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From the Editor-in-Chief

Anika Singh Lemar

Anika Singh Lemar

Once again, we at the *Journal* are excited to present articles from all corners of the field of affordable housing and community development law. Bill Callison explores the application of the Corporate Transparency Act to the affordable housing field. Brook Hill examines the concept of "choice" in fair housing law. Alan Tzivka Nissel explores the history and, he hopes, the future of apartment hotels in Los Angeles. Erica McWhorter writes about representation and homelessness policy. Michael Santos and Marilyn Harbur propose a tax credit for renters as one approach to address the ongoing housing crisis. And Michelle Anderson reviews Alan Mallach's latest contribution to the urban planning cannon.

It is always energizing and such a joy to see, meet, catch up with, and hear from the Forum community at the Annual Conference. This past May, I was inspired and moved as so many of you shared fond memories of two recently departed long-time Forum members, the late Susan Jones and Watt Taylor. This issue features remembrances of Susan and Watt from four Forum members. I am very grateful to Laurie Hauber, Mark Kantor, Rochelle Lento, and Dina Schlossberg for writing these tributes and, to you all, for reading them.

I hope everyone has had a lovely summer!

Tributes

Susan Jones: A Leader . . . An Influencer . . . A Mentor

Laurie Hauber*

Susan was a mentor to hundreds, an influencer of thousands, and a leader in many fields. Community economic development (CED) as a practice area is what it is today because of Susan. She brought so many ideas to the field, to clinical teaching, and, ultimately, to her clients and the community. She was the bridge between CED clinicians and practitioners in private, government, and nonprofit sectors engaged in CED work. Her leadership in both spheres helped create new synergies and expand CED as a field.

She embraced new challenges and was incredibly adept at creating and implementing innovative solutions to address critical community needs. Over the years, I have marveled at how quickly Susan learned new areas of law, becoming an expert in so many. When I was editor-in-chief of the *Journal* from 2014 to 2017, Susan wrote articles for the *Journal* on a wide range of topics, from cloud storage (to my knowledge, she was the first transactional clinician to write on this topic) to social impact bonds. In the early 2000s, she was one of the few transactional clinicians who had created a formal partnership between her CED clinic and George Washington University's business school. Her influence led not only to several law-business school partnerships around the country, but also to collaborations between CED clinics and various graduate programs (when I taught the CED Clinic at Vanderbilt Law School, she inspired me to engage in joint projects with Vanderbilt's School of Education). In recent years, she saw the value and applicability of coaching for law students. She created a coaching program at George Washington that became a model for other law schools. These are just a few of many examples of her unique ability to both identify needs and take action to execute solutions.

Susan also recognized the importance of sharing her work so others could learn from her expertise. She began publishing practice-oriented, scholarly articles in the early 2000s, and she was one of the first to write about CED work. I first met Susan in 2004 at the Transactional Clinical Conference. It was during the early years of this conference when everyone sat around the same table and spent the day discussing a wide array of topics. Through these conferences, as well as her scholarship, Susan taught so

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many of us what clinical teaching was about. From her, we learned what it meant to be both effective teachers and community advocates.

And, somehow, she found the time to be a mentor, continuing to work with so many of us over several decades, and taking on new mentees every year. Over the course of her career, she encouraged and inspired so many students and recent graduates to pursue a career in CED, get involved in the Forum, and, more generally, to make a difference in the world.

Susan's leadership, influence and mentorship has touched the lives of thousands in ways that will continue to shape CED, clinical teaching, and law school pedagogy for generations to come.

Memories of Susan Jones

*Dina Schlossberg**

I am so saddened by the loss of Susan Jones. Susan was a giant and a leader in the ABA Forum on Affordable Housing and Community Development Law and in the academic world of Clinical Legal Education. I had the privilege of teaching at the University of Pennsylvania Law School from 2000 to 2006. When I started at Penn, I knew nothing about teaching clinical legal education. Not many clinicians focused on transactional law, and most clinicians were not highly regarded by doctrinal faculty. Susan was instrumental in developing the field of transactional clinical education and paved the way for other transactional clinical educators to be recognized for the value that they contributed to their respective law schools. Susan was a guide and a sounding board for me as I developed my course at Penn. We kidded back and forth—she and I—on whose law school was the first to develop a clinical course devoted to transactional practice as both Penn and George Washington were early adopters of this course of education. Susan encouraged me to look at the educational value of clinical teaching and to focus on client selection that would promote benefits for the community and that would advance racial and economic equity.

I became a member of the ABA Forum in part because of Susan (and the indominable Rochelle Lento). After attending a clinical educators conference, I learned of their involvement with the Forum, and I was at once interested. I participated in a conference and several committees and then shortly thereafter joined the Forum Governing Committee. Susan's influences on the Forum were immeasurable, including being the Chair, co-editor of a book on Community Development (for which I had the pleasure of drafting a chapter), and in cultivating a relationship with the business section of the ABA to align the work of the Forum on micro-businesses with that of the Business Section of the ABA.

I will miss Susan and all of her amazing energy, creativity, intellect, and focus on excellence. She will be remembered for all of this, as well as for her amazing smile, and her patience and kindness to others. May her memory forever be a blessing.

*Dina Schlossberg is the Executive Director of Regional Housing Legal Services.

My Tribute to Susan Jones

*Rochelle Lento**

Let me start by saying that Susan Jones was one of a kind and very generous in spirit and her time. My first involvement with the ABA Forum on Affordable Housing and Community Development Law (Forum) was when I was asked to be the editor of the Forum's *Journal*. The *Journal*, as many of you know, is a special publication that has an academic, research approach but provides articles that are useful and oriented to practitioners. At the time, I was a new clinical law professor at the University of Michigan Law School and recognized that, to do this task professionally, I needed a tried-and-true clinical law professor so that is how I found Susan Jones. Susan was an established and well-respected clinical law professor at George Washington School of Law. Needless to say, Susan saved me on many levels with this task. For those of you involved in the *Journal*, you know it can be a demanding task to solicit articles, assure their accuracy, read them all thoroughly, and edit. For a period of four years, first as my associate editor and then as editor-in-chief of the *Journal*, Susan and I worked together on that publication. She was definitely the lead in this task on so many levels, and I was grateful for her expertise. We used to joke about not ever going anywhere without an article to be edited, read, or reread. I truly appreciated her commitment to that task, and this is how our relationship began.

Our next joint effort for the Forum was to establish the Legal Educators Group, comprised of clinical faculty from around the country engaged in affordable housing, business development, or community economic development as a sub-group or committee of the Forum. We both recognized that there needed to be a space for clinical faculty engaged in affordable housing and community development law to engage with each other, to share strategies and approaches, and just to provide support and comradery with each other. We were initially co-chairs of this initiative. For many years, we coordinated the Legal Educators Group at the annual Forum Meetings, figuring out topics, workshops, and the agendas for each meeting. But, clearly, Susan was the leadership voice in this effort and continued to be an active and strong leader in this group for the past seventeen years—and I know she is a hero larger than life to fellow clinicians.

The above describes Susan as a colleague who could always be relied upon for her intellect and contributions to the legal realm of affordable housing, business, and community development. She was a wealth of knowledge and expertise. But, more importantly, over the years we worked on various projects together, she became a good friend, whose infectious laugh and smile are indelibly etched in my heart. She is someone who impacted me both personally and professionally, and I miss her dearly.

*Rochelle Lento is a Member at Dykema Gossett PLLC.

Tribute to Watt Taylor

*Mark Kantor**

As members of the Forum well know, Waller (Watt) Taylor was a terrific attorney and tireless advocate for affordable housing. Watt was always happy to provide advice and guidance to all who had questions for him on HUD and Fair Housing issues, and particularly enjoyed providing younger attorneys with advice and information. He was a true mentor not only to the attorneys at Kantor Taylor, but to all who sought his wisdom and guidance.

Yet Watt was more than a superb attorney. His life was filled with family, philanthropy, and adventure. He was the proud father of Evan and Kari and a devoted grandfather to Mason and Makaiya and in many ways a father figure to them both as he helped Kari, a single mother, raise them. Whether celebrating a birthday, an achievement in school, or Mason on the football field, he always had a sparkle in his eye and a bounce in his step.

Those who knew Watt may not have known that he was a serious practitioner of Isha meditation and felt that, along with his children and grandchildren, meditation changed his life. He would meditate for hours a day and actually went to a meditation retreat where he did not speak for ten days. For those of you who knew Watt, the idea of him not talking, or even more surprising, bellowing out that amazing laugh for ten days is remarkable.

Watt loved to travel—to Europe, the South Pacific, India, and most dear to his heart Uganda. Travel to Uganda blended the importance of family and travel with philanthropy. Watt met three young Ugandan orphans and essentially adopted them. He paid for Hope, Amos, and Dylan to go to school, brought them to the United States for a visit and even took them on vacation to Europe. I want to read portion of a letter from Amos, one of Watt's "adopted" children in Uganda.

As of today, I still don't believe that Watt is gone. I was hit hard with the news that he wasn't anymore. I remember the first time I saw Waller was Christmas of 2012 together with his beautiful daughter Kari and grandson Mason both of which became my family. I didn't speak English and when [he] said hello to me, I simply ran away or, if I did, even smiling was hard.

Back then my dream was to fly on a plane, see snow and visit America, but after meeting Watt my dream changed to being a businessman and making a lot of money so that I could help others like he did for me.

There are many things to say and talk about Waller as he has been the key to my success. What hurts me the most is he has left without me taking him to lunch with the money that I will make. I have just become independent and was hoping that I would extend my appreciation by one day paying for my own ticket to see him and paying for him to come to Uganda.

*Shareholder, Kantor Taylor, Seattle Washington.

We have not only lost a great, generous, kindhearted man but also lost a father, a role model and a guardian angel for all. His generosity beats everything I have ever seen in my whole life.

We shall always cherish the life you have left behind. May you Rest in Peace Papa.

I think that Watt's long time legal assistant Tracey Hillman may have said it best: "When I think of Watt, I think of light. He was a bright light that touched so many lives. When he walked into a room, the air became lighter, and his amazing laugh brought a smile to everyone."

Watt and I and started Kantor Taylor together over twenty-six years ago, and, while he is no longer with us, his professionalism, passion, and commitment has always been, and will continue to be, a guiding light for not only those at Kantor Taylor but members of the Forum as well.

