding to comments submitted during the notice and comment period. The Los Angeles Administrative Code provides no analogous provision for Los Angeles municipal agencies.

31. Cal. Pub. Res. Code § 21000 *et seq.*

32. Jennifer Hernandez, *California Environmental Quality Act Lawsuits and California's Housing Crisis*, 24 Hastings Env't L.J. 21 (2018).

33. *Id.*

34. Manuel Tobias, Matt Levin & Ben Christopher, *Californians: Here's Why Your Housing Costs Are So High*, Cal Matters (Aug. 21, 2017), https://calmatters.org/explainers/housing-costs-high-california.

CEQA lawsuits have been used by all sides: white middle class and upper class communities use CEQA lawsuits to oppose affordable housing and homeless shelters;[35] low-income communities of color use CEQA lawsuits to oppose gentrifying luxury market-rate developments;[36] and construction unions use CEQA lawsuits to get developers to use union labor.[37] For low-income communities of color, growing precedent suggests that CEQA can be interpreted to require agency consideration of the socioeconomic effects of real estate development, such as displacement and rising housing costs, when the agency prepares its Environmental Impact Report (EIR). In recent years, California trial and appellate courts have begun to seriously consider arguments that EIRs must account for the possible effects of displacement caused by large-scale housing construction.[38]

Despite California courts' warming to anti-displacement arguments, low-income communities of color seeking to exert greater control of the real estate development process still face several serious strategic issues by relying on CEQA litigation. First, and most obviously, CEQA litigation is expensive and time-consuming. Even though plaintiff-side lawyers work on a contingency fee, they may also charge an hourly rate that is quite high for small volunteer-based community groups, even if such rates are well below market rate.[39] For low-income neighborhoods of color facing significant speculation and development pressures, it is impractical for a community group to sue every single high-end developer entering the

35. Chris Elmendorf, *How San Francisco's Infamous 469 Stevenson Project Just Helped Gut California's Housing Laws*, S.F. Chron. (Nov. 2, 2022), https://www.sfchronicle.com/opinion/openforum/article/california-469-stevenson-court-ceqa-housing-17550982.php.

36. Chinatown Cmty. for Equitable Dev. v. City of Los Angeles, 2021 WL 5709507 (Cal. Ct. App. Dec. 2, 2021).

37. Editorial, *CEQA Is Too Easily Weaponized to Block Housing and Slow Environmental Progress*, L.A. Times (Jan. 30, 2023), https://www.latimes.com/opinion/story/2023-01-30/editorial-ceqa-is-too-easily-weaponized-to-block-housing-and-slow-environmental-progress.

38. Save Berkeley's Neighborhoods v. Regents of the University of California, Docket No. A163810 (Cal. Ct. App. Oct. 18, 2021) (ongoing California appellate court briefing as of February 17, 2023, for a case where the trial court ruled that Berkeley's EIR was inadequate based in part on its failure to mitigate potential displacement from the construction of new student housing); Make UC a Good Neighbor v. Regents of the University of California, Docket No. A165451 (Cal. Ct. App. June 14, 2022) (ongoing California appellate court case as of February 17, 2023, in which neighborhood organizers sued UC Berkeley on the grounds that the EIR failed, among other things, to consider the noise and displacement effects of building new student housing in a historic park).

39. For example, a plaintiff-side lawyer charging thirty percent of the hourly market rate in California would charge approximately $120 per hour. *How Much Do Lawyers Charge in California?*, Clio, https://www.clio.com/resources/legal-trends/compare-lawyer-rates/ca (last visited Feb.17, 2022).

neighborhood. Even in the best-case scenario, where the litigation succeeds in either stopping the development entirely or winning desired changes to the development, the entire expensive and lengthy litigation and/or settlement process would have to be repeated on a case-by-case basis for every incoming development. This process cannot serve as a sustainable or long-term strategy for community control of development.

Second, CEQA litigation is a poor substitute for serious community control of development. CEQA cases are adjudicated by judges, and, even in the case of a victory for the community group, changes to the EIR are ultimately made and re-approved by the relevant government agency. The public hearing processes for EIRs would suffer from the same shortfalls as other public planning hearings detailed in the previous section. At no point in the litigation or post-litigation EIR redrafting process does the community group actually have control of decision-making or changes to the development: it is either in the hands of a judge or government agency at every point in the process.

Finally, CEQA litigation is a last-ditch effort that occurs after all project approvals have come through and so cannot feasibly result in the kinds of gains that community members would like to see, such as increased affordable housing, community gathering spaces, parks, and gardens. CEQA lawsuits can provide leverage for settlement negotiations with a developer to win these changes, but such outcomes are not guaranteed and are dependent on the willingness of both parties to negotiate. It is an expensive and protracted risk for volunteer-run and/or underfunded community groups to take. In the event that the case goes to trial and the community group wins, the agency could conceivably use the revised EIR to require the developer to make changes to their site plan to satisfy court-ordered changes. However, given the very early-stage nature of ongoing displacement-based CEQA litigation, the actual ability of courts, agencies, and the CEQA process to meaningfully address residents' and advocates' displacement fears is still unknown.

III. The CBO in Detroit

For low-income communities of color seeking more upstream and binding ways to influence and control development in their neighborhoods, a CBO offers many attractive features. The mandate that developers with projects of a certain size directly negotiate binding and legally enforceable CBAs with relevant community organizations could transform the landscape of real estate development in Los Angeles. This section of the paper examines the story of the first and only CBO in the United States, enacted in Detroit. Understanding the conditions that led Detroit community organizers to create and advocate for a strong CBO, and the political context in which the proposal was negotiated, voted on, and ultimately rendered toothless, carries important lessons and implications for any similar CBO campaign in Los Angeles.

A. History

In January 2014, a group of community organizations in Detroit came together to discuss a vision for a CBO. Led predominately by women of color, these organizations had faced numerous real estate developments—from supermarkets and streetcar lines to hockey stadiums and medical centers—for which they had fought for CBAs and community benefits. In attempting to negotiate CBAs, the organizers found that they lacked the leverage to get the developers to come to the bargaining table, let alone make any substantive changes to their developments to address their concerns around labor, environment, and affordable housing.[40] CBA negotiations often occurred after critical decisions were made, without access to public officials and key decisionmakers, and without community leverage to compel developers to negotiate in good faith. The end results of these troubled CBA negotiation processes were "weak agreements or no agreements at all."[41]

The Equitable Detroit Coalition, as the pro-CBO coalition of community organizations came to be known, drafted and submitted CBO language to the Detroit City Council. There was swift backlash from corporations and politicians sympathetic to developers. After several years of delays and feet-dragging from the city council, community organizations decided to abandon the legislative process and put forward a ballot measure for a public referendum in November 2016. The coalition's proposal, dubbed Proposal A, would trigger CBA negotiations for any project that had a development cost above $15 million or that received over $300,000 in public subsidies. These accorded with the average size of a development project or public subsidy in Detroit. The CBA would be directly negotiated with a coalition of community members, and community organizations would have the ability to enforce the CBA in court. Using their deep community connections, Equitable Detroit Coalition was able to campaign and secure enough signatures to get Proposal A on the ballot.[42]

The existence of Proposal A shocked Detroit's city council into action, and they voted to put an alternative proposal on the ballot that was sympathetic to developers. Their proposal, Proposal B, raised the triggers for CBA negotiations to $75 million of cost and $1 million in public subsidies—a rare occurrence—and gave the city, not community organizations, control over CBA negotiations. Only the city would have standing to enforce the CBA. Proposal B, then, represented a continuation of the status quo. After a hotly contested election with lopsided advertising and campaign funding,

40. Kravetz, *supra* note 13, at 1–2.

41. Nicholas Belongie & Robert Mark Silverman, *Model CBAs and Community Benefits Ordinances as Tools for Negotiating Equitable Development: Three Critical Cases*, 28(3) J. Cmty. Prac. 1, 8 (2018).

42. Kravetz, *supra* note 13.

Proposal B passed with fifty-three percent of the vote and Proposal A failed with forty-six percent of the vote.[43]

B. Current Status

Since its enactment, the CBO has spurred development agreements for eleven projects in Detroit. The projects include the Michigan Central Station (a railway station), the Fiat Chrysler Plant, Pistons' Performance Center (a training center and corporate headquarters for Detroit's NBA team), and the new Hudson's building (a mixed-use development in downtown Detroit).[44] CBAs for CBO-covered developments have included provisions for the creation of walkable public space near the development; funding for the creation and preservation of 700 affordable housing units; construction of sound-barrier walls to protect neighboring homes from industrial noise; improvements to park and open space; contributions to workforce development and education programs.[45]

However, community organizations have criticized the high monetary thresholds to trigger the ordinance, the non-binding nature of the agreements, and the lack of democratic resident representation on the neighborhood advisory councils involved in the community benefit process.[46] Detroit community organizations submitted sixty-two ordinance amendment recommendations to the City Council in 2020 to respond to these concerns.[47] Of these sixty-two recommendations, the City Council's legislative policy division presented, seventeen recommendations to the City Council for consideration.[48] In 2021, the City Council amended the Community Benefits Ordinance, increasing the number of public meetings that the Council must hold before approving a project and expanding the area required to notify residents of new developments.[49] However, City Coun-

---

43. *Id.* at 11.

44. City of Detroit, Community Benefits Ordinance, Slide 4 (2020), https://detroitmi.gov/sites/detroitmi.localhost/files/2020-08/CBO_Overview_08.2020.pdf.

45. *Id.* Slide 6.

46. Aaron Mondry, *Detroit's Community Benefits Ordinance Could Be Strengthened. Do the Changes Give Residents Enough Power*?, Detour Detroit (Feb. 9, 2021), https://detourdetroiter.com/detroit-community-benefits-ordinance-revisions-raquel-castaneda-lopez; Kimberly Hayes Taylor, *Why Detroit's Tool to Force Developers to Invest in Community Is Coming Up Short*, Curbed Detroit (Jan. 21, 2020), https://detroit.curbed.com/2020/1/21/21066933/detroit-community-benefits-agreement-ordinance-process.

47. Candice Williams, *Detroit Panel Seeks Feedback on Changes to Community Benefits Law*, Detroit News (Jan. 30, 2020), https://www.detroitnews.com/story/news/local/detroit-city/2020/01/30/detroit-community-benefits-ordinance-feedback/4613038002.

48. Letter from David Whitaker, Director, Legis. Pol'y Div. Staff, to Detroit City Council, Recommended Revisions to the Community Benefits Ordinance (May 26, 2020), https://detroitmi.gov/sites/detroitmi.localhost/files/2021-01/CBO%20Report%20Rec%20Changes%2005262020.pdf.

49. Ordinance No. 2021-4, Detroit Legal News (Dec. 8, 2021), https://detroitmi.gov/sites/detroitmi.localhost/files/2022-04/Ordinance%20No.%202021-4%20

cil refused to make more impactful changes to the Ordinance, including reducing the development cost threshold for CBO negotiations from $75 million to $50 million. The city's refusal to make more substantial changes to the CBO left many low-income residents and organizers of color with a feeling that they were still being ignored, despite the lofty promises of the CBO when it was passed half a decade ago.[50]

Since Detroit passed its CBO in 2017, other cities across the country have attempted to follow suit, with varying degrees of success. City councilmembers in St. Louis introduced competing CBO bills in 2017—one an ambitious, community-driven proposal, and the other a weaker, preemptive bill. Both bills stalled in the legislative process and were not reintroduced after their first readings.[51] St. Petersburg, Florida, passed a CBO in 2021 mandating CBAs for all developments that cost over $2 million and that receive more than twenty percent of their funding from the city to provide community benefits.[52] As of May 2023, one project has been considered under this CBO—a $300 million mixed-use cancer center in downtown St. Petersburg, proposed in August 2021.[53] After thorough vetting by the CBO process, the mayor rejected the development proposal in August 2022 on the grounds that the development did not provide sufficient affordable and workforce housing.[54] Organizers in Chicago campaigned for a city-wide CBO in 2018, but shifted their focus in recent years to strengthening

Community%20Benefits%20Ordinance.pdf; Committee of the Whole – CBO Amendments Hearing, Detroit City Council (Sept. 7, 2021), https://docs.google.com/document/d/1ochyaNeKOcCuweelQ4vQo-5nDPknmiOsErSHD-d86Rc/edit.

50. Rukiya Colvin, *Is Detroit's Community Benefits Ordinance Living Up to Its Promise?*, Detour Detroit (Oct. 11, 2021), https://detourdetroiter.com/is-detroit-community-benefits-ordinance-living-up-to-promise.

51. Alex Williamson, *Which Community Benefits Agreements Really Delivered?*, Shelterforce (Aug. 31, 2021), https://shelterforce.org/2021/08/31/which-community-benefits-agreements-really-delivered.

52. Matthew Griffin, *St. Petersburg to Require Developers Who Get City Money to Provide Community Benefits*, Tampa Bay Times (July 22, 2021), https://news.yahoo.com/st-petersburg-require-developers-city-231600133.html?guce_referrer=aHR0cHM6Ly9sLmZhY2Vib29rLmNvbS8&guce_referrer_sig=AQAAANZLNtF2BrLtok20MaU0DAQFWkOpLDoaDiDr8y8sOa0g6XXhEyQylfVjmDH20Tf6aH4XRiemRnuSji0DUGmtH9VxyFNROvdebI8sMhsV28JL3SeHFcHwDaxz7A26Bu0T4qSHACulKRaFrkSD4pZXdLllctoaJaZXqKBlTa3iw0Ql&guccounter=2.

53. Anthony Close, *$300 Million Mixed-Use Development Anchored by Moffitt Moves Forward in Downtown St. Pete*, St. Pete Rising (May 16, 2022), https://stpeterising.com/home/2022/5/16/300-million-mixed-use-development-anchored-by-moffitt-moves-forward-in-downtown-st-pete.

54. Press Release, City of St. Petersburg, Mayor Ken Welch Makes Decision on TPA/Moffitt Development (Aug. 12, 2022), https://www.stpete.org/news_detail_T30_R425.php.

Chicago's inclusionary zoning policy.[55] As of May 2023, city councils in Cleveland and Sacramento are both considering enacting CBOs.[56]

C. Current CBO Mechanics

Detroit's current CBO works as follows. Any development with an expected cost of $75 million or more that requests a public land transfer of at least $1 million, or that requests at least $1 million in tax abatements, is required to go through the CBO process. Before submitting the requests for approval, the planning director holds at least five noticed public meetings in the development's impact area and, through the meetings, convenes a neighborhood advisory council composed of nine members: two elected by residents of the impact area affected by the development, and seven selected by the planning director and City Council. The planning department then provides the neighborhood advisory council with all of the essential development documentation and facilitates at least one meeting between the advisory council and the developer where the council can raise their concerns.[57]

Based on these meetings and concerns voiced by the advisory council, the planning director drafts and submits a community benefits report to the city council containing procedural information, a list of council concerns, and mitigation measures for those concerns. The submission of the report must occur within six weeks from the date that the notice is sent of the initial public meeting. The report is also provided to the advisory council, and the advisory council may vote to sign the letter in support of the report or may vote for additional discussion and negotiation.[58]

After the city council and the advisory council approve the report, the city enters into a development agreement with the developer by conditioning approval of the requests for public land and/or tax abatements on compliance with the community benefits agreement. The ordinance does not require the developer to enter into a legally binding agreement with the neighborhood advisory council. Enforcement of the agreement falls on the enforcement committee, composed of five city officials and one nonvoting neighborhood advisory council member. Penalties for noncompliance may include clawback of city-provided benefits, revocation of land transfers and sales, debarment, and penalties and fees. The enforcement committee prepares a biannual compliance report for the city council for

55. Williamson, *supra* note 51.

56. Kim Palmer, *Cleveland's Construction, Development Stakeholders Go Back and Forth on Community Benefits Ordinance*, Crain's Cleveland Bus. (May 10, 2023), https://www.crainscleveland.com/government/council-opens-hearings-community-benefits-ordinance; City of Sacramento, Community Benefits Ordinance (2023), https://www.cityofsacramento.org/Economic-Development/Community-Benefits-Ordinance.

57. Ordinance No. 2021-4, Detroit Legal News (Dec. 8, 2021), https://detroitmi.gov/sites/detroitmi.localhost/files/2022-04/Ordinance%20No.%202021-4%20Community%20Benefits%20Ordinance.pdf.

58. *Id.*

a set time period. There is at least one city-facilitated meeting per year between the neighborhood advisory council and the developer for a term specified in the CBA.[59]

If the neighborhood advisory council suspects the developer is violating the terms of the CBA, the council can report the violation to the enforcement committee, who will conduct an investigation. If the investigation shows non-compliance, then the enforcement committee will detail the necessary enforcement steps to the neighborhood advisory council. The enforcement committee then must provide monthly compliance reports to city council and the neighborhood advisory council until the city council adopts a resolution declaring the developer in compliance with the CBA or has adequately mitigated violations.[60]

D. Original Proposed CBO Mechanics

The original CBO proposed by the Equitable Detroit Coalition would have worked in a very different way from the watered-down version enacted into law. The original CBO mandated that any development expected to incur investment of $15 million or more, and that requested at least $300,000 in land or tax abatements, would have to go through the CBA process. Once the site plan for a qualifying development is submitted to the city planning department, the City Councilmember of the affected district would call a noticed public meeting to form a host community representative organization to negotiate and execute a CBA. The host community representative organization would be made up of residents, local businesses, and nonprofits located in the census tract and adjacent census tracts where the development will occur. Aside from noticing and organizing the first public meeting, the city council and city officials would be barred from direct involvement in the process of forming a host community representative and negotiating the CBA.[61]

The CBA negotiation would address each and every one of the following subjects: targeted benefits, low and moderate-income housing, quality of life and environmental mitigations, neighborhood infrastructure and amenities, and host community representation in the development and post-development process. The final CBA, which would be a legally enforceable contract, would also address each of these topics using language agreed to by both parties.[62] If negotiations stall and the parties are unable to reach an agreement for a CBA, then the developer would request that city council grant it an exemption from the CBA requirement. To gain an exemption,

59. *Id.*

60. *Id.*

61. An Ordinance to Amend Chapter 14 of the 1984 Detroit City Code, https://www.metrodetroitd4.org/_files/ugd/3dbf23_7533bf2386384d0dbb5983a6a9f460b3.pdf (LAST VISITED AUG. 2, 2023).

62. *Id.*

the developer must detail its negotiation efforts and document how it will nonetheless seek to implement the purpose of the CBO.[63]

CBA enforcement would be accomplished through litigation initiated by the host community representative party or the city (as a third-party beneficiary of the CBA). Failure to comply with the terms of the CBA would result in denial, suspension, revocation, termination, or withdrawal of the requested public support. Remedies in the breach of contract litigation would be limited by ordinance to judicial enforcement of the CBA.[64]

E. Lessons

In their 2017 report on their fight for a CBO, the Equitable Detroit Coalition listed ten lessons for organizers and advocates in other cities considering pushing for a CBO. The lessons include prioritizing outreach and education, building on existing neighborhood organizations, capitalizing on pivotal moments where disadvantage is especially pronounced, nurturing coalitional advocacy, controlling the narrative of the CBO, redefining normalcy in an era of corporate greed, drawing on legal support, building political support and accountability, investing in new fundraising methods, and incorporating a holistic mindset to community benefits.[65]

In addition to these recommendations, scholars Nicholas Belongie and Robert Mark Silverman note the importance of a "sustained progressive local political culture focused on equitable development" for CBA institutionalization.[66] Based on their case studies of CBAs and CBA institutionalization in Detroit, Cleveland, and Portland, Belongie and Silverman argue that other critical components of effective CBOs are the integration of grassroots coalitions into CBO processes, the presence of mandates for binding agreements, and strong enforcement mechanisms.[67]

Other scholars, including Lisa Berglund and Sam Butler, interviewed community participants in Detroit's CBO through the first ten developments subject to its mandates to determine whether the ordinance truly incorporates Detroiters' voices in the development process. Through their research, they "question the legitimacy of government-sanctioned community benefits agreements relative to the concerns raised about inclusivity."[68] The authors argue for a community-oriented and community-driven process free of government involvement. Berglund and Butler also note the need for a truly inclusive means of selecting who gets to represent the community in CBA negotiations, as most representatives were selected due to

63. *Id.*
64. *Id.*
65. Kravetz, *supra* note 13, at 12-16.
66. Belongie & Silverman, *supra* note 41, at 17.
67. *Id.*
68. Lisa Berglund & Sam Butler, *Detroit's Community Benefits Ordinance: Setbacks and Opportunities to Giving Residents a Voice in Development*, 29 J. Cmty. Prac. 23, 39 (2021).

their elite social and professional networks.[69] A more expansive initial outreach process would mitigate this concern. The authors also recommend that negotiations be facilitated by a neutral third-party mediator; that all relevant development agreements be disclosed immediately; that the bundling of projects diminishing the amount of negotiations required be prohibited; that community consultation be incorporated into the RFP process; and that regular, sustained bargaining meetings be required.[70] Ultimately, they find that Detroit's CBO fails to truly incorporate Detroiter's voices in the development process.

Based on my analysis of the Detroit CBO's enactment, amendments, and effectiveness, I would add the following observation to this insightful set of commentary. Los Angeles is incredibly different from Detroit in its size,[71] economy,[72] political culture,[73] geography,[74] and racial demographics.[75] Most pertinently, Detroit is an economically struggling Rust Belt

69. *Id.* at 39–41.

70. *Id.* at 41.

71. According to 2022 US Census Data, the City of Los Angeles has a population of 3.8 million and a land area of 469 square miles, while Detroit has a population of 630,000 and a land area of 138 square miles. *Los Angeles City*, U. S. Census Bureau (2022), https://www.census.gov/quickfacts/losangelescitycalifornia; *Detroit City*, U. S. Census Bureau (2022), https://www.census.gov/quickfacts/detroitcitymichigan.

72. The St. Louis Federal Reserve FRED estimates Los Angeles's 2021 gross domestic product (GDP) at $1.1 billion and Detroit's at $283 million. Gross Domestic Product for Los Angeles-Long Beach-Anaheim, CA (MSA), St. Louis Federal Reserve FRED (2022), https://fred.stlouisfed.org/series/NGMP31080; Gross Domestic Product for Detroit-Warren-Dearborn, MI (MSA), St. Louis Federal Reserve FRED (2022), https://fred.stlouisfed.org/series/NGMP19820.

73. Los Angeles is composed of a jurisdictional patchwork of the City of Los Angeles, numerous smaller municipalities, and unincorporated areas governed by the County of Los Angeles. This jurisdictional fragmentation has led to a highly divided and territorial political culture within the City of Los Angeles, as well as clashing policies and politics on housing between neighboring municipalities in L.A. County. Daniel Hennessy, *Bordering Towns in LA County Clash over Their Homeless Policies*, Shelterforce (Jan. 27, 2023), https://shelterforce.org/2023/01/27/bordering-towns-in-la-county-clash-over-their-homeless-policies. The most prominent example of this fragmentation is the 2022 Los Angeles City Council scandal, in which leaked audio of racist anti-Black and anti-Indigenous remarks made by several city councilmembers and the president of a powerful local union in conversations over political redistricting. Jill Cowan & Shawn Hubler, *Anger Erupts at Los Angeles City Council Meeting Over Racist Remarks*, N.Y. Times (Oct. 12, 2022), https://www.nytimes.com/live/2022/10/11/us/la-city-council-racist-remarks.

74. In his critical geography and history of Los Angeles, Mike Davis vividly describes the city circa 1990 as a swelling suburb "reproducing itself endlessly across the [Mojave] desert with the aid of pilfered water, cheap immigrant labor, Asian capital and desperate homebuyers willing to trade lifetimes on the freeway for $500,000 'dream homes' in the middle of Death Valley." Mike Davis, City of Quartz: Excavating the Future in Los Angeles 7.34 (2006) (ebook).

75. Los Angeles is predominately Hispanic, with a population that is 48% Hispanic, 11.7% Asian, 8.6% Black, and 28% white. In contrast, Detroit is majority Black, with a

city that has seen massive white flight and depopulation in the last few decades, declared bankruptcy in 2013, has swathes of vacant, abandoned, and cheap land, and is now desperate to attract investment and economic development to retain their population and economically recover from deindustrialization.[76] As such, Detroit's government dangles cheap land and tax abatements in front of developers to try to attract investment, which in turn offers community groups plenty of opportunities for CBA negotiations.[77] Los Angeles, by contrast, is home to a massive and highly diversified economy, a powerful service worker and construction worker labor movement, concentrated and unequal wealth, expensive land and housing, and an abundance of ongoing high-end real estate development. As a result, Los Angeles engages in relatively fewer land transfers and tax breaks to attract development compared to Detroit.[78] Thus, the CBO in

population that is 7.8% Hispanic, 1.6% Asian, 77.9% Black, and 13% white. *See Los Angeles City, supra* note 71; *Detroit City, supra* note 71.

76. In the face of continued population loss, both the City of Detroit and the State of Michigan have been working to design and enact new measures to "improv[e] education outcomes, job opportunities and public health, rebuild[] aging housing and offer[] quality public services like reliable transportation, clean water and safe neighborhoods." Malachi Barrett, *Detroit's Population Slide Challenges Vision of Revitalization*, Bridge Detroit (May 30, 2023), https://www.bridgedetroit.com/detroits-population-slide-challenges-vision-of-revitalization. One analyst notes that Detroit's continuing economic struggles are linked to "its inability to attract capital, business and economic growth." Scott Beyer, *Why Has Detroit Continued to Decline?*, Forbes (July 31, 2018), https://www.forbes.com/sites/scottbeyer/2018/07/31/why-has-detroit-continued-to-decline/?sh=457227853fbe.

77. Detroit's tax abatements accounted for 16.8% of the average annual property tax revenue generated between 2017 and 2021, totaling $20 million per year. This amount is far higher than Detroit's peer cities of Cleveland, Columbus, Memphis, and Milwaukee. *Detroit Foregoes Large Sums of Property Tax Revenues with its Use of Business Tax Abatements*, Citizens Rsch. Council of Mich. (Nov.16, 2022), https://crcmich.org/detroit-foregoes-large-sums-of-property-tax-revenues-with-its-use-of-business-tax-abatements. Meanwhile, as of January 2023, the City of Detroit owns 73,000 properties, of which 63,000 are vacant. The city maintains an active land bank to try to sell the land to homeowners and developers. Detroit Land Bank Auth., City Council Quarterly Report: FY 2023 Q2 (2023), https://dlba-production-bucket.s3.us-east-2.amazonaws.com/RFPs+and+RFQs/Q2+FY23+FINAL+CCQR.pdf.

78. For example, Los Angeles has offered only eight tax breaks to developers since 2005, totaling near $1 billion. Most of these breaks have been for downtown hotels near the Los Angeles Convention Center or for a shopping mall in the San Fernando Valley. David Zahniser, *L.A. Has OK'ed $1 Billion in Tax Incentives to Developers Since 2005. That Assistance Needs More Scrutiny, Controller Says*, L.A. Times (Aug. 10, 2018), https://www.latimes.com/local/lanow/la-me-ln-hotel-subsidy-report-20180810-story.html. Of the roughly 792,000 properties in Los Angeles, 7,508 were owned by the City of Los Angeles as of mid-2019. The debate over these properties in Los Angeles centers on their potential use as supportive housing, affordable housing, and parks and open space, not for large-scale economic development as in Detroit. Alissa Walker, *This Interactive Map Shows LA's Publicly Owned Properties*, Curbed L.A. (July 3, 2019), https://la.curbed.com/2019/7/3/20681291/map-public-property-los-angeles. Clearly, focusing on tax

Los Angeles would need to gain public leverage not only from city land transfers and tax breaks, but also from discretionary zoning and land-use approvals.[79] This change would still provide an opening for a CBO to mandate community negotiations for a meaningful number of developments, including the luxury market-rate housing developments that threaten gentrification and concern organizers in low-income neighborhoods of color.

To succeed, a citywide CBO campaign in Los Angeles needs to speak broadly to the equitable development concerns of a diverse range of constituents that serve low-income communities of color. Labor unions are an incredibly influential and powerful force for working-class people of color in Los Angeles.[80] Tenant organizers, unhoused advocacy groups, environmental justice advocates, environmentalists, racial justice organizations, immigrant and worker justice centers, legal aid organizations, faith-based organizations, and charitable and social service societies all have a stake

breaks and city property alone will not reach the kinds of gentrifying luxury housing developments that so concern tenant organizers in Los Angeles.

79. Conditioning discretionary zoning and land use approval—as opposed to public subsidies—on CBO compliance raises an important legal question around exactions and the Fifth Amendment Takings Clause. Some legal scholars have expressed skepticism about the appropriateness of mandating CBAs in land-use approval processes since municipalities may encounter Fifth Amendment Takings Clause constraints on land-use regulation. Vicki Been, *Community Benefits Agreements: A New Local Government Tool or Another Variation on the Exactions Theme?*, 77 Univ. Chi. L. Rev. 5, 27–28 (2010); Colyn Eppes, *Legislatively Mandating a CBA Is Not the Way: A Case Study of Detroit's Proposed Community Benefits Ordinance and Its Constitutionality Under the Takings Clause of the Fifth Amendment*, 26 J. L. & Pol'y 225 (2018). Specifically, the *Nollan/Dolan/Koontz* exactions doctrine establishes a test for whether concessions sought by the government in exchange for development permits constitute an unconstitutional taking under the Fifth Amendment. The doctrine asks whether there is an essential nexus and rough proportionality between the concessions sought and development proposed. Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); Dolan v. City of Tigard, 512 U.S. 374 (1994); Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595 (2013). For these scholars, there is a concern that many common CBA provisions around women and minority hiring, union labor, affordable housing, and community centers would fail this test. To guard against such dangers, Been encourages measures that ensure CBAs have a nexus to land-use concerns, do not compromise citywide interests, and are transparent, representative, accountable, and enforceable. Been, *supra*, at 32–34. Eppes suggests doing away with CBOs entirely and instead incorporating socioeconomic impact analyses into environmental review processes to help facilitate more private CBAs. Eppes, *supra*, at 263–66. This paper acknowledges the importance of these concerns, but does not contribute to this debate except to note that other recent affordable housing and local hiring requirements tied to discretionary land–use approvals in Los Angeles—like Measure JJJ, discussed *infra* note 87—have not been subject to exactions challenges. Instead, this paper is primarily focused on how to best design a CBO for Los Angeles with these challenges in mind.

80. Mike Davis referred to Los Angeles's labor unions in the mid-2000s as "the principal R&D center for the future of the American labor movement" and "the single most important electoral and social force in the city." Davis, *supra* note 74, at 6.58. The continued power of the L.A. County Federation of Labor in the 2020s bears this prediction out.

in enhancing community control of housing and real estate development in low-income communities of color. Only by pulling together a diverse coalition of social justice organizations can a CBO campaign succeed in Los Angeles.[81]

IV. A CBO for Los Angeles

What could a strong CBO look like in Los Angeles, and what would it take to make it a reality? This section moves towards an answer to these questions by investigating the contours of what a CBO could look like in Los Angeles. First, I analyze whether such a policy would be legal under Los Angeles's home rule powers as a California charter city. Second, I propose the institutional design elements necessary for a strong CBO in Los Angeles. Third, I explore possible avenues forward towards implementation of a CBO. Finally, I evaluate the potential effectiveness of such a CBO policy and address concerns around co-optation and capacity.

A. Legal Considerations

Cities in California may operate as general law cities, governed by the California Government code, or as charter cities, which operate under a city's adopted local charter. Los Angeles is a charter city.[82] Under the California Constitution, charter cities "may make and enforce all ordinances and regulations in respect to municipal affairs."[83] California courts have interpreted this provision as providing municipalities with imperio home rule: there is a realm of "municipal affairs" within which cities can make law and be immunized from state interference.[84] The California Supreme Court has treated the reach of "municipal affairs" very broadly, ruling that municipal affairs encompass "all powers appropriate for a municipality to possess" and that "so far as municipal affairs are concerned, charter cities are supreme and beyond the reach of [state] legislative enactment."[85] The primary substantial limitation that courts have imposed on charter cities' home rule authority over municipal affairs relates to matters that are of

81. For a recent example of successful coalition building in LA around affordable housing and homelessness, see the successful United to House LA ballot measure (Measure ULA) from November 2022, which passed fifty-five percent to forty-four percent. The measure imposes a transfer tax on all real property conveyances in Los Angeles over five million dollars. Money raised by the tax will be used to fund efforts to provide affordable housing and alleviate homelessness. The coalition was led by labor unions, community groups, and nonprofit affordable housing providers. United to House LA, https://unitedtohousela.com (last visited Feb. 20, 2023); *see also* Peter Drier, *How Los Angeles Won the Largest Municipal Housing Program in the Country*, Shelterforce (May 31, 2023), https://shelterforce.org/2023/05/31/how-los-angeles-won-the-largest-municipal-housing-program-in-the-country/.

82. Los Angeles Charter § 101.

83. Cal. Const. art. 11, § 5.

84. Cal. Fed. Savings & Loan Assn. v. City of Los Angeles, 54 Cal. 3d 1, 12 (1991); *Ex Parte* Braun, 141 Cal. 204 (1903).

85. *Id.* (citing *Ex Parte Braun*, 141 Cal. at 207).

"statewide concern" and have conflicting statewide enactments. In such cases where a municipal ordinance and state statute conflict, the California Supreme Court has ruled that the primary inquiry is whether there is "a convincing basis for legislative action originating in extramunicipal [sic] concerns, one justifying legislative supersession based on sensible, pragmatic considerations."[86] Since the California state government does not currently regulate community benefit agreements, there is no question of state preemption of municipal ordinances here.

The key legal question, then, is whether a CBO would qualify as a "municipal affair." Although there are no analogous cases of California charter cities passing ordinances regulating community benefit agreements, it is highly likely that California courts would find that a CBO is within Los Angeles's powers as a charter city. The CBO would only cover developments that are within the city limits; the community organizations that would bargain with the developer would all be based in the city; the bargained-for benefits would all be located in Los Angeles; and the rationale for the ordinance—to promote equitable development—is an issue that municipal governments are traditionally empowered to undertake.[87]

B. Institutional Design

The institutional design of the CBO is a crucial component of the ordinance that will determine whether it is able to operate as true and binding community control of development. In their 2020 *California Law Review* article, "The Institutional Design of Community Control," K. Sabeel Rahman and Jocelyn Simonson offer three dimensions of authority that "provide a way to read the comparisons between different visions of institutional reform" in movements for community control of policing and local economic development.[88] The three dimensions are the following:

(1) The Nature of Authority: Power Versus Input;

(2) Composition of Authority: Composition and Representation of Disempowered Populations; and

(3) Moment of Authority: Upstream vs. Downstream[89]

86. *Id.* at 18.

87. The most compelling example of this objective is Los Angeles's attempts to promote equitable development and affordable housing through its zoning powers. See, for example, 2016's Ballot Measure JJJ, which requires developers to add affordable units to new buildings and mandates local hiring of construction workers for all developments with ten or more housing units that request zoning variances to increase unit density. Bianca Barragan, *Ballot Measure JJJ*, Curbed L.A. (Oct. 11, 2016), https://la.curbed.com/2016/10/11/13238820/explain-ballot-measure-jjj-los-angeles. Measure JJJ also created the Transit Oriented Communities Incentive Program, which allows for even more density bonuses for developers who build in affordable units near identified public transit. *Transit Oriented Communities Incentive Program*, L.A. City Planning (last visited Feb. 20, 2023), https://planning.lacity.org/plans-policies/transit-oriented-communities-incentive-program.

88. K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 Cal. L. Rev. 679, 727 (2020).

89. *Id.* at 683.

The first dimension, Nature of Authority, analyzes whether the institution possesses binding governance or nonbinding input into its domain of authority. It also analyzes whether the institution governs an issue "with connections to deep structural drivers of inequality or distribution."[90] The second dimension, Composition of Authority, examines whether traditionally ignored and oppressed populations are represented on the body and whether they are independent. The third dimension, the Moment of Authority, considers whether the institution's decision-making occurs upstream (affecting a wider array of decisions), or downstream (affecting a more restricted and limited set of choices).

This institutional design rubric offers a powerful way to conceptualize the key elements of meaningful community control of development in Los Angeles. Consider how each of the three existing methods of community input into development discussed in Section II figures in the institutional design matrix:

	Nature of Authority	**Composition of Authority**	**Moment of Authority**
Neighborhood Councils	*Weak:* can only submit nonbinding, advisory Community Impact Statements	*Medium:* councilmembers are volunteers elected by anybody with ties to the neighborhood, and anybody with ties to the neighborhood is eligible to join the council	*Medium:* input occurs during the development planning and approval process
Administrative Hearings	*Weak:* testimony at the hearings is nonbinding; unlike federal administrative notice and comment periods, municipal agencies do not need to respond to every single comment	*Medium:* hearings are noticed and open to the public, but often occur during the workday and suffer from language accessibility issues, among others	*Weak:* hearings putatively occur "during" the decision-making process, but, in reality, most decisions have already been made behind closed doors
CEQA Appeals/ Litigation	*Strong:* judicial review of agency environmental review processes includes the authority to order the agency to revise their review	*Weak:* high cost and technical expertise needed to initiate CEQA litigation limits who is able to participate	*Weak:* often occurs after environmental review processes have been completed and development approvals have been awarded

90. *Id.*

With these examples of institutional design in mind, we can begin to sketch out the most important components of an effective CBO in Los Angeles. First, the CBO should mandate that a developer with a project of a cost above a certain amount must enter into legally enforceable CBAs with community groups before the city will grant the developer the requested public support in the form of tax abatements, land, or discretionary land use and zoning approvals (Nature of Authority). This would give community negotiating groups real power and leverage in shaping the development to maximize community benefits. The CBO should also mandate city and developer disclosure of any existing memorandum of understandings (MOUs) and agreements to the representative community group. Just as in the original ordinance proposed in Detroit, Los Angeles's ordinance could also mandate bargaining over certain subjects, like affordable housing, labor, environment, and amenities. The community group would sign its own binding CBA contract with the developer and would have standing to enforce the contract in court. Developer compliance with the community-negotiated CBA would also be included as a provision in the contract for public support between the developer and the city. Just as in Detroit, the City of Los Angeles would also be given standing as a third-party beneficiary to enforce the contract. Penalties for violations would include revocation of city support (i.e., tax abatements, land, and/or zoning and land-use approvals). Remedies would be limited to enforcement of the CBA.

Second, community negotiating bodies must be democratically elected and representative of the communities they negotiate on behalf of (Composition of Authority). This component could even work in tandem with Los Angeles's existing toothless Neighborhood Council system by designating the Neighborhood Council(s) in the development area as the community representative for CBA negotiation purposes. Such a designation would give Neighborhood Councils real teeth and power and allow them to live up to their stated purpose. To ensure adequate representation of poor and working-class people, the Neighborhood Council ordinance should be amended to require that Neighborhood Council positions be adequately and proportionally compensated, that meetings generally occur outside the workday, and that meetings have maximum language accessibility for all participants. Linking the CBO process to the Neighborhood Council system would also ensure continuity of neighborhood representation across CBA agreements in a given area. Since Neighborhood Councils are flexible in terms of bylaws and structure, this would allow neighborhoods to tailor their representation in the way that best suits them.

Third, negotiations must begin as early as possible in the development process, starting by shaping the city's initial Request for Proposals (RFP) that limits what can be negotiated about in a development, and continuing into a developer's initial submission of site plan to the city planning department. This timing would ensure that the CBAs have a meaningful effect on the shape of the final project (Moment of Authority). The CBO should also mandate regular negotiation meetings to ensure that they are

completed in a meaningful and timely manner. Since site plan approvals often look more like an iterative negotiation process between the city and the developer, rather than one-off approval/denial decisions, the CBA negotiations are well-suited for incorporation into this existing site-plan approval process. To ensure negotiations go smoothly, the ordinance could provide that a neutral third party be appointed as a facilitator and mediator. With each of these three components in place, the CBO would enable democratically representative community organizations to exert strong upstream community control of development in their neighborhoods. The institutional design table for such a CBO would look like the below:

	Nature of Authority	**Composition of Authority**	**Moment of Authority**
Strong Los Angeles CBO	*Strong:* binding CBA contract with standing to enforce in court; mandated subjects of bargaining	*Strong:* democratically elected community representatives; could connect with Los Angeles's existing Neighborhood Council system	*Strong:* upstream process that begins right when the developer submits the site plan and/or when the city creates an RFP

With these strong institutional design measures in place, a CBO would be able to serve as a non-reformist reform in Los Angeles. By creating an infrastructure through which communities of color will have leverage to make real demands against developers and deeply shape and control the development process in their neighborhoods, a CBO can spark the longer process of creating a society where people "have real say over all aspects of their lives, where they are not subject to unchecked private or state power."[91] With the benefits of such a strong CBO ordinance in mind, the next subsection of the paper considers possible avenues towards implementation.

C. Implementation

Under the Los Angeles City Charter, Los Angeles community organizations could draft and submit a CBO as an initiative petition to the Los Angeles City Clerk.[92] The initiative petition could request that City Council adopt the ordinance in one of two ways: (1) through a city council vote, or (2) through a majority vote of Los Angeles electors.[93] In this subsection, I outline the processes for each of these two methods and recommend the latter.

91. Akbar, *supra* note 14, at 113.
92. L.A. City Charter § 450(a).
93. The L.A. City Charter section 451 governs Initiative Petitions.

The initiative petition could request that the CBO be adopted by the Council or submitted to a vote by City electors.[94] After submission and certification, community organizations may circulate the initiative petition to the public and gather signatures in support of the ordinance. To qualify for presentation to City Council, the petition must be signed by at least fifteen percent of the total number of votes cast for all candidates for mayoral office in the most recent general or primary municipal election. Only signatures collected within 120 days prior to the filing of the signed petition will count towards this number.[95] Once community organizations gather the required number of signatures and submit the initiative petition to the City Clerk, the Clerk must certify the signatures and, if the number of signatures is sufficient, immediately present the petition to City Council.[96] Within twenty days after the petition is presented to City Council, the City Council must then either (1) adopt the proposed ordinance; (2) call a special election for the ordinance to be voted upon by City electors within 110 to 140 days; or (3) submit the proposed ordinance to a vote by City electors at the next regular City election held more than 110 days from the date of Council action.[97]

Given the racism, dysfunction, and corruption endemic in Los Angeles's City Hall,[98] a public ballot measure would be the most promising way to enact a CBO in Los Angeles. As the November 2022 voter approval of Measure ULA shows, Los Angeles voters have an appetite for ballot measures that address the city's severe affordable housing and equitable development shortage.[99] The initial process of gathering initiative petition signatures, followed by the later process of campaigning for "yes" votes for the CBO, would catalyze a critical conversation in Los Angeles about the importance of community control of development for low-income communities of color. Compared to the shadowy, tenuous, contested, adversarial, and uncertain strategy of lobbying Los Angeles City Council—members of whom may be in developers' pockets, or who may be easily swayed by developers' doomsday predictions of CBO-produced economic disaster triggered by falling property values and lost property tax revenues—the democratic procedure of a ballot measure is clearly preferable. This was certainly the case in Detroit, where the Detroit city council stalled discussing and voting on the CBO for years until organizers got the CBO on the ballot and forced a public debate and discussion on the importance of community benefits and community control. Los Angeles could very well benefit from the same conversation.

94. L.A. City Charter § 450(a).
95. *Id.* § 451(b).
96. *Id.* § 451(e).
97. *Id.* § 452(b).
98. *See* Cowan & Hubler, *supra* note 73.
99. *See* United to House LA, *supra* note 81.

D. Critiques and Responses

There are a number of critiques regarding a CBO's potential negative effects on social movements, affordable housing production, and the city's economic development. First, there is a concern that a CBA could co-opt and neuter a low-income community of color's capacity to resist a gentrifying development. Second, there are concerns that a CBO would strain and overburden under-resourced community organizations with project-by-project CBA negotiations and enforcement. Third, there is a concern that wealthy and white communities could somehow use the CBO process to slow down and stop affordable and supportive housing development. Fourth, there is a concern that a CBO is incompatible with economic growth and development by driving away developers who would otherwise invest in and bring capital into Los Angeles. This subsection of the paper addresses each of these concerns in turn.

First, there is the concern that CBAs may enable a form of developer cooptation of community-based anti-gentrification resistance. Even though CBAs are powerful tools for communities to attain meaningful control over and input into the development process, this concern is not unfounded. As prominent Los Angeles organizer Gilda Haas points out in her analysis of CBAs in Los Angeles, such agreements tend to concern upscale housing and commercial developments that ultimately contribute to "market conditions that are pushing our members out of the neighborhoods where they have lived for decades."[100] In other words, as scholar Leland Saito notes in his study of CBAs in Los Angeles, CBAs can "contribute to the housing and businesses aimed at affluent consumers that result in gentrification and the displacement of long-term residents."[101] Such an analysis is not an indictment of CBAs, but serves to place "these agreements in the big scheme of things."[102]

A CBO would certainly be vulnerable to this important structural critique. A strong CBO would enable a high degree of community control over luxury developments entering low-income neighborhoods—and ensure that benefits from such developments flow to the neighborhood in the form of affordable housing, unionized jobs, environmentally friendly design, and community amenities. However, a CBO would not be able to stop the incursion of such developments wholesale. There is no doubt that a CBO would not revolutionize the development process, institute full community control of development, and end all gentrifying developments in one swoop; rather, it would be "a transitional step in the long-term goal of transforming city policies regarding key issues such as housing, wages,

100. Leland Saito, Building Downtown Los Angeles: The Politics of Race and Place in Urban America 152 (2022) (citing Gilda Haas, *Community Benefits or Community Control? What We Really Want*, Strategic Action for a Just Economy (2007)).

101. *Id* at 194.

102. *Id* at 152.

hiring practices, and public subsidies for large projects."[103] At best, a CBO can only ensure that such development occurs in the most equitable manner possible.

Increased community control over gentrifying real estate development is not necessarily a bad thing. Stopping gentrification, improving existing housing conditions, and ultimately de-commodifying housing and ensuring that everyone has access to affordable high-quality housing requires a multi-prong strategy with many components, of which a CBO can and should be one important part.[104] But for low-income communities of color that lack any leverage to negotiate any community benefits for gentrifying developments, let alone leverage to stop such developments wholesale, a CBO is an important non-reformist reform in the long-term fight for housing justice. Because the CBO requires developers to come to the table to negotiate benefits, it creates leverage for low-income communities of color where none currently exists. As such, it can start to "undermine the prevailing political, economic, social system from reproducing itself and make more possible a radically different political, economic, social system."[105] This goal of non-reformist reform is in line with the Equitable Detroit Coalition's original vision for Detroit's CBO: to "fundamentally alter expectations on how development is done in Detroit by normalizing a community-driven approach."[106]

Second, CBA negotiation and enforcement is a resource-intensive process. The difficulty that community organizations faced in even getting to the negotiating table was what motivated the creation of the CBO campaign in Detroit.[107] By mandating CBA negotiations, the CBO eases the process by requiring community organizations and developers to sit down in the same room and negotiate benefits. However, this mandate does not change the fact that CBA negotiations require a high degree of technical, legal, and financial skill regarding the nature of development processes. Additionally, enforcement is incredibly difficult, technical, and time-consuming for community organizations—many of whom have day jobs and organize on a volunteer basis. Although CBAs were invented in Los Angeles in the late 1990s and early 2000s, with the Hollywood and Highland Center CBA in 1998 and the Staples Center/LA Live CBA in 2001, the persistent difficulties discussed above make clear why the strategy in Los Angeles today has shifted towards lobbying "local, state, and federal governments to enact policies that address the issues covered in CBAs."[108] In Los Angeles, this evolution has taken the form of incorporating wages and

103. *Id* at 194.

104. See the conclusion for more details on what these other components can and should include.

105. Akbar, *supra* note 14, at 104.

106. Kravetz, *supra* note 13, at 2.

107. *Id.*

108. Saito, *supra* note 100.

hiring practices in city projects involving significant subsidies,[109] increasing the minimum wage,[110] passing zoning ordinances mandating increased affordable housing in developments seeking variances from the city,[111] and increasing sales and property taxes to fund supportive housing,[112] homelessness services,[113] and affordable housing.[114]

Even with all these important policies, there is still a critical place for CBAs in Los Angeles's housing justice movement. Unlike blanket city policies, which ultimately require the city to monitor compliance and enforce ordinances against violators—a responsibility that Los Angeles city agencies have failed at in the past[115]—a CBO would give community groups a broad grant of authority to monitor and enforce the terms of their CBAs.[116] In other words, CBAs provide for community control of development in a way that does not depend on often unreliable city agencies to adequately monitor the implementation of voter-approved policies. Additionally, CBAs "are a way to direct benefits to residents most directly experiencing the negative effects of the project, such as displacement and increased traffic and pollution"[117] that a blanket citywide policy does not. As such, CBAs allow for more tailored and hyperlocal benefits at the block-by-block and neighborhood level.

To alleviate the burden that such processes can place on community organizations, the CBA can provide funding for paid staff to administer the terms of the agreement.[118] Experience from Detroit's CBO suggests that such policy measures would help ensure that the community negotiating bodies are more representative. Because Detroit's CBO structure requires government officials to select the majority of the volunteer negotiating members on the neighborhood advisory council, most representatives "found themselves in positions to negotiate due to personal or professional

109. *Id.* at 194–95.

110. *Id.* at 195.

111. *See* Measure JJJ, *supra* note 87.

112. Saito, *supra* note 100, at 195.

113. *Id.*

114. *See* United to House LA, *supra* note 81; *see also* Measure JJJ, *supra* note 87.

115. Saito, *supra* note 100, at 147 (noting that blanket city policies like inclusionary zoning and linkage fees "have mixed outcomes, in part because benefits are often based on developer predictions rather than concrete, enforceable objectives. Also, city officials and staff may not have the resources or motivation to monitor the developer's performance once a project is built and the attention of staff and officials has shifted to uncompleted projects. In Los Angeles, for example, an audit by the city controller showed that the Community Redevelopment Agency (CRA) had done 'a poor job ensuring that the public receives the benefits promised in exchange of subsidies given to private developers' and the Agency often did not 'verify that the units created for low to moderate income housing are actually being used for that purpose.'").

116. *Id.*

117. *Id.*

118. *Id.* at 146.

connections, meaning that the class identity and education attainment of NAC members was often reflective of the higher rent areas that projects were placed in, and elite networks that they belonged to."[119] If the Los Angeles CBO requires broad outreach and allows for paid, locally elected representatives to negotiate CBAs and monitor compliance—such as through the existing Neighborhood Council system—then it could help grow organizational capacity to address these issues.

Third, there is a concern that wealthy and white communities in Los Angeles could co-opt the CBO process to slow down or stop affordable and supportive housing developments. The fear is that, faced with an affordable or supportive housing development to be built in their neighborhood, a wealthy community could leverage the CBO process to delay the development process so long that the development is never built, or could craft a CBA that effectively negates the affordability and supportive housing provisions of the development. This disturbing scenario could be avoided by drafting the CBO in such a way that the city is prohibited from granting the developer's requested public support if the negotiated CBA contains terms that reduce the amount of affordable or supportive housing, prevent the use of unionized labor, reduce wages, or decrease the number of amenities or quality of infrastructure to be offered. In other words, the proposed development and all background regulations and requirements must serve as a floor that the CBA can only bargain up from. The existence of such bars may help to ward off attempts by exclusionary wealthy and white communities to hijack the CBO process. Although, as discussed earlier in this paper, Detroit is a very different city from Los Angeles, the CBAs created so far in Detroit have not faced this issue—perhaps because the thresholds triggering CBO negotiations there are so high, and perhaps because Detroit is a poorer and Blacker city than Los Angeles with fewer wealthy white enclaves.

The fourth concern is whether a CBO and equitable development are consistent with Los Angeles's growth imperatives. Since the 1990s, Los Angeles's infamous and powerful growth machine has politically and economically fractured and made way for the rise of a strong "growth-with-equity" coalition composed of service worker unions, neighborhood organizations, and local residents of color.[120] This coalition has negotiated massive and precedent-setting individual CBAs and successfully developed and advocated for citywide policies that address affordable housing, wages, and local hiring guidelines in new developments.[121] The successes of this coalition in the last few decades have not stopped or stalled Los Angeles's economic growth, but have merely helped to ensure that the wealth and benefits generated by such growth are more equitably distributed across racial and class lines. The Equitable Detroit Coalition argues in their report on the Detroit CBO that "every development that has signed a

119. Berglund & Butler, *supra* note 68, at 42.
120. *Id.* at 10.
121. *Id.* at 14.

CBA has come to fruition and become profitable, offering proof that strong CBAs are not antithetical to economic growth."[122] Indeed, in the decades since the advent of CBAs, developers have come to "recognize CBAs as an acceptable tradeoff and one of the costs of doing business," especially in hot real estate markets like Los Angeles.[123] Additionally, if the ultimate goal of housing justice social movements is for housing decommodification, then the CBO could also mark the beginning of a shift against capitalist growth imperatives and towards a democratic political economy.

V. Conclusion

A CBO can serve as an important non-reformist reform in asserting community control of new development in low-income communities of color in Los Angeles. In the face of Los Angeles's massive affordable housing crisis, low-income communities of color are being subject to fierce luxury real estate development pressures that threaten to displace longtime residents. Lacking the leverage to challenge or change the nature of these developments, under-resourced community groups are struggling for ways to assert community control over the development process. Against these predations of racial capitalism,[124] I propose a CBO as one component of a broader strategy for decommodifying housing, establishing community control of real estate development, and ensuring that housing is a human right.

Of course, many other critical components of a broad-based and comprehensive housing justice strategy must be in place for housing to become a human right. Perhaps the most crucial piece is a massive increase in federal funding and state administrative capacity for direct construction and maintenance of deeply and permanently affordable housing. This objective is necessary because neoliberal attempts to incentivize the free market to produce high-quality affordable housing have failed and will continue to fail to meet the scale of need. There must also be increased federal and state funding, administrative capacity, and community education to bolster solidarity economies, such as small-scale, local, and democratic economies that foreground nontraditional models of permanent affordable housing like community land trusts and limited equity housing cooperatives, as well as nontraditional forms of small business ownership like worker and producer cooperatives.[125]

At the municipal level, there must be changes to the planning process that allocate greater authority to disempowered communities to decide what gets built in their neighborhoods, when it is built, and where it is built, while also ending the exclusionary zoning policies that wealthy and

122. Kravetz, *supra* note 13, at 4.

123. Saito, *supra* note 100, at 194.

124. *See* sources cited *supra* note 15.

125. For more on solidarity economies generally, see Ctr. for Popular Econ., Solidarity Economy I: Building Alternatives for People and Planet, Papers and Reports from the 2009 U.S. Forum on the Solidarity Economy (Emily Kawano, Thomas Neal Materson & Johnathan Teller-Elsberg eds., 2009).

white communities have long used to keep out affordable housing that would serve poor people of color. Municipal policy measures like inclusionary zoning can ensure that private housing developments provide their fair share of affordable housing.[126] On the tenant rights front, state and local action in California must include repealing the Costa-Hawkins Act of 1995,[127] tightening rent control,[128] establishing a right to counsel in eviction cases,[129] and adequately funding and staffing housing code inspection, licensing, and penalty regimes.[130]

By institutionalizing community control of real estate development, a CBO can act as a non-reformist reform towards the horizon of a democratic political economy in which we have "a say in how we spend our collective wealth, how we relate to the land, and how we reimagine the infrastructure in which we live."[131] Together with the comprehensive suite of federal, state, and local policy measures sketched in this conclusion, a CBO can begin to afford low-income communities of color in Los Angeles a privilege that wealthy white communities have always hoarded at the expense of poor people of color: self-determination over how their land is used and developed.

126. Los Angeles City Council recently enacted the city's first inclusionary zoning policy in May 2023 as part of a major downtown zoning plan update. The inclusionary zoning requirements will apply to new housing developments in downtown Los Angeles. David Zahniser, *L.A. Adopts Strategies for Bringing 135,000 New Homes to Downtown and Hollywood*, L.A. Times (May 3, 2023), https://www.latimes.com/california/story/2023-05-03/l-a-adopts-two-zoning-plans-to-bring-up-to-135-000-homes-to-downtown-and-hollywood.

127. The Costa-Hawkins Act of 1995, codified as California Civil Code §§1954.50–1954.535, is a state bill enacted to restrict municipalities' ability to enact rent control ordinances. Its repeal would allow localities to set stricter rent control policies. *See* Elijah Chiland & Jenna Chandler, Costa Hawkins: The California Law Renters Want Repealed, Explained, Curbed L.A. (Apr. 29, 2020), https://la.curbed.com/2018/1/12/16883276/rent-control-california-costa-hawkins-explained.

128. The California Tenant Protection Act of 2019, codified as California Civil Code §§1946.2, 1947.12, 1947.13, established statewide rent control in California until 2030. *See* Jenna Chandler, "Here's How California's Rent Control Law Works," Curbed L.A. (Jan. 6, 2020), https://la.curbed.com/2019/9/24/20868937/california-rent-control-law-bill-governor.

129. On February 14, 2023, a group of Los Angeles City Councilmembers filed a motion to seek recommendations from the Los Angeles Housing Department on establishing a Right to Counsel ordinance and program in the city using funds from Measure ULA. *LA City Council Members Propose Program Giving Tenants Facing Eviction a Right to Counsel*, NBC L.A. (Feb. 14, 2023), https://www.nbclosangeles.com/local-2/la-city-council-members-propose-program-giving-tenants-facing-eviction-a-right-to-counsel/3096309.

130. Tenant organizers in Los Angeles have found that the city's housing code enforcement department "can be negligent and entirely complicit in illegal evictions and gentrification." II L.A. Tenants Union Tenant Handbook L.A. Tenants Union 26 (2019), https://latenantsunion.org/en/2017/11/08/la-tenants-union-handbook.

131. Akbar, *supra* note 14, at 113.

Understanding City NIMBYism: Planned Unit Development Litigation in Washington, D.C.

Prasanna Rajasekaran[†]

Table of Contents

Introduction

Scholars, media members, and the public often categorize protests and lawsuits against housing development as NIMBY.[1] The prevailing NIMBY framework portrays opposition to development as wealthy white

[†] JD, May 2023, Boston University School of Law. The author would like to thank Professors Jonathan Feingold and Anika Singh Lemar for their comments and guidance.

1. NIMBY is an acronym for not-in-my-backyard. Merriam-Webster defines NIMBY as "opposition to the locating of something considered undesirable (such as a prison or incinerator) in one's neighborhood." *NIMBY*, Merriam-Webster, https://www.merriam-webster.com/dictionary/NIMBY. For examples of recent housing protests categorized as NIMBY, see Kate Walz, *The Color of Power: How Local Control over the Siting of Affordable Housing Shapes America*, 12 DePaul J. for Soc. Just. 1 (2019) (analyzing housing opposition in Chicago as NIMBY); Georgina McNee & Dorina Poojani, *NIMBYism as a Barrier to Housing and Social Mix in San Francisco*, 37 J. Hous. & Built Env't 553 (2022) (same in San Francisco).

homeowners looking to preserve their property values and maintain the racial and class exclusivity of their neighborhoods.[2] This framework not only defines public perceptions of housing opposition, but it also shapes our understanding of housing politics generally. Under the NIMBY framework, the failure to build adequate affordable housing falls in some substantial part on racist, classist, and exclusionary individuals.

A recent set of lawsuits against Planned Unit Developments[3] (PUDs) in Washington, D.C. troubles the NIMBY framework and its corresponding political assumptions.[4] Developers in the nation's capital use PUDs, a zoning tool that relaxes height and density restrictions, to build more market-rate and affordable housing than would otherwise be allowed under the zoning scheme.[5] The NIMBY framework would predict an eruption of anti-PUD litigation in response, which has occurred.[6] But many advocates supporting this litigation—including tenant associations, homelessness activists, democratic socialists, and long-time Black residents—do not fit the standard NIMBY profile.[7] They do not seek to preserve white,

2. *See, e.g.*, Miriam Axel-Lute, *What Is NIMBYism and How Do Affordable Housing Developers Respond to It?*, Shelterforce (Nov. 17, 2021), https://shelterforce.org/2021/11/17/what-is-nimbyism-and-how-do-affordable-housing-developers-respond-to-itghgy- ("NIMBYism is often driven, more or less openly, by racism and classism. But the concerns more commonly voiced are about increased crime, traffic congestion, strain on sewers, overcrowded schools, and lowered property values and "quality of life.'").

3. Planned Unit Development is a type of development that relaxes existing zoning regulations subject to approval by a local governing body. *See infra* Part II.

4. *See, e.g.*, Barry Farm v. D.C. Zoning Comm'n, 182 A.3d 1214 (D.C. 2018); Friends of McMillan Park v. D.C. Zoning Comm'n, 211 A.3d 139 (D.C. 2019); Elliot v. D.C. Zoning Comm'n, 246 A.3d 568 (D.C. 2021).

5. David Whitehead, *Why the Office of Planning Likes PUDs (and Why You Should Too)*, Greater Greater Wash. (Mar. 6, 2018), https://ggwash.org/view/66787/why-the-office-of-planning-likes-puds-and-why-you-should-too (noting that in one year the city passed 47 PUDs that would build 13,100 new housing units, including 2,530 affordable units).

6. *See* Friends of McMillan Park v. D.C. Zoning Comm'n, 149 A.3d 1027 (D.C. 2016); *Barry Farm*, 182 A.3d 1214; Union Market Neighbors v. D.C. Zoning Comm'n, 197 A.3d 1063 (D.C. 2018); Union Market Neighbors v. D.C. Zoning Comm'n, 204 A.3d 1267 (D.C. 2019); *Friends of McMillan Park*, 211 A.3d 139 (D.C. 2019); Wheatley v. D.C. Zoning Comm'n, 229 A.3d 754 (D.C. 2020); Cummins v. D.C. Zoning Comm'n, 229 A.3d 768 (D.C. 2020); Elliot v. D.C. Zoning Comm'n, 246 A.3d 568 (D.C. 2021).

7. The D.C. Grassroots Planning Coalition is one of the main groups supporting PUD litigation, primarily by opposing Comprehensive Plan amendments that reduce the viability of these suits. *See What Is UpFLUMing?*, DC Grassroots Plan. Coal. (last visited Apr. 9, 2022), http://www.dcgrassrootsplanning.org/upfluming (expressing concern about proposed density increases in the Comprehensive Plan's Future Land Use Map (FLUM) that would provide uncontestable by-right zoning for certain large-scale developments). Its Steering Committee includes members from the Washington Legal Clinic for the Homeless, Streetsense Media (a media company for people experiencing homelessness), Empower DC (a group that commonly opposes gentrifying developments),

upper-middle class enclaves against high-density development; instead, they oppose PUDs for ostensibly forcing market-rate housing into working-class neighborhoods, pricing out long-term residents, and eroding historic centers of Black culture.[8]

PUD litigation follows a recent trend in expensive American cities where affordable housing advocates increasingly oppose market-rate housing development in or near low-income neighborhoods.[9] These advocates often believe that new market-rate housing attracts wealthy individuals to previously affordable neighborhoods, increases rents, and displaces existing residents.[10] In response, they file lawsuits against new developments and push to downzone neighborhoods—using the same tactics as suburban NIMBYs.[11] Scholars call this phenomenon "New Exclusionary Zoning,"[12] or "City NIMBYism,"[13] and view it as an understandable but mistaken response to gentrification pressures. Empirical research largely shows that new market-rate housing reduces costs at the city and neighborhood level, and opposition to new housing, even if well-intentioned, only exacerbates existing affordability issues.[14]

This article seeks to add to scholarship on the new NIMBYism emerging in cities by studying the movement behind D.C.'s PUD litigation. This movement in many ways comports with existing theories about city

---

and Democratic Socialists of DC. *See* About the Coalition, DC Grassroots Plan. Coal. (last visited Apr. 9, 2022), http://www.dcgrassrootsplanning.org/about/; *About Us*, Street Sense Media (last visited Apr. 9, 2022), https://www.streetsensemedia.org/about/#.YlHAzjfMJQI ("Street Sense Media produces journalism . . . for the purpose of . . . elevating the voices of people experiencing homelessness."); Campaigns, Empower DC, https://www.empowerdc.org/campaigns (last visited Apr. 9, 2022) (including campaigns against condominium development and public housing redevelopment).

8. *See supra* note 7 and accompanying text; Vinnie Rotondaro, *What's Behind D.C.'s Gentrification Ranking Drop? One Lawyer Suggests Development Appeals Contributed*, Wash. City Paper (Feb. 12, 2021), https://washingtoncitypaper.com/article/508617/whats-behind-d-c-s-gentrification-ranking-drop-one-lawyer-suggests-development-appeals-contributed ("According to Theresa [a lawyer involved with PUD challenges], displacement is intricately tied to the proliferation of Planned Unit Developments."); *see also* Athiyah Azeem, *Council Advances Comprehensive Plan Amid Concerns of Racial Inequity*, Street Sense Media (Apr. 28, 2021), https://www.streetsensemedia.org/article/comprehensive-plan-racial-inequity/#.YlHZVDfMJQI.

9. *See* John Mangin, *The New Exclusionary Zoning*, 25 Stanford L. & Pol'y Rev. 91, 109–10 (2014) (describing anti-gentrification efforts in New York City that "use the same tactics . . . as exclusionary suburban NIMBY groups"); John Infranca, *Differentiating Exclusionary Tendencies*, 72 Fla. L. Rev. 1271, 1280–85 (2020) (describing affordable housing activism in California, Boston, and New York premised on the fear that market-rate housing will displace low-income residents).

10. *See* Infranca, *supra* note 9, at 1280–85.

11. Mangin, *supra* note 9, at 110.

12. *Id.* at 92.

13. Vicki Been, *City NIMBYs*, 33 J. Land Use 217, 218 (2018).

14. *See infra* Part I.A.

NIMBYism: PUD litigants couch their activism in concerns about the displacement of low-income residents and the demise of historic Black neighborhoods. But PUD litigation also deviates from other instances of city NIMBYism because it blurs the line between traditional NIMBY attitudes and anti-gentrification concerns. Indeed, the affordable housing advocates leading the anti-PUD movement have formally partnered with white homeowners in wealthy neighborhoods to build a cross-racial and cross-class coalition that broadly supports PUD litigation.[15]

In light of D.C.'s PUD lawsuits, this article questions presumptions about NIMBYism and explains the city NIMBYism materializing in D.C. Part I provides a brief overview of the existing NIMBY framework and discusses how D.C.'s recent economic growth sets the stage for a new type of NIMBYism. Part II describes PUDs and the politics behind D.C.'s PUD controversy. Part III explains that PUD cases are largely brought by plaintiffs to either protect existing affordable housing, fight luxury development in principle, or promote traditional NIMBYism. Part IV argues that, despite these differing motivations, NIMBYism in D.C. stems from a shared critique of the city's rapid development and its negative impacts. Part V concludes that city NIMBYism is not limited to D.C. and portends important issues for cities throughout the United States.

I. Background

A. Old and New NIMBYism

NIMBY stands for "Not in My Backyard." The term originated in the 1980s to describe landowners who did not want Locally Unwanted Land Uses (or LULUs) sited near them.[16] LULUs can be split into two categories. The first category includes uses that cause environmental and health impacts, such as waste and industrial facilities.[17] The second includes uses that cause nebulous "quality of life" impacts, such as detention centers, homeless shelters, and affordable housing.[18] NIMBYism stemming from environmental and health concerns is largely intractable. No one blames a person for being upset about a new hazardous waste facility across the street, even if they might be encouraged to make an individual sacrifice for the social good. However, NIMBYs of the second category—those who oppose

15. *See* Alex Baca, *Why Changes to DC's Future Land Use Map Do Not Eliminate Community Input*, Greater Greater Wash. (Apr. 14, 2021), https://ggwash.org/view/81031/why-changes-to-dcs-future-land-use-map-does-not-eliminate-community-input (arguing that anti-gentrification activists have partnered with the Committee of 100, a historic preservationist group "whose most prominent leaders are White homeowners in the District's most affluent neighborhoods" and whose motivation is "to gloss the anti-development views they've held for years in a veneer of racial justice").

16. *See* Carissa Schively, *Understanding the NIMBY and LULU Phenomena: Reassessing Our Knowledge Base and Informing Future Research*, 21 J. Planning Lit. 255, 256 (2007).

17. *Id.*

18. *Id.*

homeless shelters or affordable housing—are different because their opposition to development may stem from animus.