FROM THE READING ROOM

Utopic Dystopias: The Shrinking Cities of the Future

Michelle Wilde Anderson

Smaller Cities in a Shrinking World: Learning to Thrive Without Growth
Alan Mallach
Island Press (2023)
336 pages; $35.00 (paper); $34.99 (ebook)

Soylent Green, as you may recall, was a fictional smoothie made of dead people. "It's the year 2022," the 1973 movie poster said, followed by ominous ellipses. "People are still the same. They'll do anything to get what they need. And they need Soylent Green." The popular film and book were at the vanguard of the "ecological dystopias" that now dominate apocalypse lit. But in that particular story, urban planning expert Allan Mallach reminds us, the premise of America's descent into cannibalism was not only food shortages and dying oceans caused by global warming.[1] It was overpopulation.

In *Smaller Cities in a Shrinking World: Learning to Thrive Without Growth*, Mallach suggests that dystopias like *Soylent Green* have been fixated on the wrong problem: "[F]ew if any dystopian-minded novelists," he wrote, "have looked at the consequences of the approaching future of gradual population decline fueled by sinking birth rates."[2] Not the snappiest line, I'll admit, but an arresting observation nevertheless. We spent a few decades fretting about overpopulation. But as the real 2022 came and went, it was not overpopulation we had to worry about. It was the fact that global peak population, with its attendant downturn, is heading our way.

*Larry Kramer Professor, Stanford Law School and Professor, Stanford Doerr School of Sustainability. Many thanks to Jonathan Smith, my wise editor here. Smith was once my student, and his memorable stories of studying jazz with incredible musicians in Detroit (back when he was a student in Ann Arbor) are a moving example of the life and culture still thriving in our shrinking cities.

1. Alan Mallach, Smaller Cities in a Shrinking World: Learning to Thrive Without Growth 100 (2023).

2. *Id*.

That being the case, our shrinking world is going to mean smaller cities. More cities need to learn to thrive without growth.

Here are the basic facts. In the twentieth century, "[t]o be a city was to grow, and to be a city in the Global South was to grow exponentially."[3] Today, only sub-Saharan Africa continues on that path of steep growth.[4] Overall "world population growth has slowed to a crawl."[5] Some nations have already started a population freefall. By 2011, Latvia's housing stock was twenty-one percent empty.[6] (If you find that fact as stunning as I hope you do, recall that in our own Detroit, where population loss and poverty decimated housing demand, forty-eight percent of the residential units went through a mortgage or tax foreclosure between 2005 and 2015.[7]) For the moment, however, such stories remain global outliers. Shrinking cities have brought tremendous hardships to the Rustbelt, Eastern Europe, and East Asia (especially Japan and South Korea), but they are relatively rare worldwide.[8]

By the middle of this century, shrinking cities will be the new normal.[9] More than sixty-five nations are expected to start losing population in the coming three decades.[10] Demographers predict China will have 150 million fewer people by 2050.[11] Poland will have lost 2 million people by then and will find itself in an Eastern European region where every nation faces a crisis of vacant "ghost buildings."[12]

The kicker is this: *Worldwide, most cities may be shrinking by 2100.*[13]

Mallach has written up these facts, but this is not a demography book. Ever the urbanist, he has contextualized what population decline has and will look like in specific nations given their urban history and policy. He stands on this descriptive foundation to offer several chapters of general prescriptive insights about shrinking gracefully. As a senior scholar of American shrinking cities, he is uniquely suited to this world of facts and policy.

If I have a criticism of this book, it's that Mallach has written something too important for this small a font. He buried his key facts and insights across too many pages, with the most startling bits scattered hither and yon. Reading it (even as a shrinking cities scholar myself), I felt my curiosity warring with my impatience as a busy reader.

3. *Id*. at 2.
4. *Id*. at 3, 47.
5. *Id*. at 3.
6. *Id*. at 109.
7. Michelle Wilde Anderson, The Fight to Save the Town: Reimagining Discarded America 216 (2022).
8. Mallach, *supra* note 1, at 26, 28.
9. *Id*. at 5.
10. *Id*. at 29, 48.
11. *Id*. at 28–29.
12. *Id*. at 89.
13. *Id*. at 5.

So with this review, I have assigned myself a job that I believe to be in the public interest: to discuss the core insights of this book such that you—busy leaders and practitioners all—can learn from and operationalize his book even if you don't have time to read it. A "Dear Mayor" briefing here begins.

I. Embrace shrinking cities as a vanguard of experimentation that (soon enough) the whole world will need.

The day that Detroit filed for bankruptcy, Michael Moore tweeted: "Detroit (1701–2013). Don't cry for us, America. You're next."[14] Instead of pathologizing the city or writing sentimental obituaries, he conveyed, outsiders should watch and learn from the crash and aftermath.

There but for the grace of God go we, indeed. The biggest picture of Mallach's book is that today's shrinking cities are the bleeding edge of what is to become a global problem. Famously depopulated cities are not behind the times; they are in front of them. Will we throw stones? Watch passively? Help? Learn from them?

Leaders of shrinking cities need to reorient their priorities and public rhetoric to claim their mantle as leaders adapting to a shared problem. Their trial and error is not just locally necessary; it's publicly valuable.

Adaptation to shrinkage, Mallach says, begins with discarding the idea that recovery means restoring population growth. Shrinking cities now and in the future must "embrace the idea of a city growing smaller as both a long-term reality and a legitimate future path rather than a failure of growth or a problem to which growth is the solution."[15] Population size or ranking need not be the measure of a city. Leaders of shrinking cities need to reject the knee-jerk stigmatization that they are dying rather than changing.

If this sounds like an easy mental reorientation, it is not. Cities like Johnstown, Pennsylvania (where the city has lost 70% of its population since its peak in 1920), show how hard it is for city leaders to admit they are losing population. In a comprehensive land use plan, the city first admitted its devastating ratio of vacant properties on page 100.[16] What could better communicate shame and denial? By treating a ubiquitous fact as a dirty secret, the city forfeited the chance to reframe that fact (to city staff, community leaders, and residents alike) as an opening for positive change—or at least a challenge that could be managed.

Even where leaders admit and explicitly plan for depopulation, it can be hard to deliver actual gains. Youngstown's planners embraced the green virtues of shrinkage (more on these below), but then were too broke,

14. Blake Thorne, *Flint Native Michael Moore Tells Film Festival Crowd Detroit Bankruptcy Is 'Personal,'* MLIVE (Aug. 6, 2013), https://www.mlive.com/news/flint/2013/08/flint_native_michael_moore_tel.html.

15. MALLACH, *supra* note 1, at 156.

16. *Id*. at 112, 160.

understaffed, and unprepared to deliver on their celebrated plans.[17] In the absence of outside support, falling population and rising poverty mean austerity budgets. Local politics become preoccupied with what to cut and what to keep, not new initiatives.

So yes, it's hard. But that's the work. Cities need outside support when stuck in this vicious cycle. To command that attention, they need a vision for progress. "Blight" should not be the final buzzword of shrinking cities. The fact of blight should precede a vision for its aftermath—a chance to deliver social and environmental gains instead.

II. A shrinking future can put social and environmental well-being—not just consumption or economic status—at the center of public policy.

The future will not, Mallach cautions, see the kind of economic growth we've had in the past. Declining population (and the attendant aging of the population) will drag down growth, as will climate change and political instability within and across nations.[18] Cities will suffer for these wider global corrections. But a society built around "the single-minded purpose of indefinitely maximizing growth and material wealth," he writes, was never environmentally sustainable anyway. Economic growth "must, by necessity, consume more and more natural resources and energy, and in tandem, generate more and more waste products, from microplastics in the oceans to greenhouse gases in the atmosphere."[19] A political culture that valorized population and economic growth also tended to define well-being in purely economic terms—a warped lens on human flourishing.

Mallach resists a broader theory that these changes will mean the end of capitalism, and he worries about dramatic, coercive, and centralized changes to overthrow the prevailing economic order. But he argues that "evolutionary" changes and lots of trial and error will be needed to adapt to "a new world of ever-lower growth"[20] in which consumption is not the measure of the man—or of his city.

As cities adapt gradually to local conditions, they will build an archive of options for improving quality of life beyond growth alone. These changes can yield a category of gains that Mallach usefully calls "environmental dividends."[21] Shrinking cities can become greener cities by repurposing vacant land to become parks and trails for recreation, green and blue infrastructure (such as tree canopy and rain gardens) that provide shade and absorb extreme rainfall, urban farms and orchards that supply food, and landscaped streetscapes that beautify neighborhoods.[22] Such actions

17. *Id*. at 159.
18. *Id*. at 263–64.
19. *Id*. at 163.
20. *Id*. at 168.
21. *Id*. at 99.
22. *Id*. at 179.

promise social benefits too, such as improved public health and reduced crime.[23] Civic engagement around these changes can draw neighbors into joint projects, which in turns helps smaller cities embrace the virtues of small-town life.

Blight is a burden before it's an "opportunity," and transformative changes (such as rebuilding our food systems on locavore terms) are not close at hand. Mallach is a realist about this challenge, stressing that large-scale environmental gains are easy to dream up but hard to realize, given shrinking cities' funding and capacity issues. This is clearly true at the level of centralized policy and data, but there is a more positive story to tell about small, distributed private actions. As a number of Black writers (including Dorceta Taylor, Alesia Montgomery, and Monica White)[24] have memorialized, Detroit has a proud history of small-scale food production that long predates the trends cynically dubbed "apocalyptic gardening." From the private gardens that helped the Black segregated neighborhoods survive the Great Depression to the community-based farm programs that distributed fresh food early in the COVID-19 pandemic, Detroit's history of urban agriculture is not a city marketing ploy: it's a heritage of self-determination, dignity, and humanitarian aid. To model a future where our value is not counted in dollars, shrinking cities should celebrate patterns like these.

III. All future cities will not shrink. those that do won't all be the same.

Winner-take-all urbanism, to use Richard Florida's phrase, may be here to stay.[25] Migration trends will continue to swell some cities as others decline. Even when nations have a declining overall population, one or more of their big cities may continue to grow.[26] Other cities are expected to lose population at a faster rate than their home country.[27] These differences among cities will further intensify the fiscal inequality and economic segregation that I and other scholars have documented with grave concern.[28]

Among shrinking cities, distinct challenges emerge. Some will face a depopulation problem in a specific architectural generation of buildings.

23. *Id*. at 176–77.

24. *See* Alesia Montgomery, Greening the Black Urban Regime: The Culture and Commerce of Sustainability in Detroit (2020); Dorceta Taylor & Kerry J. Ard, *Food Availability and the Food Desert Frame in Detroit: An Overview of the City's Food System*, 17 Env't Prac. 102 (2015); Monica M. White, Freedom Farmers: Agricultural Resistance and the Black Freedom Movement (2021).

25. *See* Richard Florida, The New Urban Crisis (2107); Richard Florida, Charlotta Mellander & Karen M. King, *Winner-Take-All Cities*, *in* Urban Empires: Cities as Global Rulers in the New Urban World (Edward Glaeser, Karima Kourtit & Peter Nijkamp eds., 2021).