Thus, in debates about housing, "NIMBY" takes on a more pejorative meaning that often involves an accusation of racial or class prejudice. To be sure, some scholars note that opposition to new housing need not stem from prejudice. William Fischel, a professor of economics at Dartmouth College, points out that homeownership is "a high-return, high-risk asset that is held by people who have little ability to diversify that risk."[19] While homeowners can protect their assets from certain risks like fire and burglary through insurance, they cannot insure against the possibility of neighborhood decline, leading to strong but justified NIMBY responses to new housing developments.[20] However, many scholars reject the notion that NIMBYism is rational. Instead, they argue that NIMBYs in general tend to harbor prejudice and that so-called reasonable concerns—such as fears about property value decline—in fact hinge on racism.[21] In a literature review about public reactions to affordable housing development, J. Rosie Tighe, an associate professor in the department of Urban Studies at Cleveland State University's Levin College of Urban Affairs, found that "concerns regarding property values have become a proxy for racial prejudice" and "that 'Not In My Back Yard' has become the symbol for neighborhoods that exclude certain people because they are homeless, poor, or disabled, or because of their race or identity."[22] As a result, calling someone "NIMBY" often amounts to an accusation that that person has racist or classist motivations.[23]

But the idea that NIMBYism stems from prejudice, or even from homeowner's selfish desire to protect their investments, no longer comports

19. William Fischel, *Why Are There NIMBYs?*, 77 Land Econ. 144, 146 (2001).

20. *Id.* at 145.

21. *See, e.g.*, Axel-Lute, *supra* note 2 ("NIMBYism is often driven, more or less openly, by racism or classism."); J. Rosie Tighe & Edward G. Goetz, *Comment on "Does the Likely Demographics of Affordable Housing Justify NIMBYism?,"* 29 Hous. Pol'y Debate 369, 369 (2019) ("'[A] rational self-interest to protect one's home value' is better understood, however, as selfish protection of white homeowners' own market advantage, created by white supremacy . . . ."); Corianne P. Scally, *The Nuances of NIMBY: Context and Perceptions of Affordable Rental Housing Development*, 49 Urb. Affs. Rev. 718, 721 721 ("[NIMBY attitudes] are assumed to be strongest in the suburbs to which wealthy, white households fled to escape from high-poverty, high-minority urban centers with higher renter-occupancy rates."); Dwight Merriam, *The Great "Yes in My Backyard (YIMBY)" Movement: Driven by the Gig Economy*, 29 J. Affordable Hous. & Cmty. Dev. L. 57, 58 ("The NIMBY opposition is often couched in terms of adverse impacts on the value of existing properties, but the not-so-hidden agenda in many cases is one of racial and class exclusion.").

22. J. Rosie Tighe, *Public Opinion and Affordable Housing: A Review of the Literature*, 25 J. Plan. Literature 3, 3–4 (2010).

23. *See supra* note 21 and accompanying text. Some scholars acknowledge that, while NIMBY is often used as a pejorative term, they do not use it in that way. *See* Been, *supra* note 13, at 218 n.1.

with recent instances of NIMBYism cropping up throughout American cities. This new NIMBYism has proliferated in lower-income urban neighborhoods and is promoted not by suburban homeowners but by tenants who advocate for affordable rental housing. In describing these "city NIMBYs," Vicki Been, a law professor at NYU School of Law, notes that "cities are experiencing substantial opposition to proposed new development, driven, in substantial part, by renters who fear that the development will make their homes less affordable and either cause them to leave the neighborhood or change the neighborhood to something less familiar and appealing to them."[24] John Mangin, Senior Counsel at the NYC Department of City Planning and an Adjunct Assistant Professor of Urban Planning of NYU's Robert F. Wagner Graduate School of Public Service, has also documented the rise of a "New Exclusionary Zoning" in cities among affordable housing advocates seeking to prevent new housing development,[25] and Michael Hankinson, Assistant Professor of Political Science at the George Washington University, has empirically shown that "renters living in expensive cities . . . express NIMBYism towards market-rate housing at a level similar to homeowners."[26]

City NIMBYs can be identified by four main sentiments that underlie their activism: fear of displacement, fear of neighborhood change, fear of long-term residents losing power, and the sense that certain neighborhoods are unfairly targeted for redevelopment.[27] The calling card of city NIMBYs—and their most controversial position—is their belief that new market-rate housing displaces existing low-income residents by attracting wealthy residents who drive up rents throughout a given neighborhood. John Mangin calls this belief the "supply-side theory of gentrification," in that increases in market-rate housing supply are thought to induce housing demand, increase rents throughout a neighborhood, and eventually spur gentrification.[28] Mangin and other scholars widely reject the supply-side theory of gentrification, invoking economic theory and pointing to empirical studies showing that increases in market-rate housing lower housing costs at the city and neighborhood level.[29]

24. Been, *supra* note 13.

25. Mangin, *supra* note 9.

26. Michael Hankinson, *When Do Renters Behave Like Homeowners? High Rent, Price Anxiety, and NIMBYism*, Joint C. for Hous. Stud. (Feb. 2017), https://www.jchs.harvard.edu/sites/default/files/harvard_jchs_hankinson_2017_renters_behave_like_homeowners_0.pdf.

27. Infranca, *supra* note 9, at 1285–87.

28. Mangin, *supra* note 9, at 108.

29. *Id.* at 104–08; Vicki Been, Ingrid Gould Ellen & Katherine O'Regan, *Supply Skepticism: Housing Supply and Affordability*, 29 Hous. Pol'y Debate 25 (2019); Infranca, *supra* note 9, at 1288–94; Shane Phillips, Michael Manville & Michael Lens, *Research Roundup: The Effect of Market-Rate Development on Neighborhood Rents*, UCLA Lewis C. (2021) (summarizing six recent studies, five of which show increases in market-rate housing decrease rents at the neighborhood level). *But see* Been, *supra* note 13, at 246 ("The evidence about

However, scholars also recognize that city NIMBYism cannot be dismissed as a simple misunderstanding of economics. Vicki Been writes that "today's City NIMBYism raises legitimate concerns, different from those raised by traditional suburban NIMBYism, that researchers and policy makers need to address."[30] Among these legitimate concerns are whether displacement can be prevented when housing supply does not increase fast enough to meet demand, whether new market-rate construction over time leads to a less diverse population, and whether long-term and low-income residents should be afforded some local control over development decisions.[31] City NIMBYs raise salient questions about the nature of housing development in gentrifying neighborhoods. Their concerns cannot easily be chalked up to racism, classism, or even preservation of property values. Instead, their concerns are based in fear of dislocation and housing instability. These are real concerns that must be taken seriously.

B. Setting the Stage for City NIMBYism in D.C.

This section attempts to dig deeper into the city NIMBY phenomenon by taking a closer look at Washington, D.C.'s recent economic history and considering how D.C.'s growth has led to growing opposition against market-rate housing development. In the early 1990s, D.C., like many large U.S. cities around that time, suffered from severe economic deprivation.[32] Violence stemming from disinvestment caused the number of murders to peak at 489 in 1991 (in contrast to just 226 murders in 2021 despite a much higher overall population).[33] By the mid-1990s, D.C.'s fiscal situation was so dire that Congress took control of its finances and, eventually, all of city government.[34]

Once Congress returned the city to local control, a combination of favorable macroeconomic conditions and pro-development policies spurred D.C.'s rapid growth.[35] The slowing of the crack cocaine epidemic, the increase in defense, intelligence, and technology spending after 9/11, and the expansion of D.C.'s private lobbying industry made the city an

whether displacement actually occurs in changing neighborhoods, who is affected by any such displacement, and how they are affected, however, is again woefully inadequate to answer residents' concerns . . . .").

30. Been, *supra* note 13, at 246.

31. *Id.* at 246–49; Infranca, *supra* note 9, at 1297–317 (distinguishing between NIMBYism of low-income urban residents and wealthy suburban residents and providing justifications for why the former may be entitled to limited amounts of local control over zoning decisions).

32. *See* Chris M. Asch & George D. Musgrove, Chocolate City: A History of Race and Democracy in the Nation's Capital 401–07, 422 (2017) (In the early 1990s, D.C. was $722 million in debt and on the verge of bankruptcy).

33. *Id.*; *District Crime Data at a Glance*, DC.Gov, https://mpdc.dc.gov/page/district-crime-data-glance (last visited Mar. 13, 2022).

34. Asch & Musgrove , *supra* note 32, at 430–34.

35. *Id.* at 440-42.

attractive destination for young professionals.[36] In addition, newly elected Mayor Anthony Williams announced an ambitious goal of bringing in 100,000 new residents and instituted several aggressive policies to spur population growth and economic investment.[37] From 2000 to 2020, D.C.'s population surged from 572,059 to 689,545, a 20.5% increase,[38] and the city added nearly 100,000 new private sector jobs from 2006 to 2016.[39] D.C.'s growth, while remarkable, was not unique; it matched the growth of many American cities responding to similar macroeconomic trends in the early 2000s.[40]

Despite its beneficial effects, the speed of D.C.'s growth has created a rift among residents. One tension is economic: the rapid influx of new working professionals and the related increase in demand has increased housing costs[41] and priced out long-term residents.[42] Nearly 30,000 young professionals moved to D.C. between the years of 2009 and 2011, with "an average of 1,000 per month thereafter."[43] These new residents added pressure to an already hot housing market. The average price of a house in D.C. increased by 75% between 2002 and 2007 and, following the 2008 recession, prices rose again starting in 2012.[44] The combination of an independently strong housing market and an explosion of young professionals drastically changed the affordability of D.C.'s housing stock. Between 2000 and 2010, the number of apartments rented for more than $1,500 tripled, and the number of homes valued at $500,000 doubled.[45] The number of low-rent units and low-value homes dropped by over half.[46] Long-time

36. Chris Myers Asch & George Derek Musgrove, *We Are Headed for Some Bad Trouble: Gentrification and Displacement in Washington, D.C., 1920–2014*, *in* Capital Dilemma: Growth and Inequality in Washington D.C. 138–39 (Derek Hyra and Sabiyha Prince eds., 2015).

37. Asch & Musgrove, *supra* note 32, at 440–42.

38. *2020 Census Data Shows DC's Population Growth Nearly Tripled Compared to Previous Decade*, DC.Gov (Apr. 26, 2021), https://dc.gov/release/2020-census-data-shows-dcs-population-growth-nearly-tripled-compared-previous-decade.

39. Chaz Rotenberg & Ilana Boivie, *Economic Powerhouse: DC Is Growing Faster Than the Region*, DC Fiscal Pol'y Inst. (May 24, 2017), https://www.dcfpi.org/all/economic-powerhouse-dc-growing-faster-region (D.C. adding 88,000 private-sector jobs from 2006 to 2016).

40. *See* Victor Couture & Jessie Handbury, *Urban Revival in America, 2000 to 2010*, NBER Working Paper (2017), https://www.nber.org/system/files/working_papers/w24084/w24084.pdf.

41. Jenny Reed, *Disappearing Act: Affordable Housing in D.C. Is Vanishing amid Sharply Rising Housing Costs,* D.C. Fiscal Pol'y Inst. (May 7, 2012), https://www.dcfpi.org/wp-content/uploads/2012/05/5-7-12-Housing-and-Income-Trends-FINAL.pdf.

42. Asch & Musgrove, *supra* note 36, at 138–39.

43. *Id.* at 140.

44. *Id.*

45. *Id.*

46. *Id.*

working-class residents thus faced, and continue to face, tremendous economic pressure to leave the city.[47]

The other tension between residents is racial and cultural. D.C. was once known as "Chocolate City" for being over 70% Black and a mecca of Black politics and culture.[48] The radical wings of the Civil Rights Movement gained legitimate power in local D.C. government during the late twentieth century,[49] and Black cultural institutions have long defined D.C.'s identity. These include Howard University, the center of Black American intellectual life; U Street, one of D.C.'s main commercial and entertainment districts; and historic Black-owned businesses throughout the city.[50] Today, however, D.C. is no longer a majority Black city.[51] D.C.'s Black population has declined not only in proportion, but in overall number, as 39,000 Black residents left the city from 2000 to 2010, and another 11,000 left from 2010 to 2020.[52] The sharpest declines were in areas that experienced increasing housing costs.[53] Meanwhile, white and Asian professionals have begun to dominate historically Black neighborhoods, such as Shaw and H Street,[54] and D.C.'s once radical-minded local government is now defined by a

47. *Id.*

48. Steven Overly, Delece Smith-Barrow, Katy O'Donnel & Ming Li, *Washington Was an Icon of Black Political Power. Then Came Gentrification*, Politico (Apr. 15, 2022), https://www.politico.com/news/magazine/2022/04/15/washington-dc-gentrification-black-political-power-00024515.

49. *See* Asch & Musgrove, *supra* note 36, at 396–99 (describing the political rise of Marion Barry, a one-time SNCC activist who served as D.C.'s mayor for sixteen years).

50. *See* Sarah Kaplan, *Florida Avenue Grill Celebrates 70 Years as a Soul Food Favorite, Now with Vegan Options*, Wash. Post (Oct. 3, 2014), https://www.washingtonpost.com/lifestyle/style/florida-avenue-grill-celebrates-70-years-as-a-soul-food-favorite-now-with-vegan-options/2014/10/03/ff221fc4-4a6a-11e4-891d-713f052086a0_story.html.

51. Sabrina Tavernese, *A Population Changes, Uneasily,* N.Y. Times (July 17, 2011), https://www.nytimes.com/2011/07/18/us/18dc.html.

52. *See* Overly et al., *supra* note 48; Elizabeth Burton, *D.C.'s Population Growth Has Affected the Racial and Ethnic Composition of Wards 6, 7, and 8*, Urb.Inst. (Oct. 7, 2022), https://greaterdc.urban.org/blog/dcs-population-growth-has-affected-racial-and-ethnic-composition-wards-6-7-and-8. However, many middle-class Black residents also left the D.C. in the 1980s and 1990s due to high crime, economic stagnation, and lack of faith in city government, complicating the notion that D.C.'s growth alone has led to the exodus of Black residents. Steven A. Holmes & Karen De Witt, *Black, Successful and Safe and Gone from Capital*, N.Y. Times (July 27, 1996), https://www.nytimes.com/1996/07/27/us/black-successful-and-safe-and-gone-from-capital.html.

53. Burton, *supra* note 52 ("[T]he number of Black residents has declined overall, particularly in Wards 1 and 4, which experienced increasing housing costs.").

54. *See* Deneen L. Brown, *Pushed Out*, Wash. Post (Sep. 21, 2019), https://www.washingtonpost.com/dc-md-va/2019/09/21/shed-lived-this-historically-black-dc-block-years-now-she-was-being-pushed-out; David Schulz, *On H Street, Gentrification Not As Simple As Black and White*, Wash. Post (Mar. 6, 2012), https://www.washingtonpost.com/local/on-h-street-gentrification-not-as-simple-as-black-and-White/2012/03/02/gIQAwRsBvR_story.html.

neoliberalism common to many American cities.[55] Residents fear that D.C. is losing its identity as a center of Black American politics and culture.[56]

The economic and cultural tensions fostered by D.C.'s recent development have reshaped the city's political fault lines. Some working-class Black residents have now partnered with upper middle-class white residents to combat what they see as an excessive focus on building market-rate housing in low-income neighborhoods. PUD litigation, as explained in the following sections, has not only provided an outlet for these grievances but has allowed these strange bedfellows to work together in a surprisingly effective political coalition.

II. Planned Unit Development Litigation

PUDs have played a key role in D.C.'s recent economic boom. They have spurred a new type of NIMBYism that transcends traditional racial and class divides, bringing together white, Black, low-income, and high-income residents. This section provides an overview of PUDs and the political controversies that PUDs have generated.

A. PUD Overview

The benefits PUDs provide and the legal challenges they entail are not unique to D.C. Rather, planned unit development is a zoning tool used throughout the country.[57] Generally, PUDs relax by-right zoning regulations for a parcel of land, encouraging innovative construction and design, along with mixed-use development.[58] In exchange for flexibility, PUDs are approved on a discretionary basis by the local legislative body or zoning authority, who may demand the project provide certain public benefits.[59] Local governments receive the authority to approve PUDs from the state, either through the zoning enabling act or a specific statute authorizing PUD use.[60]

55. *See* Overly et al., *supra* note 48 (describing the mayoralties of Anthony Williams and Muriel Bowser, who focused heavily on attracting private investment and building private-public partnerships).

56. *Id.*

57. Daniel R. Mandelker, *New Perspectives on Planned Unit Developments*, 52 Real Prop., Trust & Est. L. J. 229, 229–34 (2017).

58. *See* Brian W. Blaesser, Discretionary Land Use Controls: Avoiding Invitations to Abuse of Discretion 394 (24th ed. 2021) ("The essential purpose of planned unit developments—to encourage innovation in design and construction through flexibility—determines, to a certain extent, the way in which this development technique is defined.").

59. *See* Mandelker, *supra* note 57, at 230–31 (PUDs approved through "a discretionary zoning process").

60. See Daniel R. Mandelker, *Legislation for Planned Unit Developments and Master-Planned Communities*, 40 Urb. Law. 419, 419 (2008).

PUDs originated in the 1960s, in an attempt to create more open space in cookie-cutter single-family residential developments.[61] But their purpose has since expanded to include various forms of development, including urban infill projects, mixed-use development, and natural resource preservation and sustainability.[62] PUD-enabling statutes often describe only vague and general purposes that seem to encourage all types of development.[63] PUDs' wide applicability have allowed them to become the "sometimes dominant method by which communities manage new projects."[64]

In D.C., developers often use PUDs to build mixed-use developments that are taller and denser than what would be allowed by right.[65] Many of D.C.'s recent notable developments involve PUDs, including the public housing redevelopments of Park Morton[66] and Barry Farm[67]; multiple projects in the Wharf, a newly redeveloped entertainment district;[68] and large open-space redevelopments like McMillan Park[69] and Poplar Point.[70] PUD community benefit packages, provided in exchange for zoning relief, vary by project and depend on negotiations between the developer and the local community.[71] They can include infrastructure improvements (such as green building design, increased public space, and better sidewalks), affordable housing commitments, employment and job training, or monetary contributions to local non-profit organizations.[72] From 2010 to 2018,

61. *See* Mandelker, *supra* note 57, at 231 n.3, 232 n.6.

62. *Id.* at 232; *see also* Blaesser, *supra* note 58, at 391 ("[P]lanned unit developments have broad application to any type or mix of land uses, whether residential, commercial, or industrial.").

63. *See* Blaesser, *supra* note 58, at 392 ("For example, the New Jersey statute merely states that the PUD is a means to incorporate 'the best features of design and relate the type, design and layout to residential, commercial, and industrial and recreational development to the particular site.'").

64. Mandelker, *supra* note 57, at 232, 233.

65. 11-X D.C. Reg. § 300.1.

66. *Redeveloping Park Morton: Where Do Things Stand?*, Parkview DC (Sept. 28, 2020), https://parkviewdc.com/2020/09/28/redeveloping-park-morton.

67. Barry Farm v. D.C. Zoning Comm'n, 182 A.3d 1214 (D.C. 2018).

68. Nena Perry-Brown, *The Soon-to-Deliver, and 700 Proposed Units, Destined for the Wharf*, DC Urb. Turf (Mar. 30, 2022), https://dc.urbanturf.com/articles/blog/the-soon-to-deliver-and-700-proposed-units-destined-for-the-wharf/19446.

69. *See* Friends of McMillan Park v. D.C. Zoning Comm'n, 149 A.3d 1027 (D.C. 2016).

70. Nena Perry-Brown, *With PUD Appeal, Poplar Point Developer Turns to Plan B*, DC Urb. Turf (Oct. 16, 2018), https://dc.urbanturf.com/articles/blog/poplar-point-pud-appeal-leads-developer-to-plan-b/14570.

71. Nick Sementelli, *New Data of D.C. Planned Unit Developments (PUDs)*, D.C. Pol'y Ctr. (Dec. 19, 2019), https://www.dcpolicycenter.org/publications/pud-database-2010-2018.

72. *Id.*; Nick Burger, *Planned Unit Developments, Explained*, Greater Greater Wash. (Nov. 14, 2016), https://ggwash.org/view/43490/planned-unit-developments-are-a-big-part-of-building-in-dc-heres-an-explanation-of-what-those-are.

D.C. approved 82 PUDs, which accounted for over 20,000 units of housing, including 4,000 affordable units.[73]

All PUDs must follow a lengthy application process before being approved by the D.C. Zoning Commission.[74] This process involves significant public engagement, though the ultimate decision to approve PUDs lies fully with the Zoning Commission, a quasi-judicial body made up of three mayoral appointees, the Architect of the Capitol, and the Director of the National Park Service.[75] To ensure that PUDs advance the city's long-term planning vision, the Zoning Commission must find that the PUD is consistent with D.C.'s Comprehensive Plan.[76] This requirement opens the door to NIMBY litigation. Affected residents appeal PUDs approved by the Zoning Commission to the D.C. Court of Appeals, arguing that the development in question is inconsistent with the Comprehensive Plan. Usually, plaintiffs argue that the PUD conflicts with the Plan's Future Land Use Map, which establishes density guidelines for neighborhoods; its Small Area Plans, which provide recommendations for growth and redevelopment in specific areas; or its Framework Element, which sets general planning priorities for the whole city.[77]

Plaintiffs have challenged PUDs somewhat regularly since the advent of the Comprehensive Plan requirement in the 1970s.[78] But litigation has increased in frequency since 2016, when the D.C. Court of Appeals, in *Durant v. District of Columbia Zoning Commission*, for the first time reversed a Zoning Commission's PUD approval.[79] While reversals remain rare, the

73. Sementelli, *supra* note 71.

74. *Planned Unit Development (PUD) Summary*, D.C. Off. of Plan. (2016), https://planning.dc.gov/sites/default/files/dc/sites/op/publication/attachments/PUD%20summary%20ZR16%20handout.pdf; for a more detailed overview of the process, *see* 11-X D.C. Reg. § 308.

75. *See About the Zoning Commission*, D.C. Off. of Zoning, https://dcoz.dc.gov/zc/about.

76. 11-X D.C. Reg. § 300.1.

77. *See* Alex Baca, *The Comp Plan, Which Charts the Path for D.C.'s Growth, Is Being Amended. What's Taking So Long?*, Greater Greater Wash. (Sept. 20, 2019), https://ggwash.org/view/73942/the-comprehensive-plan-sets-the-path-for-dcs-growth-so-whats-happening-with-it-now; *How Does a Small Area Plan Relate to the Comprehensive Plan, Zoning, and Future Redevelopment?*, D.C. Off. of Plan., https://planning.dc.gov/sites/default/files/dc/sites/op/publication/attachments/How%20Do%20Small%20Area%20Plans%20relate%20to%20Comp%20Plan%20and%20Zoning_0.pdf (last visted July 25, 2023).

78. *See* Dupont Circle Citizens Ass'n v. D.C. Zoning Comm'n, 426 A.2d 327 (D.C. 1981); Blagden Alley Ass'n v. D.C. Zoning Comm'n, 590 A.2d 139 (D.C. 1991); Cathedral Park Condominium Comm. v. D.C. Zoning Comm'n, 743 A.2d 1231 (D.C. 2000); Watergate East Comm. Against Hotel Conversion to Co-op Apartments v. D.C. Zoning Comm'n, 953 A.2d 1037 (D.C. 2008); Wisconsin-Newark Neighborhood Coal. v. D.C. Zoning Comm'n, 33 A.3d 382 (D.C. 2011).

79. *See* Friends of McMillan Park v. D.C. Zoning Comm'n, 149 A.3d 1027 (D.C. 2016); Barry Farm v. D.C. Zoning Comm'n, 182 A.3d 1214 (D.C. 2018); Union Market Neighbors

D.C. Court of Appeals has remanded a far greater number of PUD approvals since *Durant*.[80] Remands can act as effective reversals because developers cannot afford court costs and delays to construction. They may halt or alter their projects rather than continue litigating. Even when remands do not stop projects, they slow the development process.[81]

B. Politics of the PUD Controversy

While Section IV of this paper considers in depth the political coalitions formed for and against PUD litigation, it is helpful to first touch on the political debate sparked by PUDs. The proponents of PUD litigation argue that PUDs worsen D.C.'s affordable housing crisis by building high-density, market-rate developments that rapidly increase housing costs in many of D.C.'s neighborhoods.[82] Though this argument applies to upzoning and market-rate development in general, anti-PUD activists tend to focus on PUDs for a few reasons. First, they argue that PUDs proliferate in lower income Black neighborhoods. One example that they cite is the Union Market neighborhood. Between 2010 and 2018, Union Market had twenty PUDs and saw its Black population decrease from 63% to 28.5%.[83] They also argue that PUDs expedite the erosion of already existing housing, where PUDs have twice been used to redevelop large affordable housing complexes against the wishes of tenant associations.[84] In these instances, tenants argued that the overall number of affordable units would be reduced in the redeveloped properties; that developers did not have adequate plans to relocate tenants; and that valuable multi-bedroom units would be eliminated.[85] Activists also focus on PUDs because these developments cannot occur under the by-right zoning scheme. The zoning scheme's density restrictions therefore seem to protect neighborhoods from high-density development that, in the eyes of PUD opponents, spur gentrification. Because PUDs eschew these restrictions on the vote of a city-wide body, and at the behest of developers who stand to profit, they can seem to

v. D.C. Zoning Comm'n, 197 A.3d 1063 (D.C. 2018); Union Market Neighbors v. D.C. Zoning Comm'n, 204 A.3d 1267 (D.C. 2019); Friends of McMillan Park v. D.C. Zoning Comm'n, 211 A.3d 139 (D.C. 2019); Wheatley v. D.C. Zoning Comm'n, 229 A.3d 754 (D.C. 2020); Cummins v. D.C. Zoning Comm'n, 229 A.3d 768 (D.C. 2020); Elliot v. D.C. Zoning Comm'n, 246 A.3d 568 (D.C. 2021).

80. The court has remanded three PUD approvals in five years since *Durant*. *See Friends of McMillan Park*, 149 A.3d at 1027; *Barry Farm*, 182 A.3d, at 1214; *Cummins*, 229 A.3d, at 768.

81. *See* David Whitehead, *How Many Homes Are Currently Stuck in DC Courts?*, Greater Greater Wash. (Apr. 5, 2018), https://ggwash.org/view/67150/how-many-homes-are-currently-stuck-in-dc-courts.

82. *See* Rotondaro, *supra* note 8.

83. *Id.*

84. *See Barry Farm*, 182 A.3d; *Elliot*, 246 A.3d at 579.

85. *See infra* Part III.A.

involve a conspiracy between government and business to force market-rate developments upon neighborhoods that do not want them.

There are several rebuttals to arguments made by PUD opponents. First, PUDs are used throughout the city, often involve middle-class neighborhoods,[86] and build more affordable housing than is otherwise possible.[87] In fact, one PUD stymied by litigation sought to build replacement public housing.[88] Moreover, D.C.'s gentrification is likely caused by the city's rapid growth over the last twenty years—namely, the explosion of D.C.'s defense, intelligence, technology, and lobbying industries, and the "massive migrations of well-educated millennials seeking opportunity in insulated, 'recession-proof' cities like D.C. in the aftermath of the 2008 economic crisis."[89] From this perspective, PUDs are a response to the demands of growth: by overriding burdensome zoning restrictions, PUDs present a rare opportunity for D.C. to build dense housing, meet growing demand, and eventually stabilize or reduce housing costs throughout the city.[90] As for procedural concerns, PUD proponents argue that PUDs—unlike by-right developments—allow residents to actively participate in the planning process. Residents have several opportunities through the mandatory community engagement process to convince officials of their concerns, including through an initial public meeting with the local Advisory Neighborhood Commission (ANC) and a second public hearing allowing testimony from local government, community groups, and individuals before the Zoning Commission vote.[91]

Like other instances of city NIMBYism, the PUD controversy often comes down to a disagreement about the effects of market-rate housing development on low-income neighborhoods. PUD opponents tend to believe in the supply-side theory of gentrification, that is, that new market-rate housing induces demand, increases nearby rent, and spurs gentrification. Scholars widely dismiss this theory as going against basic economic notions of

86. The only PUD challenge that resulted in a full halt of a proposed development came from a group of middle-class homeowners. *See* Durant v. District of Columbia Zoning Comm'n, 139 A.3d 880 (D.C. 2016).

87. *See* Cheryl Cort, *Will Affordable Housing Needs Overcome Some Neighbors' Opposition to Dance Loft on 14?*, Greater Greater Wash. (Apr. 11, 2022), https://ggwash.org/view/84353/will-affordable-housing-needs-overcome-neighbors-opposition-to-dance-loft-on-14.

88. *See* Cummins v. D.C. Zoning Comm'n, 229 A.3d 768, 773 (D.C. 2020).

89. Cort, *supra* note 87.

90. *See* Mangin, *supra* note 9, at 106 ("As demand to live in particular neighborhoods increases, *ceteris paribus*, housing costs increase."). Note also that there was a slowdown in housing production in D.C. in the 1990s and just after the 2008 housing crisis (mirroring other cities) that has exacerbated the city's housing supply gap. *See* Claire Zippel, *DC's Housing Affordability Crisis in 7 Charts*, Greater Greater Wash. (Apr. 30, 2015), https://ggwash.org/view/37967/dcs-housing-affordability-crisis-in-7-charts.

91. *Planned Unit Development (PUD) Summary*, *supra* note 74; for a more detailed overview of the PUD community engagement process, see 11-X D.C. Reg. § 308.

supply and demand and empirical findings.[92] However, even if there is no merit in concerns about new development causing price increases, the general sentiment that motivates anti-PUD activism—that the city's rapid economic growth has led to the displacement of low-income residents and eroded D.C.'s Black identity—remains legitimate.

C. Comprehensive Plan Amendments

In 2016, Mayor Muriel Bowser proposed amendments to the D.C. Comprehensive Plan that would abate the viability of PUD lawsuits.[93] The amendments were deeply controversial, spurring wide-ranging grassroots campaigns in support and opposition.[94] At one hearing, over 300 residents signed up to testify.[95] After years of contentious debate, the City Council passed the amended Comprehensive Plan in 2021.[96]

Among other things, the Comprehensive Plan amendments allow greater density in several neighborhoods throughout D.C.[97] Because PUDs often seek increased density, the amendments make it more likely that PUDs are consistent with the Comprehensive Plan, reducing the viability of certain types of PUD lawsuits. But the Plan amendments go well beyond the PUD issue. One of the most notable amendments is the prioritization of not just affordable housing, but *deeply* affordable housing, which must be affordable to those making 30% or less of the Area Median Income.

Despite the Comprehensive Plan amendments, PUD litigation has continued.[98] While the amendments make certain PUD lawsuits harder, the Comprehensive Plan remains a large and vague document amenable to radically different interpretations. This imprecision allows PUD litigants to continue making arguments that certain projects are not consistent with the Comprehensive Plan.[99] In addition, the Plan amendments are them-

92. *See supra* note 27.

93. Ally Schweitzer, *After Years of Arguing, D.C. Finally Has An Amended Comprehensive Plan*, DCist (May 19, 2021), https://dcist.com/story/21/05/19/after-years-of-arguing-dc-finally-has-an-amended-comprehensive-plan.

94. Ally Schweitzer, *D.C.'s Plan for Future Growth Fails Low-Income Residents, Activists Say*, WAMU (Mar. 21, 2018), https://wamu.org/story/18/03/21/d-c-s-plan-future-growth-fails-low-income-residents-activists-say.

95. *Id.*

96. Schweitzer, *supra* note 93.

97. The density designations under the Comprehensive Plan's Future Land Use Map (FLUM) are different from the density requirements prescribed by the zoning ordinance that have the full force of law. Rather, the FLUM guides zoning by setting loose density suggestions for neighborhoods. FLUM densities take on greater legal importance in the context of PUDs because PUDs must be consistent with the Comprehensive Plan.

98. *See* Beloved Cmty. All. v. D.C. Zoning Comm'n, 284 A.3d 728 (D.C. 2022).

99. Comprehensive plan "consistency" requirements have a long and complicated history. They stem from a cryptic requirement in the Standard State Zoning Enabling Act of 1926 that zoning ordinances "be made in accordance with a comprehensive plan." A Standard State Zoning Enabling Act § 3 (Dept. of Commerce 1926). Consistency requirements grew in importance as piecemeal zoning techniques, like variances, special

selves subject to an ongoing lawsuit that accuses the City Council of ignoring negative impacts on communities of color.[100]

III. The NIMBYism of PUD Litigation

PUD litigation has delayed the construction of thousands of housing units and arguably worsened D.C.'s affordability crisis.[101] But the NIMBYism seen here departs from classic cases of NIMBYism in that working-class Black renters, as opposed to wealthy White homeowners, launch many of these suits and residents of different races and classes work together in a formal political coalition focused on stopping new housing development throughout the city.[102] In the section below, I describe this new, city NIMBYism as it arises in PUD litigation. Specifically, I group several recent PUD cases into one of three categories based on the plaintiff's motivation for launching the suit: (1) protecting existing affordable housing; (2) fighting market-rate development in principle; and (3) classic exclusionary NIMBYism. By doing so, I attempt to highlight the diverse nature of PUD suits before considering how these suits actually present a shared critique of D.C.'s recent urban development.

A. Preserving Existing Affordable Housing

Some NIMBY PUD litigation involves the protection of already-existing affordable housing. In *Barry Farm Tenants and Allies Association v. D.C. Zoning Commission*[103] and *Elliot v. D.C. Zoning Commission*,[104] resident associations challenged the demolition and replacement of existing affordable housing. In both cases, the city planned to replace hundreds of units of public or subsidized housing with mixed-income developments. Developers in each case promised to replace affordable units one-for-one and prioritize

use permits, and PUDs, became more popular. *See* Mandelker, *supra* note 57, at 229–34. Because of the complex and internally conflicting nature of comprehensive plans, courts often defer to agency interpretations of plans when determining consistency. But overdeference can allow planners to "interpret" the Plan in whatever way that allows them to push through non-conforming developments, so some judges apply more scrutiny to agency interpretations. *See, e.g.*, Thomas G. Pelham, *The Role of the Local Comprehensive Plan as Law: Some Lessons from Florida*, *in* Planning Reform in the New Century 157 (Daniel Mandelker ed., 2004) (describing how judges in Florida apply strict scrutiny to plan consistency requirements).

100. First Amended Complaint for Declaratory and Injunctive Relief at 13–20, Belt v. District of Columbia, No. 2021-CA-001651-B (D.C. Super. Ct. Oct. 21, 2021). The complaint alleges that the City Council failed to follow certain procedural requirements required by D.C. law in amending the Comprehensive Plan, including requirements to provide reports and assessments on the effects of proposed Plan changes on vulnerable communities. *Id.*

101. *See* Whitehead, *supra* note 81.