26. Mallach, *supra* note 1, at 5.

27. *Id*. at 5.

28. Anderson, *supra* note 7, at 6–7.

Picture hulking, cheap, Soviet-era apartment blocks with a bland façade outside and low ceilings inside.[29] In Eastern Europe and other regions facing that kind of challenge, the postwar generation of housing now has high vacancy rates and rising concentrations of elderly or low-income people with few consumer choices. Architectural problems are hardly painless, and serious changes to the built environment are expensive and disruptive to fix. But at least we more or less know the work at hand. Planning, demolition, and replacement can go a long way.

Other shrinking cities, including our own in the United States, face problems where more than money and political will stand in the way of progress. Mallach refers here again to cities like Johnstown, where deep structural problems amplify physical challenges. Many residential buildings are empty, but so too are factories and schools and storefronts. Economic restructuring has driven massive outmigration of jobs and people, leaving behind a denuded tax base facing a giant bill for industrial decontamination, residential demolition, and obsolete school, water, and sewage systems. As Mallach documented in his prior book *The Divided City* (which is excellent—and frankly the more essential reading for a U.S. policymaker), such a city's economy is so decimated that the primary local income stream is federal safety net payments and food supports.[30]

Observing these alternative models of shrinkage, Mallach implies a point that I think we should make explicitly here. All too often, policymakers act as though upgrades to a city's built environment can solve chronic social and economic problems. Convinced though I am about the importance of our built environment for quality of life, dignity, civic engagement, and climate resilience,[31] redevelopment cannot be our primary answer to poverty and crime.[32] Cities facing population loss alongside systemic economic losses need more than new riverwalks and big-box retail. They need workforce training and development; nurturing and academically challenging public schools; counseling to treat the fallout of violence and drug addiction; humane and effective public safety services; and other reinvestments in people worn down by intergenerational poverty.

IV. As cities shrink, our language to describe them will have to grow.

An exercise in vision and rebranding starts with changing the way we talk about shrinking cities. Self-evidently, calling shrinking towns "legacy cities" was a much more hopeful, asset-based framing than earlier talk of

29. Mallach, *supra* note 1, at 80–83.

30. *Id*. at 112 (calling this an "urban transfer payment economy").

31. For more on this important premise, see Eric Klinenberg Palaces for the People: How Social Infrastructure Can Help Fight Inequality, Polarization, and the Decline of Civic Life (2018).

32. Anderson, *supra* note 7, at 4450.

"weak market" cities.[33] "Right-sizing cities" was not as negative, but not was its meaning obvious. The more modest "smaller cities" is both more straightforward and more appealing.

Those terms are all familiar to any child or student of the Rustbelt, but Mallach collects some less familiar global gems, too. I was struck by the grieving beauty of *shometsu*, "vanishing" in Japanese, which was coined by politician/researcher Hiroya Masuda when he predicted that half of Japan's cities will have lost so much population that they "disappear" by 2040.[34] *Stadtumbau Ost*, "Eastern City Unbuilding" in German, offered a poetic term for the dramatic thinning and reconfiguration of neighborhoods to eliminate 350,000 housing units in eastern Germany.[35] "Naturally occurring retirement communities" (NORCs) is an anodyne and homely phrase, but it at least gives us words to describe an important phenomenon: a building, neighborhood, or whole town that has lost most of its families and working adults.[36] In gathering such terms across his pages, Mallach reminds us of the new vocabulary, theory, and ideas that we are going to need to manage a world in which growth is not the organizing principle of urban policy.

V. Cities need to build up localized solutions. But that doesn't mean they're on their own. Shrinking cities need to network strategically at the state and federal levels.

Sustainability and shrinkage will require that each city builds its own capacity "to produce a significant portion of the goods, services, food and energy it consumes from its local endowment of financial, natural and human capital."[37] But Mallach stresses that locavore planning does not mean "being isolated, as in some hypothetical dystopian Mad Max future scenario."[38]

Forging networks among cities nationally and internationally will require technological connectivity that allows cities to plan cooperatively, share information, and create alternative trade systems to support more sustainable, proximate local enterprises. Such connections can be built through stronger intercity institutional hubs, where cities can congregate to swap lessons, lobby higher governments for change, team up to seek outside resources, and link their staff to new expertise. Mallach recommends a hypothetical Center for a Sustainable Economy, which could be a state-based, action-oriented research center located at a regional university.[39] On

33. Mallach, *supra* note 1, at 237.
34. *Id*. at 28.
35. *Id*. at 82.
36. *Id*. at 214.
37. *Id*. at 170 (quoting a 2006 study of the San Francisco Bay area).
38. *Id*. at 171.
39. *Id*. at 275.

topics ranging from energy provision to manufacturing policy, such a center would hasten information sharing and applied research. An associated training and grant-making arm could move knowledge among the state's smallest cities. Mallach offers models from Germany and Lithuania for this kind of regional hub, emphasizing the flexibility of their networks to adapt to emerging changes.[40]

Federal grantmaking programs can also help transfer knowledge across cities. Mallach daydreams a network of 250 shrinking American cities where a local community development organization would each receive a $1 million annual federal grant to pioneer programs related to goals like localizing food systems and decentralizing manufacturing.[41] Such numbers are modest from a federal budget point of view, but could be quite significant for building capacity within and across local organizations.

The success of institution building efforts like these will depend, as Mallach puts it well, on "a society's level of solidarity and its readiness to direct energy and resources to address issues that are affecting people unequally."[42] Relatively low inequality in Germany and Japan has enabled national political will in both states to face and adapt to population loss, putting financial and human resources toward the problem.

To help build that solidarity in the United States, shrinking cities and their coalitions need to emphasize durable models of resilience and progress, rather than unitary concepts like "recovery" and "renewal." It takes time for a city to accumulate the hundreds of small gains that can turn a vicious cycle of decline into a virtuous cycle of improvements. "To restore political will for action," I wrote in a recent book, "we need to replace a discourse of lost causes with one about good causes. We have to look for improvement, not just transformation."[43]

VI. Since the federal government is unlikely to ride to the rescue, shrinking cities need to get busy on their own. That means affordable, reliable basic services—not new casinos.

In literature, *deus ex machina* refers to a plot device where a simple solution shows up to an impossible problem—the god who swoops down in the chariot. The urban planning equivalent, Mallach says, is cities who seek divine chariots in casinos and convention centers.[44] But there will be no such swift, decisive resolutions to problems rooted in population loss, racial segregation, and intergenerational poverty. The Biden administration's generational investments in infrastructure through the 2021 American Rescue Plan Act, 2022 Inflation Reduction Act, and other bills felt like important contributions from on high, but Mallach worries that

40. *Id*. at 276–77.
41. *Id*. at 277–78.
42. *Id*. at 97.
43. Anderson, *supra* note 7, at 23.
44. Mallach, *supra* note 1, at 269.

these represent "the last hurrah" of sweeping federal funding for cities and infrastructure.[45] (Leading to another piece of advice for policymakers: *Carpe diem* with those IRA grants!)

If he's right and federal redistribution never meaningfully offsets the distortions of contemporary inequality, cities are going to have to find ways to go in the right direction anyway. Mallach presents his own version of what I think of as "resident-centered governance."[46] He renders that principle as "a sustainable, localized economy," which means good governance and public services, with strong lines of communication between residents and leaders; the prioritization of education and human capital; a focus on local quality of life; and a commitment to environmental sustainability.[47]

I think these are the right values. They remind me of the profound privilege I had in reporting in detail on the city of Lawrence, Massachusetts, which offers "proof of concept" that an extremely poor city can still make headway on the values that Mallach prizes. City officials in Lawrence systematically redirected their efforts towards rebooting the reliability and fairness of basic services.[48] This meant daily diligence about little things (such as riding hard on a contractor doing a half-hearted job on a sidewalk rebuild) but also long-term toil and trouble (such as filing lawsuits against large-scale land owners who had decided to self-exempt from property taxes).[49] Meanwhile, these leaders worked effectively with the city's nonprofits, who improved quality of life in the city by redeveloping blighted mills as affordable and market rate housing; decontaminating and repurposing a giant toxic pit into a park with a butterfly garden and maze; and creating safe, green walking paths through the city. Through their ongoing work and vision, a local river and canals that had looked mainly like passageways for trash and pollution became corridors for fish, birds, and (on special occasions) lanterns floating at night. These groups built the citizen networks that would both demand and appreciate city officials' care for local quality of life.

VII. To do all this good work, cities don't need heroic single leaders. They need internal networks of people doing their part who are connected to external networks of others doing the same.

"Making the transition from being a pawn in the globalized economic system to building a successful localized economy is fundamental, wrenching

45. *Id*. at 251.

46. Anderson, *supra* note 7, at 242–45. Lawrence has not been a shrinking city for most of its modern history, but it's always been a very low-income city, and, as its giant mill complexes closed and left giant empty carcasses of blight behind, the city's daytime population plummeted.

47. Mallach, *supra* note 1, at 171.

48. Anderson, *supra* note 7, at 161–67.

49. *Id*. at 158–61.

change,"[50] Mallach writes in italics. He is right: it's "wrenching" to try to go from being a pawn to being a builder, to reduce a city's servitude to global markets in order to build a modern society that is for and by local people. Single mayors can't do all that. Neither can great land use departments or workforce development programs.

Shrinking cities need three big drivers of change, Mallach says. The first is flexible, experimental leadership empowered across a wide base of actors—what he calls in business speak "adaptive leadership." It's not "followers" that elected leaders in shrinking cities need, it's a wider network of people who build momentum and accomplishments on their own. A good mayor recognizes and embodies this value. I recall here a line that I once heard Michael Tubbs (a former mayor of Stockton, California) say: "Change is not going to happen because one person is elected. It's going to happen because a person is elected as a catalyst to bring a whole lot of people into the process of creating change."[51]

The second is human capital. A new generation of technological jobs adapted to advanced manufacturing, decarbonization, and AI are here or coming fast. These industries require innovation and reinvestment in our deteriorating system of career and technical education.[52] Massachusetts, Mallach says, offers a compelling model for coordinating colleges, workforce development agencies, vocational programs, and local employers.

Finally, shrinking cities need to nurture their institutions and organizations, large and small.[53] Even a city in chronic decline has organizations that help transmit a vision for change—from churches to hospitals, arts programs to food co-ops, nursing homes to schools. To be effective, these institutions need to build trust across the city's full population.[54] Racial and economic segregation, tensions related to racial turnover, institutional inertia, and discrimination against/exclusion of newer organizations can render a city's institutional landscape out of date and out of touch. Here again, as Mallach described this imperative in broad terms, I thought of the city of Lawrence in specific terms. A new generation of leaders there rescued and rebuilt Lawrence Community Works, a community development corporation, to include and serve the city's growing Latino population. As they did so, they fostered connections and positive interdependence across the city's public and private institutions and among ethnic groups. Their work began to transform the city's electoral politics from a machine that mostly served public workers and landowners who lived in the suburbs into a local democracy built for (and held accountable to) its current Latino majority.[55]

50. *Id*. at 252.

51. I don't recall where I heard him say this. So my footnote is to the handwritten note on my desk where I penned this approximation of his line to remember it.

52. Mallach, *supra* note 1, at 255–56.

53. *Id*. at 257–60.

54. *Id*. at 260.

55. Anderson, *supra* note 7, at 153–74.

VIII. The people left in shrinking cities are not always there by choice. Extreme poverty, racial/ethnic exclusion from alternative places to live, and physical vulnerability keep people in places they'd rather leave behind.

To make a home for vulnerable people is a function that is so central to our national ideals that it is inscribed on the Statute of Liberty, our "Mother of Exiles."[56] You could recite her message by heart, but I will revere it in writing nonetheless:

> Give me your tired, your poor, your huddled masses yearning to breathe free, the wretched refuse of your teeming shore. Send these, the homeless, tempest-tossed to me, I lift my lamp beside the golden door!

These were humanitarian words and we remember them in that spirit. But the 1886 context of the statue's unveiling reveals that this commitment was not just magnanimous humanitarianism. Industrialization was picking up speed. Our cities needed workers to power the Machine Age.

I thought of this language and historical moment as I read Mallach's arguments about declining birth rates in Western nations and the inclusive immigration policy that those birth rates suggest we need. But this text also came to mind because most of America's shrinking cities have long histories of making a home for refugees of famine, war, and oppression—people with nowhere else to go. They did that 100 plus years ago for our first industrial workforces, and they do that to this day.

Shrinking cities thus shelter the most vulnerable among us—those for whom it is physically or administratively difficult to relocate (e.g., because they are elderly), those who are new to the United States, those who cannot afford housing elsewhere, and those who feel unwelcome or unsafe in other communities.

Looking out for post-industrial cities' people is in the national self-interest. Populations formed by stigma, social isolation, segregation, economic restructuring, and hardship are susceptible to problems that do not stay within their borders, including right-wing extremism, gun violence, drug addiction, or illegal trafficking. Deindustrialization and female outmigration have left some shrinking cities with a population that is disproportionately male.[57] Forgive me for being so blunt as to say: Bad idea.

From disintegrating apartment blocks in Slovakia that house the marginalized Roma people to the most depopulated neighborhoods of Cleveland that house the Black grandchildren of the Great Migration, shrinking cities are shaped by histories that did not live up to national ideals. For both humanitarian and practical reasons, our regional, provincial, and national publics should help take responsibility for their people.

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56. *The New Colossus, Statue of Liberty National Monument New York*, Nat'l Park Serv., https://www.nps.gov/stli/learn/historyculture/colossus.htm.

57. Mallach, *supra* note 1, at 67.

Conclusion

Shrinking cities are the cities of the future. Losing population is a tough, expensive, demoralizing problem for residents and leaders. But it need not be a preview of emptiness, with tumbleweeds rolling past a rotting post office. Shrinking cities can seek quality of life improvements, greater sustainability, and stronger civic engagement. Because a majority of cities globally will soon face the same challenges—and because shrinking cities today make a home for some of the most vulnerable among us—we owe them our support for experimentation and adaptation.

If you're still with me, I think you're the kind of urbanist who would enjoy reading the full book. You'll be rewarded with genuinely interesting global miscellany from Bulgarian architecture to Iranian birth-control policy. You'll dazzle friends with fun facts ranging from remittances in Nepal and Tajikistan (who knew that they make up twenty-five percent of the nation's GDP!) to the observation that people in Japan only buy "used" houses if they have no other choice.[58] Domestically preoccupied readers will find just as much to love, from the dominance of exported corn and soybeans in Peoria to city marketing to climate migrants in Duluth.[59]

So go ahead, read the thing. Or storyboard our next-gen dystopic lit, where gradual population loss can become a heroic adventure. May we eat no people.

58. *Id*. at 53, 92.
59. *Id*. at 181, 247.

ORGANIZATIONAL PROFILE

HeirShares—Innovating Past the Pitfalls of Heirs' Property

*Mavis Gragg & Daniel Walker**

HeirShares, a founder, attorney, and family-led technology start-up is looking to close a century-old access to justice gap impacting African-American property owners. Founders Mavis Gragg, Monica Gragg, and Otis Jennings are on a mission to reduce the cost of legal services available to heirs' property owners and democratize access to legal and financial tools and services that are critical for closing the American racial wealth gap. Approximately eighty-one percent of African-American landowners in North Carolina do not have succession plans. In that same state, the total heirs' property land value amounted to $1.8 billion in 2017.[1] And yet, this land-based value is a fraction of the wealth held by African-American landowners in the past, as African-Americans in several states have lost untold acres of land after emancipation and over one and a half centuries of discrimination. The loss of heirs' property (property passed down to heirs through inheritance) particularly impacts African Americans in the rural South disproportionately. Among the many influences contributing to this fact are the potentially exorbitant fees (including attorney fees) associated with defending heirs' property interests, lack of available trusted attorneys, notably low engagement with succession instruments like wills and trusts, and competition from cash-flush development companies. These owners are often land-rich but cash-poor, so they lack access to the capital necessary to utilize or defend their assets, making them vulnerable to predatory buyers or default. Heirs' property is thus a critical subsection

*Mavis Gragg, CEO of HeirShares, is a self-described "death and dirt" attorney and conservation professional empowering families to use real estate as a source for intergenerational resiliency and wealth. Daniel Walker is a recent graduate of Harvard Law School. A former F-22 Raptor Mission Commander and Fighter Fundamentals Instructor Pilot, Daniel pursued a career in law to learn how to leverage capital and policy to directly support the advancement of historically disenfranchised communities.

1. Scott Pippin, Shana Jones & Cassandra Johnson Gaither, Identifying Potential Heirs Properties in the Southeastern United States: A New GIS Methodology Utilizing Mass Appraisal Data (Sept. 2017), https://www.srs.fs.usda.gov/pubs/gtr/gtr_srs225.pdf.

of access to justice with imperative racial justice implications. HeirShares aims to address the access-to-justice and equality imperative inherent in the challenges above by enhancing property owners' understanding and management of heirs' property, while navigating the complex legal and economic landscapes more easily and efficiently.

Heirs' Property as an Access to Justice Imperative

The perils of insufficient legal representation and management resources are on display in the film *Silver Dollar Road*, a gut-wrenching documentary exploring the journey of the Reels family in coastal North Carolina who lost their battle to retain their heirs' property to a land developer.[2] Their land not only served as working land for farming, fishing, and shrimping, but also supported several Reels family households on a few parcels that have been in the family for a century. In the aftermath, judicial proceedings left two brothers imprisoned and dispossessed from their only source of wealth and income.

Though it would be overly reductionist to suggest that earlier and more affordable legal representation might have mitigated the damage done to the Reels, it is reasonable to imagine that even cursory estate planning or succession management would have prevented some of the harm. Be that as it may, heirs' property representation is particularly costly. For heirs' property owners, simply figuring out who owns what interests in the land can be a financial nonstarter because the task often requires a search through disjointed records from multiple states to identify familial heirs who may not know they own property or may have moved away. But there is no substitute for finding interested parties, as quiet title laws require notice to all interested parties, and the legal presumption of tenancies in common often multiplies their number. Consequently, a landowner could spend down all their available legal funds before quieting title, while repeat players and opportunistic buyers like the developers from the Reels' unfortunate case take advantage of economies of scale through specialized professionals and technology.[3]

Heirs' property by that measure can be a pivotal access-to-justice issue for owners. In the United States' adversarial judicial system, representation in legal proceedings can mean the difference between just and unjust outcomes and/or imbalances in negotiating power. While the same can be said for both civil and criminal proceedings, criminal defendants benefit from a right to counsel[4] in arguably the direst circumstances, whereas

2. Silver Dollar Road (Amazon MGM Studios 2023). (The film adapts Lizzie Presser's 2019 *ProPublica* article *Kicked off the Land*, which detailed the Reels' family's battle with a property developer resulting in land dispossession and imprisonment for the Reels brothers.)

3. *See* C. Scott Graber, *Heirs Property: The Problems and Possible Solutions*, 12 Clearinghouse Rev. 273 (1978).

4. Gideon v. Wainwright, 372 U.S. 335, 343 (1963).

civil litigates have no such right constitutionally. The nonprofit sector and access-to-justice initiatives like the Civil Gideon movement are focused on protecting the most basic rights of those most in need of representation. Housing, food, and health representation by public and non-profit funds are largely centered on safety net programs, sustenance, and homelessness prevention (mainly leasehold tenants' rights). Monetary support for these initiatives ebbs and flows, with funds drying up in economic downturns.[5]

While heirs' property can present a threat of homelessness, the dynamics of these properties and the conflicts that they attract often do not trigger the need-based criteria for triage in the legal aid system. An owner facing a partition sale, for instance, is not facing imminent homelessness but the prospect of below-market realization that subsequently restricts their ability to find comparable housing. Such a prospect cannot outrank the needs of a tenant likewise facing the consequences of a property sale (the landlord selling her property), which might necessitate that what capital the tenant may have is then either spent to move, rent, or purchase a different property if such funds are available at all. While the aforementioned is duly prioritized, those who could build communal wealth with the help of legal representation, as other communities have, lack similar access to pro bono services but likewise cannot afford professional services on par with the commercial giants that desire their property.

If heirs' property is to play a part in building meaningful wealth in the African-American community, it cannot be the object solely of defense or last-chance litigation. Civil representation of heirs' property as a proactive tool for prosperity may not thereby fit the mold of indigent aid because it is, in an economic sense, too far upstream from a crisis. So, while the individual may not be in the dire circumstances typical of a legal-aid client, the need remains in order to stave off land and wealth losses.

The aforementioned gap in legal representation for heirs' property owners has manifested into widespread wealth inequality. Narrowing the access to justice gap through technology-enabled education and legal representations may help remedy this inequality.[6]

Our Story

HeirShares is a legal-tech company providing education and tech-driven solutions to families and service providers for maintaining and growing intergenerational wealth using real estate. It was co-founded by attorney Mavis Gragg along with mathematician Otis Jennings and Monica Gragg,

5. ABA Standing Committee on Legal Aid Indigent Defendants, *Civil Legal Aid Funding*, Am. Bar Ass'n (2024), https://www.americanbar.org/groups/legal_aid_indigent_defense/resource_center_for_access_to_justice/resources---information-on-civil-legal-aid-funding ("Financial resource limitations remain one of the largest barriers preventing civil legal aid providers, even with their pro bono allies, from addressing the needs of low-income client communities.").