102. *See infra* Part IV.A.

103. Barry Farm Tenants & Allies Ass'n v. D.C. Zoning Comm'n, 182 A.3d 1214 (D.C. 2018).

104. Elliot v. D.C. Zoning Comm'n, 246 A.3d 568 (D.C. 2021).

the return of existing low-income residents (many of whom were Black). However, in both redevelopments, residents became skeptical about the validity of these promises and used PUD litigation to challenge the redevelopments in court. In other words, the plaintiffs did not object to the redevelopment itself, but instead to displacement that they believed would likely occur in the course of redevelopment.[105] PUD litigation proved an available tool to challenge that redevelopment.

Before its redevelopment, Barry Farm was a 432-unit public housing complex in the predominantly Black Anacostia neighborhood of Southeast D.C. [106] In *Barry Farm*, the Barry Farm Tenants and Allies Association (BFTAA) argued that the proposed redevelopment would result in higher density levels than what the Comprehensive Plan called for; that the 1,400 proposed units would be inconsistent with 1,100 units specified for construction in the Barry Farm Small Area Plan; and that the relocation plan did not take sufficient measures to ensure that residents would be able to return to the new development.[107] The Court of Appeals sided with BFTAA and remanded the Zoning Commission's PUD approval.[108] Among other issues, the court found that the Commission erred when finding that the ratio of affordable to market-rate housing satisfied the requirements of the Small Area Plan, where the Plan called for 1/3 market-rate units and the PUD allowed up to sixty percent market rate.[109] In addition, the court found the Commission failed to properly address all adverse effects of the PUD by ignoring BFTAA's concerns about the developer's tenant relocation plan.[110]

In *Elliot*, plaintiffs voiced similar concerns. *Elliot* involved the redevelopment of the Brookland Manor Apartments in Northeast D.C. Before redevelopment, Brookland Manor had 535 units, 373 of which were Section 8 project-based apartments, meaning that the government subsidized rent payments on these units.[111] The remaining units were occupied

105. Public housing redevelopment in D.C. since the 1990s has been marked by a failure to bring residents back to redeveloped properties or build replacement low-income housing. *See* Johanna Bockman, *Removing the Public from Public Housing: Public-Private Redevelopment of the Ellen Wilson Dwellings in Washington, DC*, 43 J. Urb. Affs. 308 (arguing that D.C.'s first public housing redevelopment in the 1990s under HUD's HOPE VI program "permanently displaced nearly every [resident]"); Aaron Wiener, *Report: D.C. Should Redevelop Public Housing Without Replacing Units First*, Wash. City Paper (Sept. 9, 2014), https://washingtoncitypaper.com/article/373099/report-d-c-should-redevelop-public-housing-without-replacing-units-first (arguing that D.C.'s New Communities Initiative—replacing four aging public housing projects in the early 2000s—failed to provide adequate and timely replacement housing for residents).

106. *Barry Farm*, 182 A.3d at 1217.

107. *Id.*

108. *Id.* at 1230.

109. *Id.* at 1226–27.

110. *Id.* at 1228–30.

111. Elliot v. D.C. Zoning Comm'n, 246 A.3d 568 572–73 (D.C. 2021).

mostly by Section 8 Housing Choice Voucher (HCV) holders, who received subsidized rents through vouchers (not through the unit itself).[112] Brookland Manor also had subsidized multi-bedroom units, including four- and five-bedroom units, necessary for large families and intergenerational households who struggle to find similar low-income units elsewhere in the city.[113]

The developer proposed tearing down the existing units and replacing them with 1,760 residential units, and the Zoning Commission required full replacement of the 373 Section 8 project-based units. However, the developer would not replace the existing multi-bedroom units, and residents feared that, despite developer promises, HCV holders would not receive spots in the new development. In *Elliot*, the plaintiffs argued that the developer failed to abide by its commitment not to displace voucher holders and large families.[114] But the court upheld the Zoning Commission's approval by finding that the Zoning Commission never required the developer to prevent the displacement of these residents.[115]

Despite their differing outcomes, *Barry Farm* and *Elliot* each involve residents fighting against the demolition and replacement of currently affordable housing. This type of litigation clearly defies the existing NIMBY framework. Here, working-class residents of color seek to stop new housing development because it would eliminate existing affordable housing and fail to provide replacement housing in a timely manner.

B. Fighting Market-Rate Development in Principle

In some cases, city NIMBYs voice opposition to luxury developments as a general principle —even development of vacant or underutilized property that does not directly impact already existing affordable housing. This litigation approaches the more controversial side of city NIMBY activism, where market-rate development is accused of having negative impacts on surrounding communities *per se* by indirectly raising housing costs and changing the character of a neighborhood.[116]

In *Union Market Neighbors v. District of Columbia Zoning Commission*,[117] the Union Market Neighbors (UMN), a neighborhood activist group, challenged the Zoning Commission's approval of a PUD that included 370 residential units, 175 hotel rooms, office space, and ground floor retail on an underutilized parcel.[118] UMN argued that the PUD was not consistent with the Comprehensive Plan because it "permit[ted] a project that concentrates wealth in spite of comprehensive plan policies and zoning regulations that

112. *Id.* at 573.
113. *Id.*
114. *Id.* at 581–82.
115. *Id.*
116. *See supra* Part I.A.
117. Union Market Neighbors v. D.C. Zoning Comm'n, 197 A.3d 1063 (2018).
118. *Id.*

seek to build an inclusive city."[119] UMN also raised "more general objections to the project, invoking inter alia principles of affordability concentration of 'significant luxury and wealth.'" And while the court conceded that "[i]t is entirely understandable that settled neighborhoods may be seriously distressed by the impact of major changes," it rejected these arguments as beyond the scope of legal review.[120]

In *Beloved Community Alliance v. District of Columbia Zoning Commission*,[121] the pastors of two Black churches—First Rising Mt. Zion Baptist Church and Miles Memorial Christian Methodist Episcopal Church—opposed the construction of a residential apartment building on a parcel of vacant apartments in the historically Black Shaw neighborhood.[122] The developers sought to replace the sixty-three vacant units with a modern apartment building containing 360 units, including 41 inclusionary zoning units as required by the city.[123] The plaintiffs, however, "claimed the PUD would provide insufficient affordable housing, displace residents and reduce the diversity of the neighborhood, and exacerbate a problem of limited Sunday parking availability for the churches in its vicinity."[124] The plaintiffs argued further that the Comprehensive Plan required any development to protect the historic character of the neighborhood in question and that this neighborhood was "a vibrant center of African American culture" and "an economically and ethnically diverse residential neighborhood."[125]

The developer's and city's rebuttal to these arguments highlights the policy disagreements between city NIMBY activists and their pro-development opponents. The developer argued that, aside from the affordable units built by the new development, "the creation of new housing units helps buffer increasing housing costs, by increasing the supply of housing stock."[126] In its PUD approval, the Zoning Commission acknowledged "the potential displacement of low-income residents through gentrification and market pressures," but found that these concerns would not override the benefits of the project where the project would not directly displace anyone and would build forty-one new affordable units.[127] The Court sided with the developer and the Zoning Commission, holding that the Commission "properly concluded that the PUD's new housing, both affordable and market rate, outweighed any potential . . . displacement impacts in the surrounding neighborhood."[128]

119. *Id.*
120. *Id.*
121. Beloved Cmty. All. v. D.C. Zoning Comm'n, 284 A.3d 728 (2022).
122. *Id.* at 731.
123. *Id.*
124. *Id.* at 730.
125. *Id.* at 733.
126. *Id.*
127. *Id.* at 734.
128. *Id.* at 736.

C. Classic Exclusionary NIMBYism

Finally, many PUD cases seem to represent classic exclusionary NIMBYism, in which homeowners prevent housing development for their own economic (and perhaps racial) interests. *Durant I, II, and III*, the series of cases that opened the floodgates of PUD litigation, involved plaintiffs who sought to prevent an influx of students from nearby Catholic University into their neighborhood.[129] At a public hearing during the PUD approval process, the *Durant* plaintiffs claimed that the new mixed-use development would result in a de facto extension of Catholic University's campus and that the developer's efforts to engage the community were inadequate.[130] Generalized concerns about lack of community engagement and the proliferation of a new demographic group (in this case, students) fit the classic NIMBY framework of homeowners seeking to maintain property values and exclude newcomers.

In *Cummins v. D.C. Zoning Commission*, developers sought to redevelop a community park on the former location of Bruce Monroe Elementary School.[131] The PUD proposed to replace half of the park with an apartment building, a building for senior residents, and eight town homes.[132] Notably, the new apartment building would replace public housing for the Park Morton complex, which was being torn down and redeveloped into mixed-income housing.[133] Park Morton residents would relocate to the Bruce Monroe site, which would have 273 new residential units.[134]

Opposition came from the Bruce Monroe Park Neighbors, a group of homeowners within 200-feet of the park.[135] The group appealed the Zoning Commission's approval of the PUD on the ground that the proposed buildings would be denser and taller than what the Comprehensive Plan allowed for the area.[136] They also expressed concerns about blocked air and light, reduced on-street parking, increased traffic, air, and noise pollution, and green space reduction.[137] The *Cummins* plaintiffs could not be more classically NIMBY: homeowners complaining about traffic and reduced parking who, in effect, attempt to prevent the construction of public housing.

129. Durant v. D.C. Zoning Comm'n, 65 A.3d 1161 (D.C. 2013); Durant v. D.C. Zoning Comm'n, 99 A.3d 253 (D.C. 2014); Durant v. D.C. Zoning Comm'n, 139 A.3d 880 (D.C. 2016). The *Durant* cases concern a six-story residential and commercial development on Monroe Street (Monroe) in the Northeast segment of the city. The project proposed ground-floor commercial space for five to eight tenants, and more than 200 apartment units on the upper floors. The building would have been six stories in height and required demolishing several single-family homes on the lot. *See Durant*, 65 A.3d at 1164.

130. *See id.* at 1167–72.

131. Cummins v. D.C. Zoning Comm'n, 229 A.3d 768, 773 (D.C. 2020).

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 774.

136. *Id.*

137. *Id.*

IV. Understanding City NIMBYism

One simple explanation for the wide diversity in plaintiffs and motivations for PUD lawsuits is that different people use the same tool for different ends. A homeowner NIMBY takes advantage of onerous PUD approval requirements to prevent high-density development in her posh neighborhood, while a low-income tenant uses the same tool to save her rent-restricted apartment from redevelopment. This does not mean they share the same grievances or political goals. Why not interpret the PUD controversy as involving two distinct issues: traditional NIMBYism on one hand and anti-displacement efforts on the other? But the alliances formed between traditional NIMBYs and city NIMBYs in the course of the PUD controversy seem to subvert this idea.

A. Beyond Race and Class

The D.C. Grassroots Planning Coalition (GPC) is one of the most active organizations supporting PUD litigation.[138] Started in 2017, GPC describes itself as "committed to furthering racial, economic and environmental justice by challenging rampant development which contributes to gentrification and displacement of existing residents."[139] GPC's activism has mostly focused on the Comprehensive Plan amendment process that commenced in 2016 and finished in 2021. GPC had two main goals: to insert language in the Comprehensive Plan to protect vulnerable residents from displacement and to prevent density increases to the Plan's Future Land Use Map (FLUM) that would abate the viability of anti-PUD lawsuits. GPC largely accomplished its first goal, as the amended Plan prioritized deeply affordable housing (affordable for those making less than forty percent Area Median Income); committed to applying a racial equity lens in planning processes; and implemented an anti-displacement strategy that would identify vulnerable neighborhoods and deploy resources to residents that would help them remain in their housing.[140] However, GPC did not achieve its second goal; the new Plan amended the FLUM to increase density limits throughout the city.[141] However, GPC has continued to fight these density increases. It filed a lawsuit against the city alleging that the City Council failed to consider the new Plan's impact on communities of color.[142] The

138. *About the Coalition*, D.C. Grassroots Plan. Coal. (2023), http://www.dcgrassrootsplanning.org/about.

139. *See About the Coalition*, *supra* note 138.

140. *Comprehensive Plan Update*, D.C. Grassroots Plan. Coal., http://www.dcgrassrootsplanning.org/wp-content/uploads/2020/01/2021_06_08_dcgpc_Comp_Plan_recap_wins.pdf (last visited June 29, 2023).

141. *Key Losses & More Harm*, D.C. Grassroots Plan. Coal., http://www.dcgrassrootsplanning.org/compplanlosses (last visited June 29, 2023).

142. First Amended Complaint for Declaratory and Injunctive Relief at 13–20, Belt v. District of Columbia, No. 2021-CA-001651-B (D.C. Super. Ct. Oct. 21, 2021).

suit is ongoing after the D.C. Superior Court denied a motion to dismiss in early 2022.[143]

Based on its work, we would expect GPC to mostly represent low-income tenants of color and left-leaning political organizations. Indeed, its Steering Committee includes representatives from Empower DC (which "organizes political power among D.C.'s lowest income communities"),[144] the Washington Legal Clinic for the Homeless, and the Democratic Socialists of DC, among others.[145] But GPC also includes representatives from the Committee of 100 on the Federal City.[146] Founded in 1923, the Committee of 100 is a private civic association that advocates for a particular vision of the nation's capital, as expressed in the 1791 L'Enfant Plan and the 1902 McMillan Plan.[147] In essence, the Committee seeks to preserve what it sees as core elements of D.C.'s character—its walkability, building height limit, and low-density residential neighborhoods. Many credit the Committee for saving D.C.'s urban character and public transit when it blocked the construction of four superhighways in the 1950s and 1960s.[148] But now the Committee is associated with the traditional NIMBY politics of older residents who live in D.C.'s upscale, car-centric neighborhoods.[149] Its positions certainly seem classically NIMBY: in recent years, it has opposed a zoning update that would have eliminated minimum parking requirements;[150] development proposals for unused land in McMillan Park and along Georgetown's C&O Canal;[151] and increases to D.C.'s notorious 130-foot

143. Order Denying Defendant District of Columbia's Opposed Motion to Dismiss Plaintiff's First Amended Complaint, Belt v. District of Columbia, No. 2021-CA-001651-B (D.C. Super. Ct. Mar. 16, 2022).

144. *Our History*, Empower DC (2023), https://www.empowerdc.org/our_history.

145. *See About the Coalition*, *supra* note 138; *Home Page,* Street Sense Media (2023), https://www.streetsensemedia.org.

146. *See* Baca, *supra* note 15. Nancy MacWood is listed on GPC's website as the representative from Advisory Neighborhood Commission (ANC) C3, but she is also the Vice Chair of the Committee of 100. *Who We Are*, Comm. of 100 (2015), https://committeeof100.net/who-we-are; *About the Coalition*, *supra* note 138.

147. *See Who We Are*, *supra* note 146.

148. Melissa Castro, *The Committee of 100 on the Federal City, Founded in 1923, Could Be the City's Worst Nightmare or Its Ultimate Savior, Depending on Your Viewpoint*, Wash. Bus. J. (May 27, 2011), https://www.bizjournals.com/washington/print-edition/2011/05/27/the-committee-of-100-on-the-federal.html.

149. *See* Mike Debonis, *DC Zoning Revamp Stokes Residents' Fears About Changing City*, Wash. Post (Dec. 1, 2012), https://www.washingtonpost.com/local/dc-politics/dc-zoning-revamp-stokes-residents-fears-about-changing-city/2012/12/01/9cab5986-359b-11e2-9cfa-e41bac906cc9_story.html (describing a Committee of 100 representative's concern, shared by other Upper Northwest D.C. residents, that zoning updates would reduce parking-space in car-centric neighborhoods).

150. *Id.*

151. David Alpert, *Plans for Georgetown's C&O Canal Meet Misanthropic Planning Attitudes*, Greater Greater Wash. (July 16, 2019), https://ggwash.org/view/72998/georgetowns-c-o-canal-meets-misanthropic-planning.

building height limit.[152] As one influential activist puts it, the Committee of 100 "generally stands against change."[153]

The partnership between socialists and advocates for the homeless with an organization that consistently stakes out NIMBY positions is confounding. The original NIMBY framework based itself upon the natural antagonism between these groups; NIMBYs are best known for stopping homeless shelters and affordable housing. GPC's coalition gives rise to the criticism that, while some members of the coalition hold sincere views about the negative effects of market-rate development on working-class residents, others latch onto these efforts to "gloss the anti-development views they've held for years in a veneer of racial justice."[154] According to one writer and activist, "GPC has yoked together people who care deeply about preventing the displacement of longtime residents . . . with house-rich homeowners long known for meddling in development fights."[155] She goes on to note, "Empower [a non-profit fighting against the displacement of people of color] deserves better than to be co-opted by an organization that, while counting some racial diversity among its members, promotes the views of primarily white preservationists."[156]

This explanation corresponds with the scholarly view that city NIMBYism stems, in part, from housing advocates' mistaken belief that new market-rate development leads to gentrification.[157] This mistake purportedly allows traditional NIMBYs to glom onto city NIMBY movements, disguising their exclusionary beliefs in their allies' rhetoric of racial and economic justice, while supporting policies that ultimately stop new housing construction, worsen affordability, and increase their own property values.

Certainly, one explanation for the alliance between city NIMBYs and traditional NIMBYs is co-optation, and this explanation may be true to an extent. But it also evinces a paternalism towards grassroots housing activists, who are assumed not to understand the effect of development on their own neighborhoods and to be easily manipulated by others. Further, it ignores areas of agreement between residents of different socioeconomic positions about the ill-effects of market-rate development that form the basis of the city NIMBY alliance (at least in D.C.). In order to understand city NIMBYism fully, it is important to take these shared grievances seriously.

152. Lydia Depillis, *Let D.C.'s Buildings Grow*, Wash. City Paper (Dec. 17, 2010), https://washingtoncitypaper.com/article/221592/let-dcs-buildings-grow.

153. *See* Alpert, *supra* note 151.

154. *See* Baca, *supra* note 15.

155. *Id.*

156. *Id.*

157. *See supra* Part I.A.

B. Shared Grievances Behind City NIMBYism

Putting aside the possibility of co-optation, the alliance between city and traditional NIMBYs in D.C. stems from three shared resident fears or perceptions. First, that D.C.'s local character is eroding. Second, that long-term residents deserve more control over local planning. And third, that government and for-profit developers are in a perceived alliance to "grow" the city at all costs. These issues are unique because they bring together residents who, under the traditional NIMBY framework, would stand on opposite ends of housing debates.

1. Protecting Local Character

While debates about PUDs tend to center on economic impacts, the city NIMBY critique expresses a deeper dissatisfaction with D.C.'s rapid development. Many residents worry that the proliferation of PUDs, and of high-density, mixed-use development in general, has changed the city's *character*.[158] An anti-gentrification activist leading the fight against PUDs rails against the "big box luxury buildings" that have taken over a city once defined by its low-rise, tree-lined residential streets.[159] Elsewhere, he argues that density advocates "possess a monolithic cultural approach to reshaping cities" and seek to attract residents who "can afford expensive food, coffee and beer, appreciate yoga, and have a small dog."[160] In a similar vein, a former chair of the Committee of 100 defends his affection for the particular character of D.C. as opposed to denser cities by noting, "I like the Upper West Side, but I don't want to live there. If I wanted to live there, I would move there."[161]

City NIMBYs are not alone in their aesthetic distaste for high-density housing construction. A recent *New York Times* article discusses the rise of "5-over-1s," "[c]omplexes with roughly five wood-frame stories atop one concrete podium" that characterize virtually all new multifamily development in American cities.[162] Residents in several growing cities, including Seattle, Denver, and Nashville, scorn the bland uniformity of this type of development. One artist protested 5-over-1s by creating a Facebook Group called "Denver FUGLY," which gained nearly 10,000 members. He compares 5-over-1s to Denny's, the national diner chain. "You could be at a

158. "Character" is a nebulous word. I use it to mean the aesthetic, cultural, and communal feel of a city.

159. *YIMBY'S: D.C. "Desperately & Urgently" Needs More Housing*, D.C. for Reasonable Dev't (Feb. 21, 2022), http://www.dc4reality.org/updates/612.

160. *Assail the Street View*, D.C. for Reasonable Dev't (Sept. 4, 2020), http://www.dc4reality.org/updates/544.

161. Lydia DePillis, *The Smart Growth Set*, Wash. City Paper (Sept. 3, 2010), https://washingtoncitypaper.com/article/223069/how-32-year-old-google-veteran-david-alpert-and-his.

162. Anna Kode, *America, the Bland*, N.Y. Times (Jan. 20, 2023), https://www.nytimes.com/2023/01/20/realestate/housing-developments-city-architecture.html.

Denny's in Iowa or New Mexico or Colorado, and you wouldn't know. You just know that you're at a Denny's."

Aesthetic concerns may seem unimportant when compared to the urgent need to build more housing.[163] But as John Infranca, a Professor of Law at the Suffolk University Law School, writes, "Even if they are not displaced, undesired changes to a neighborhood can significantly affect existing residents and the identity they derive from their existing neighborhood."[164] At the forefront of these undesired changes are aesthetics: "'[aesthetic changes] may be felt very deeply indeed, for the look of the place may affect the social self-definition of the residents and their sense of control of their lives.'"[165]

The original NIMBY framework understands that aesthetic and character concerns motivate NIMBYism,[166] but it does not necessarily predict that character would trump racial and class antagonisms in determining whether residents might support a given development. And yet, this is what has happened in the PUD controversy. Members of the D.C. Grassroots Planning Coalition are united in their distaste of rapid multifamily housing development, whether that development harms the character of wealthy white neighborhoods like Dupont Circle[167] or (once) working-class Black neighborhoods like Union Market. Perhaps the new urgency around protecting character reflects the remarkable speed of recent multifamily housing development. Throughout the country, 420,000 new apartments were built in 2022, the largest amount in the last fifty years.[168] While these housing supply increases are laudable, they necessarily have a notable impact on urban character that many residents react negatively to.

2. Control for Long-Term Residents

The city NIMBY alliance is also characterized by a general belief that long-term residents deserve more say in local development decisions. John Infranca has argued that long-term residents claim a distinct stake

163. *See id.* ("[A]dvocates for multifamily housing say there are times when design has to take a back seat to necessity, and an affordability crisis, exacerbated by inflation and brutally low housing inventory, is one of those times.").

164. Infranca, *supra* note 9, at 1303.

165. *Id.* (quoting Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 Calif. L. Rev. 837, 911 (1983) (footnote omitted)).

166. *See* Merriam, *supra* note 21, at 578 ("The fear [of NIMBYs] is that the loss of single-family zoning or the development of a more inclusive housing stock will change the character of existing neighborhoods.").

167. One of the Coalition's Steering Committee member is Nick Delledonne, a Dupont Circle resident who filed suit against a plan to redevelop part of a Freemason Temple site into multifamily housing. *See* About the Coalition, DC Grassroots Planning Coalition, http://www.dcgrassrootsplanning.org/about (last visited Mar. 1, 2023); *News Updates*, Keep Dupont Green, https://keepdupontgreen.org/news-updates/ (last visited Mar. 1, 2023).

168. *See* Kode, *supra* note 162.

in their neighborhoods, entitling them to some control over development decisions and/or a financial claim to increased property values stemming from gentrification.[169] However, Infranca distinguishes between residents of low-income and affluent neighborhoods, where the former have a more legitimate claim to certain entitlements because of their historic mistreatment and their stark lack of governmental influence compared to wealthier residents.[170] Infranca also warns about the negative effects of establishing greater local controls, even for deserving residents: affluent residents may end up exercising these controls despite well-intentioned targeting, and more local deliberation may lead to decisions that slow housing development and exacerbate affordability issues.[171]

D.C.'s experience shows that, in practice, city NIMBYs may not distinguish much between long-term residents who deserve greater control and those who already have too much of it. Certain PUD lawsuits—like those opposing the Barry Farm and Brookland Manor affordable housing redevelopments—clearly seek to exercise greater local control in favor of low-income residents historically subject to discriminatory practices.[172] Other PUD suits, like the *Durant* litigation, obviously support the interests of middle-class homeowners.[173] But plenty of anti-PUD activism does not fit squarely on one side or the other, evincing a general protectiveness towards long-term residents regardless of whether they are low-income or high-income. For example, anti-PUD activists frequently express process concerns regarding failures to engage long-term residents that are, in effect, agnostic to differences between affluent and low-income residents. Claims behind PUD litigation often rely on process failures—such as inadequate public review processes or inadequately explained approval orders—rather than failures to obtain material benefits for low-income residents.[174] The lawsuit against the Comprehensive Plan amendments also relies on procedural rules under D.C. law that require impact assessments for Plan changes.[175] In addition, anti-PUD activists sometimes argue simultaneously for the seemingly contradictory interests of low-income and middle-income residents. In *Beloved Community Alliance*, plaintiffs argued that a new development in a predominantly Black neighborhood would

169. Infranca, *supra* note 9, at 1286.

170. *Id.* at 1297-1301.

171. *Id.* at 1301.

172. *See supra* Part III.A.

173. *See supra* Part III.C.

174. *See, e.g.*, Union Market Neighbors v. D.C. Zoning Comm'n, 204 A.3d 1267, 1271 (D.C. 2019) (arguing that the Commission failed to conduct a proper "comprehensive public review" of adverse effects on surrounding communities); Cummins v. D.C. Zoning Comm'n, 229 A.3d 768, 776 (D.C. 2020) (arguing that the Commission's development order failed to adequately explain its reasoning); Friends of McMillan Park v. D.C. Zoning Comm'n, 149 A.3d 1027, 1031 (2016) (same).

175. First Amended Complaint for Declaratory and Injunctive Relief at 13–20, Belt v. District of Columbia, No. 2021-CA-001651-B, at 8 (D.C. Super. Ct. Oct. 21, 2021).

cause the displacement of low-income Black residents and, conversely, that it would reduce the amount of available parking.[176]

The NIMBY framework understands that reliance interests motivate NIMBYism among long-term residents: homeowners invest in property relying on a steady increase in value based partly on neighborhood stability.[177] When these expectations are upset, homeowners turn NIMBY. But city NIMBYism is different in that a much broader and more diverse swath of residents feel their reliance interests have been upset—not just homeowners' interests but low-income residents' interests as well. Thus, these long-term residents can find common ground in accruing more control over development decisions for themselves.

3. Against the Growth Machine

That said, cities need to attract new residents for economic growth, and the benefits of growth redound to long-term residents through increased economic opportunity, safer streets, and an improved built environment. Certainly, few residents would prefer a situation like D.C. in the 1990s, with its escalating murder rate and empty city coffers. This line of thinking accords with urban sociologists' idea of "the city as a growth machine." In the growth machine, city officials and business interests work together to promote growth above other policy priorities; or, more extremely, they view that growth is *the* function of city governments, that city governments exist only for this end.[178]

Perhaps the most defining characteristic of city NIMBYism, then, is its skepticism of the growth machine as represented in government-developer partnerships. And a zoning device like planned unit development puts a particularly fine point on this concern. PUDs involve a form of deal-making between government and private developers, where governments relax zoning requirements in exchange for public benefits provided by the developer. Two scholars note that, "the actual decisions on land use and building forms in [PUD] district[s], and perhaps also on density, are explicitly to be made, not by a general public policy adopted in advance, but by negotiation between the municipality and the developer. Those who take a rosy view of the capacities of local government will naturally applaud this; those who tend to have reservations on the subject . . . will take a more skeptical view."[179]

This reflects how PUDs work in D.C. Developers create a PUD proposal and present it to the public in a series of hearings. The proposal then goes

176. *See infra* Part III.B.

177. *See* Fischel, *supra* note 19, at 145 (arguing that NIMBYism stems from the fact that homeowners cannot insure against risks of sudden neighborhood change).

178. *See generally* Harvey Molotch, *The City as a Growth Machine: Towards an Economy of Urban Place*, 82 Am. J. Socio. 309 (1976).

179. 2 Norman Williams & John M. Taylor, American Land Planning Law 49 (2003).

before the Zoning Commission for official approval. The Zoning Commission is meant to neutrally decide whether the PUD proposal conforms with and furthers the priorities of the Comprehensive Plan. But, in reality, it seems as if the Zoning Commission rubber-stamps PUD applications. One PUD approval was remanded by the Court of Appeals because the Zoning Commission copied ninety percent of the developer's proposed approval order, including its typos.[180] Rather than being a neutral arbiter, the Zoning Commission is part of the growth machine: it is an arm of city government that partners with developers to pass PUDs and promote growth.

Some scholars look upon concerns about growth machine politics as counterproductive "folk ideology."[181] John Mangin writes that "many in the housing advocacy community define themselves in opposition to developers, landlords, big business, 'Growth Machine' politicians, and other winners in the apparently zero-sum competition in increasingly unequal American cities."[182] Such an attitude ignores "that what developers do might in most cases be broadly beneficial and even specifically beneficial to low-income constituencies."[183]

Indeed, anti-PUD activism is marked by at least some anti-elite romanticism. But these activists also have a point: PUDs seem to shirk democratic and prospective planning. The Comprehensive Plan is a document created and amended by the City Council—the elected representatives of D.C. residents—that sets out prospective planning priorities for the city as a whole. The Plan is meant to be the main check on the city's zoning authority. And while comprehensive plans may seem like outdated formalities in other cities, residents in D.C. clearly take the vision laid out by their Plan seriously. The widespread engagement in the recent Plan amendment process proves this point.[184] If the Comprehensive Plan provides no meaningful check on PUD proposals, it seems as if government and for-profit developers are in cahoots to push through any development, regardless of how much it flouts planning priorities established by residents. Maybe local governments ought to ignore such concerns in order to increase the housing supply as quickly as possible, but it should not be surprising that many residents find this kind of development objectionable.

Conclusion

Admittedly, much of the analysis above is speculative, and we need more research to understand what motivates city NIMBYism. In any case, city NIMBYism is here to stay. In California, anti-gentrification activists partnered with homeowners from Beverly Hills—a mirror-image of the coalition that formed in D.C.—to oppose S.B. 827, a state law that would have

180. Cummins v. D.C. Zoning Comm'n, 229 A.3d 768, 775 (D.C. 2020).
181. Mangin, *supra* note 9, at 110.
182. *Id.*
183. *Id.*
184. *See supra* Part II.C.

overridden zoning restrictions that make it difficult to build dense, mixed use developments.[185] Similarly, Minneapolis' full-scale elimination of single-family zoning, famously pushed by a group of Yes In My Backyard (YIMBY) residents, has recently been criticized for spurring gentrification, reflecting the same mixture of anti-displacement and traditional NIMBY concerns present in D.C.[186] The YIMBY versus city NIMBY debate that has popped up throughout the country takes on a particular form: "the argument devolves into accusations that the YIMBYs are tools of rich, white real-estate developers, and that [city] NIMBYs are tools of rich, white home-owners, and the space in between these two positions is quickly converted into a muddy field, where no one dares show a white flag."[187]

While this debate may at times seem unnecessarily contentious (or pedantic), it forces us to reconsider long-held truisms. We cannot resort to the old framework that dismisses NIMBYism as a mere expression of racism or classism. Instead, we must confront the questions posed by city NIMBYism. For example, how should we promote growth if it often leads to the displacement of low-income residents? Does growth inevitably mean the autonomous replication of luxury high-rises, Sweet Greens, and yoga studios in neighborhoods that once felt more particular to themselves, "authentic"? Or are these aesthetic concerns overstated when compared to the material problems—housing, jobs, crime—that cities face? And who should decide? Do long-term residents deserve more say than newer ones? What about the hypothetical future residents that cities want to attract? How much should current policies cater to them? If anything, city NIMBY-ism is a valuable development because it forces these questions, which go to the heart of urban politics, to the fore.

185. Nikil Saval, *The Plight of the Urban Planner*, New Yorker (Nov. 20, 2019), https://www.newyorker.com/books/under-review/the-plight-of-the-urban-planner. However, several of S.B. 827's provisions were added into subsequent bills. *SB 827*, CA YIMBY, https://cayimby.org/sb827 (last visited June 29, 2023).

186. Cinnamon Janzer, *Use Upzoning Sparingly, New Report Suggests*, Next City (Aug. 31, 2021), https://nextcity.org/urbanist-news/use-upzoning-sparingly-new-report-suggests (interviewing associate director of non-profit in Minneapolis community of color who argues that upzoning has hastened gentrification). Recent empirical findings—contrary to city NIMBY concerns—show that upzoning leads to an increase in housing supply and that downzoning leads to an increase in rents. Christina Stacy et al., *Land-Use Reforms and Housing Costs: Does Allowing for Increased Density Lead to Greater Affordability?*, Urban Inst. (2023), https://www.urban.org/sites/default/files/2023-03/Land-Use%20Reforms%20and%20Housing%20Costs.pdf.

187. Saval, *supra* note 185.

Affordable Housing Versus Housing Safety: Illegal Housing in California and the Housing and Building Code Dichotomy

Patricia R. Di Pasquale[†]

Abstract

The affordable housing crisis and the lack of housing for low-income individuals is a significant problem in major metropolitan areas in the United States and specifically in California. This article introduces the affordable housing crisis, how building codes impact the affordable housing crisis, and how private citizens are responding to the crisis with private solutions in the form of "illegal housing." Illegal housing is housing that is built in violation of state and local building and safety codes and includes any informal housing such as illegally converted garage apartments, warehouses, accessory dwelling units, or tiny houses. This article argues that state and local governments should relax building and zoning codes to allow for some informal housing. This would encourage government oversight of currently existing illegal housing, allowing the government to ensure the proper health and safety of these alternate housing situations, while simultaneously ameliorating the housing crisis by allowing for informal housing solutions.

Table of Contents

[†] Patricia R. Di Pasquale is a Law Clerk at Klein DeNatale Goldner and an incoming Associate Attorney upon bar passage. She graduated from the University of Iowa College of Law with a JD in May 2023. This article is dedicated to Portia, whose experience with informal housing in the Bay Area inspired this article. A special thank you to Professor Larisa G. Bowman for her encouragement, comments, and critiques. All arguments and opinions belong to the author alone.