6. *Id.*

an adult-learning and user-experience design expert. The concept of the company came about from the founders' personal challenges owning heirs' property (real estate owned through inheritance) and Mavis' professional experience through her law firm specializing in legal services for families who are land-rich–cash-poor. Like the founders' families and the families that Mavis worked with in her practice, retaining and managing their generational real estate—much of which is important generational housing—is only possible if they can resolve title issues and develop comprehensive succession plans that mitigate future title issues and that help optimize their real estate as an asset.

Threats to prosperity and property aside, even preliminary tasks like clearing title on heirs' property are necessarily complicated and distinct from a standard title clearing process. Although it is very common, often the norm, for heirs' properties to have "cloudy title" and no paper trail of ownership, the process of completing a title search and a reliable title opinion is very complicated and onerous: ownership succession of heirs' property is typically through inheritance (i.e., owners die and their interests are automatically transferred to their heirs, and so, there is not often a paper trail). Attorneys clearing title rely heavily on the family tree, which is rich with data necessary for analyzing intestate succession and for obtaining the necessary documents that support the legal analysis of ownership changes.[7] Added to the complexities is the fact that ownership succession through inheritance (will or intestate), which is most common over intrafamily deed transfers, typically results in an increase in the number of owners with each death requiring a lot of math resulting in a lot of fractions in a single family tree. "I'll be frank in sharing that I'm not great at math nor are many of my colleagues working on heirs' property matters," says Gragg. She continues, "In fact, the complex nature of heirs' property matters dissuades a lot of attorneys from handling these kinds of matters, and those that do will often charge a premium." These premiums for time and risk represent a significant widening of the affordability gap for legal services already scantily available Black heirs' property owners. HeirShares was founded to help fill this gap.

Despite having access to various technologies for drafting succession plans and managing client relations, for example, Mavis and other attorneys doing this unique heirs' property work have struggled with not having any tech tools that significantly aid the process of clearing title on heirs' property. Gragg unsuccessfully sought to make accommodations for the lack of a single tool or even a good combo of tools while also trying to make the client costs more affordable. However, the costs remained high for most clients and limited her capacity to serve more clients. "One client 'ghosted' me for a year, and when he re-emerged he informed me that he had to choose between paying property taxes on the subject property and paying me to help his family keep the property," says Gragg. She looked to her payment

7. *See generally* Graber, *supra* note 3.

structure and fees to again make legal services more accessible to those who need it the most. Still, most of her heirs' property clients were not successful in securing and optimizing their property through legal services.

Inspired by the seemingly devastating fate of the world, both the pandemic and her own belief that she had failed with her firm, Gragg decided to take a chance and quench her thirst for something different for how we perform heirs' property title searches by leveraging technology. She teamed up with Otis whom she'd previously relied on for calculating shares in Mavis's client matters and her sister, Monica, with whom she also owns heirs' property to start HeirShares in March 2020.

Work, Services, and Feature Development

With some seed money from grants and a round of friends and family investing coupled with lots of sweat equity, HeirShares has been on an incredible journey to build a tool that will make the process of clearing title on heirs' property easier, efficient, and much more affordable. The underlying belief is that a successful tech-driven tool will encourage more attorneys to take heirs' property matters, thereby filling an incredible gap in access to legal services enabling heirs' property clients to obtain more comprehensive legal services and management resources related to their land.

HeirShares took the modest seed funding and surveyed fifty-one jurisdictions in 2021 and used its time in the Founder Gym to produce an initial mapping of its Tree Builder App.[8] These initial steps provided the necessary platform to expand their offerings to consulting and learning platforms in 2022 before receiving funding from Kenneth L. Karst Racial Equity Foundation to build the first online learning platform about heirs' property, Death & Dirt,[9] co-founding the Heirs' Property Practitioner Network (HPPN) with Fran Miller of the Center for Agricultural and Food Systems, and developing proprietary algorithms that predict changes in ownership and calculate ownership shares.[10] Product iteration

8. Spanning twenty-six countries and six continents, Founder Gym, https://foundergym.com/about, was one the leading online programs training underrepresented founders on how to raise money to scale their tech startups.

9. Death & Dirt (2024), https://www.deathanddirt.com (online training for heirs' property owners).

10. Incorporated in 2021, the Racial Equity Foundation, https://www.klkrefoundation.org, was started to honor Kenneth L Karst's work and extend the legacy of his lifelong endeavor to advance equality for all. The primary objective of this foundation is to help create a deeper understanding of the facts of and reasons for the ever-increasing racial inequity in America, and to work towards greater equity for all residents of the United States through various means including grants, scholarships, and impact-investing programs. The mission of the Heirs' Property Practitioner Network (HPPN) is to build and sustain a healthy ecosystem of legal service providers who are committed to promoting justice and preserving generational wealth through their work either directly with heirs' property owners as clients, in support of those legal providers, or in the work to change policy to support heirs' property owners better.

through 2023 led to a refined understanding of who the true market for HeirShares' technology is—attorneys and agencies, rather than property owners themselves; this discovery necessitated a shift from a Business-to-Customer (B2C) to Business-to-Business (B2B) that should scale the reach of services and ensure the survival of the venture itself. In 2024, HeirShares will test the Tree Builder app with attorneys in North Carolina and South Carolina and complete the Heirs' Property Knowledge Base in preparation for a relaunch in 2025.

Conclusion

HeirShares is on the precipice of a unique legal technology offering not seen to date, as the first effort to democratize strategic estate management for historically disenfranchised heirs' property owners. Should everything go mostly to plan ("of mice and [wo]men" and all), the cost of legal services sorely needed by cash-strapped property owners should come down to an attainable level and bring more balance to the information and options available to families just as interested in their land as any developer. With information and options, African-American families can plan for succession, hold property in instruments that benefit the stainability of their interests, and participate gainfully in the American dream that they and their ancestors helped build. Should this come to pass, fewer African-American landowners will lose their properties to extractive methods and will instead retain their best wealth-building and transfer engines: their land.

ARTICLES

The Corporate Transparency Act and Affordable Housing Transactions: The Mischief Wrought Through Statutory and Regulatory Opaqueness

*J. William Callison**

In 2021, Congress enacted the Corporate Transparency Act (CTA), which enables the Treasury Department, acting through its Financial Crimes Enforcement Network (FinCEN) to obtain information about the creation and beneficial ownership of certain entities.[1] Congress's intent in enacting the CTA was to prevent criminals from maintaining anonymity through the use of shell business entities while undertaking money laundering, fraud, drug trafficking, corruption, tax evasion, organized crime, and other illicit activities through those entities. The provision of affordable housing may not be illicit, but the CTA's reach is expansive, perhaps unduly so.

The Treasury Department promulgated CTA regulations (CTA Regulations), which became effective as of January 1, 2024.[2] The CTA and the CTA Regulations are broad sweeping and require many entities created both before and after January 1, 2024, to file reports setting forth the names of their "company applicants" and their "beneficial owners," a term which is itself broad sweeping and can include persons who are not owners of reporting entities, at least as "ownership" is ordinarily understood.[3] The CTA and the CTA Regulations also leave numerous significant questions unanswered.

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1. 31 U.S.C. § 5336.

2. 31 C.F.R. § 1010.380 (the "CTA Regulations") [hereinafter CTA Regulations].

3. This Article discussed "domestic reporting companies" only, and not "foreign reporting companies."

This Article provides an outline of the CTA requirements and discusses certain questions that may affect entities involved in affordable housing and community development activities. It attempts to offer guidance concerning CTA compliance. The CTA has been challenged in the courts on constitutional grounds, and careful attention should be paid to statutory and regulatory changes and interpretations. In this regard, this article provides a background against which such changes can be considered.

This article proceeds as follows: First, it discusses the question of what entities are required to report beneficial ownership under the CTA. Second, it discusses the highly significant question of which entities, although they would otherwise be reporting companies, are exempt from reporting requirements. Third, assuming that a reporting company is not exempt, it discusses reporting requirements, including the required timing for reports, the meaning of "beneficial ownership," the meaning of "company applicant" (which must be reported for entities formed after December 31, 2023), and the "FinCEN Identifier" concept. Fourth, it discusses penalties for failure to report. Finally, the article discusses more pragmatic questions, and it attempts to highlight methods for enabling required reporting of beneficial owners.

A. What Is a "Reporting Company" Under the CTA?

Under the CTA and the CTA Regulations, certain entities, referred to as "reporting companies," are required to report information about their "beneficial owners" and "company applicants" to FinCEN.[4] The term "reporting company" generally includes any entity that is a corporation, a limited liability company, or "*created* by the filing of a document with a secretary of state or a similar office under the law of a State or Indian Tribe."[5]

Although corporations and LLCs are reporting companies virtually by definition,[6] there may be questions concerning whether other entity forms are "created" by the filing of a document with a secretary of state or similar office. The word "created" is undefined in the CTA and the CTA Regulations. In my view, limited partnerships are created by filing and should be considered reporting companies.[7] As limited partnerships, limited liability limited partnerships (LLLPs) also should be considered reporting companies.

4. CTA Regulations, *supra* note 2, §1010.380(a). There is no distinction between for-profit and non-profit corporations in this regard.

5. CTA Regulations, *supra* note 2, § 1010.380(c)(1).

6. In recent FAQ guidance, FinCEN indicated that corporations and LLCs that are not created by a filing are not reporting companies. I think this may be a very small class of business entities. I note that the status of series entities and entities established by conversion is unclear; this article will not discuss these matters.

7. *See, e.g.*, Uniform Limited Partnership Act § 201 (2001), *available at* https://www.hooyou.com/eb-5/Uniform%20Limited%20Partnership%20Act.pdf ("In order for a limited partnership to be formed, a certificate of limited partnership must be delivered to the [Secretary of State] for filing.").

However, general partnerships are not "created" by a filing with a secretary of state or similar office. Instead, they are formed, whether by the partners' intent or inadvertently, when there is an "association of two or more persons to carry on as co-owners a business for profit" that does not take another entity form.[8] Therefore, general partnerships should not be "reporting companies" for CTA purposes, irrespective of their size, their business, or the nature of their owners.[9]

In my view, in many or all states limited liability partnerships (LLPs) are not "created" by a filing with a secretary of state or a similar office.[10] "Creation" should be understood as being brought into a state of existence from a state of non-existence. LLPs exist as general partnerships and register with a secretary of state in order to obtain the benefit of limited liability protection.[11] Unlike corporations, LLCs, and limited partnerships, LLPs do not come into existence from a state of nonexistence by virtue of a filing with a secretary of state. Similarly, general partnerships may cease to be LLPs by delivery to the secretary of state a statement of withdrawal of LLP registration; but such withdrawal means only that the general partnership no longer affords limited liability protection to its partners and has no effect on the partnership's existence.[12]

It is not difficult to see the potential for chaos created by the concept of creation by filing. For example, the well-represented drug trafficker/money launderer could organize as a general partnership, register as an LLP, enter a partnership agreement replicating LLC governance and other matters, and avoid filing beneficial ownership information with FinCEN. Although FinCEN may be considering the question, and indeed may be operating under the belief that LLPs must file beneficial ownership information, such regulatory or administrative positions would likely fail in light of the statutory "created by a filing" language and that any solution rests with Congress.

This leads to the question of whether and when LLPs can be useful in affordable housing transactions. In my view, in some circumstances they can be quite useful. For example, assume that two individuals (or one individual and an entity, or two entities such as individually owned LLCs) participate in an affordable housing transaction as developers. Rather than forming an LLC to establish their relationship, they can act as joint venture partners for a single transaction and register as an LLP to avoid joint and

8. See Revised Uniform Partnership Act § 202 (1997).

9. In my view, a partnership that is formed by two or more reporting companies (such as LLCs) is not itself a reporting company. This leaves a rather large hole in the CTA. In addition, sole proprietorships and common law trusts are not reporting companies.

10. FinCEN has not provided guidance on this question, and such guidance may be forthcoming.

11. Revised Uniform Partnership Act, *supra* note 8, § 1001(c) ("*A partnership may become a limited liability partnership* by filing a statement of qualification." (emphasis added)).

12. *Id.* § 1001(e).

several personal liability. When the development services end, the LLP can dissolve and begin the winding up process as a "partnership for a definite term or particular undertaking." As an LLP, the partnership is not a "reporting company" and is not subject to beneficial ownership filing with FinCEN. As discussed below, the CTA and the CTA Regulations mandate updated reports whenever there is any change with respect to required information previously submitted concerning a reporting company or its beneficial owners. Also as discussed below, it is not clear when the reporting requirements end or even if they do. By forming an LLP as opposed to an LLC, the developers likely avoid any long-term requirements to file updates, at no cost to them. A traditional choice of entity analysis, particularly with respect to governance issues, should be undertaken when choosing an LLP form over an LLC form.

B. What Entities Are "Exempt Entities?"

The CTA Regulations provide that the term "reporting company" does not include certain exempt entities. Thus, if a corporation, LLC, or other similar entity created by filing is an exempt entity, it does not need to report its beneficial ownership to FinCEN. Affordable housing transactions frequently involve exempt entities as investors, sponsors, developers, and in other capacities. Importantly, they also involve tiered structures, which may include exempt entities, non-exempt entities, or both. Such exempt entities include the following:

a. Securities reporting issuers, are issues of registered securities under the Securities Exchange Act of 1934.[13]

b. Governmental authorities, are defined as "any entity that: (A) is established under the laws of the United States, an Indian tribe, a State, or a political subdivision of a State; and (B) exercises governmental authority on behalf of the United States or any such Indian tribe, State or political subdivision."[14] In my experience, local housing authorities frequently participate in affordable housing transactions as sponsors/developers or for property-tax-exemption purposes. This participation leads to a question of whether such housing authorities, which generally are established pursuant to state statute, are reporting companies. A related question is whether their affiliates (e.g., wholly owned corporations or LLCs) are exempt entities.

First, although the question is one of state law, housing authorities generally are created by complying with a state statute and not by a filing with the secretary of state or similar filing office.[15] In such case, housing authorities should not constitute "reporting companies."

13. CTA Regulations, *supra* note 2, § 1010.380(c)(2)(i).

14. *Id.* § 1010.380(c)(2)(ii).

15. *See, e.g.*, Colo. Rev. Stat. § 29-4-201 *et seq.* (Colorado city housing authorities created by compliance with Colorado statute). Even though many Colorado housing authorities register with the Colorado Department of Local Affairs, Division of Housing,

Second, housing authorities frequently participate in transactions through wholly owned LLC corporations or other entities. Since those entities are themselves created by filing, they are generally reporting companies, and it becomes important to determine whether they are exempt entities. Under the CTA Regulations, as discussed below, housing authority subsidiaries would be exempt from beneficial ownership reporting if the housing authority that owns or controls them is a "governmental authority."[16] As stated above, a housing authority is a governmental authority if: (1) it is established under the laws of the United States, an Indian tribe, a state, or a political subdivision (e.g., a city or county) of a state; and (2) it exercises governmental authority on behalf of the jurisdiction under whose laws it is formed. Generally, housing authorities will meet the first element. With respect to the second element of exercising governmental authority, FinCEN has not given specific CTA guidance. However, in the foreign account reporting context, FinCEN regulations provide that an entity "generally exercises governmental authority on behalf of the United States, an Indian Tribe, a State, or a political subdivision *only* if its authorities include *one or more of* the powers to tax, to exercise the power of eminent domain, *or* to exercise police powers with respect to matters in its jurisdiction."[17] Although the regulations are not entirely clear (e.g., the word "generally" gives one pause), in my view, the underlying question is whether a housing authority has the authority, whether or not exercised, to do one or more of taxation, eminent domain, or exercise police power. Although some state statutes concerning housing authorities give such entities the *power* of eminent domain,[18] it is my understanding that some states provide housing authorities with none of these enumerated powers. In the first case, housing authorities should be "governmental authorities" and their wholly owned or controlled affiliates should be exempt entities; in the second case, they would not be as the CTA Regulations are currently written. In my view, this outcome is absurd, and it is hoped that FinCEN will rectify this situation so that the governmental authority exemption does not depend on the state in which the housing authority exists.

c. Banks and bank holding companies.[19]

d. Insurance companies.[20]

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such registration is not an element of their creation. In addition, still using Colorado as an example, some housing authorities file documents with the Colorado Secretary of State, generally involving tradename protection. In the case of housing authorities that file articles of incorporation with the secretary of state, and there are some in Colorado, it is necessary to determine whether that is the actual mode of "creation" or whether that is protective or mistaken in nature.

16. CTA Regulations, *supra* note 2, § 1010.380(c)(2)(xxii).
17. *See, e.g.*, 31 C.F.R. § 1010.350(c)(4).
18. *See, e.g.*, Colo. Rev. Stat. § 29-4-211.
19. CTA Regulations, *supra* note 2, § 1010.380(c)(2)(iii), (v).
20. *Id.* § 1010.380(c)(2)(xii).

e. Charitable Organizations, are described in Code Section 501(c) and exempt from taxation pursuant to Code §501(a).[21] Section §501(c)(3) organizations, and to a lesser extent §501(c)(4) organizations, frequently participate in affordable housing transactions as sponsors and developers and through LLCs that serve as general partners/managing members and developers. One issue with respect to newly formed Section 501(c)(3) organizations is whether they are "described in section 501(c)" prior to the time, which can be prolonged, when they receive an IRS determination of their tax-exempt status. Although there may be conflicting views on this question, the most conservative approach appears to be to take the position that an entity is not exempt under Code Section 501(c)(3) until it receives an IRS determination. Notwithstanding, in my view, the correct analysis is that a 501(c)(3) organization is exempt as of the time it is created even when, and assuming that, the IRS determination is received later. This view is based in part on language in the CTA Regulations that exempt entity includes "an organization that is described in Section 501(c)(3) of the Internal Revenue Code of 1986 (*determined without regard to Section 508(a) of the Code*) and exempt from tax under Section 501(a) of the Code."[22] Code Section 508(a) sets forth the charitable exemption filing requirements and, therefore, in my view an appropriate reading of the "without regard to" language means that a (c)(3) is a (c)(3) from the beginning irrespective of whether it has met mandatory filing and determination requirements, assuming that it ultimately does so. As a practical matter, until FinCEN provides further guidance, in my view legal counsel should refrain from advising clients that they will quality as exempt organizations, and a client that reasonably believes it will be exempt can make its own decision not to file and disclose its beneficial owners. The safe approach, which should not be dismissed as out of hand, would be for the exempt organization to file and then, when it receives an exemption determination, file an amendment to its report informing FinCEN that it is exempt under the CTA. However, this filing and refiling may involve a complex process of determining a (c)(3) organization's beneficial owners since that may involve difficult determinations concerning substantial control, discussed below. Stay tuned for FinCEN guidance on this issue.

f. Large operating companies are defined as entities that (i) employ more than twenty full-time employees in the United States; (ii) have an operating presence at a physical office in the United States; and (iii) file a federal income tax or information return demonstrating more than $5,000,000 in gross receipts or sales, excluding gross receipts or sales from outside the United States.[23] It should be noted that large start-up companies that have not filed tax returns of reports would not qualify and that the exemption

21. *Id.* § 1010.380(c)(2)(xix).
22. CTA Regulations, *supra* note 2, § 1010.380(c)(2)(xix) (emphasis added).
23. *Id.* § 1010.380(c)(2)(xii).

can be transient with respect to entities operating close to the employee or receipts thresholds.

g. Subsidiaries of exempt entities are defined as any entity whose ownership interests are fully controlled *or* wholly owned, directly or indirectly, by one or more exempt entities, with two minor exceptions.[24] Since affordable housing transactions generally involve tiered structures, the subsidiary entity exemption is important. For example, on the one hand, an LLC having two members, with the managing member being a §501(c)(3) organization (and thus, itself, an exempt entity) and with the investor member being a bank, insurance company, or large operating company (or an entity owned by such entities), would constitute an exempt entity. On the other hand, the introduction of any entity, such as a for-profit sponsor, that is not an exempt entity into the ownership or control structure would cause the LLC to fail to constitute an exempt entity. In the first case, the LLC would not be required to report its beneficial owners and company applicants to FinCEN, and, in the second case, it would. The effect of this file/no file setting requires special attention to organizational structure, particularly in settings involving housing authorities and nonprofit organizations.

h. Inactive entities is defined as any entity that was in existence on or before January 1, 2020, which is not engaged in an active business, is not owned by a foreign person, has not has an ownership change in the preceding twelve months, has not sent or received funds greater than $1,000 in the preceding twelve months, and does not hold any assets of any kind or type. The requirement of existence on or before January 1, 2020, means that many otherwise inactive entities will not qualify for the exception.