Introduction

In 1997, in a tragic accident, a grandmother and her two grandchildren, ages seven and four, died in the blaze of a garage fire in Los Angeles, California.[1] A bedroom had been illegally built in the garage in violation of building codes[2] and without proper permitting.[3] The bedroom's television was powered by extension cords, which started the fire while the family was sleeping.[4] The garage bedroom did not have a window, ultimately trapping its occupants in the blaze.[5] At the time, these types of spaces were desirable because of the low cost of living, with rent around $350 a month.[6]

In 2016, a similar tragedy occurred in Oakland, California.[7] This time it was an illegally converted warehouse.[8] The Ghost Ship art collective, an illegally converted warehouse used for art and residential space, which was occupied by residents, burned to the ground during a dance party, killing thirty-six people, becoming the deadliest fire in Oakland history.[9] Although the cause of the fire was never discovered, there is evidence that one of the many electrical code violations started the fire.[10] The warehouse was powered by electrical cords, connected to an autobody shop next door through a hole in the wall.[11] Some of the many code violations included the fact that the warehouse lacked sprinklers and fire alarms, an illegally constructed staircase made out of pallets led to the second floor, shower water was heated with propane tanks in the bathrooms, a mazelike interior was cluttered with artistic junk like pianos and art, there were no marked or direct emergency exits, and only two exits led outside the building.[12] Resi-

1. Jill Leovy, *Fire Kills 3 Living in Garage*, L.A. Times (Mar. 20, 1997, 12:00 AM), https://www.latimes.com/archives/la-xpm-1997-03-20-me-40188-story.html.

2. "Building codes" is used in this article as an expansive term applying to both building construction codes and codes for the use and maintenance of buildings, including health and safety and fire codes.

3. Leovy, *supra* note 1.

4. *Id.*

5. *Id.*

6. *Id.*

7. *See* David DeBolt, *5 Years After Oakland's Deadliest Fire: Ghost Ship 'Frozen in Time,'* Oaklandside (Dec. 2, 2021), https://oaklandside.org/2021/12/02/5-years-after-oaklands-deadliest-fire-ghost-ship-frozen-in-time.

8. *See id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *See id.*; Roger K. Lewis, *Ghost Ship Warehouse Fires Is Tragic Reminder of Building Codes' Importance*, Wash. Post (Jan. 6, 2017), https://www.washingtonpost.com/realestate/ghost-ship-warehouse-fire-is-tragic-reminder-of-building-codes-importance/2017/01/05/79b06f34-c09d-11e6-897f-918837dae0ae_story.html; Alex Emslie, *Ghost Ship Neighbor: Calls to Police Brought No Action Against Warehouse*, KQED (Dec. 7 2016), https://www.kqed.org/news/11208358/ghost-ship-neighbor-calls-to-police-brought-no-action-against-warehouse; Ford Fessenden & Anjali Singhvi, *The Oakland Fire: What*

dents were attracted to the warehouse because of its artistic appeal and the low cost of living, with one occupant paying $565 a month,[13] and others paying between $300 to $700 a month,[14] which was very inexpensive rent for the area at the time.

Both of these fires show how private solutions to the affordable housing crisis[15] can place low-income[16] occupants in unnecessary danger while simultaneously providing necessary low-income housing. These fires helped demonstrate the need to balance creative affordable housing solutions with the health and safety of low-income occupants. Often domestic discussions of housing policy in the United States fail to address illegal housing.[17] However, considering the state of the affordable housing crisis and the need to house both people experiencing homelessness and low-income individuals in major metropolitan areas, policymakers and local governments need to reconsider when and how creative housing solutions should be permitted.

"Illegal housing," "shadow housing," or "informal housing"[18] all refer to housing built without the proper permitting and below the standard that the building and safety codes require to keep occupants safe.[19] Whether or not the government changes its oversight of illegal housing, there is little

Happened Inside the Ghost Ship, N.Y. Times (Dec. 12, 2016), https://www.nytimes.com/interactive/2016/12/12/us/oakland-warehouse-ghost-ship-fire.html.

13. *See* Sudhin Thanawala, *Witness Recalls Escape from Oakland Ghost Ship Warehouse During Fire*, Press Democrat (Dec. 7, 2017), https://www.pressdemocrat.com/article/news/witness-recalls-escape-from-oakland-ghost-ship-warehouse-during-fire.

14. First Amended Master Complaint at 14, *In Re* Ghost Ship Fire Litigation, (2016) (RG16843631) [hereinafter Master Complaint].

15. The "affordable housing crisis" refers to the lack of affordable housing available for low-income individuals in the United States, specifically within major metropolitan areas, due to the loss of affordable housing, soaring rents, and a failure to produce sufficient housing to keep pace with demand.

16. "Low-income" in this article does not refer to a specific income level such as incomes at or below the poverty line or 30% of an area's medium income. Rather, "low-income" refers to an income where 30% of that income would not be sufficient to afford a one-bedroom apartment in that area. A renter is considered "cost-burdened" when they pay more than 30% of their income on housing. Christopher Herbert et al., *Measuring Housing Affordability: Assessing the 30 Percent of Income Standard*, JCHS (Sept. 2018), https://www.jchs.harvard.edu/sites/default/files/Harvard_JCHS_Herbert_Hermann_McCue_measuring_housing_affordability.pdf.

17. Noah J. Durst & Jake Wegmann, *Informal Housing in the United States*, 41 Int'l J. Urb. & Reg'l Rsch. 282, 282 (2017).

18. This article will refer to these three synonymous terms as "illegal housing," and legalized informal housing will be referred to as "informal housing."

19. *See* Jake Wegmann & Sarah Mawhorter, *Measuring Informal Housing Production in California Cities*, 83 J. Am. Plan. Ass'n 119, 122 (2017); Durst & Wegmann, *supra* at note 17, at 282 (noting that "informal housing" in this article is described as "non-compliant" and "non-enforced" including violations of land-use, zoning, subdivision regulations, and building codes).

doubt that this type of housing will only increase. According to one study, in the ten largest major metropolitan areas in the United States between 2000 and 2014, thirty-seven percent of new single-family housing units were illegal.[20] These units are often built with recycled or reclaimed materials; they are often physically small units, built over a long period of time by unlicensed contractors, unofficially connected to municipal water and sewer networks, and hidden from the sight of code enforcement officers.[21] Illegal housing includes garage apartments, illegally converted warehouses, accessory dwelling units (ADUs), or tiny houses. These units can result in tragic deaths due to unregulated construction, drain economic resources from the government by avoiding property tax evaluations, and put a strain on utility networks.[22]

Private solutions to the affordable housing crisis (i.e., private construction of illegal housing including warehouses, garages, and basements) create unsafe living conditions because local government often has no oversight over the health and safety at unknown illegal housing, and local government has no way to locate all the illegal housing situations.[23] However, illegal housing also helps fill a gap by providing inexpensive housing to a growing segment of society that cannot afford to live anywhere else. To help alleviate the affordable housing crisis and homelessness, state and local governments should relax building, zoning, and code enforcement rules for certain emergency and necessary housing, such as ADUs, tiny houses, warehouse conversions, garage apartments, and basement apartments. This would encourage the creation of alternative housing within the limits of the law, which would allow for the government to ensure the proper health and safety of these alternative housing situations.

This article does not advocate for unsafe housing. Rather, it encourages state and local governments to reconsider safety and building codes that are not necessary for the protection of residents but that burden the creation of affordable housing. This article focuses specifically on illegal housing in California because California has the nation's worst housing shortage,[24] a high poverty rate (13.2%), and the nation's largest homeless population

20. Anne Brown et al., *Converting Garages into Housing*, 40 J. Plan., Educ. & Rsch. 56, 57 (2020). The percentage of unpermitted or "illegal" housing between 2000 and 2014 was estimated by comparing "the number of new single-family housing units reported in the U.S. Census with the number of single-family building permits reported by the U.S. Department of Housing and Urban Development" for the cities of Los Angeles, New York, Boston, Philadelphia, Chicago, Miami, Washington, DC, Dallas, Atlanta, and Houston. *Id.*

21. Wegmann & Mawhorter, *supra* at note 19, at 122.

22. *Id.*

23. *See* Durst & Wegmann, *supra* at note 17, at 295 (showing that informal housing in the United States is hidden from the government and enforcement because it is interwoven or hidden within formal housing).

24. Adam Barnes, *These Are the States Where the Housing Shortage Is the Worst*, The Hill (July 14, 2022), https://thehill.com/changing-america/sustainability/infrastructure/3559650-these-are-the-states-where-housing-shortage-is-the-worst.

(both in number and proportion).[25] Section I begins with an overview of the affordable housing crisis, followed by Section II's brief history of building codes and how restrictive building codes contribute to the shortage of affordable housing. Section III analyzes the opposition to informal housing (III.A) and evaluates the government's response to illegal housing in California, specifically in Los Angeles with illegal garage conversions (III.B) and Oakland with illegal warehouse conversions (III.C). Section IV of this article proposes legal changes, so that state and local governments may properly balance affordability and safety by encouraging creative solutions to the affordable housing crisis.

I. The Affordable Housing Crisis and the Need for Informal Housing

The affordable housing crisis refers to the lack of housing available for low-income individuals in the United States, specifically within major metropolitan areas, due to soaring rents and a failure to produce sufficient housing to keep pace with demand.[26] The affordable housing crisis, especially within the major metropolitan areas of California, makes low-income housing harder to find and even more necessary because medium incomes have not matched the increase in rents in the United States.[27] Properly regulated informal housing, which balances cost with the health and safety of occupants, is necessary to fill this need.

The affordable housing crisis in cities in the United States has become a major issue since the Great Recession, with market decline beginning in 2007 and recovery beginning in 2009,[28] and the number of renters increasing by nine million nationally from 2005 through 2015.[29] With this increase in renters, supply has not been able to meet demand, raising the prices of rental units.[30] After the Great Recession, construction of new housing fell, and, even when construction started to rebound, it has failed to keep pace with the growing demand.[31] Across the nation, from 2001 to 2018, "[g]rowth in median rents has outpaced growth in median renter income since 2001 in nearly every state," with California rental costs increasing 30% from 2001 to 2018.[32]

25. Dan Walters, *California Housing Shortage Triggers Cycle of Despair*, Cal Matters (Jan. 23, 2023), https://calmatters.org/commentary/2023/01/california-housing-shortage-triggers-cycle-of-despair.

26. Ashfaq Khan et al., *The Rental Housing Crisis Is a Supply Problem That Needs Supply Solutions*, CAP (Aug. 22, 2022), https://www.americanprogress.org/article/the-rental-housing-crisis-is-a-supply-problem-that-needs-supply-solutions.

27. *Id.*

28. *Id.*

29. *The State of the Nation's Housing 2016*, Joint Ctr. for Hous. Stud. Harvard U., at 23 (June 22, 2016), https://www.jchs.harvard.edu/sites/default/files/media/imp/jchs_2016_state_of_the_nations_housing_lowres_0.pdf.

30. Khan et al., *supra* at note 26.

31. *Id.*

32. Alicia Mazzara, *Rents Have Risen More Than Incomes in Nearly Every State Since 2001*, Ctr. on Budget & Pol'y Priorities (Dec. 10, 2019, 1:15 PM), https://www.cbpp.org/blog/rents-have-risen-more-than-incomes-in-nearly-every-state-since-2001.

A comparison of fair market rent for two-bedroom apartments in the Bay Area in 2016 (when the Ghost Ship fire occurred) and 2021 and 2022 (recent data) shows the drastic increase in rental costs further exacerbating the affordable housing crisis. In 2016, across the state of California, the fair market rent for a two-bedroom apartment was $1,487, requiring an annual salary of $59,464, or $28.59 per hour working 40 hours a week, to avoid paying more than 30% of household income on rent.[33] In Alameda County and San Francisco County, both two of the most expensive counties in California, the wage required to stay below this 30% threshold was $40.44 and $44.02, respectively, assuming a 40-hour work week.[34] In the major cities in California in 2016, the fair market rent for a two-bedroom apartment was even more drastic, with Oakland having a fair market rent of $2,103, requiring a yearly salary of $84,120 or an hourly wage of $40.44 with a 40-hour work week.[35] In San Francisco, in 2016, the fair market rent for a two-bedroom apartment was $2,289, requiring a yearly salary of at least $91,560, or an hourly wage of $44.02 with a 40-hour work week.[36]

By 2022, across the state of California, the fair market rent for a two-bedroom apartment had risen to $2,028, requiring an annual salary of $81,133, or $39.01 per hour working 40 hours a week to avoid paying more than 30% of household income on rent.[37] To put this in context, this salary or hourly wage would require at least 2.6 jobs at minimum wage (calculating minimum wage by state or federal minimum wage, whichever is higher) to avoid spending more than 30% of income on rent.[38]

In 2021, in San Francisco, a salary of $142,120, or an hourly wage of $68.33, was required to stay below 30% with the fair market rent for a two-bedroom costing $3,553; across the Bay in Oakland and Freemont, it would take a salary of $95,320 or an hourly wage of $45.83, assuming a 40-hour work week, to afford the fair market rent for a two-bedroom apartment at

33. Diane Yentel et al., *Out of Reach 2016*, Nat'l Low Income Hous. Coal. 6, 31 (2016), https://nlihc.org/sites/default/files/oor/OOR_2016.pdf (Out of Reach 2016 bases its fair market rents on the Department of Housing and Urban Development (HUD) fair market rents, used to calculate rent-payments for HUD programs, HUD fair market rents are estimates of what a person will pay for a modest apartment and do not actually reflect what renters are currently paying.).

34. *Id.*

35. *Id.* at 32.

36. *Id.*

37. Andrew Aurand et al., *Out of Reach 2022: The High Cost of Housing*, Nat'l Low Income Hous. Coal. iii, 23 (2022), https://nlihc.org/sites/default/files/oor/2022/OOR_2022_Mini-Book.pdf (Out of Reach 2022 bases its fair market rents on the Department of Housing and Urban Development (HUD) fair market rents, used to calculate rent-payments for HUD programs, HUD fair market rents are estimates of what a person will pay for a modest apartment and do not actually reflect what renters are currently paying.).

38. *Id.* at 23.

$2,383.[39] In San Francisco in 2021, to avoid spending more than 30% of one's income toward rent, 4.9 jobs at minimum wage (assuming a 40-hour work week) were required (calculating minimum wage based on county, state, or federal minimum wage, whichever is higher).[40] In Oakland in 2021, 3.3 jobs at minimum wage were required to avoid paying 30% of one's income on rent.[41] However, 45% of California's population was renting in 2021, and the average income across the state was $24.89 an hour.[42]

To put this in perspective, secretaries, administrative assistants, financial clerks, office and administrative support staff—all white-collar occupations—would not be able to afford a two-bedroom apartment in California or would end up paying more than 30% of their income toward rent.[43] In 2023, the average administrative assistant in California made $49,164 or $23.63 an hour[44] and the average retail worker in California made a salary of $33,482 or $16.09 an hour.[45] Blue-collar workers, including workers in retail and the service industry, would not even be close to affording a two-bedroom apartment in California without additional income.

Low-income people have been forced to leave these cities because of the decreasing supply of housing due to the influx of high-paid tech workers, lack of new construction, state property taxes, and the resulting rise in rental prices of the existing rental stock, causing gentrification and displacement.[46] Additionally, these people leave behind family homes, circles of friends, family, and connections—their safety net—and the many benefits of living in a major metropolitan area due to the locality of arts, sciences, and other benefits.[47]

---

39. Andrew Aurand et al., *Out of Reach 2021: The High Cost of Housing*, Nat'l Low Income Hous. Coal. 11, 40–41 (2021), https://nlihc.org/sites/default/files/oor/2021/Out-of-Reach_2021.pdf (Out of Reach 2021 bases its fair market rents on the Department of Housing and Urban Development (HUD) fair market rents, used to calculate rent-payments for HUD programs, HUD fair market rents are estimates of what a person will pay for a modest apartment and do not actually reflect what renters are currently paying.).

40. *Id.* at 41.

41. *Id.* at 40.

42. *Id.* at 39.

43. *See* Aurand et al., *supra* at note 37, at 4.

44. *Administrative Assistant I Salary in California*, Salary.com (last visited May 26, 2023), https://www.salary.com/research/salary/benchmark/administrative-assistant-i-salary/ca.

45. *Retail Sales Staff Salary in California*, Salary.com (last visited May 26, 2023), https://www.salary.com/research/salary/benchmark/retail-sales-staff-salary/ca.

46. Louis Hansen, *Oakland, S.F. Neighborhoods Fastest Gentrifying in the U.S.*, Mercury News (updated June 20, 2020, 6:10 AM), https://www.mercurynews.com/2020/06/18/oakland-s-f-neighborhoods-fastest-gentrifying-in-u-s.

47. *See* Jason Richardson et al., *Gentrification and Disinvestment 2020*, Nat'l Cmty. Reinvestment Coal. (June 2020), https://ncrc.org/gentrification20 ("Gentrification is usually associated with population size and growth of U.S. cities, and a variety of economic and cultural factors "pull" people to cities where it is most intense . . . these factors

From 2013 to 2017, San Francisco and Oakland led the nation as the most intensely gentrifying cities, with 131 eligible census tracts (i.e., "[i]n the lower 40th percentile of income and home value but not gentrifying") and 41 gentrifying tracts, for a total of 31.3% gentrifying.[48] Most importantly, people being priced out of major cities are disproportionately people of color because of income inequality along racial lines.[49] For example, comparing the seventieth percentile of white, Black, and Latino workers, white workers in the seventieth percentile made on average $33.15 an hour, versus Black workers at $24.37, and Latino workers at $23.25.[50] Because of this difference, at the seventieth percentile of wages, white workers typically were able to spend less than 30% of their income on housing, compared to Black and Latino workers.[51] Even more problematic, the white households were less likely to be renters, with only 28% renting, compared to 58% of Black households and 54% of Latino households.[52]

The affordable housing crisis is not over and is only getting worse. Between 2021 and 2022, "median rents for two-bedroom apartments in metropolitan counties increased 15%, or $179."[53] In contrast, the previous four years, there was only a $25 to $39 increase in median rents.[54] There is an increasing need for affordable housing.

II. Building Codes' Impacts on the Affordable Housing Crisis

To compound the affordable housing crisis, there is evidence that building codes (i.e., building construction codes, codes for the use and maintenance of buildings, health, safety, and fire codes) increase the price of housing and even rents.[55] Some even argue that strict code enforcement eliminates housing opportunities for the poor and that it might be better for the poor to be living in slums with a roof over their heads than having the only

involve strong correlations for gentrification with wage and income growth, expansion of technology based industries, transit access and use.").

48. *Id.*

49. Aurand et al., *supra* at note 39, at 6.

50. *Id.*

51. *See id.*

52. *Id.* at 7.

53. Aurand et al., *supra* at note 37, at 6.

54. *Id.*

55. Robin Bartram, *The Cost of Code Violations: How Building Codes Shape Residential Sales Prices and Rents*, 29 Hous. Pol'y Debate 931, 931, 933 (2019); David Listokin & David B. Hattis, *Building Codes and Housing*, 8 Cityscape: J. Pol'y Dev. & Rsch. 21, 42–43 (2005) (This article briefly reviews the literature on building codes' relationship to the cost of housing and finds that the literature indicates that "the literature on the subject of building codes and new housing costs has claimed that codes increase the cost of new housing from roughly 1 percent to more than 200 percent." The authors note that that building codes add to expenses but argue that land use and improvement requirements added more expenses.).

housing they could afford demolished for the sake of housing reform.[56] William Tucker has posited that strict building codes are harmful for the poor because they eliminate cheap housing.[57] He stated:

> [C]heap lodging has all but disappeared from downtown areas, where the poor and marginal inevitably congregate. The reason is simple—building code enforcement. Inevitably, some politician has come along with a campaign to "clean up downtown" and "get rid of substandard housing." "Code enforcement" is always the tool of choice. The first housing to go is the cheapest—that inhabited by the most marginal citizens. Buildings are condemned as "firetraps," for not having adequate ventilation, not providing kitchen or bathroom facilities, and for not offering people a "decent place to live."
>
> The promise is always that such code enforcement will improve living conditions for the poor. But the result is just the opposite. "Substandard" housing that was providing some kind of shelter for the poor is forced out of business. Better housing does not appear magically in its place. Instead, people are forced off the bottom rung of the housing ladder. They become "homeless."[58]

Tucker does not address the issue of dangerous housing and whether these buildings were unjustifiably condemned while providing safe housing, but, rather, describes how building codes were and are used to eliminate cheap and unsightly housing, resulting in higher housing costs and homelessness.

Historically, building and fire codes were created in response to tragic accidents and designed to prevent further deaths of innocent people.[59] The 1871 Great Chicago Fire is considered the impetus for creating modern building codes in the United States.[60] There are multiple theories as to how the Great Chicago Fire started, but the most popular version of events blame the fire on Mrs. O'Leary, whose barn supposedly erupted into flames after the cow she was milking kicked over a lantern.[61] What is certain is that the building techniques in Chicago, including wooden buildings, thin walls, and ornamentation, contributed to the rapid spread of flames and destruction caused by the fire.[62] Even buildings of cast iron con-

56. William Tucker, *Building Codes, Housing Prices, and the Poor*, *in* Housing American: Building Out of a Crisis 66–69 (Randall G. Holcombe & Benjamin Powell eds., 2009).

57. *Id.* at 65.

58. *Id.*

59. Blair Kamin, *City Learned Lessons from Its Catastrophes*, Chicago Trib. (Apr. 28, 1992, 12:00 AM), https://www.chicagotribune.com/news/ct-xpm-1992-04-28-9202070670-story.html.

60. *Id.*

61. Richard F. Bales, The Great Chicago Fire and the Myth of Mrs. O'Leary's Cow 3 (2002).

62. John J. Pauly, *The Great Chicago Fire as a National Event*, 36 Am. Q. 668, 673–74 (1984).

struction were easily destroyed by the fire, even though previously considered fireproof.[63] The fire started in a neighborhood of wooden houses and spread quickly due to dry wood of buildings and even sidewalks, eventually burning 2,100 acres, causing 200 million dollars in damage, and killing 300 people.[64] At the time, articles in technical magazines after the fire noted the inferiority of American buildings and advocated a return to European buildings styles, abandoning the use of wood, and suggested various fireproofing techniques, including different types of roofs, pavements, and concrete buildings.[65]

After the fire, the owner of the *Chicago Tribune* ran for mayor, making building code improvements, specifically fireproofing, the basis for his political platform, resulting in his election.[66] The new city council sought to eliminate wooden buildings by revising the building codes.[67] However, they were unsuccessful because "[t]he harsh reality of such an idea was that better construction meant that houses would be expensive, pushing the cost of the American dream beyond the reach of many of Chicago's working class."[68] The revised building code of 1872 prohibited wood balloon frames in the business district, and exterior walls of new buildings had to be made of iron, stone, or brick.[69]

The 1911 Triangle Shirtwaist Fire in New York propelled the creation of fire and building codes for the safety of building occupants in factories.[70] In March 1911, 146 workers were killed in the factory, the worst fire in New York history and the worst disaster in New York history until the World Trade Center on September 11, 2001.[71] The fire started when a lighted cigarette was thrown upon a pile of fabric cuttings.[72] The factory occupied the top three floors of the ten-story Asch building and was the largest manufacturer of shirtwaists (women's bodices) in the city.[73] Of the 146 killed, at

63. Gerald R. Larson, *Chapter 3. How Did the 1871 Fire Change Chicago?*, Arch. Prof. (May 16, 2020), https://thearchitectureprofessor.com/2020/05/16/chap-3-how-did-the-1871-fire-change-chicago.

64. Pauly, *supra* at note 62, at 669.

65. *Id.* at 674.

66. Larson, *supra* at note 63.

67. *Id.*

68. *Id.*

69. *Id.*

70. Stephen Jones, *The Triangle Shirtwaist Fire: Difficult Lessons Learned on Fire Codes and Safety*, Bldg. Safety J. (Mar. 22, 2021), https://www.iccsafe.org/building-safety-journal/bsj-dives/the-triangle-shirtwaist-fire-difficult-lessons-learned-on-fire-codes-and-safety.

71. *Id.*

72. Preliminary Report of the Factory Investigating Commission, Vol. I at 38. Robert F. Wagner, Chairman. Albany, New York: Argus Co. (1912) [hereinafter Preliminary Report].

73. Arthur F. McEvoy, *The Triangle Shirtwaist Factory Fire of 1911: Social Change, Industrial Accidents, and the Evolution of Common-Sense Causality*, 20 L. & Soc. Inquiry 621, 627 (1995).

least 125 of them were young girls.[74] Some were suffocated or burned to death; others jumped from the windows to their deaths.[75]

The Asch building only had two entrances, four elevators holding approximately twelve people, and a 33-inch-wide set of stairs that went from the first floor to the roof.[76] The building also had an additional partial set of stairs that did not go to the roof and a fire escape that only went down to the second floor.[77] All the stairs in the Asch building had doors that opened inward because there was only one foot of space between the last step and the doors, so it was not practicable for the doors to open outward (successfully circumventing the labor code).[78] When the fire started, the elevators were only able to carry a limited number of loads before the heating of the cables put them out of commission, but an estimated forty to seventy people were waiting for the elevators.[79] Those attempting to escape down the stairs were met with a closed door due to the throngs pushing against the doors that opened inward.[80] The fire escape was inadequate and resulted in many falling to the pavement below.[81]

The Asch building was considered a "fireproof" loft building at the time.[82] Fireproof loft buildings had brick, stone, or metal exterior walls with stairways of stone or metal with fireproof walls.[83] However, "fireproof" loft buildings still had wooden floors, doors, and trim.[84] As a result of the Triangle Shirtwaist Fire, in 1911 the New York legislature and governor passed an act creating a commission to investigate the unsafe conditions in loft buildings.[85] The Commission commented on the fire dangers in

74. *141 Men and Girls Die in Waist Factory Fire; Trapped High up in Washington Place Building; Street Strewn with Bodies; Piles of Dead Inside*, N.Y. Times, Mar. 26, 1911, at 1 (although this newspaper article states that 141 people lost their lives in the fire, later sources update the number to 146).

75. *Id.*

76. Jones, *supra* at note 70.

77. McEvoy, *supra* at note 73, at 627.

78. Leon Stein, The Triangle Fire 23 (1962).

79. Jones, *supra* at note 70; *141 Men and Girls, supra* at note 74, at 2.

80. *141 Men and Girls, supra* at note 74, at 2.

81. *Id.*

82. Preliminary Report, *supra* at note 72, at 32.

83. *Id.*

84. *Id.*

85. *Id.* at 13. The Commission noted, based on testimony, that fifty to seventy-five percent of fires in loft buildings were preventable. *Id.* at 38. The Commission recommended that the best method to prevent future fires would be to prohibit heaps of garbage, smoking, lighted matches, and exposed gas jets. *Id.* at 38–39. The Commission recommended provisions requiring fireproof waste receptacles, no smoking signs with notice of penalties for violation on every floor, globes or wire cages protecting gas jets and lights in factories, and strict punishment for failure to comply with these provisions. *Id.* at 39–40. Additionally, the Commission recommended fire drills be regularly conducted (at least every three months) for factory buildings employing more than twenty-five employees. *Id.* at 41–42. These fire drills would indicate to employees the locations of stairwells and

"fireproof" loft buildings, noting that "[w]hile the fireproof building itself will not burn, the merchandise, wooden partitions and other inflammable material burn as readily in a fireproof building as any other."[86] The Commission noted that this is exactly what happened in the Triangle Shirtwaist Fire, with the fire being confined to three floors and the flammable contents of these floors.[87]

Additionally, the Commission also noted that, even though many fireproof loft buildings had stairwells, exterior fire escapes, and even standpipes connected to the city water, the employees only used the elevators and not the stairs, and were not aware of the fire safety measures.[88] Also, the doors leading to the stairwells opened inward, which was problematic in the event of an emergency.[89] The Commission also commented that the conditions within these buildings added to the fire hazard, such as the manufacturing of flammable materials, floors cluttered with waste soaked with oil or grease, employees smoking during business hours, and lighted gas jets, unprotected by globes or wire netting, placed near materials.[90] Exits were unmarked, fire drills were rarely held, locations of stairways and escape routes were unknown and often blocked by materials and merchandise.[91] The balconies to the fire escapes were often out of reach for female employees or the windows leading to fire escapes were too small for grown employees to easily pass through.[92]

Building and fire codes are necessary to protect occupants and surrounding buildings from fires and other safety concerns. However, these codes should not be so strict as to prevent the construction or existence of necessary housing. Currently, the different codes applicable to building

---

fire escapes and would be supervised by the local fire departments. *Id.* at 41. Also, the Commission recommended that automatic sprinkler systems be required for buildings with more than seven floors where over 200 employees are employed above the seventh floor because the fire department could not reach above the seventh floor. *Id.* at 43–44.

Even though the Labor Law under section 80 provided that doors leading outwards should open outward whenever practicable, this provision was rarely followed due to the elasticity of the code. *Id.* at 47. The Commission recommended that all doors leading to exits in manufacturing buildings open outwards or slide freely where twenty people or more are employed on one floor. *Id.* at 48–49. Additionally, the Commission suggested that exits must be at least three feet wide, passageways in factories must provide safe and unobstructed passage to exits and escapes, and all exits must be marked and emergency exits painted red, including the windows leading to outside fire escapes. *Id.* It was noted by the fire chief that even if just the sprinkler system had been in place, not a single life would have been lost during the Triangle Shirtwaist Fire. *Id.* at 44.

86. *Id.* at 33.
87. *Id.* at 34.
88. *Id.* at 32.
89. *Id.* at 31–32.
90. *Id.* at 34.
91. *Id.*
92. *Id.*

construction across the United States include building codes (involving structural and general safety including fire safety, interior, enclosure, and materials), plumbing codes, mechanical codes (involving combustion and mechanical equipment in the building), electrical codes, gas codes, energy codes, and disability accessibility codes.[93] Different codes applicable to the use and maintenance of buildings may overlap with building construction codes but generally include fire codes, housing codes (involving health and sanitation of residential buildings), property maintenance codes, and hazard abatement codes.[94]

Building codes balance the protection of the occupant on one hand—such as protecting an ignorant homebuyer from purchasing a hazardous home, and protecting the community from fire, collapse of the building, or other hazards—and the costs of compliance imposed upon building owners and occupants.[95] For a building code to be effective, it must balance both the costs and the benefits of implementing that code.[96] Examples of inappropriate building codes include codes that require questionable improvements, restrict cost-saving materials and technologies, impede scale and efficient production, require excessive fees, result in administrative delays or conflicts, or result in code enforcement skill inadequacies.[97] For instance, the "25 to 50 percent rule" is considered an inappropriate building code because it requires a questionable improvement.[98] The "25 to 50 percent rule" requires a rehabilitated building to be brought up to current building standards for new construction if a new project is worth 25–50% of the value of the rehabilitated structure.[99] This rule discourages investment in older buildings by requiring expensive and often unnecessary alterations to older buildings.[100] For example, this rule could require a stairway that is 3/4 inch too small to be widened or windows that are 5/8 inch too small to be replaced, which actually happened in New Jersey under this rule.[101]

California has more regulations for land use and residential construction than any other state.[102] Moreover, there is a correlation between "the degree of regulatory stringency and housing prices for both owner-occupied units and rental units."[103] Even property taxes and sales taxes in California encourage the construction of retail buildings over residential buildings and expensive housing over affordable housing because property taxes are

93. Listokin & Hattis, *supra* at note 55, at 23.
94. *Id.* at 23–24.
95. *Id.* at 33.
96. *Id.*
97. *Id.* at 33–36.
98. *Id.* at 34.
99. *Id.*
100. *Id.*
101. *Id.*
102. John M. Quigley & Steven Raphael, *Regulation and the High Cost of Housing in California*, 95 Am. Econ. Rev. 323, 323 (2005).
103. *Id.* at 327.

limited to one percent of acquisition costs, but cities receive their share of local sales taxes.[104] Most recently, California changed its building code to require some new homes and buildings to have solar panels and batteries, and wiring for electrical heaters to address environmental concerns.[105] These requirements could increase the cost of a new home by $20,000, and are likely to result in an increase in rents.[106]

Additionally, California's energy efficiency standards and cities' Green Building codes could prevent people from either getting accessory dwelling units (ADUs) permitted or from building properly permitted ADUs. For example, the City of Los Angeles requires ADUs to comply with the state energy-efficiency standards and the City's Green Building codes, even though the state allows previously unpermitted ADUs to become permitted according to the building code in place when they were built.[107] The City of Los Angeles's Green Building codes require all electric infrastructure for appliances in non-attached ADUs and a cool roof that reflects sunlight and absorbs less heat or solar panels.[108]

Additionally, even ordinary building codes do not always protect the safety of the resident. For example, a perfectly safe and livable ADU would not be permitted in Los Angeles if a habitable room did not have a window of eight percent of the room's floor area or installed artificial lighting illuminating on average at least six foot-candles located thirty inches above the floor.[109] Also, a perfectly safe and livable ADU would not be permitted if a habitable room was less than seventy square feet.[110] Although environmental codes may be necessary to combat climate change in California, such regulations are likely to exacerbate the affordable housing crisis.

III. Private Solutions to the Affordable Housing Crisis: Illegal Housing

Because of the affordable housing crisis, including the high demand for housing within major metropolitan areas and high rental prices, private parties introduce independent solutions to the problem by providing garage apartments, basement apartments, accessory dwelling units (ADUs)

104. *Id.* at 323.

105. Ivan Penn, *California's Plan to Make New Buildings Greener Will Also Raise Costs*, N.Y. Times (updated Sept. 9, 2021), https://www.nytimes.com/2021/08/30/business/energy-environment/californias-solar-housing-costs.html.

106. *Id.*

107. Jon Healey, *So You Have an Unpermitted ADU? Here's How to Bring It Up to Code*, L.A. Times (May 24, 2023, 1:17 PM), https://www.latimes.com/homeless-housing/story/2023-05-24/how-to-get-permits-for-an-adu-built-without-them.

108. L.A. Municipal Code §§ 99.04.106.5, 99.04.106.8.

109. City of Los Angeles Department of Building and Safety Information Bulletin / Public Building Code: Accessory Dwelling Unit Conversion at 5, (rev. Apr. 26, 2023), https://www.ladbs.org/docs/default-source/publications/information-bulletins/building-code/accessory-dwelling-unit-conversion-of-existing-detached-structure.pdf?sfvrsn=1c07f453_17.

110. *Id.*

(separate residential units located on property zoned for single-family homes), tiny houses, or warehouse space, in violation of building codes. Additional factors contributing to the creation of these types of illegal housing include "the unpermitted conversion of permanent dwellings into short-term rentals" and "grossly inadequate rental housing subsidies."[111] These types of private solutions to the affordable housing crisis in violation of building codes are considered "illegal housing" because they do not conform to the health and safety standards that have been ostensibly created to protect the occupants of these dwellings.