C. Assuming a "Reporting Company" That Is Not an Exempt Entity Under the CTA, What Are the CTA Reporting Requirements?

a. Timing of Reports. The CTA mandates that non-exempt reporting companies file an initial report and, in the event of information changes, updated reports. For entities formed between January 1, 2024, and December 31, 2024, the initial report must be filed within ninety days after the earlier of the date it receives actual notice that its creation has become effective or the date on which the secretary of state or similar office first provides public notice, such as through a publicly accessible registry, that the reporting company has been formed.[25] In the case of LLCs, limited partnerships, and corporations, the safest approach is to begin the ninety-day period on the effective date of the filing. For example, many states, such as Colorado, provide public notice of formation on a publicly accessible database immediately on such effective date. The CTA Regulations do not define "actual notice," but even in cases where there is no correspondence or certificate of formation, it seems difficult to take a position that an entity causing its

24. *Id.* §1010.380(c)(2)(xxii).
25. *Id.* § 1010.380(a)(1).

formation documents to be filed does not have actual notice that they are effective as of the effective date of formation.

For reporting companies formed *before* January 1, 2024, the CTA Regulations currently require that an initial report be filed by December 31, 2024.[26] For reporting companies formed on and after January 1, 2025, the initial report needs to be filed within thirty (not ninety) days after formation.[27] Suffice it to say that a December 31, 2024, deadline for many millions of existing reporting companies is sobering.[28]

The CTA Regulations state that if there is any change to information previously submitted to FinCEN about a reporting entity (e.g., address changes) or its beneficial owners, including changes to who is a beneficial owner or information reported for any particular beneficial owner, the reporting company must file an updated report within thirty days after the change date.[29] Effectively, this places the burden on the reporting company to know about and to report changes. Reporting companies should require that their beneficial owners provide current, updated information concerning such changes, and there should be reporting and updated language in LLC operating agreements. Sample language is provided below. Further, because beneficial owners include individuals who exercise "substantial control" over the reporting company, it is important that reporting companies know the meaning of substantial control, so they can report, for example, changes in managers and persons having substantial influence over decisions. Fortunately, it is possible to alleviate some of the burdens of, for example, reporting changes to beneficial owners' addresses and other information by having beneficial owners obtain a "FinCEN identifiers," as discussed below.

b. Contents of Initial Reports. The CTA Regulations state that a reporting company's initial report shall contain specified information, including the legal name of the reporting company, any tradenames or d/b/a names, the reporting company's *street* address, the jurisdiction under which the reporting company was formed and the IRS tax identification number (EIN) of the reporting company.[30] The CTA Regulations also provide that the initial report shall include information concerning each *individual* who

26. *Id.* § 1010.380(a)(1)(iii).

27. *Id.* § 1010.380(a)(1)(i).

28. On May 6, 2024, FinCEN report that 1.7 million beneficial ownership reports have been filed, which is less than five percent of the anticipated approximately forty million reports due by December 31, 2024. *See* Prepared Remarks of FinCEN Director Andrea Gacki During the SIFMA AML Conference, Fin. Crimes Enf't Network (May 6, 2024), https://fincen.gov/news/speeches/prepared-remarks-fincen-director-andrea-gacki-during-sifma-aml-conference.

29. CTA Regulations, *supra* note 2, § 1010.380(a)(2)(i).

30. *Id.* § 1010.380(b)(1)(i). I understand that, in the case of disregarded LLCs, FinCEN will not allow use of the parent entity's EIN. This divergence from tax rules necessitates getting an EIN for the subsidiary.

is a beneficial owner and each *individual* who is a company applicant,[31] including the individual's name, date of birth, street address, unique identifying number from a passport or driver's license, and an image of such document.[32] The information requirements are relaxed for individuals who apply to FinCEN for a FinCEN identifier, which requires only that the FinCEN identifier be used on the initial report. These requirements shift the burden of reporting changes (e.g., an address change or a new passport number) from the reporting company to the individual.[33] Lawyers and paralegals who form reporting companies, and are thereby "company applicants," should be encouraged to obtain a FinCEN identifier through a simple online filing. Counsel likely should encourage persons who are beneficial owners to obtain a FinCEN identifier.

In the case of reporting companies that are owned wholly or in part by exempt entities, when an individual is a beneficial owner *exclusively* by virtue of having an ownership interest in the exempt entity, the initial report can contain the name of the exempt entity only, in lieu of other required information about the individual.[34] However, if the individual is a beneficial owner by virtue of substantial control of the reporting entity, all requisite information must be provided (or alternatively, the individual's FinCEN identifier). This provision can create significant issues, as discussed below.

c. Who are "beneficial owners"?

A "beneficial owner" of a reporting company is any individual who, directly or indirectly, either owns or controls twenty-five percent or more of the ownership interests in the reporting company or exercises "substantial control" over the reporting company.[35] In all cases, the beneficial owner must be an individual, thereby requiring tracking through tiers of entities.

i. "Ownership interest" includes equity, stock or other instrument, or, importantly for affordable housing transactions, any capital *or* profit interest in an entity.[36] Assuming an LLC or limited partnership reporting entity, and therefore the use of capital or profit interests, the FinCEN Regulations state that the individual's ownership interests are their capital and profits interests in the entity, calculated as a percentage of the total outstanding capital and profits interests of the entity.[37] Therefore, although specific guidance has not been issued, when profits and capital interests are specifically allocated (for example, 90% to the managing member and 10% to the investor member), the beneficial owners would likely include persons

31. CTA compliance ultimately links back to individuals, and this raises complexity in tiered entity structures.

32. CTA Regulations, *supra* note 2, § 1010.380(b)(2)(ii).

33. *Id.* § 1010.380(b)(4).

34. *Id.* § 1010.380(b)(2)(i).

35. *Id.* § 1010.380(d).

36. *Id.* § 1010.380(d)(2)(i).

37. *Id.* § 1010.380 (d)(2)(iii)(B).

having an at least a 27.77% (0.25/0.9 = x) interest in the managing member. It is unclear whether financial performance-based fees, such as incentive management fees, will be treated as a profit interest, and the conservative approach would be to treat such fees as a profit interest.

The CTA Regulations also state that "any options or similar interests of the individual shall be treated as exercised."[38] Therefore, when a person has an option to purchase an ownership interest in a reporting company, it is likely that the option will be treated as though it is exercised in determining beneficial ownership.[39] Using the 90–10 profits structure set forth above, and assuming that the managing member has an option to acquire the 10% profit *interest* of the investor member (e.g., a fifteen-year buyout), the managing member likely will be treated as the 100% owner of the reporting company, and individuals owning 25% or more of the managing member would be treated as beneficial owners of the reporting company.[40]

ii. Substantial Control. The CTA Regulations state that an individual exercises "substantial control" over a reporting company if the individual (A) serves as a "senior officer" of the reporting company; (B) has authority over the appointment or removal of any senior officer or a majority of the board or equivalent; (C) directs, determines, or has substantial influence over important decisions made by the reporting company, including decisions about the business of the reporting company, major expenditures or investments, issuance of equity, incurrence of debt, expenditures or approval of the operating budget; compensation and incentives for senior officers; the entry into or termination of significant contracts; and amendments of any substantial governance documents of the reporting company; or (D) has any other form of substantial control of the reporting company.[41] Parsing through some of the language, and demonstrating its lack of clarity and uncertainty, a "senior officer" means any individual holding the position or *exercising the authority of* a president, chief financial officer, general counsel, chief executive officer, chief operating officer, or any other officer, regardless of official title, who performs a similar function.[42] One obvious question is whether an LLC manager or managing member, who is not an "officer," is a "senior officer" of the LLC. I think that the likely answer is that such person will be a senior officer of the LLC. In addition, the CTA Regulations provide that a person may, directly or indirectly, exercise substantial control through board representation, ownership or control of a majority of the voting power in a reporting company, rights associated

38. *Id.* § 1010.380(d)(2)(iii)(A).

39. However, it is not clear what the "of the individual" reference means when it is an entity that has the option or similar interests.

40. The effect of an asset purchase option is uncertain, including whether a resulting dissolution of the owner entity due to a transfer of all substantially all assets would be treated the same as an interest purchase option.

41. CTA Regulations, *supra* note 2, § 1010.380(d)(1)(i).

42. *Id.* § 1010.380(e)(8).

with any financial arrangement, control over intermediary entities that exercise substantial control over a reporting company, or any other contracts, arrangement, understanding, relationship, or otherwise.[43] This list creates a thicket with no clear route in, or out.

For illustrative purposes, assume a LIHTC Owner LLC that is a reporting company, that an exempt entity is the investor member, and that the investor member directs, determines, or has substantial influence (e.g., approval or veto power, or decision-making power) over the sale or mortgage of the Owner LLC's assets, dissolution of the Owner LLC, the incurrence of significant debt by or issuance of additional equity in the Owner LLC, budget approval, and amendment of the Owner LLC's operating agreement. In my view, this typical scenario leads to the question of who the beneficial owners of the Owner LLC are, based on the substantial control prong of the beneficial owner test. This resolution itself requires an understanding of the control structure of the investor member—namely, how the approval, veto, and other powers with respect to the Owner LLC are exercised. If one person exercises these powers, that person likely is a beneficial owner of the Owner LLC; the more dispersed the power, the less likely that any particular individual will be a beneficial owner; the less direct the power (for example, does that person repot to a committee or board with the authority?), the less likely an individual is to be a beneficial owner. Stated differently, it all depends.

This problem is amplified by the CTA Regulations' provision that if an exempt entity has or will have an ownership interest in a reporting company (here, the Owner LLC) and an individual is a beneficial owner of the reporting company *exclusively* by virtue of the individual's ownership interest in the exempt entity (meaning, not due to substantial control), the beneficial owner interest report (BOIR) may include the name of the exempt entity in lieu of information *otherwise required* regarding such beneficial owner.[44] Translated, in my view this means that if an individual is a beneficial owner of Owner LLC due to such person's substantial control, information regarding that individual must be included in the BOIR and must be kept up to date. This seems to be a particular problem where the Owner LLC (and its manager) does not know who these individuals (all of whom are upstream from the exempt investor entity) with substantial control powers are. Some possible solutions to this problem are discussed below. Notwithstanding the possibility that there might be some solutions, the stupidity of this problem is demonstrated by the fact that there would be no issues if an exemption were to apply to the Owner LLC, for example where the Owner LLC's managing member is a governmental authority, or 501(c) organization, or a wholly owned affiliate of such an entity, and the investor member were the same exempt entity. In such case, the Owner LLC would not be a reporting company, and the persons exercising

43. *Id.* § 1010.380(d)(1)(ii).
44. *Id.* § 1010.380 (b)(2)(i).

substantial control on behalf of the investor member would be irrelevant for reporting purposes. The question of reporting for the exempt entity that is an investor member depends on the nature of the managing member. The moral of this hyphothetical is that things that are alike for all real intents and purposes need not be treated alike for CTA purposes.

d. Who are "company applicants"?