Illegal housing is problematic for city governments because their code enforcement authorities often might not be aware of illegal housing given that these types of dwellings are often "physically hidden within an existing structure or situated out of view at the rear of a lot behind a main building."[112] Another problem for state and local governments attempting to regulate illegal housing is that, even when an enforcement mechanism exists to prevent these types of housing, the volume of noncompliance and the enforcement officers necessary to prevent such housing makes it impossible to enforce.[113] Illegal housing is often not enforced because it provides a useful service: low-income housing.[114] This lack of enforcement, even when regulations exist to prevent illegal housing, sometimes results in the tragic deaths of occupants living in unsafe conditions.

Illegal housing is not disappearing; it is increasing.[115] Researchers estimate that the average California city adds 1.3% of its housing stock each year with permitted housing and 0.4% with illegal housing, with most illegal housing being created in major metropolitan cities.[116] Rather than encouraging illegal housing to remain hidden with restrictive zoning, building, and safety codes, state and local governments should encourage informal housing by relaxing building and safety codes that are unnecessary for safety.

For example, local governments could require informal housing to meet minimum safety standards—standards that are absolutely necessary to protect life or health—that are lower than the standards for other types of housing. Relaxed codes could allow for smaller rooms, smaller staircases, and smaller windows that a person could still easily pass through, provided these reductions did not endanger occupants or residents. This is better than allowing "illegal" housing that is currently unseen and unregulated by the government. If unseen illegal housing were discovered and held to the same building, safety, and zoning standards as other housing, it

111. Wegmann & Mawhorter, *supra* at note 19, at 120.
112. *Id.* at 122.
113. Durst & Wegmann, *supra* at note 17, at 290.
114. *Id.*
115. *See* Wegmann & Mawhorter, *supra* at note 19, at 121.
116. *Id.*

would inevitably be closed, forcing occupants into homelessness[117] or out of major cities. If not discovered and closed, illegal housing would remain hidden from regulation and tragic accidents could result due to a lack of minimum safety standards. A proper balance is necessary for informal housing to provide a minimum standard of safety while simultaneously providing low-income housing.

A. Costs Versus Benefits: Informal Housing

The concerns that opponents have to legalizing informal housing are outweighed by the necessity for low-income housing that informal housing offers, provided that it is held to a minimum standard of safety. Concerns that cities have with illegal housing include deadly living conditions, the strain on water and sewer networks because illegal housing does not contribute to connection fees, and the avoidance of property taxes because additions to housing made without permits are not included in property evaluations.[118] Other arguments against legalizing garage apartments include the increase in traffic, diminution in property values, and changing the character of neighborhoods by allowing more than single-family housing.[119] Some of these arguments are largely unfounded because illegal housing already exists covertly; it is unlikely that legalizing certain levels of informal housing will increase traffic or change the neighborhood more than current illegal housing already does. Deadly living conditions may be abated in existing illegal housing when state and local governments encourage regulation through relaxing unnecessary zoning, building, and safety codes.

The arguments that illegal housing puts a strain on water and sewer networks and avoids property taxes are largely financial concerns. However, litigation resulting from illegal housing disasters also is costly for cities. For example, the City of Oakland settled the Ghost Ship warehouse fire lawsuit with the injured victims for $32.7 million to avoid legal costs, even though the city did not admit liability[120] and had already spent $13.4 million to defend the case.[121] Considering that cities and counties are likely to

117. *See* Thomas Byrne et al., *New Perspectives on Community-Level Determinants of Homelessness*, 35 J. Urb. Affs. 607, 607, 621 (2013) (showing that "homelessness has its roots in housing market dynamics, and particularly in the difficulty in obtaining affordable housing" and "underscores the need for policies that either increase the supply of affordable housing or provide additional safety net supports to households to help them afford housing and decrease competition for a finite number of low-rent units").

118. *See* Wegmann & Mawhorter, *supra* at note 19, at 122.

119. Hugo Martin, *Crackdown Urged on Illegal Garage Homes*, L.A. Times (May 28, 1997, 12:00 AM), https://www.latimes.com/archives/la-xpm-1997-05-28-me-63256-story.html.

120. *Oakland to Pay $32.7 Million to Settle Suits over Deadly Ghost Ship Warehouse Fire*, L.A. Times (July 16, 2020, 8:32 PM), https://www.latimes.com/california/story/2020-07-16/oakland-to-pay-32-7-million-to-settle-suits-over-deadly-ghost-ship-warehouse-fire.

121. David Debolt, *Oakland Spent $13.4 Million on Ghost Ship Legal Defense, Records Show*, Mercury News (updated Mar. 16 2021, 3:17 PM), https://www.mercurynews

be sued resulting in significant legal fees and settlements when a disaster involving illegal housing occurs, it is in the best interest of local governments to discover illegal housing and encourage visible informal housing that conforms to minimum safety standards. This could avoid both deaths and costly litigation. Additionally, local governments may save money with informal housing because it might decrease homelessness.[122] For example, Oakland's homeless population doubled between 2015 and 2019, driven by the affordable housing crisis and economic inequality.[123] Oakland allotted $34 million to the homeless in its 2019–2020 budget.[124] Keeping people off the streets would save cities and counties money.

A question often pondered by local government officials when presented with the deaths of occupants due to unsafe living conditions is whether it is better to live in potentially dangerous housing or be homeless.[125] Closing illegal housing would probably result in homelessness for many individuals. For example, one occupant of the Ghost Ship warehouse, Carmen Brito, a substitute teacher and potter, lived in her car and an attic before finding the Ghost Ship.[126] Low-income occupants often have to choose between either affordable, safe housing or leaving their city of choice due to rising rents and gentrification.[127] Tenants living in illegal housing cannot ask their landlord or city officials for help with unsafe housing conditions because they fear eviction and homelessness.[128] However, when a city does identify dangerous conditions unsafe for habitation, this results in occupants losing their low-income housing, which is often replaced with market-rate housing that low-income individuals cannot afford.[129]

Allowing for informal housing with minimum safety standards would solve this conundrum, and the benefits are significant. Illegal housing, due to the cheap nature of its construction—such as inexpensive materials, unlicensed contractors, built over a long period of time, avoiding utility

.com/2021/03/16/oakland-spent-13-4-million-on-ghost-ship-legal-defense-records-show.

122. *See* Byrne et al., *supra* at note 117, at 607, 621.

123. City of Oakland, Addressing Homelessness in Oakland at 4 (2021), https://cao-94612.s3.amazonaws.com/documents/City-Oak_Homeless-Strategies_Deck_final.pdf.

124. *Id.* at 21.

125. Sharon Bernstein, *City Officials Grapple with Illegal Garage Apartments*, L.A. Times (Apr. 21, 1997, 12:00 AM), https://www.latimes.com/archives/la-xpm-1997-04-21-mn-51013-story.html.

126. Liam Dillon, *One Year After the Ghost Ship Fire, Artists Struggle to find Housing in Oakland*, L.A. Times (Dec. 2, 2017, 6 AM), https://www.latimes.com/politics/la-pol-ca-ghost-ship-fire-anniversary-housing-201711202-story.html.

127. Sam Levin, *Oakland Warehouse Fire Is Product of Housing Crisis, Say Artists and Advocates*, Guardian (Dec. 5, 2016, 6:00 AM), https://www.theguardian.com/us-news/2016/dec/05/oakland-warehouse-fire-ghost-ship-housing-crisis.

128. *Id.*

129. *Id.*

connection fees—provides affordable housing where it would be impossible if the units were legally constructed.[130] Low-income individuals and people of color (because of the correlation between race and income inequality) would benefit from legalized informal housing. For example, illegal housing in Los Angeles provides necessary housing for Latinos, especially low-income immigrants and working-class Latinos working in the area.[131] Without illegal housing, low-income individuals would have to move away from major metropolitan areas to find affordable housing, commute long distances to the city for work, or suffer from overcrowding.[132] Even underground businesses and dance clubs (i.e., without the proper permits or licensing) existing in illegal warehouses fill a necessary gap by providing a safe space for historically marginalized people, including LGBTQ artists and people of color.[133]

Homelessness disproportionately impacts people of color.[134] For example, in 2021, in Oakland, 69% of the homeless population was Black, compared to 28% of Oakland's total population.[135] Of the homeless population in Oakland, 58% were homeless due to money concerns.[136] In 2020, across the entire Bay Area, 80% of homeless youth were people of color, yet only 49% of Bay Area's population includes people of color.[137] Even though only 12% of the Bay Area's population identified as LGBTQ, 46% of homeless youth in the Bay Area were LGBTQ.[138] Without the necessary low-income housing available, more minorities will end up homeless. Even modest housing that conforms to a minimum safety standard is better than living on the street.

B. Los Angeles: Garage Conversions

Illegal housing is not a new phenomenon but has historically provided low-income people with necessary housing. However, currently, illegal housing is generally considered by the media only after a tragic accident occurs. Government oversight of illegal housing has fluctuated from encouraging

130. Wegmann & Mawhorter, *supra* at note 19, at 122.

131. Jake Wegmann, *Research Notes: The Hidden Cityscapes of Informal Housing in Suburban Los Angeles and the Paradox of Horizontal Density*, 22 Bldg. & Landscapes: J. Vernacular Arch. F. 89, 91 (2015).

132. *Id.*

133. Levin, *supra* at note 127.

134. Matthew Z. Fowle, *Racialized Homelessness: A Review of Historical and Contemporary Causes of Racial Disparities in Homelessness*, 32 Hous. Pol'y Debate 940, 940 (2022) (In the United States, 52.5% of the homeless population are people of color or mixed race despite only 23.5% of the total population being people of color or mixed race.).

135. City of Oakland, *supra* at note 123, at 3.

136. *Id*. at 6.

137. *Expert: Homelessness Disproportionately Impacts Black and LGBTQ Youth*, CBS Bay Area (Jan. 6, 2020, 11:22 PM), https://www.cbsnews.com/sanfrancisco/news/street-kids-homelessness-disproportionately-impacts-black-and-lgbtq-youth-expert-says.

138. *Id.*

it, to discouraging it with fines and criminal charges. For example, in the early to mid-1900s, informal housing was encouraged by local government in Los Angeles. In the 1920s and 1930s, it was common for new residents to build their own homes, living in tents while building a garage, and then living in a garage until construction on their home was complete.[139] These practices were allowed due to lack of regulation, and often these houses did not follow any of the minimal existing regulations.[140] Additionally, in the 1940s, Los Angeles suffered from a housing crisis due to World War II, the influx of defense workers, and the Great Depression halting construction.[141] Los Angeles County officials started an initiative to encourage homeowners to rent garages or let out rooms to help alleviate the crisis, specifically providing housing for war workers, which was promoted as a patriotic duty.[142] One veteran and his family lived in a garage with no plumbing, no heating, and only a dirt floor.[143]

On the flip side, local governments discourage illegal housing by imposing fines and other remedies that penalize landlords. In the 1980s, in the greater Los Angeles area, illegal housing was widespread.[144] A study in 1987 revealed that around 42,000 illegal garage apartments existed in the city, housing about 200,000 people.[145] In 1989, the Los Angeles City Council approved an ordinance to require landlords of illegal dwellings, mostly garages, to pay tenants $2,000 or $5,000 (disabled individuals, families, and older tenants receiving $5,000) to move when evicted due to building code violations.[146] Similarly, in 1992, the City of Whittier in Southern California passed an ordinance requiring landlords of illegal housing to pay for their tenants' moving costs and any increases in rent.[147]

In 1997, the Los Angeles City Council considered proposals for an ordinance regarding illegal garage apartments and rejected a proposal to legalize an estimated 50,000 to 100,000 garage apartments in the city after eight deaths over a period of three months due to fires in illegally converted garage apartments.[148] Instead, the joint council committee proposed a misdemeanor for renting illegal garage apartments, with a fine of $1,000

139. Becky Nicolaides, *From Resourceful to Illegal*, Boom Cal. (Jan. 31, 2019), https://boomcalifornia.org/2019/01/31/from-resourceful-to-illegal/#_edn11.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. Stephanie Chavez, *Tenants of Illegal Units May Receive Eviction Fee*, L.A. Times (Mar. 23, 1989, 12:00 AM), https://www.latimes.com/archives/la-xpm-1989-03-23-me-108-story.html.

146. *Id.*

147. Kirsten Lee Swartz, *Issue: Illegal Garage Apartments*, L.A. Times (Mar. 12, 1992, 12:00 AM), https://www.latimes.com/archives/la-xpm-1992-03-12-hl-5389-story.html.

148. Martin, *supra* at note 119.

imposed on landlords.[149] The misdemeanor proposal also supported and recommended state legislation making it a felony for the death of a tenant resulting from an illegal garage fire.[150] Other proposals included educating the public about the dangers of living in garages or legalizing garages that met certain minimum safety standards.[151]

Eventually, in 2019, the Los Angeles City Council passed an ordinance amending the city's Municipal Code, following state legislation providing for ADUs,[152] allowing for detached and attached ADUs (including ADUs contained entirely within the dwelling), junior ADUs, and moveable tiny houses, in certain situations.[153]

C. Oakland: Warehouse Conversions

In the Bay Area, illegal warehouse conversions are another example of private citizens attempting to solve the affordable housing crisis. Although these illegal warehouse conversions provide necessary housing for low-income individuals due to their affordability, they can be a death trap to occupants because they fall below building and safety code standards. However, local governments cannot regulate these illegal warehouses because they do not know where they are located, or they do not want to force occupants into homelessness.

For example, in Oakland, the 2016 Ghost Ship warehouse fire was a wakeup call for California concerning illegal housing. To date, this fire remains the deadliest that Oakland has experienced, resulting in the deaths of thirty-six individuals.[154] The Ghost Ship warehouse underwent significant illegal modifications, making the commercial warehouse more suitable for residential and event space.[155] These illegal modifications included construction of residential units with toilets, kitchens, showers, hallways, and event spaces.[156] Violations of safety codes included a lack of smoke alarms, exit signs, emergency lighting, fire sprinklers, fire extinguishers, and sufficient means of exiting the building.[157] Additionally, a makeshift staircase connecting the first floor to the second floor of the warehouse was constructed out of wooden pallets, with varied and irregular steps,

149. *Id.*

150. *Id.*

151. *Id.*

152. *See* A.B. 68, 2019 Cal. Legis. Serv. Ch. 655 (Cal. 2019); S.B. 13, 2019 Cal. Legis. Serv. Ch. 653 (Cal. 2019); A.B. 670, 2019 Cal. Legis. Serv. Ch. 178 (Cal. 2019); A.B. 881, Cal. Legis. Serv. Ch. 659 (Cal. 2019).

153. *See* L.A. Municipal Code §§ 12.03, 12.22.33, and 12.33.

154. David DeBolt, *5 Years After Oakland's Deadliest Fire: Ghost Ship 'Frozen in Time,'* Oaklandside (Dec. 2, 2021), https://oaklandside.org/2021/12/02/5-years-after-oaklands-deadliest-fire-ghost-ship-frozen-in-time.

155. Master Complaint, *supra* note 14, at 9.

156. *Id.*

157. *Id.* at 11.

without the proper permitting and in violation of the building code.[158] In addition to illegal modifications, the Ghost Ship warehouse contained dangerous and flammable material, including propane tanks for recreational vehicles, kitchen camp stoves, propane to heat shower water, and a maze-like interior containing recreational vehicles, art supplies, scrap wood, instruments, decorations, and artwork.[159]

The City of Oakland was aware of the illegal warehouse, yet it did not attempt to evict the residents or try to get the building up to code. Numerous complaints were made to the City Planning and Building Department for blight prior to the fire in 2016 and complaints were made about habitability or constructing a structure without permits.[160] Records also show that Oakland police had been to the warehouse at least eight times prior to the fire.[161] The warehouse conditions violated at least nineteen local ordinances related to health and safety.[162]

After the Ghost Ship Fire, Oakland Mayor Libby Schaaf issued Executive Order 2017-1: Improving Safety of Non-Permitted Spaces While Avoiding Displacement, which instructed the city departments and city administrator to enter into abatement and compliance plans with existing warehouses used for residential occupancy that violate building, housing, or fire codes, or zoning.[163] Existing illegal warehouses would have sixty days to become compliant with codes and to secure zoning approval.[164] Oakland's mayor and city leaders made numerous promises after the fire, including hiring a new fire chief, doubling Oakland's inspection staff, which at the time of the fire consisted of eight fire code inspectors and eight building code inspectors, identifying hazardous properties, and implementing an interdepartmental database to address lack of communication between departments.[165] After the fire, officials identified 135 hazardous properties with multiple hazards and 21 cases with people living inside.[166] However, Oakland officials were not confident that they identified all of the illegal warehouses in the city.[167]

158. *Id.*

159. *Id.* at 10.

160. *Id.* at 22–23.

161. *Ghost Ship Fire: A 2 Investigates Special Report*, *KTVU Ghost Ship Special: 1 Year After the Deadly Ghost Ship Warehouse Fire in Oakland*, KTVU Fox 2 San Francisco (Nov. 22, 2017), https://www.youtube.com/watch?v=bbU7eCfKLLw.

162. Master Complaint, *supra* note 14, at 23.

163. City of Oakland Executive Order 2017-1: Improving Safety of Non-Permitted Spaces While Avoiding Displacement at 2 (Jan. 11, 2017).

164. *Id.*

165. *Ghost Ship Fire: A 2 Investigates Special Report*, *supra* at note 161.

166. *Id.*

167. *Id.*

IV. State and Local ADU Laws and Proposed Modifications

State and local governments should relax building and zoning codes to allow for informal housing by amending their codes. In 2019, California changed its ADU laws by amending Government Code Sections 65852.2 and 65852.22, and Civil Code Section 4751.[168] Under the current law, local governments in California may enact ordinances allowing for construction of ADUs and junior ADUs in areas zoned for single-family or multifamily dwelling residential uses.[169] However, the state's ADU requirements supersede local ordinances if they conflict with a local ordinance.[170] Despite this, a local ordinance may be less restrictive for creating ADUs than the state's ADU requirements provided that they do not conflict with state laws.[171] For example, a less restrictive ordinance can allow for a maximum square footage requirement for an attached or detached ADU greater than 850 square feet for a studio or one-bedroom ADU and greater than 1,000 square feet for an ADU larger than one bedroom.[172] However, an ordinance cannot provide a maximum square footage requirement that goes below 850 and 1,000 square feet, respectively.[173] If local governments do not enact their own ordinances, then California's ADU laws apply.[174] However, under state law, any alteration, construction, enlargement, or conversion of a house or dwelling is subject to the building code and health and safety code and enforced by every city or county.[175] Despite this, even if a local agency does not enact an ADU ordinance,

> [t]he local agency shall not deny an application for a permit to create an accessory dwelling unit due to the correction of nonconforming zoning conditions, building code violations, or unpermitted structures that do not present a threat to public health and safety and are not affected by the construction of the accessory dwelling unit.[176]

Enforcement of code violations may be delayed for five years upon the request of the owner of the ADU provided that the violations are not a threat to health and safety and the ADU was built before January 1, 2020.[177]

California's ADU laws are expansive, but they do not encourage all forms of illegal housing to become legal. They only allow certain types of ADUs in certain limited situations. Illegal housing encompasses more than

168. A.B. 68, 2019 Cal. Legis. Serv. Ch. 655 (Cal. 2019); S.B. 13, 2019 Cal. Legis. Serv. Ch. 653 (Cal. 2019); A.B. 670, 2019 Cal. Legis. Serv. Ch. 178 (Cal. 2019); A.B. 881, Cal. Legis. Serv. Ch. 659 (Cal. 2019).

169. Cal. Gov't Code §§ 65852.2, 65852.22.

170. *Id.* § 65852.2(g).

171. *Id.*

172. *See id.* §§ 65852.2(c)(2)(B)(i), 65852.2(c)(2)(B)(ii).

173. *Id.*

174. *Id.* § 65852.2(b)(1).

175. Cal. Health & Safety Code § 17960.

176. Cal. Gov't Code § 65852.2(d)(2).

177. Cal. Health & Safety Code § 17980.12.

just ADUs, such as, for example, housing-to-dormitory conversions, travel-trailers parked in a yard or driveway, and nonresidential-to-residential space conversions, including warehouse conversions.[178] Additionally, California's ADU statutes only legalize informal housing that qualifies as ADUs where residential housing already exists.[179] Thus, illegal housing unconnected with residences will remain illegal with no chance of becoming legitimate housing. Relaxing specific building and safety codes for certain types of illegal housing would be problematic because of the California Building Standards Code and Health and Safety Code[180] and local governments' own standards. For example, the Ghost Ship warehouse's violations of Oakland's Municipal Code related to health and safety included the following sections:

> 8.24.020D (property inadequately maintained); 8.24.020C (building or structure in a state of disrepair); 8.40.170 (hallway and exit obstructions prohibited); 9.16.060 (lighting approval of city before energy is supplied); 9.52.030 (permit required for special events); 15.08.050 (maintenance code-general standards); 15.08.190 (habitable space); 15.08.210 (room dimensions); 15.08.220 (light and ventilation); 15.08.240 (security); 15.08.260 (mechanical and electrical systems); 15.08.270 (exiting); 15.08.300 (wooden stairs); 15.08.310 (fire protection); 15.08.320 (smoke detectors); 15.08.340 (substandard and public nuisance buildings); 15.12.100 (CA Fire Code); 15.24.020 (substandard buildings); and 15.64.060 (abatement of security bars on windows).[181]

Most, if not all, of these violations are related to health and safety, so it is unlikely that relaxing the codes would have had an impact on the Ghost Ship warehouse. However, other converted warehouses that pose no threats to health and safety, or have minimal changes required to make the housing safe, would likely be eligible for a permit if zoning and strict building codes unrelated to health and safety were not an issue. California's ADU statutes do not encourage legalizing informal housing that falls below building and safety standards to become legitimate housing, and they do not encourage other forms of illegal housing that occur in spaces designated for non-residential use. Thus, illegal housing that falls below building and residential standards is likely to remain unregulated and dangerous.

The City of Los Angeles's municipal code sections related to ADUs stem from California's ADU statutes.[182] ADUs and tiny houses are only permitted in residential or mixed-use zones on a lot with a proposed or

178. Wegmann, *supra* at note 131, at 94-101.

179. *See* Cal. Gov't Code § 65852.2(a)(1)(D)(ii).

180. *See* Cal. Code Regs. tit. 24; Cal. Health & Safety Code § 17910 et seq.

181. Master Complaint, *supra* note 14, at 23.

182. *See* L.A. Municipal Code § 12.22.33(a) (creation of ADUs in Los Angeles must be "consistent with California Government Code Sections 65852.2 and 65852.22, as amended from time to time"); Cal. Gov't Code §§ 65852.2, 65852.22.

existing dwelling.[183] Additionally, these ADUs still must comply with all building and residential codes.[184] Owners of any ADUs built before January 1, 2020, have the opportunity, however, to request a five-year delay of enforcement of any building code violations provided the correction is "not necessary to protect health and safety."[185] Also, this code requires that an ADU have at least one parking space unless within a half mile of public transportation, one block from a ride-share pick-up and drop-off spot, or a part of the existing primary residence or accessory structure.[186] Despite this provision, a parking spot is not necessary when an ADU replaces a converted or demolished garage carport or covered parking structure.[187]

Los Angeles's municipal code could be improved by allowing more garage apartments to be legalized as ADUs, which would help alleviate the affordable housing crisis. Even though garage apartments can be permitted in Los Angeles, they often are not permitted due to the parking space requirement, allowing these garage apartments to remain hidden from code enforcement and building and safety codes.[188] California's ADU laws do allow local governments to eliminate parking requirements for ADUs.[189] It would be an easy remedy for Los Angeles to remove its parking requirements to help bring non-compliant garage apartments and other forms of illegal housing under the purview of code enforcement.

California should amend its Government Code to relax building standards for ADUs and expand its ADU statutes to encompass other forms of informal housing, including housing that is not located within a residential dwelling or proposed residential dwelling. Because there are so many codes, both state and local, for building conversions, alterations, and enlargements, state legislation similar to California's ADU laws would be necessary to legalize informal housing in certain situations. For example, the state could amend its Health and Safety Code by providing something like the following exception, in italics:

> **Health & Safety Code § 17960. City or county building departments.**
>
> The building department of every city or county shall enforce within its jurisdiction all the provisions published in the State Building Standards Code, the provisions of this part, and the other rules and regulations promulgated pursuant to the provisions of this part pertaining to the erection, construction, reconstruction, movement, enlargement, conversion, alteration, repair, removal, demolition, or arrangement of apartment houses, hotels, or dwellings.

183. L.A. Municipal Code §§ 12.22.33(c)(3), 12.22.33(c)(6).
184. *Id.* § 12.22.33(c)(9).
185. *Id.* § 12.22.33(l); Cal. Health & Safety Code § 17980.12.
186. L.A. Municipal Code § 12.22.33(c)(12).
187. *Id.* § 12.22.33(c)(12)(iii).
188. Brown et al., *supra* at note 20, at 58.
189. *See* Cal. Gov't Code § 65852.2(B)(ii).

EXCEPTION: The building department of the city or county may delay enforcement of the State Building Standards Code, and any provisions of this part, for up to five years for abatement of any code violations for any enlargement, conversion, or alteration of residential or nonresidential space into an apartment or dwelling that provides low-income housing on the basis that correcting the violation is not necessary to protect health and safety and the city or county is currently experiencing an affordable housing crisis.

Of course, local governments would also have to enact similar ordinances providing for delay in enforcement.

Additionally, the state could enact a zoning preemption law to require cities and counties to provide permitting for informal housing when it is constructed in nonresidential zoning areas, which could look like the following:

PROPOSED SECTION: A city or county experiencing an affordable housing crisis shall not deny a permit application for an existing or proposed enlargement, conversion, or alteration of nonresidential space into apartments or dwellings that provides low-income housing based on its location in a nonresidential zoning area, including Commercial Office, Neighborhood Commercial, Retail Commercial, General Commercial, Industrial Park, Light Industrial, and Heavy Industrial.

The proposed amendment and exceptions would likely encourage informal housing in areas zoned nonresidential. However, illegal housing would still exist even without these proposed changes. Considering the state of the affordable housing crisis and the homelessness crisis in major cities, encouraging informal housing in nonresidential zones is the lesser of two evils.

Conclusion

Private individuals have responded to the affordable housing crisis and decrease in the availability of low-income housing with their own solutions, including illegal housing like garage apartments, warehouse conversions, ADUs, tiny homes, and basement apartments, built without permitting and outside the purview of code enforcement. These private solutions to the housing crisis fill a necessary gap in housing for low-income individuals but can be dangerous housing situations resulting in death. This concern is exemplified in the garage fires in Los Angeles and Oakland's Ghost Ship warehouse fire. They demonstrate the need for local governments to encourage creative housing solutions or informal housing solutions within the oversight of the law.

Local governments can only regulate the safety of informal housing if they know where it is located and if they have the money and staff to enforce the building codes. Due to the hidden nature of informal housing in the United States, it is in the best interest of the government to eliminate unnecessary code restrictions that encourage covert, illegal housing. This goal can only be accomplished if informal housing that conforms to minimum safety standards is legalized at the state and local levels and landlords are encouraged to bring existing illegal housing up to minimum safety standards.

Two Sides to the Same Coin: How Tenants and Attorneys Can Combine to Win Housing Justice for All

Allison Dentinger[†]

Abstract

One of the most destabilizing events in a person's life is coming home to find a Warrant of Eviction posted on the door. That notice indicates that the tenant's family has only days to be out of their home if they want to avoid being forced out by the eviction marshal. This is an increasing reality for low-income tenants, particularly tenants of color. The eviction crisis in the United States is a symptom of a larger housing crisis that feeds cyclical poverty. A tenant facing eviction is in a highly vulnerable position and, without intervention, is at high risk of becoming homeless. With just a single missed rent payment, a landlord can move forward with forcibly removing a tenant from their home. Even if a tenant pays rent on time and complies with the terms of the lease, they may still find themselves on the receiving end of a lease non-renewal in favor of a higher-earning tenant.

The imbalance of power between a tenant and a landlord becomes abundantly clear when the two parties are standing before a judge in Eviction Court; likely, the landlord will be represented by an attorney and the tenant will not. Unrepresented tenants are denied procedural Due Process because the legal system was built by lawyers to be navigated by lawyers. As a response to the eviction crisis, tenants from across the nation are organizing a mass movement for housing justice, not only to build tenant power, but to build tenants' rights.

Attorneys must join and be deeply integrated into the movement for housing justice. Having a legal education provides practitioners with a unique set of skills that movements fighting for housing justice are often lacking. Simply standing next to a tenant in Eviction Court and providing legal representation is not enough. To build a true system of housing justice, the housing movement and the legal community must become two sides to the same coin. One example of this objective is attorneys being deeply integrated into the movements to establish a Right to Counsel for all tenants facing eviction and the implementation of that right.

This essay examines the direct link between the housing crisis and the eviction crisis. Then it examines why attorneys should join the movement for housing justice and the direct impact the legal community can have within the housing

[†] JD candidate, 2024 at Albany Law School. Thank you to the New York State tenant movement for inspiring my love of housing justice and supporting my transition to "the other side of the coin." Much thanks and appreciation to Professor Edward W. De Barbieri for feedback and guidance throughout the writing process. Thanks also to the *Journal of Affordable Housing* for the opportunity to publish this article.

movement. Further, this article examines and compares locations where tenants and attorneys work together through Right to Counsel programs. Finally, this essay compares different models and mechanisms used to enact the Right to Counsel throughout the United States and shows how other ideas blend with this right to work toward a society where housing justice exists for all.

Table of Contents

I. Introduction

Eviction Court[1] is the emergency room of poverty. A family or individual in the middle of the eviction process faces enormous amounts of uncertainty and instability. When a person loses their housing, the impact goes beyond the loss of shelter. The impact of eviction ripples into every aspect of a person's life and often results in education interruptions, physical and mental health issues, food insecurity, job instability, and more.[2] The housing crisis is broad and far-reaching, but Eviction Court is the place where the housing crisis is most acutely felt. In addition, "eviction is the leading cause of homelessness," [3] making eviction a catalyst for homelessness. Research in New York, New York, concluded that the effect of eviction is often long-term; thus, avoiding eviction altogether not only prevents homelessness but prevents other side effects that follow eviction.[4] The dark

1. In this essay, "Eviction Court" is used to encompass all legal proceedings in which the occupant of the home may be evicted. This includes, but is not limited to Housing Court, Civil Court, Town Court, Village Court, etc.

2. Gracie Himmelstein & Mathew Desmond, Eviction And Health: A Vicious Cycle Exacerbated By A Pandemic, Health Affairs (Apr. 1, 2021), https://www.healthaffairs.org/do/10.1377/hpb20210315.747908/full.

3. Neil Steinkamp, The Estimated Cost of an Eviction Right to Counsel Outside of New York City, Stout (Mar. 2022), https://assets.nationbuilder.com/righttocounselnyc/pages/1294/attachments/original/1646928176/Stout_Report_-_Cost_of_RTC_ONYC_March_2022.pdf?1646928176.

4. *Id.*

reality for a person facing eviction is that they are often on the losing end of the systemic housing crisis. Mathew Desmond, in his award-winning book *Evicted: Poverty and Profit in the American City*, described the fundamental stability a person's housing provides in the following manner: "[I]t is hard to argue that housing is not a fundamental human need. Decent, affordable housing should be a basic right for everybody in this country. The reason is simple: without stable shelter, everything else falls apart."[5]

The COVID-19 Pandemic (Pandemic) highlighted the immense need for not only tenant protections, but a comprehensive and collaborative system to prevent the housing crisis from intensifying.[6] The reality is that mass evictions are not a new phenomenon, but rather one that was illuminated in the wake of the economic crisis that accompanied the Pandemic.[7] The need for people to stay home and social distance highlighted the importance of housing being healthcare.[8] Thus, it is even more important for the tenant movement[9] to be a strong and progressive movement that connects tenants into community-based services and provides tenants access to meaningful solutions to remain in their homes, and for tenants to have the support needed to build systemic housing change and tenant power.[10] For this movement to be successful, attorneys must be aligned with and working towards these goals.

Due to the systemic nature of the housing crisis, a multi-tiered approach must be taken to ensure the most vulnerable members of communities live in safe and stable homes.[11] This approach must both react to the current conditions and look to systemic changes to undo the current housing crisis and build a new system of housing. Arming tenants with as many tools as possible to fight their evictions is a reactive response to the current housing crisis, but it significantly disrupts the status quo that led to the housing crisis communities now face.

To create a more stable and just housing system, the tenant movement must be merged with tenant-aligned attorneys. The current reality in many

5. Matthew Desmond, Evicted: Poverty and Profit in the American City 300 (2016).

6. Jacquelyn Simone, State of the Homeless 2022, Coalition For the Homeless (2022), https://www.coalitionforthehomeless.org/state-of-the-homeless-2022.

7. *Id*.

8. John Lozier, Housing Is Health Care, National Healthcare for the Homeless Council, https://nhchc.org/wp-content/uploads/2019/08/Housing-is-Health-Care.pdf (last visited July 28, 2023).

9. "Tenant movement" is meant to describe any movement of organized people working build power among and improve the living conditions of those who do not have full control of their homes.

10. Lozier, *supra* note 8.

11. Alexis Butler & Natasha Leonard, *Long-Term Approaches to Preventing Evictions Now and Beyond COVID-19*, Nat'l League of Cities (2023), https://www.nlc.org/article/2020/08/07/long-term-approaches-to-preventing-evictions-now-and-beyond-covid-19.

cities is that the two exist as siloed entities. For many in the tenant movement, an attorney is just a tool used to fight eviction, not a partner working in collaboration towards housing justice. To achieve housing justice, the tenant movement and legal services must become two sides to the same coin. A unification of the tenant movement and tenant-aligned legal services is the only way to achieve true housing justice in the United States. A common component of the wins tthat he tenant movement has achieved throughout the country is that tenant-aligned attorneys have been deeply involved.

II. The Modern-Day Housing and Eviction Crisis

A person's home is meant to be their safe haven. A home should be a beacon of stability and a place of refuge. According to Desmond, [T]the home is the center of life. It is a refuge from the grind of work, the pressure of school, and the menace of the streets. We say that at home, we can 'be ourselves.' Everywhere else, we are someone else. At home, we remove our masks."[12] For many families across the nation, that description is just not a reality.

Homeowner, Elizabeth McGriff, of Rochester, New York, purchased her home in 2001 for a modest price of $53,000.[13] McGriff made the monthly mortgage payments until 2008 when she was laid off by the United States Postal Office.[14] Like many low-income homeowners, McGriff felt the brunt of the Great Recession through the foreclosure[15] process.[16] MidFirst Bank offered McGriff the option to "make up the debt by extending the term of her mortgage."[17] The offer from the Oklahoma-based bank was significantly higher than the previous monthly payments, and not affordable for McGriff's family.[18] Despite being back to work, she was unable to pay down the missed payments.[19] Shortly after, the bank began foreclosure proceedings against McGriff.[20] The bank offered McGriff the option to buy

12. Desmond, *supra* note 5, at 293.

13. Erica Bryant, *It's Official: Woman Who Refused To Accept Foreclosure Is Keeping Her House*, Democrat and Chronical (Feb. 23, 2018), https://www.democratandchronicle.com/story/news/2018/02/23/its-official-woman-who-refused-accept-foreclosure-keeping-her-house/325085002.

14. *Id*.

15. When examining the rebirth of tenant organizing in the United States, one must start with the foreclosure and financial crisis from 2007–2009. Although the foreclosure process for homeowners is typically much longer than the eviction process for tenants, there are striking similarities in outcomes. If Eviction Court is the emergency room of poverty, then going through the foreclosure process is like going through cancer.

16. Bryant, *supra* note 13.

17. *Id*.

18. *Id*.

19. *Id*.

20. *Id*.

back the property for $129,720.45, despite the mortgage being consistently paid for several years and the home being assessed at $73,000 in 2015.[21]

Meanwhile, McGriff's story took place amidst the backdrop of a resurgence of housing activism that grew in the United States in response to the "foreclosure crisis that started in 2007 and the ensuing Great Recession."[22] Across the nation, activist groups and organizations who had long organized communities sprang into action to become home defenders for bank tenants in foreclosure.[23] In some cities, nearly half of residents facing eviction were homeowners.[24] During this period, many long-time tenants lost their homes when the owner of the property foreclosed.[25] Other low-income homeowners found themselves in financial ruin because they owed more to the bank than the house was worth.[26] As a result, nearly six million[27] "former homeowners were forced to become renters—increasing pressure on an already tight rental market."[28]

Despite her house being in foreclosure, McGriff was determined to not lose her home.[29] The locally based activist group, Take Back the Land (TBL) reached out to McGriff and encouraged her to fight the foreclosure.[30] Several years later, McGriff recalled the impact of going through foreclosure:

> I was going through foreclosure when someone came knocking on my door to tell me about TBL. At first I was skeptical. I was afraid the sheriff was going to come and I was going to lose everything, including my children's future. When you go through this, you feel ashamed, like it's your fault. You put up defenses. Still I went to a meeting where I met others who were going through the same experience. They made me realize it wasn't my fault and I wasn't alone. And when I heard about some of the victories TBL had achieved, I felt more at ease.[31]

From the activists' perspective, the fight to save McGriff's home was a part of a larger social movement that illuminated a "moral issue."[32] McGriff, a single-mother of color, quickly came to agree with that sentiment,

---

21. *Id*.

22. Shelby King, *Organized Tenants Are Baaaaack*, Shelterforce (Nov. 21, 2022), https://shelterforce.org/2022/11/21/organized-tenants-are-back/?utm_source=Under+the+Lens+email&utm_medium=email&utm_campaign=Nov23.

23. *Id*.

24. *Id*.

25. *Id*.

26. *Id*.

27. Michael Ohlrogge, Starting over: Michael Ohlrogge Tracks Post-foreclosure Outcomes During the Great Recession, N.Y.U. Law (Jan. 6, 2021), https://www.law.nyu.edu/news/ideas/michael-ohlrogge-great-recession-foreclosures.

28. King, *supra* note 22.

29. Bryant, *supra* note 13.

30. *Id*.

31. City-Wide Tenant Union of Rochester, Origins of the City-Wide Tenant Union (Mar. 9, 2022), https://roctenantunion.org/history-list.

32. *Id*.

"I purchased my home for my children to have a future . . . so they would always have housing and not be afraid to lose that housing."[33] When an eviction notice appeared on McGriff's door, TBL mobilized to physically block the eviction marshal from removing McGriff and her family from the home.[34] Protestors successfully blocked the house during four separate eviction attempts by chaining themselves to the porch and protesting the eviction marshal.[35] Although a fifth action on the part of the bank was considered a successful eviction, supporters changed the locks and moved McGriff right back into the property.[36] After over three years of public pressure and eviction blockades, McGriff was able to stop the foreclosure and renegotiate the mortgage for reasonable terms.[37] Shortly after, McGriff arranged for her home to be placed in the City Roots Community Land Trust to "ensure she remains in her home and the house remains affordable for any future owners."[38]

The housing movement that grew during the Great Recession continued to boil over as the economic recovery post-recession was uneven and rocky—particularly for low-income Americans.[39] The economic growth following the Great Recession occurred primarily in high-income industries that populated urban centers.[40] Workers seeking high-paying jobs flocked to areas already lacking adequate safe and affordable housing.[41] As a result, "lower-income, often longtime residents were priced out of homes, neighborhoods, and entire cities."[42] Residents of neighborhoods experiencing gentrification are at "the mercy of profiteering landlords who serv[e] up no-cause evictions, unregulated rent increases, and retaliation against complainers."[43] When demand for and the cost to rent an apartment increases, the for-profit housing system incentivizes landlords to push out and evict lower-income tenants in favor of tenants who possess the ability to pay higher rents.[44] Research out of Chicago, Illinois, demonstrated "city-led urban renewal projects and inflationary rent pressure driven by an influx of upper-and middle-class white residents resulted in the widespread involuntary displacement of families, small businesses,

33. *Id*.

34. Bryant, *supra* note 13.

35. *Id*.

36. *Id*.

37. *Id*.

38. Annette Jiménez, *Land Trust Help Keep Families in Their Homes*, El Mensajero (Nov. 10, 2015), https://en.elmensajerorochester.com/news/land-trust-helps-keep-families-in-their-homes.

39. King, *supra* note 22.

40. *Id*.

41. *Id*.

42. *Id*.

43. *Id*.

44. Ayobami Laniyonu, *Assessing the Impact of Gentrification on Eviction: A Spatial Modeling Approach*, 54 Harv. C.R.-Civ. Liberties L. Rev. 741, 742–43 (2019).

and community organizations."[45] Another study out of New York, New York, showed that between twenty-three and forty-three perecent of tenants who were displaced could be attributed to "landlord harassment, eviction, or another landlord action."[46]

In addition, high and unregulated rents place renters in precarious situations that consistently leave low-income tenants vulnerable to eviction and displacement.[47] The issue of housing affordability has plagued the nation for decades, but was exacerbated by the Great Recession.[48] Since then, "[r]ent has risen for all demographic groups, but the crisis is more acute for low-income families, especially families of color."[49] The recommendation from the U.S. Department of Housing and Urban Development (HUD) is for a family not to spend more than thirty percent of their income on housing each month so the family is not rent-burdened.[50] Despite this recommendation, many low-income families are forced to spend significantly more of their income to pay rent each month.[51] In times of economic or personal financial hardship, it becomes particularly difficult to ensure rent is paid in full.[52] As a result, low-income families are forced to make choices between keeping roofs over their heads or putting food in the refrigerator.[53]

Over eighty-eight percent of families who reported a yearly income of less than $20,000 reported paying more than thirty percent of their monthly income towards rent.[54] Unsurprisingly, non-payment of rent is the most common reason tenants end up in Eviction Court in the United States.[55] To keep a stable roof over their heads, many low-income tenants must spend a large percentage of their monthly income.[56] According to the Princeton University Eviction Lab:

---

45. *Id*. at 747.

46. *Id*.

47. *See generally* Judith Fox, *The High Cost of Eviction: Struggling to Contain a Growing Social Problem*, 41 Mitchell Hamline L.J. Pub. Pol'y & Prac. 167 (2020).

48. *Id*. at 171.

49. *Id*.

50. Housing and Urban Development Rental Burdens: Rethinking Affordability Measures, https://www.huduser.gov/portal/pdredge/pdr_edge_featd_article_092214.html (last visited July 28, 2023).

51. *Census Bureau Releases Data from 2019 ACS,* National Low Income Hous. Coal. (Sept. 28, 2020), https://nlihc.org/resource/census-bureau-releases-data-2019-acs.

52. *See generally* Desmond, *supra* note 5.

53. Jenni Spinner, *The Cost of Being Poor*, Streetwise (Apr. 22, 2019), https://www.streetwise.org/magazine/the-cost-of-being-poor.

54. Housing and Urban Development Rental Burdens: Rethinking Affordability Measures, *supra* note 50.

55. *See generally Why Eviction Matters: Why Do People Get Evicted*, Eviction Lab (2018), https://evictionlab.org/why-eviction-matters/#affordable-housing-crisis.

56. *Id*.

> [M]ost poor renting families spend at least half of their income on housing costs, with one in four of those families spending over 70 percent of their income just on rent and utilities. Incomes for Americans of modest means have flatlined while housing costs have soared. Only one in four families who qualifies for affordable housing programs gets any kind of help. Under those conditions, it has become harder for low-income families to keep up with rent and utility costs, and a growing number are living one misstep or emergency away from eviction.[57]

Moreover, tenants in Eviction Court, who are already in precarious economic situations, are almost certainly unable to pay for an attorney to defend their legal rights.[58] Nationally, on average only three percent of tenants are represented when facing eviction, compared to eighty-one percent of landlords.[59]

The imbalance of power between a tenant and a landlord becomes abundantly clear when the two parties are standing before a judge in Eviction Court. Eviction Court is among the most dehumanizing places a person can end up.[60] Understaffed courts with crowded dockets move through the eviction process with stunning speed that resembles an assembly line.[61] Court observations describe two-minute trials in front of crowded courtrooms, leading to eviction warrants with less than ten minutes in total spent in front of the judge.[62] Most observers would agree any "system that can evict in less than ten minutes is a broken system."[63]

Eviction is not the cause of poverty but rather a symptom of poverty.[64] The reality is that Eviction Court is simply the epicenter of poverty, where the housing crisis is most acutely apparent. Statistically, tenants in Eviction Court already live in poverty and will continue to after Eviction Court is complete.[65] Because the number one reason that a person becomes homeless is eviction, evicted tenants are more likely to spend time in a homeless shelter and struggle to find new housing.[66] In many states, an eviction judgment becomes a "lasting imprint on a tenant's record."[67] To many

57. *Id*.

58. Andrew Scherer, *Why People Who Face Losing Their Homes in Legal Proceedings Must Have a Right to Counsel*, 3 Cardozo Pub. L. Pol'y & Ethics J. 699, 701 (2006).

59. Nat'l Coal. for a Civ. Right to Counsel, Eviction Representation Statistics (July 2022), http://civilrighttocounsel.org/uploaded_files/280/Landlord_and_tenant_eviction_rep_stats__NCCRC_.pdf.

60. *See* Paula A. Franzese & Cecil J. Thomas, *Disrupting Dispossession: How the Right to Counsel in Landlord-Tenant Proceedings Is Reshaping Outcomes*, 52 Seton Hall L. Rev. 1255 (2022).

61. *Id*. at 1264.

62. *Id*.

63. *Id*.

64. *Why Eviction Matters: Why Do People Get Evicted*, *supra* note 55.

65. Fox, *supra* note 47, at 170.

66. *Id*.

67. Franzese & Thomas, *supra* note 60 at 1257.

landlords, a tenant who has been evicted is a "bad tenant" and not someone that the landlord wants in their property.[68] Thus, even after a tenant goes through Eviction Court, they may find themselves the victim of cyclical poverty.[69]

The Pandemic exposed what tenants, activists, and organizers already knew: the American housing system is in crisis.[70] A California tenant organizer observed how the Pandemic "just poured gasoline on the fire, so there are more people who are facing serial eviction and homelessness and an incredibly uneven job recovery."[71] Many states instituted temporary tenant protections and eviction moratoria, but tenants still found themselves on the receiving end of eviction warrants in 2020 because of loopholes in the laws.[72] Even ostensibly liberal states such as New York continued to hold eviction proceedings in 2020.[73]

Community members and activists, who had been radicalized in the streets in the Summer of 2020, joined tenant led-groups who had blocked evictions during the Great Recession.[74] Pro-tenant and mutual aid groups saw no other option than to physically block the evictions of their neighbors.[75] The same community members who blockaded their bodies against evictions also took to the streets to "Cancel Rent." The baseline idea was the full cancellation of rent payments, the pause of mortgage payments, and reimbursement of property owners who could show financial hardship.[76] Although the legality of the "Cancel Rent" proposal was questioned, tenant organizations who led strong "Cancel Rent" campaigns found themselves poised to help pass stronger rental assistance programs.[77] For example, tenants in New York State who received assistance from the state's emergency rental assistance program are guaranteed a new lease for one year after the payment occurs.[78]

---

68. *Id*.

69. *See generally* Desmond, *supra* note 5.

70. King, *supra* note 22.

71. *Id*.

72. Leslie Hannon, *Tenant Union Keeps up Eviction Blockade, Calls on Mayor to Use Emergency Powers to Call Moratorium*, Reclaiming the Narrative (Nov. 20, 2020), https://www.reclaimingthenarrative.org/post/tenant-union-keeps-up-eviction-blockade-calls-on-mayor-to-use-emergency-power-to-call-moratorium.

73. *Id*.

74. King, *supra* note 22.

75. Jonah Bromwich, *The Evictions Are Coming. Housing Activists Are Ready,* N.Y. Times (June 23, 2021), https://www.nytimes.com/2020/12/23/style/rent-evictions-new-york.html.

76. Miriam Axel-Lute, *What Would It Mean to Cancel Rent?*, Shelterforce (May 4, 2020), https://shelterforce.org/2020/05/04/what-would-it-mean-to-cancel-rent.

77. Cea Weaver, *The Promises and Failures of the "Cancel Rent" Movement*, N.Y. Focus (July 20, 2021), https://www.nysfocus.com/2021/07/30/cancel-rent-promises-failures.

78. *Id*.

The evictions that occurred during the Pandemic placed a mainstream spotlight on what low-income tenants had known all along: "evictions are violent."[79] For sixth-grade teacher, Clianda Florence-Yarde, the phrase "evictions are violent" became a reality in December 2020 in Rochester, New York.[80] After months of an unaddressed rodent infestation, Florence-Yarde began to withhold rent in an effort to force the landlord to make repairs to the property.[81] After she called Code Enforcement, Florence-Yarde's landlord appeared at her door and terminated her month-to-month lease.[82] Feeling that she was being retaliated against, Florence-Yarde refused to just move and was brought to Eviction Court for a Holdover Proceeding.[83] At her first appearance, Florence-Yarde informed the court she had called Code Enforcement and felt the eviction was retaliatory.[84] The second appearance took place during the Pandemic, and Florence-Yarde hoped that she would be eligible for pandemic protections.[85] But because the New York State's temporary Pandemic-related protections did not apply to Holdover Proceedings, Florence-Yarde was forced into a move-out stipulation.[86] Over eight months into the Pandemic, Florence-Yarde found limited housing options for her and her family to move into.[87]

Years after keeping her home, Elizabeth McGriff was still involved in the housing justice movement in Rochester, New York as member of the City-Wide Tenant Union of Rochester (CWTUR).[88] The CWTUR began in 2017 as a way to unify renters across the entire city.[89] In Fall 2020, the CWTUR knocked the doors of hundreds of tenants facing eviction in Rochester,

79. Nawal Arjini, *For Tara Raghuveer, 'Every Eviction Is an Act of Violence,'* Nation (Sept. 2, 2020), https://www.thenation.com/article/politics/tara-raghuveer-interview-evictions.

80. Bromwich, *supra* note 75.

81. Brian Sharp & Robert Bell, *Evictions And Crime: The City's Dual Crisis In Housing And Public Safety Might Be Linked, Research Shows*, Democrat and Chronical (Mar. 29, 2022), https://www.democratandchronicle.com/story/news/2022/03/29/study-shows-rochester-dual-crisis-eviction-and-crime-might-linked/7075315001.

82. Tiffany Cusaac-Smith & Sarah Taddeo, *NY Renters Face Pandemic Evictions Ahead Of Christmas, Even with Moratorium. What to Know*, Lohud (Dec. 20, 2020), https://www.lohud.com/story/news/2020/12/21/ny-renters-face-pandemic-eviction/3945132001.

83. Darien Lamen, *Evicted Mother Takes a Stand, and Rochester Community Stands with Her*, Reclaiming the Narrative (Dec. 20, 2020), https://www.reclaimingthenarrative.org/post/an-evicted-mother-makes-a-stand-and-rochester-community-stands-with-her.

84. *Id*.

85. *Id*.

86. *Id*.

87. *Id*.

88. Cusaac-Smith, *supra* note 82.

89. City-Wide Tenant Union of Rochester, About the City-Wide Tenant Union of Rochester (Mar. 7, 2018), https://roctenantunion.org/aboutus.

New York.[90] That is how McGriff came to meet Florence-Yarde.[91] Both women are single Black mothers, who experienced the community rally around their families in order to keep them in their homes.[92] On a bitterly cold winter night in December 2020, members of the CWTUR attempted to physically blockade the eviction of Florence-Yarde and her family.[93] By the end of the night, Florence-Yarde, New York State Assembly member Demond Meeks, and sixteen others were arrested by dozens of members of the Rochester Police Department in full riot gear.[94] As a result of the eviction, Florence-Yarde's family was homeless for the next six months.[95] The violent arrests sparked outrage in Rochester, New York, and throughout New York State.[96] In addition, the violent eviction sparked statewide outrage from members of the New York State Legislature, who responded by passing one of the most comprehensive eviction moratoriums in the nation.[97]

The eviction crisis has led to a major upswing in tenant organizing and activism across the United States.[98] The same grassroots groups defending homes after the Great Recession continued to be a part of tenant-led groups organizing their neighbors to pass Pandemic-related tenant protections and prevent displacement in their communities.[99] A Connecticut tenant attorney described the eviction crisis in the following manner:

> The call for reform becomes even more urgent when we are given proximity to the suffering of people who dwell in uninhabitable spaces without complaint for fear of reprisal or, worse, displacement. In many cases, it is only a few hundred dollars in rent arrears that stands between housing stability and homelessness. But without access to opportunities for eviction prevention and diversion, eviction is all but assured.[100]

This tenant-led movement has provided the momentum behind the argument that "all tenants must have a *right* to an attorney" and is demanding legislative bodies step in to protect tenants.[101] Although this reality is a hard pill for many to swallow, the tenant movement needs the

90. *See* Steven Wishnia, *Hurricane Warning, Tenants Nationwide Face a Looming Wave of Evictions*, Indypendent (Dec. 19, 2020), https://indypendent.org/2020/12/hurricane-warning.

91. Lamen, *supra* note 83.

92. *Id*.

93. *Id*.

94. *Id*.

95. Sharp & Bell, *supra* note 81.

96. Dana Rubenstein, *New York Bans Most Evictions as Tenants Struggle to Pay Rent,* N.Y. Times (Dec. 28, 2020), https://www.nytimes.com/2020/12/28/nyregion/new-york-eviction-ban.html.

97. *Id*.

98. King, *supra* note 22.

99. *Id*.

100. Franzese, *supra* note 60 at 1311.

101. *Id*.

deep support of the legal community in order to truly achieve housing justice. Lawyers, who are already doing great work within the housing field, can step into the tenant movement and become movement lawyers who are deeply integrated into the movement. Others, who are aligned in ideology, but not in practice can learn more about the movement work being done and get involved. Lawyers, following the lead of tenants, must step out of the courtrooms and into the movement because the "legal system is the very powerful glue that holds together our many intersecting systems of oppression."[102]

III. From Lawyer to Movement Lawyer

According to the American Bar Association, to be a movement lawyer means "taking direction from directly impacted communities and from organizers, as opposed to imposing our leadership or expertise as legal advocates. It means building the power of the people, not the power of the law."[103] Movement attorneys recognize that they are taking on a lifetime commitment to work towards "dismantling systems of oppression, including white supremacy, cis-heteropatriarchy, and capitalism in our country."[104] Although there is no universal definition of movement lawyering, many agree the core of the practice is for a lawyer to use their "legal skills to further grassroots movement building."[105]

Allowing the directly impacted community members to lead is often challenging for members of the legal community. The reality is social and justice-based movements existed long before lawyers joined. Social change that is sustainable can only occur when "directly-impacted individuals take collective action, lead their own struggles, and gain power to change conditions of oppression."[106] Movement lawyers understanding their role is to use their "legal knowledge, skills, and resources to support the various aspects of organizers' and tenants' work as [tenants] determine what is necessary or helpful."[107] A movement lawyer who does not take a

102. *See* Marika Dias, *Paradox and Possibility: Movement Lawyering During the COVID-19 Housing Crisis*, 24 CUNY L. Rev. 173 (2021), https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1520&context=clr.

103. Law For Black Lives, *Movement Lawyering in Moments of Crisis: Some Things White Allies (and Others) Can Do*, Am. Bar Ass'n (Jan. 11, 2021), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/movement-lawyering-in-moments-of-crisis/#:~:text=Movement%20lawyering%20means%20taking%20direction,or%20expertise%20as%20legal%20advocates.

104. *Id*.

105. Dias, *supra* note 102, at 175.

106. Right to Counsel: NYC Coal., *COVID-19 Rent Strike Legal Support Guide* 7 (2021), https://d3n8a8pro7vhmx.cloudfront.net/righttocounselnyc/pages/100/attachments/original/1588183192/COVID-19_Rent_Strike_Legal_Support_Guide.pdf?1588183192.

107. *Id*. 8.

supportive role that follows the lead of those most impacted is missing the point of movement lawyering.

Deciding on the shift from lawyer to movement lawyer does not require a paradigm-shifting moment or client. A lawyer integrating into movement work and seeing the impact their legal skills can have for the movement is often inspiring enough. If you have not already been radicalized by the not so just "justice system," take the time to visit a local meeting of a grassroots movement. To step into the role of movement lawyer, one must be willing to "build relationships with community organizers working toward transformative social change."[108] To successfully integrate into a movement, trust must be established between the movement's leaders and the movement lawyers.[109] The reality is, a lawyer's support for any social movement is good, but a deep integration of a lawyer into the movement is better.

To truly shift from lawyer to movement lawyer, you must make the conscious decision to "commit yourself to using law to build power for the people."[110] This will likely require a shift in your way of thinking and in your practice of law. In the housing context, when attorneys join the housing movement, they give credibility to the demands of the movement and lend their skills to help the movement as a whole build strength and power. As a rule, it is better for the tenant movement and legal services to be working together than working in silos because, at the end of the day, both groups want to see a more just housing system.

A lawyer who truly wants to join the housing justice movement must first and foremost follow the lead of the tenants—particularly those most impacted by the housing crisis.[111] It should come as surprise to no one that the tenant movement should be and is tenant-led.[112] Nevertheless, as people of privilege, it can be difficult to take the lead from those most impacted by a social issue. Showing up into a space which is struggling and asking "how can my skills best be put to use" is a powerful tool, but it is hardly a new practice.[113] Movement lawyer, William P. Quigley, poses the following question to lawyers who are trying to follow the lead of those most impacted: "Is the directly impacted community making decision about what the lawyer should be doing in terms of the direction,

108. Law For Black Lives, *supra* note 103.

109. *Id*.

110. *Id*.

111. *See generally Report Shows New York City's Tenant Movement Stronger Four Years After Winning the Right to Counsel*, Nat'l Low Income Hous. Coal. (Apr. 4, 2022), https://nlihc.org/resource/report-shows-new-york-citys-tenant-movement-stronger-four-years-after-winning-right.

112. *See generally* Right to Counsel: NYC Coalition, *NYC Tenant Movement History*, https://www.righttocounselnyc.org/nyc_tenant_movement_history (last visited July 28, 2023).

113. *See generally* William P. Quigley, *Ten Ways of Looking at Movement Lawyering*, 5 How. Hum. & C.R.L. Rev., 23 (2020).

purpose, strategies, and tactics?"[114] In the housing-justice context, following the lead of tenants can mean supporting tenant associations through a "buy-out clear-out" or an organized rent strike to compel the landlord to make repairs. Movement lawyering in the context of the tenant movement means showing up to Eviction Court, day after day after day, and continuing to listen to each tenant's individual stories and housing goals.

In that vein, to be a successful movement attorney within the housing justice movement, you must display diligence on behalf of tenants. As a result of the cyclical nature of the housing crisis, many of the clientele of Eviction Court will not be facing eviction for the first time.[115] Being a diligent housing attorney means putting up as much of a fight on the fifth or sixth eviction attempt as you did on the first. Sateesh Nori, a longtime tenant attorney out of New York, New York, described this phenomenon through an interaction with a landlord attorney who told him:

> "Kid, we only have to win once, but you have to win every time." What he meant was that a landlord could sue a tenant over and over again and he only had to succeed once and the tenant would be evicted. A tenant had to win their case every single time in order to keep their home.[116]

A deep understanding of that reality for tenants should remind you that you need to be a zealous advocate every time you show up to court or provide legal support on behalf of tenants.

In addition, as a lawyer, keeping yourself abreast of the latest in tenant protections and case law is critical to the success of the movement for housing justice. The pandemic demonstrated this need even more on account of the new local, state, and national protections for tenants being put into place. As a result, organizers turned to the legal community to decipher not only what the protections were, but how they would be instituted to prevent mass evictions.[117] Being a diligent housing attorney means wielding the law as both a sword and shield on behalf of tenants with the recognition that tenants are unlikely to have the skills to do so *pro se*. Successful legal work on behalf of tenants must include affirmative work. Simply put,

> [t]here is a common misconception that laws act like magic wands: once legislation takes effect, the problem goes away. Unfortunately, laws do not enforce themselves, and individuals may be required to actively assert their rights in court. This often is a daunting and cumbersome process without professional legal assistance.[118]

---

114. *Id*. at 27.

115. Ken Szymanski, *Eviction: A Vicious Cycle for People in Poverty*, UNC Charlotte Urb. Inst. (July 27, 2016), https://ui.charlotte.edu/story/evictions-vicious-cycle-people-poverty.

116. Sateesh Nori, Sheltered: Twenty Years in Housing Court 219 (Mar. 19, 2023).

117. *How Attorneys Are Key to the Housing Crisis*, Am. Bar Ass'n (Mar. 30, 2021), https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/march-2021-wl/evictions-0321wl.

118. *Id*.

Many tenants are distrustful of attorneys because of previous experiences, but the legal community has an opportunity to undo those experiences by incorporating themselves into the movement.[119] Before the movement for Right to Counsel (RTC) was normalized within tenant spaces, many attorneys just assumed they should take the lead in the representation;[120] after all, that is how many attorneys are trained to represent their clients. Tenant organizers out of New York, New York, have been able to experience first-hand the impact of dedicated—tenant-centered—attorneys entering the movement for housing justice.[121] One tenant organizer noted,

> They have come out to support marches, and rallies, they have spoken up, written op-eds. Their involvement and participation is more visible and active then before. And that's great because that's part of what the movement is trying to build. We all need the skills and all of the tools available to win.[122]

Another tenant organizer out of New York, New York, holds a similar sentiment noting the above actions of those lawyers "add[s] them into the fold and add them into the sense of community."[123]

A final thought on becoming a movement lawyer is that law school clinics are an ideal place for future attorneys to gain a true sense of movement lawyering and to apply many of the practices described above.[124] Law school clinics are an ideal place to shape the perspectives of young lawyers in training, because within a clinic, "lawyers combine modes of advocacy—litigation, policy reform, transactional work, organizing support, media relations, and community education—in order to maximize political pressure and transform public opinion."[125] Clinics specializing in community development, transactional law, immigration law, housing law, etc. are well positioned to shift the thinking on what "property rights the courts should vindicate, and what property rights would conflict with important underlying values" of movement lawyering.[126] For example, the Community and Economic Development Clinic (CEDC) at Albany Law School has become the center point for legal advocacy on behalf of tenants in Albany,

119. Right to Counsel: NYC Coal., TakeRoot Justice, Organizing is Different Now: How the Right to Counsel Strengthens the Tenant Movement in New York City 13 (Mar. 2022), https://assets.nationbuilder.com/righttocounselnyc/pages/1334/attachments/original/1647562375/Organizing_is_Different_Now_FINAL.pdf?1647562375.

120. *Id*.

121. *Id*.

122. *Id*. at 14.

123. *Id*.

124. Brandon M. Weiss, *Progressive Property Theory and Housing Justice Campaigns*, 10 U.C. Irvine L. Rev. 251, 281 (2019).

125. *Id*. at 282.

126. *Id*. at 283.

New York.[127] The CEDC worked with local tenant advocacy organization United Tenants of Albany, Inc. (United Tenants) to develop a rent-abatement calculator to assist practitioners and advocates when assisting tenants suing for a rent abatement based on violations to the warranty of habitability.[128] The former executive director of United Tenants, Laura Felts describes the relationship between the law school and the advocacy organization: "The law school really sees how clinic work makes the work of lawyers more accessible and sustainable for everyone. It's right along with what United Tenants does—none of us are attorneys, but we support and empower people to be able to navigate their legal issues."[129]

IV. Disrupting the "Status Quo" of Eviction Court with a Right to Counsel Attorney

One of the most effective and impactful ways for an attorney to meaningfully support the tenant movement is to provide zealous legal support and representation to tenants facing eviction. Tenant movements from across the country are taking steps to invite attorneys into the movement by demanding the enactment of Right to Counsel (RTC) statutes. The systemic housing crisis, a growing tenant-powered housing movement, and the eagerness of civil legal services to provide representation to tenants created the right conditions for a growing number of cities and states to pass some version of an RTC law.[130] Since 2017, fifteen cities, one county, and three states (Washington, Maryland, and Connecticut) passed an RTC statute for tenants facing eviction, with many other cities passing comparable programs and funding.[131]

Every housing attorney must partner with the tenant movement in advocating for local and state governments to establish "publicly funded legal services for low-income families in housing court" because it is "a cost-effective measure that would prevent homelessness, decrease evictions, and give poor families a fair shake."[132] When every tenant has representation in Eviction Court, the status quo assembly line of most eviction dockets is significantly disrupted.[133] As a general rule, a represented tenant achieves a more desirable outcome than an unrepresented tenant in Eviction Court.[134] Unrepresented tenants are asked to navigate a complex and brutal court system with little to no knowledge of terminology and

127. *See generally Students, Staff Attorney Make Impact on Housing* Law, Albany L. Sch. (Mar. 23, 2023), https://www.albanylaw.edu/the-justice-center/news/students-staff-attorney-make-impact-housing-law.

128. *Id*.

129. *Id*.

130. *See* Nat'l Coal. for a Civil Right to Counsel, *supra* note 59.

131. *Id*.

132. Desmond, *supra* note 5 at 303.

133. *Id*. at 304.

134. *See* Steinkamp, *supra* note 3.

procedures.[135] When compared to a tenant without representation, a tenant with legal counsel is more likely to avoid a monetary judgment, stay in their home, or set a move-out date which gives the tenant a reasonable opportunity to find alternative permanent housing.[136]

An effective lawyer will raise affirmative defenses that tenants do not know exist or that apply to their case.[137] A civil RTC "has a constitutional foundation in the federal and state Due Process Clause, the Equal Protection Clause, and the principle of fundamental fairness."[138] A tenant's attorney can ensure that Due Process of law and fairness to the tenant are being met.[139] This fairness can include procedural and substantive defenses.[140] Some tenants will know to bring up warranty of habitability or retaliation issues, but it is far less likely a tenant will know if the procedural rules of service are not followed.[141] The heart of the Due Process clause of the Fourteenth Amendment is procedure and process.[142] When a *pro se* tenant walks into Eviction Court, they are being denied Procedural Due Process merely because they did not receive the privilege of attending law school.

In addition, an unrepresented tenant will likely not know the power of negotiating to stop the eviction process or to stay the warrant execution while other arrangements are made.[143] These tenants frequently find themselves on the receiving end of a warrant of eviction and a monetary judgment because they were unaware of the affirmative defenses available to them.[144] A San Francisco, California, study observed major disparities in outcomes for unrepresented tenants at the hands of landlords' attorneys who have learned to "gain the upper hand even when the law does not support their case."[145] Landlords' attorneys who specialize in eviction become experts in the law, the court procedures, and the judges.[146] That same study observed that "landlord[s'] attorneys who are repeat players know that there is a good chance that a tenant will not be represented at

135. Desmond, *supra* note 5, at 303.

136. Kriston Capps, *New York City Guarantees a Lawyer to Every Resident Facing Eviction*, CityLab (Aug. 14, 2017), https://www.citylab.com/equity/2017/08/nyc-ensures-eviction-lawyer-for-every-tenant/536508.

137. Desmond, *supra* note 5, at 304.

138. Robin White, *Increasing Substantive Fairness and Mitigating Social Costs in Eviction Proceedings: Instituting A Civil Right to Counsel for Indigent Tenants in Pennsylvania*, 125 Dick. L. Rev. 795 (2021).

139. Steinkamp, *supra* note 3, at 13.

140. *Id*. at 19.

141. *Id*.

142. Vamisi Damerla, *The Right to Counsel in Eviction Proceedings: A Fundamental Rights Approach*, Colum. L. Rev. 356, 364 (2022).

143. Desmond, *supra* note 5, at 303.

144. *Id*.

145. Steinkamp, *supra* note 3, ¶ 112.

146. *Id*.

trial, and some consequently take a hard line when it comes to settlement negotiations."[147]

Furthermore, an unrepresented tenant may struggle to follow the policies and procedures of a courtroom.[148] This is particularly problematic for tenants with disabilities, limited English proficiency, or low reading comprehension.[149] A tenant who is trying to tell "their side of the story" may not know to bring up certain facts that could change the outcome of the case.[150] Finally, judges may respond better to represented tenants than unrepresented tenants solely because the tenant has not been trained in the policies and procedures of the court.[151]

A tenant who knows that an attorney will defend them in court is more likely to enforce their basic tenant protections such as calling Code Enforcement and organizing with their neighbors.[152] Despite retaliation being illegal, tenants often do not report unaddressed safety violations out of fear of a lease non-renewal.[153] If a tenant confidently knows a lawyer will zealously fight for them in court, the tenant is more likely to take preemptive steps to ensure their family is living in dignified conditions.[154] In addition, tenants who are confident that they will be represented are less likely to default at court.[155] A study from Philadelphia, Pennsylvania, demonstrated that "tenants who were represented were 90% less likely to lose by default than unrepresented tenants."[156]

A final way RTC assists in fighting the eviction crisis is through the cost-saving that occurs when tenants are represented in court. The cost of funding an RTC is offset by the costs typically spent on social services and emergency housing.[157] Eviction is the leading cause of homelessness and the costly shelter placements that follow.[158] Studies from New York, New York, show an individual experiencing homelessness can cost taxpayers over $35,000 per year through programs and services.[159] Targeted interventions to prevent homelessness, such as RTC, are proven strategies

147. *San Francisco Right to Civil Counsel Pilot Program Documentation Report*, John & Terry Levin Ctr. for Pub. Service & Pub. Int. at Stan. Law Sch. 21 (May 2014).

148. *Id*.

149. *Id*.

150. *Id*.

151. *Id*.

152. *See* Desmond, *supra* note 5, 303–04.

153. Legal Assistance of Western New York, Inc., When a Landlord Won't Make Repairs (Mar. 25, 2022), https://www.lawny.org/node/131/landlord-wont-make-repairs.

154. Desmond, *supra* note 5, at 304.

155. Steinkamp, *supra* note 3, at 18.

156. *Id*. at 10.

157. *Id*. at 9.

158. *Id*. at 30.

159. *Id*.

to provide stability for families.[160] These targeted interventions also save communities valuable tax dollars.[161] In fact, a cost study to enact an RTC for the state of Massachusetts found that full implementation would result "in an overall estimated cost savings of $36.73 million annually, providing a return of approximately $2.40 for every one dollar spent."[162]

The question of why a *right* to counsel is frequently raised by skeptics of the tenant movement. The answer is clear: improved outcomes. A growing number of cities and states recognize that tenants' needs are better met in the courtroom when the tenant possesses a guaranteed attorney at their side.[163] In a one-year study of represented tenants in Cleveland, Ohio, positive outcomes included preventing an eviction judgment or involuntarily moving, securing rental assistance, securing at least thirty days to move, and overall mitigation of damages to the tenant.[164]

Improved access to civil legal services and the funding of eviction defense programs prompt some to argue that a legal right to counsel is not necessary.[165] Renowned tenant attorney and law professor Andrew Scherer described why tenants nonetheless require a legal right:

> [W]hile an expansion of funding for legal assistance to people facing eviction is enormously helpful, it is not enough to simply increase funding; there are many important and compelling reasons why access to counsel should be a right. A right protects right-holders against government error and unfairness and advances the rule of law. A right protects right-holders' well-being, security and stability. A right reinforces right-holders' dignity and respect. A right fosters equality. And perhaps most importantly, a right fundamentally shifts power to the right-holder. And, by increasing fairness in the operations of the Court, improving the status and treatment of tenants, fostering equality and altering the balance of power, the right to counsel would disrupt the existing ecology and bring about concrete changes in the practices of . . . Housing Court and the relations between landlords and tenants.[166]

160. *Id*.

161. Steinkamp, *supra* note 3, at ¶ 70.

162. Liel Sterling & Maria Rouminantseva, *New Report Illustrates How Right to Counsel Prevents Evictions and Their Discriminatory Impacts on Communities*, ACLU (May 11, 2022), https://www.aclu.org/news/womens-rights/new-report-illustrates-how-right-to-counsel-prevents-evictions-and-their-discriminatory-impacts-on-communities#:~:text=Just%20one%20example%20is%20a,on%20full%20legal%20representation%20in.

163. Nat'l Coal. for a Civ. Right to Counsel, *supra* note 59.

164. Cleveland Eviction Right to Counsel Annual Independent Evaluation: January 1, 2022 to December 31, 2022, at 5 (Jan. 31, 2023), https://freeevictionhelp results.org/wp-content/uploads/2023/01/UPDATED-Stouts-2022-Independent-Evaluation-FINAL_2023.01.31.pdf.

165. Andrew Scherer, *Why a Right: The Right to Counsel and the Ecology of Housing Justice*, Impact Ctr. for Pub. Int. L. N.Y. L. Sch. 11, 17 (July 2016), *available at* https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=1017&context=impact_center.

166. *Id*. at 12.

Going back to basics, the *Merriam-Webster Dictionary* defines a "right" as "something to which one has a just claim."[167] In general, if you look at the platforms and demands of the tenant movement in the United States, the common thread of tenants' rights is found again and again.[168] The power of a *right* to an attorney gives tenants the confidence that they need to trust their other legal rights will not be trampled on when in a courtroom.[169] When a tenant has meaningful access to an attorney, the tenant is able to use law as both a shield and a sword to enforce their rights.[170] Having a legal right is worthless if that right is unenforceable.

A legal right is meant to protect the holder against systems of oppression.[171] The Founding Fathers took the concept of rights seriously, but not as something judges should decide for the holder of the right.[172]A housing activist from New York, New York, described the glaring disregard for tenants in Eviction Court in the following way:

> While all people nominally have the right to a lawyer in court, in reality, legal representation is limited to those who can afford it. And when tenants are unable to access a lawyer, any and all laws regulating landlord behavior become meaningless. Tenants have come to describe the . . . court system as an eviction mill.[173]

Eviction Court is often a place where unrepresented tenants' substantive and procedural rights are violated because courts were built by lawyers to be navigated by lawyers.[174] When tenants possess a legal right, courts are forced "to act in a manner that is more deliberative, less arbitrary, more thoughtful; and in so doing, rights foster the rule of law."[175] When both parties to the eviction proceeding are assumed to be equally represented, Eviction Court as an entity behaves in a more dignified way. A judge who knows both the landlord and the tenant are represented by counsel is more likely to make decisions based on legal substance, not because procedural

167. *Right*, Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/right (last visited Dec. 6, 2022).

168. *See* Neil Steinkamp, Right to Counsel: The Nationwide Movement to Fight the Eviction Crisis, Stout (2019), https://www.stout.com/en/insights/article/right-to-counsel-nationwide-movement-fight-eviction-crisis.

169. *Id*.

170. Melvyn Colon, *The Sword and the Shield*, Shelterforce (Dec. 14, 2011), https://shelterforce.org/2011/12/14/the_sword_and_the_shield.

171. Scherer, *supra* note 165, at 12.

172. Anna Bauman & Meghna Chakrabarti, *In Jamal Greene's 'How Rights Went Wrong,' Reimagining America's Legal Approach to Rights*, WBUR (Dec. 28, 2021), https://www.wbur.org/onpoint/2021/12/28/in-jamal-greenes-how-rights-went-wrong-reimagining-americas-legal-approach-to-rights.

173. Cameron Orr, *'Lawyers for Me, but Not for Thee': N.Y. Tenants Fight Capitalist Courts*, People's World (Nov. 28, 2022), https://www.peoplesworld.org/article/lawyers-for-me-but-not-for-thee-n-y-tenants-fight-capitalist-courts.

174. *See generally* Damerla, *supra* note 142.

175. Scherer, *supra* note 165, at 15.

rules are followed by the landlords' counsel.[176] In addition, a represented tenant is more likely to appeal a poor substantive ruling than an unrepresented tenant; an unrepresented tenant may not know of their legal right to an appeal.[177] Practices such as negotiations between the landlord and tenant become an expectation before a judge will permit a hearing.[178] The court is more likely to look at the two sides as being on an equal playing field and thus entitled to equal treatment.[179] When tenants possess a *right*, the status quo of Eviction Court beomes disrupted.

In contrast, while providing funding for representation is an effective method relying on dedicated finances and staffing alone, this model should be secondary to tenants having an RTC provided through statute. Under this model, there is a designated amount of funding given to local civil legal services providers to represent tenants facing eviction.[180] In densely populated areas with limited civil legal services, the model can become particularly problematic if the legal service provider can only cover a limited number of cases—whatever resources permit.[181] Many municipalities and funders "delegate the gatekeeping task to the nonprofit legal organizations that provide the service, so that when low-income tenants facing eviction are turned away and denied services by the nonprofit providers, they experience the providers as the gatekeepers because they hear the word 'no' directly from them."[182]

Without a dedicated right to ensure the funding will follow, programs are precarious and risk being closed altogether.[183] In hard economic times, when tenants are most in need of RTC, legislative budgets are less likely to provide funding for expensive programs.[184] When tenants possess an RTC, the budget allocation cannot be taken out unless the statute is repealed.[185]

Although a limited funding allocation will make a meaningful difference for every tenant who is represented, every tenant who is not able to be represented will likely feel that the way representation is determined is fundamentally unfair and unjust.[186] When limited funding constrains civil legal services, legal providers are often forced to take winnable cases to continue to demonstrate success. This model, although better than nothing,

176. *Id*. at 19.
177. *Id*.
178. *Id*.
179. *Id*.
180. Scherer, *supra* note 165, at 11.
181. *Id*.
182. *Id*.
183. Andrew Scherer, *The Price of Equal Justice: How Establishing a Right to Counsel for People Who Face Losing Their Homes Helps Tackle Economic Inequality*, Articles & Chapters: N.Y. L. Sch. 29, 34 (2005), https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=2127&context=fac_articles_chapters.
184. *Id*.
185. *Id*.
186. Scherer, *supra* note 165, at 13.

comes at the expense of other tenants who may possess fewer affirmative defenses but who could still avoid homelessness.[187]

V. Comparing Right to Counsel Legislation

From the perspective of the tenant movement, the goal of an RTC statute is not just to provide every tenant with an attorney while in court, but to provide the "right as part of a broader strategy 'to increase the power of the tenant movement.'"[188] When a tenant group begins a campaign for an RTC statute, the movement is extending a bridge to legal service providers to join the fight for housing justice. Most tenant groups understand Eviction Court is a primary battle ground of the movement for housing justice. To equip a tenant in Eviction Court with an attorney is "a strategy to undercut landlord power in courts."[189]

A. New York, New York

New York, New York, was the first city in the nation to propose and pass an RTC law for tenants facing eviction after years of tenants organizations working to address the inequities between tenants and landlords in Eviction Court.[190] Tenants from CASA Bronx and the Flatbush Tenant Coalition were the anchor tenant-led groups that formed the New York City RTC Coalition.[191] This coalition grew into a powerful tenant-led movement made up of thousands of tenants and won the support of local legal services providers.[192] The objective was simple: to persuade the New York City Council to pass the first RTC statute in the nation.[193]

The efforts for a civil RTC are not new, but historically struggled to gain traction.[194] New York City RTC Coalition Coordinator Susanna Blankley described a shift in the public mindset that needed to occur before New York, New York, could pass an RTC.[195] "In New York, many people told us that winning [RTC legislation] wasn't possible, that full RTC was a pipe dream, that many people had worked on it and we'd never win,"[196] Blankley said. Three long years of "working with city legislators, mobilizing town halls, canvassing tens of thousands of residents, and regularly engaging with the press" culminated in August 2017 with the passage of the first

187. *Id*.

188. Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 Stan. L. Rev. 821, 854 (2021).

189. *Id*. at 855.

190. Steinkamp, *supra* note 168 at 67.

191. *Id*.

192. *Id*.

193. *Id*.

194. *See* Raymond H. Brescia, *Sheltering Counsel: Towards a Right to a Lawyer in Eviction Proceedings*, 25 Touro L. Rev. 187, 210–24 (2009).

195. Steinkamp, *supra* note 168.

196. *Id.*

tenant RTC legislation in the history of the United States.[197] Because New York, New York, was the first municipality to pass an RTC, all the other statutes are modeled after that original success.[198]

The original draft of the RTC bill had no income limits for tenants to qualify for legal representation when in Eviction Court.[199] The final 2017 law limits representation to tenants whose income is below 200% of the Federal Poverty Level.[200] Full implementation of the New York, New York, RTC includes administrative hearings for tenants connected to the Public Housing Authority and appeals to the appellate court. [201] The New York City Council allocates, from the general revenue, $166 million per year to fund the local law.[202] At Year Four of implementation, the New York City Office of Civil Justice reported 71% of tenants are represented in court, and 84% of those represented tenants stayed in their homes.[203] Four years in, evictions by the marshal declined 41% from 2013, and filings fell by 30% from 2013 to 2019.[204]

B. San Francisco, California

Building off of the successful tenant movement in New York, New York, advocates in San Francisco, California formed a coalition that led to a successful ballot initiative.[205] This vote made San Francisco, California, the second city in the country to pass an RTC law through the No Eviction Without Representation Act of 2018 (Proposition F).[206] This vote was the result of several years of tenant organizing and advocacy that culminated with the San Francisco RTC Committee submitting over 21,000 petition signatures to start the ballot proposal process.[207] Although some expressed concerns regarding the cost to implement RTC in San Francisco, California, the Controller's office provided information that eased those concerns.[208] The Controller said: "While the costs of Proposition F will be significant—between $4.2 and $5.6 million annually—providing universal access to civil legal services may actually save the city money. Services that keep

197. *Id*.

198. *Id*.

199. Right to Counsel NYC Coal., Introduction: About the Authors and the Toolkit, https://www.rtctoolkit.org/chapters/1-introduction (last visited July 29, 2023).

200. Nat'l Coal. for a Civ. Right to Counsel, *supra* note 59.

201. *Id*.

202. *Id*.

203. *Id*.

204. *Id*.

205. *Id*.

206. Nat'l Coal. for a Civ. Right to Counsel, *supra* note 59.

207. From the Field: San Francisco Voters Guarantee Right to Counsel for All Tenants Facing Eviction, Nat'l Low Income Hous. Coal. (June 11, 2018), https://nlihc.org/resource/field-san-francisco-voters-guarantee-right-counsel-all-tenants-facing-eviction.

208. *Id*.

tenants in their homes help reduce or prevent other costs such as shelters and other homeless services."[209] As a result of tenant advocacy, 55.6% of San Francisco, California residents voted yes to pass guaranteed representation for tenants in Eviction Court.[210]

A unique component of the local law is the absence of an income limit and eligibility requirements to receive an attorney.[211] However, the law does not apply to owner-occupied housing.[212] For tenants in San Francisco, California, representation is available from the original notice of an Eviction Court case until the case is withdrawn, dismissed, or a judgment is entered.[213] Implementation of the law began in 2019, but was not fully funded until 2021.[214] The results have been astounding with eviction filings dropping by 10% and over two-thirds of represented tenants staying in their homes.[215] The successful efforts along the West Coast demonstrate how passing an RTC is a racial and economic justice: of the tenants who stayed in their homes, 80% were Black and 85% were considered either extremely low-income or low-income.[216]

C. Kansas City, Missouri

In December 2021, the City Council in Kansas City, Missouri, unanimously passed an RTC after nearly a year of court disruptions from the Kansas City Tenant Union (KC Tenants).[217] Most tenant advocates in the United States describe the KC Tenants as one of the most powerful and influential tenant groups in the nation. They are famous for the "Zero Eviction January" campaign that disrupted every case on the local eviction docket in January 2021.[218] When this RTC legislation was signed into law, Kansas City, Missouri, local government acknowledged the influence of the tenant group:

> Thank you to leaders at KC Tenants for identifying a serious unmet need in our city and for shining light on one of the biggest challenges and traumatic

209. *Id*.
210. *Id*.
211. Nat'l Coal. for a Civ. Right to Counsel, *supra* note 59.
212. *Id*.
213. *Id*.
214. *Id*.
215. *Id*.
216. *Id*.
217. Rebecca Rivas, *Kansas City Residents Will Soon Have the Right to an Attorney in Eviction Proceedings*, Kansas Reflector (Dec. 28, 2021), https://kansasreflector.com/2021/12/28/kansas-city-residents-will-soon-have-the-right-to-an-attorney-in-eviction-proceedings; *see also* Emily Cox, *KC Tenants' Month of Activism Broke the System*, Pitch (Mar. 8, 2021), https://www.thepitchkc.com/kc-tenants-month-of-activism-broke-the-system.
218. Jazzlyn Johnson, *KC Tenants Blocks Almost All January Evictions in Jackson County*, Voice (Feb. 12, 2021), https://www.communityvoiceks.com/2021/02/12/kc-tenants-blocks-almost-all-january-evictions-in-jackson-county.

> events our residents face: evictions. This is just one step of many we will take to better support those with housing insecurity in Kansas City.[219]

The Legal Aid of Western Missouri, which had long provided limited representation to tenants, was also involved in the fight to win the city's RTC.[220] One of those attorneys described how disheartening it was to see fifty to one hundred tenants a week lose their homes because of a lack of representation.[221] Once the law was passed, the same attorney said, "It's encouraging to know that, hopefully, it will no longer be luck or chance whether someone will have an attorney. But it'll be a right as enshrined in law."[222]

The only requirement to qualify for representation is to be a legal occupant of a rental unit.[223] The statute imposes no income limitations to qualify for representation.[224] The representation scope is broad and includes any case "filed by a property owner that demands removal of a tenant from the tenant's current residence including those seeking possession for nonpayment of rent, property, holdover, retaliatory evictions or proceedings for ejectment."[225] It is clear tenant voices were included when the bill was written because, under the law, legal representation is defined as

> [f]ull-scope representation provided by a licensed attorney for a tenant in a covered proceeding. This includes all activity necessary to zealously represent tenants, including but not limited to, filing responsive pleadings where applicable, appearing on behalf of the tenant in court, and providing legal advice, advocacy, and assistance associated with such matters, and necessary fees and costs related thereto.[226]

In the first three months of implementation, over 400 tenants were represented in Eviction Court.[227] In that short time, 40% of the cases were either "dismissed or decided in favor of [the] tenant."[228]

D. Rochester, New York

The active tenant movement in Rochester, New York inspired by TBL and the CWTUR, advocated for additional tenant protections and a local RTC well before the legislative chambers of Rochester City Council decided

219. Press Release, Kansas City, Mo., Right to Legal Counsel for Kansas City Tenants Facing Eviction to Start June 1 (May 25, 2022), https://www.kcmo.gov/Home/Components/News/News/1882/16.

220. *Id*.

221. *Id*.

222. *Id*.

223. Nat'l Coal. for a Civil Right to Counsel, *supra* note 59.

224. *Id*.

225. *Id.*

226. *Id*.

227. Celisa Calacal, *In Just 3 Months, Kansas City's Right-To-Counsel Program Has Helped Nearly 400 Tenants*, NPR Kansas City (Oct. 3, 2022), https://www.kcur.org/housing-development-section/2022-10-03/in-three-months-kansas-citys-right-to-counsel-program-has-helped-nearly-400-tenants.

228. *Id*.

to consider one.[229] In the wake of the Pandemic, the local government moved forward with funding to give tenants in Eviction Court meaningful access to counsel.[230] The Rochester City Council acknowledged the procedural due process violations *pro se* tenants face when they do not possess assistance to navigate the complex court rules.[231] When the budget bill was introduced to the City Council, the CWTUR remarked that "[f]or too long most tenants have been forced into Eviction Court without a lawyer. Expanded legal counsel will give us tenants a better footing to keep our housing and live in better conditions."[232]

Although Rochester, New York, does not have a local law that provides RTC to tenants, an adequate representation program ensures nearly every tenant who wants an attorney is able to receive on-the-spot representation or request an adjournment to seek an attorney. This representation is free to all tenants who are in Eviction Court in Rochester, New York.[233] Mark Muoio, of the Legal Aid Society of Rochester, New York, said that "[the city is] allocating money so that our office can provide access to counsel to any person who is facing eviction in the city of Rochester that wants representation. It kind of, sort of, takes the form of a public defender."[234]

Despite positive success with the full funding model in Rochester, New York, leaders in the National Civil RTC movement believe the funding alone model should be secondary to a right.[235] National Civil RTC Director John Pollock in a 2019 study said:

> A funding allocation, when not backed by a right established by statute or court decision, is easily reduced or eliminated altogether during a complex and mostly invisible budget appropriations process. . . . Conversely, RTC established by statute or ordinance would have to be separately repealed or amended in a process that typically has public hearings, and threats to such a statute are more easily identified and gain organizational support.[236]

Although this model is a highly effective universal model for tenants for Rochester, New York, tenants still do not possess a *right* to an attorney while they are in Eviction Court.[237] Programs that rely on yearly decisions

229. Gino Fanelli, *Tenant 'Right to Counsel' Program Begins in Rochester*, CITY News (Aug. 25, 2020), https://www.rochestercitynewspaper.com/rochester/tenant-right-to-counsel-program-begins-in-rochester/Content?oid=12170284.

230. *Id*.

231. *Id*.

232. *Id*.

233. City of Rochester, NY, Eviction Prevention Resources, https://www.cityofrochester.gov/EvictionPrevention (last visited July 29, 2023).

234. Gino Fanelli, *Rochester Tenants Facing Eviction Would Get Free Legal Counsel Under New Bill*, CITY News (Aug. 3, 2020), https://www.rochestercitynewspaper.com/rochester/rochester-tenants-facing-eviction-would-get-free-legal-counsel-under-new-bill/Content?oid=12087059.

235. Steinkamp, *supra* note 168.

236. *Id*.

237. *Id*.

to allocate funding are precarious and risk disappearing if the legislative body no longer sees the value in providing counsel to tenants in Eviction Court.[238]

E. Washington State

After several years of local municipalities funding an RTC, the state of Washington became the first state in the nation to pass a statewide RTC in 2021.[239] Before 2020, an average of 17,000 to 20,000 eviction cases were filed in Washington State each year.[240] Case filings dropped drastically before the RTC statute was passed because of a temporary eviction moratorium related to the Pandemic.[241] Statewide RTC was seen as a bridge for "renters [who] have been able to stay in their homes despite pandemic-related job loss, layoffs and economic turmoil."[242] Unlike other cities, the movement to pass statewide RTC was less led by the tenant movement and more so by civil legal services.[243]

To qualify for representation in Washington State, a tenant's income must be 200% or less of the Federal Poverty Level.[244] The statute covers eviction proceedings, administrative hearings, and appeals.[245] The Office of Civil Legal Aid reported nearly 3000 qualifying tenants were represented by an RTC attorney between January 1 and May 30, 2022.[246] Represented tenants remained in their homes in more than 50% of those cases.[247] In other cases, "tenant attorneys have helped expand tenant time to move, obtained orders of dismissal and limited dissemination, provided relief from future back-due rent claims, and helped achieve other outcomes that significantly benefit the tenant and reduce the long-term negative impact on their ability to find rental housing."[248] The Washington State RTC model is unique because tenants are not required to reach out to an agency for representation

238. *Id*.

239. Nat'l Coal. for a Civil Right to Counsel, *supra* note 59.

240. Heidi Groover, *In 'Historic' Move, Free Attorneys Provided for Tenants Facing Eviction in Some Washington Counties*, Seattle Times (Oct. 4, 2021), https://www.seattletimes.com/business/real-estate/in-historic-move-free-attorneys-for-tenants-facing-eviction-to-begin-in-a-dozen-washington-counties.

241. *Id*.

242. *Id*.

243. *See generally* Sebastian Robertson, *Washington Is First State to Provide Free Legal Help to Tenants Who Can't Pay Rent*, KGW8 (Oct. 4, 2021), https://www.kgw.com/article/news/local/washington-is-first-state-to-provide-free-legal-help-to-tenants-who-cant-pay-rent/281-e2d42c08-7100-4eb6-bf3b-88c2f584185c.

244. Nat'l Coal. for a Civil Right to Counsel, *supra* note 59.

245. *Id*.

246. *All About Washington State's Groundbreaking Eviction Right to Counsel*, Nat'l Coal. for a Civil Right to Counsel (July 28, 2022), http://civilrighttocounsel.org/major_developments/1500.

247. *Id*.

248. *Id*.

before court.[249] Rather, the court informs tenants of their right to representation, provides time for tenants to be screened for eligibility, and appoints counsel to those who qualify for and want representation.[250]

VI. How Other Housing Justice Solutions Blend with the Right to Counsel

Finally, despite the progress the tenant movement can make when deeply aligned with the civil legal services field, additional solutions and protections are needed if the nation ever hopes to move towards a more equitable system of housing justice. The tenant movement must work with movement attorneys to pass and enforce tenant protections. Attorneys must recognize what the tenant movement has known all along, that the attorney does not possess a "magic wand" that will cure poverty or solve the housing crisis. An intentional and comprehensive system of tools needs to be harnessed together to create a system of stabilized housing and anti-displacement. According to Desmond, "A program as big as the affordable-housing crisis calls for a big solution."[251] Under the current profit-based housing system, examples can include basic tenant protections; housing choice vouchers; and emergency rental assistance. Under a less profit driven model, this can include programs such as the "Tenant Opportunity to Purchase Act."

A comprehensive "package" of tenant protections provides a strategy to prevent loopholes and limit displacement.[252] Basic tenant protections, including Good Cause Eviction Laws (Good Cause"), are what prevent a renter from ending up in court in the first place.[253] In jurisdictions with Good Cause, "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.'"[254] These statutes are critical to preventing "unwarranted and retaliatory evictions" and give tenants stronger bargaining power.[255] Most states provide limited tenant protections from retaliation, but there is almost always a time frame limitation for the tenant to raise retaliation as a defense.[256] For example, the New York State retaliation statute's protection lasts only for one year after the original incident.[257] Jurisdictions with a Good Cause law only allow an eviction to occur when there is a "just cause" such as non-payment of rent or the owner desires to occupy the

249. *Id*.

250. *Id*.

251. Desmond, *supra* note 5, at 304.

252. Chester W. Hartman, W. Dennis. Keating, Richard T. LeGates & Steve Turner, *Displacement: How to Fight It*, Berkeley, Cal.: National Housing Law Project 80 (1982).

253. *Id*. at 81.

254. Thomas McCarthy, *Helping the Good Cause: Building a Better Anti-Eviction Scheme Through Local Innovation*, 31 J. Affordable Hous. & Cmty. Dev. L. 253, 254 (2022).

255. *Id*. at 82–83.

256. *Id*. at 83.

257. N.Y. Real Prop. Law § 223-B (2015).

unit themselves.[258] Most good cause statutes apply to nearly all tenants, "[r]egardless of the fact that a tenant may have no lease at all, or that the term of the lease . . . may have expired, . . . [the tenant] may continue in the rental housing unless and until the landlord offers a good enough reason to evict."[259] The final component of Good Cause is the ability of tenants to raise the defense against unconscionable rent increases that lead to the renter falling behind on rent.[260]

Good Cause and RTC blend to make powerful tenant protections because a tenant's attorney is better equipped than the tenant alone to refute the eviction if the landlord is unable to show "cause" to the court to evict. This is because properly invoking Good Cause requires a knowledge of the statute, an understanding of the burdens on the parties, and the confidence to follow the procedure. If Good Cause is a relevant defense for a tenant in Eviction Court, having an attorney by your side will make all the difference. An attorney who defends a tenant without legal protections often only slows down the process and helps to mitigate damages. But for a tenant in a jurisdiction with Good Cause, an attorney can wield the tenant's rights as intended by the legislature.

In addition, a portable housing choice voucher (HCV) is another effective way to ensure a tenant is paying a reasonable out-of-pocket cost for their housing.[261] The federal HCV program

> supplements rent payments for 1.7 million low-income families and individuals, making it the nation's largest housing assistance program. Recipients choose a house or apartment available in the private market and contribute about 30 percent of their incomes toward rent, while the federal government pays the difference—up to a locally defined "payment standard." Compared to unassisted households at comparable income levels, voucher recipients are far less likely to be paying unaffordable housing cost burdens, and more likely to be living in decent quality housing . . . .[262]

HCVs are one of the recommendations Desmond provides as a means of helping both tenants and landlords.[263] Although not a perfect system, HCV provides enormous stability for families who can devote more of their income to other necessities.[264] Desmond describes the relief a family gains when they are finally granted a voucher after waiting on the list for years:

---

258. 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, 430 (2008).

259. *Id*.

260. Suzannah Cavanaugh, *Landlords, Advocates Go Toe-to-Toe on Good Cause Eviction*, Real Deal (Jan. 10, 2022), https://therealdeal.com/2022/01/10/landlords-advocates-go-toe-to-toe-on-good-cause-eviction.

261. Margery Austin Turner, *Strengths and Weaknesses of the Housing Voucher Program*, Urb. Inst. (June 17, 2003), https://www.urban.org/sites/default/files/publication/64536/900635-Strengths-and-Weaknesses-of-the-Housing-Voucher-Program.pdf.

262. *Id*.

263. Desmond, *supra* note 5 at 302.

264. *Id*.

"the first place they take their freed-up income is the grocery store. They stock the refrigerator and cupboards. Their children become stronger, less anemic, better nourished."[265] Because an existing system of HCV already exists through local housing authorities,[266] expanding the program and providing additional funding could be an effective method of providing more ongoing subsidies to individuals with very low incomes.

It is worth noting that additional attention needs to be devoted to tenants with HCV to ensure those tenants are able to maintain the voucher in times of economic crisis and high inflation.[267] Tenants with particularly low incomes are most impacted by inflation when the costs of daily living expenses skyrocket.[268] A tenant with a limited income is still expected to pay 30% of that income towards rent, but the tenant may find it difficult to cover basic necessities such as food and gasoline.[269] Because tenants with HCV will likely lose their voucher if they are evicted, it is particularly important that these tenants are represented to ensure the subsidy is maintained.[270]

In addition, access to limited emergency rental assistance provides a last-ditch safety net to prevent eviction for tenants with limited arrears who can afford to pay the rent going forward.[271] Alternatively, this form of funding can be used to assist tenants with their first month's rent and security deposits. In 2009, the American Recovery and Reinvestment Act created the Homelessness Prevention and Rapid Re-Housing Program (HPRP) to help provide emergency rental assistance.[272] According to HUD, nearly 700,000 people were served through HPRP, and nearly all "were subsequently able to obtain or maintain permanent housing."[273] Although HPRP was only in existence for three years, Pandemic-related rental relief has been a critical component of preventing Pandemic-related evictions.[274] Over $30 billion in emergency rental assistance was paid out over the first two years of the Pandemic.[275] This was primarily done through statewide

265. *Id*.

266. Michelle D. Layser, Edward W. De Barbieri, Andrew J. Greenlee, Tracy A. Kaye & Blaine G. Saito, *Mitigating Housing Instability During a Pandemic*, 99 Or. L. Rev. 445, 508 (2021).

267. *See generally* Pa. Legal Aid Network, Survey Finds Rising Evictions in HUD-Assisted Housing (July 13, 2022), https://palegalaid.net/news/survey-finds-rising-evictions-hud-assisted-housing.

268. *Id*.

269. *Id*.

270. *Id*.

271. *Id*. at 475.

272. *Id*.

273. *Id*.

274. *Id*. at 508.

275. US Dep't of the Treasury, Treasury Announces $30 Billion in Emergency Rental Assistance Spent or Obligated with over 4.7 Million Payments Made to

rental-assistance programs.[276] For many tenants, rental assistance is only a temporary solution because rents are high and unstable.[277] To combat this problem, some states require a temporary rent freeze following a rental assistance payment.[278] Although not a long-term solution, emergency rental assistance is a direct and effective method of protecting tenants from eviction.[279]

Statutes and programs that provide tenants with the opportunity to become the owners, such as the "Tenant Opportunity to Purchase Act," go a long way to undo many of the historical and systemic aspects of the housing crisis. Renters of color and low-income families have traditionally felt the burden of the high cost of rent and housing instability that comes from a long history of structural racism,[280] redlining, and predatory lending.[281] These statutes are an affirmative alternative for legislative bodies that give current tenants the first opportunity to purchase the property they live in themselves before it is sold to another as well as the opportunity to match an offer if the owner is approached to sell.[282] These policies serve as a method of "empowerment and self-determination for tenants," giving them the dignity to help determine what happens to their homes.[283] Since the 1980s, when the first ordinance giving tenants a right of first refusal was passed, thousands of renters around the nation have gained ownership over their housing, and municipalities have prevented the displacement of their residents.[284] In these cases, the right of first refusal is a device to transfer housing from financially troubled (1) to avert displacement, (2) to build community stability, and (3) to increase homeownership while

---

Households Through February 2022 (Mar. 30, 2022), https://home.treasury.gov/news/press-releases/jy0688.

276. *Id*.

277. *See generally Tenant Protections and Emergency Rental Assistance During and Beyond The Covid-19 Pandemic*, Nat'l Low Income Hous. Coal. (Jan. 2022), https://nlihc.org/sites/default/files/Tenant-Protections_Emergency-Rental-Assistance-during_beyond_COVID-19_Pandemic.pdf.

278. *Id*.

279. Layser et al., *supra* note 266, at 507–08.

280. Joint Ctr. for Hous. Stud. of Harv. Univ., Renter Demographics 17, https://www.jchs.harvard.edu/sites/default/files/ahr2011-3-demographics.pdf (last visited July 29, 2023).

281. *See generally* Richard Rothstein, The Color of Law (2018).

282. Faith Meixell, *Housing for the People: A Tenant Opportunity to Purchase Act for New York City*, 48 Fordham Urb. L.J. 255, 277 (2020).

283. Tenant / Community Opportunity to Purchase, Policy Link (2023), https://www.policylink.org/resources- tools/tools/all-in-cities/housing-anti-displacement/topa-copa.

284. Jenny Reed, *DC's First Purchase Program Helps to Preserve Affordable Housing and Is One of DC's Key Anti-displacement Tools*, Fiscal Pol'y Inst. (Sept. 24, 2013).

limiting unwanted speculation.[285] Transactional attorneys are particularly well-positioned to embrace this policy change because of their extensive knowledge and skills related to transactional law.

VII. Conclusion

A growing *tenant-led* movement for housing justice is spreading across the United States with the goal of providing tenants more stability and control over their homes. If this country ever hopes to have a more equitable system of housing justice for tenants, one that is comprehensive and disrupts the status quo of housing, it is imperative the tenant movement and tenant-aligned attorneys work together. For deep change to occur in our housing system, the tenant movement and tenant-aligned attorneys must function as two sides to the same coin. This effort must continue to make bold demands for legal rights, resources, funding, and power.

Attorneys must boldly step into the movements and collectively work with organizers to demand systemic and legal changes to this nation's housing system. It is not too late for a practicing attorney to join the movement for housing justice; tenant organizing is happening across the nation, and the movement is desperately seeking the legal assistance of movement attorneys. In sum, a deep unification of the tenant movement and tenant-aligned attorneys is the only way to achieve true housing justice in the United States. In closing, the famous words of Arundhati Roy come to mind: "Another world is not only possible, she is on her way. On a quiet day, I can hear her breathing."[286]

285. Julie Lawton, *Tenant Purchase as a Means of Creating and Preserving Affordable Homeownership*, 20 Geo. J. on Poverty L. & Pol'y 55, 65 (2012).

286. *Arundhati Roy*, *Quotes*, Goodreads, https://www.goodreads.com/quotes/292642-our-strategy-should-be-not-only-to-confront-empire-but (last visited June 22, 2023).