Entities that are formed after (but not on or before) December 31, 2023, must name their "company applicants" in its beneficial owner report. A company applicant is the individual who directly files the documents that creates the entity *and* the individual who is primarily responsible for directing or controlling such filing if more than one individual is involved in the filing.[45] Even if more than two individuals are involved in the filing, only two can be company applicants. Although the determinations are situational, when a lawyer directs a paralegal or other assistant to prepare and file an LLC's articles of organization, both the paralegal/assistant and the lawyer will be company applicants. If the lawyer does the filing themself, the lawyer is the company applicant (and there is a question of whether an individual at the client a company applicant would also be a company applicant). If the paralegal (or lawyer) directs a corporate service provider to file the articles, the individual at the provider who directly files the articles is a company applicant along with the lawyer (but not the paralegal). If a client directly asks the corporate service provider to file the articles, then the individual at the provider who directly files and an individual at the client who directed the provider to file are the company applicants. It may be the case that law firms will avoid having their lawyers and paralegals be company applicants by causing the client to contact the service provider directly.[46]

e. FinCEN Identifiers.

When an individual is a beneficial owner or company applicant, the use of a "FinCEN Identifier" eliminates the need to include specific information concerning the individual on a beneficial ownership repot, and updating the report with respect to changes relating to that individual (e.g., changes in address).[47] A FinCEN Identifier is obtained by application to FinCEN, which application includes information about the individual such as driver's license and passport information (and a copy of the underlying document). This can be done online and, in my experience, is quick and

45. *Id.* § 1010.380 (e).

46. I, personally, am agnostic on this as I have a FinCEN identifier and do not find being a company applicant burdensome. In my view, lawyers should consider directly filing themselves to avoid identifying a paralegal. I recognize that I, as the holder of a FinCEN identifier, need to report charges in information. I also recognize that law firms are adopting different policies concerning entity filings.

47. CTA Regulations, *supra* note 2, § 1010.380(b)(4)(ii).

painless. An individual with a FinCEN in the application;[48] this shifts the continuing reporting requirements from the reporting company.

D. Noncompliance Penalties.

The CTA establishes criminal and civil penalties for *willful* noncompliance. The civil penalty is not more than $500 per day of noncompliance. The criminal penalty is not more than a $250,000 fine or imprisonment for not more than five years. No enforcement action has yet occurred, and it will be interesting to consider how FinCEN will enforce the CTA in the future.

E. Concluding Thoughts.

a. Do not let CTA compliance determine deal structure. Generally speaking, compliance itself is relatively simple.

b. Understand the deal structure in CTA terms. For example, a chart indicating direct and indirect ownership, the existence of options, direct and indirect control, exempt entity status, and the like is extremely helpful in tracking the ultimate reporting requirements.

c. Get Help. Firms should have one more or more point persons tasked with understanding the CTA and assisting others with compliance. The CTA is not intuitive, and expertise is necessary.

d. Include CTA compliance language in operating agreements and partnership agreements. Investor-directed compliance requirements could take the form of the following *draft* language:

> The Investor Member (a) represents that it is an "exempt entity" under the Corporate Transparency Act; (b) agrees that it shall (i) notify the Company of any changes in the ownership of the Investor Member, and (ii) in such event provide or cause to be provided to the Company and the managing member a written representation to the effect that the Investor Member continues to be an exempt entity under the CTA; (c) in the event that Investor Member ceases to be or is determined not to be an exempt entity, it shall promptly, but in no more than ten business days, provide to the Company all information that the Company requests in order for the Company to comply with the CTA Requirements, and shall promptly notify, but in no more than ten business days, the Company of any change or inaccuracy in the information previously provided to the Company; (d) provide the Company and the managing member with the names and CTA-required information of all persons affiliated with the Investor Member who exercise "substantial control," as defined in the CTA, over the Company, together with information concerning any changes in such persons; (e) notify the Company and the managing member; and (f) indemnify, defend, and hold harmless

48. *Id.* § 1010.380(b)(4)(iii).

the Company, and their affiliates for all losses, costs, and expenses, including reasonable attorneys' fees and costs, incurred by an such persons, as a result of or arising out of, such Investor Member's failure or refusal to comply with this section 8.06

e. Since noncompliance penalties are imposed only for willful acts, attempt should be made to make sure any noncompliance is not willful. For example, if an investor will not agree to operating agreement provisions, consider having the reporting company and its manager send out an annual letter to the investor stating, for example, an assumption that the investor continues to be an exempt entity; if it is not, demanding the submission of information needed for CTA compliance; stating an assumption that the investor has no individuals who might be treated as exercising "substantial control" over reporting company decisions; demanding information required for CTA compliance if there are such controlling individuals; noting the requirement that updated reports must be submitted within thirty days of changes and demanding immediate notification of any such changes; and stating that the investor entity is responsible for any failures in CTA compliance caused by the investor's actions or inactions.

Equitable Community Investment for the Win: How Changes to Homeless Services Procurement Could Shift Local Economies

*Erica McWhorter**

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Abstract

In homeless service systems and local communities, it is important to look to upstream activity, such as procurement, to identify and address ongoing inequities downstream. Current regulatory structure, policy frameworks, and procurement practices encourage equitable and innovative approaches to procurement efforts, specifically homeless service resource allocations. This article will identify intervention opportunities that can reduce homeless service monopolies, outdated procurement practices, and unintended disparate impacts. Interventions would benefit the systems, their participants and stakeholders, local community economies, and under-resourced and under-represented community members, such as nonprofit homeless service providers identifying as Black, Indigenous, and People of Color. Finally, this article raises a call to action for opportunities for intervention, compliance with Title VI of the Civil Rights Act, and research questions for further study.

I. Introduction

a. Overview of Homeless Services and Community Systems of Care

Homeless services are undoubtedly a necessary part of a successful response to housing unaffordability, systemic and structural inequities, economic crises, inadequate social network capital, and for communities unable to economically sustain their members. In fact, viewing homeless services through those lenses, it becomes clear that homeless services also function as community investments and development supports. This community investment matches the U.S. Department of Housing and Urban Development's (HUD's) stated purpose for the Continuum of Care (CoC) Program.

This is equally true locally where these systems are often referred to as "systems of care." Recently, this has led to increased awareness of the systemic and structural inequities that have caused and perpetuate homelessness and even how homelessness amelioration to date has contributed to new and growing inequities. While local homeless systems and the CoC Program have grappled with this reality—especially in the wake of recent national visibility of social inequity—there are still systemic and structural opportunities for HUD and local homeless service systems to reduce disparities and improve equity, specifically for procurement.

After the passage of the McKinney-Vento Homeless Assistance Act in 1987,[1] HUD began coordinating the provision of homeless services,

1. McKinney-Vento Homeless Assistance Act, Pub. L. No. 100-77, 101 Stat. 482 (1987) (codified at 42 U.S.C. § 11301 *et seq*.).

including housing, using the Continuum of Care (CoC) Program.[2] Later in 2009, Congress passed the Homeless Emergency Assistance and Rapid Transition to Housing (HEARTH) Act of 2009,[3] which formalized the CoC process.[4] According to HUD, "The Continuum of Care (CoC) Program is designed to promote a community-wide commitment to the goal of ending homelessness."[5] The program provides funding to nonprofit providers, states, Indian Tribes or tribally designated housing entities and local governments to quickly rehouse persons experiencing homelessness.[6]

Between 2012 and 2022, homeless services under the CoC program and as an industry grew significantly in response to increasing crises, technological and service innovation, and the visibility of homelessness. By 2022 funding awarded through the CoC Program's Annual Notice of Funding Opportunity (NOFO) totaled $2.76 billion—a sixty-five percent increase from 2012.[7] In 2023, HUD issued a NOFO that awarded $3.2 billion in funding to homeless service projects—about a sixteen percent increase year over year.[8] That NOFO, which is the primary but not only HUD funding stream for the CoC Program, awards the vast majority of homeless assistance funding for local communities to use and distribute to nonprofit service providers.[9]

b. Homeless Services Procurement and Opportunities for Inequities

Procurement for HUD-funded programs, including grants awarded under the CoC NOFO, is guided by several statutes, including federal

2. U.S. Dep't of Hous. & Urb. Dev. (HUD), Continuum of Care Program (2024), https://www.hud.gov/program_offices/comm_planning/coc [hereinafter CoC Program].

3. Homeless Emergency Assistance and Rapid Transition to Housing (HEARTH) Act of 2009, 42 U.S.C. § 11302 (2018).

4. 24 C.F.R. pt. 578 (2018).

5. *Id*.

6. CoC Program, *supra* note 2.

7. HUD, FY 2022 Continuum of Care Notice and Funding Report (Mar. 2, 2024), https://www.hud.gov/program_offices/comm_planning/coc/fy_2022_coc_competition.

8. HUD Press Release, Biden-Harris Administration Awards $3.16 Billion in Homelessness Assistance Funding to Communities Nationwide (Jan. 29, 2024), https://www.hud.gov/press/press_releases_media_advisories/HUD_No_24_018. Local communities received necessary increases during the COVID-19 pandemic. However, such increases were needed prior to the pandemic.

9. HUD also funds many other national housing and homeless service programs under separate funding allocations, which are often braided or leveraged to add resources to the local stock of affordable housing and services that can be used for homelessness assistance. Programs include Emergency Solutions Grants (ESG); Community Development Block Grants (CDBG); Public Housing Programs (Housing Choice and Project Based Vouchers); Section 8 Project-Based Rental Assistance; various ad hoc demonstration project NOFOs, and others. *See also* HUD, Programs of HUD, https://www.hud.gov/hudprograms (last visited June 4, 2024).

procurement standards[10] and the CoC Program Interim Rule.[11] The Interim Rule provides program specific details about funding disbursement, responsibilities of the local Continuum of Care, methods that the CoC applicant must follow to prepare an application for funding, the application and grant award process, project types and requirements, and program and grant administration requirements. It also identifies eligible entities, including nonprofits, states, local governments, and tribes. For-profit entities are ineligible.

For the CoC NOFO, which is the largest and primary source of federal (and often local) homeless services funding, each CoC is required to design, operate, and follow a collaborative process for developing project funding applications.[12] The CoC is also required to establish priorities for funding local projects.[13] Finally, the CoC must establish whether it will submit a single application for funding inclusive of the prioritized community projects or whether it will collect and combine all community applications for funding.[14] The CoC is eligible annually for a pro rata need amount based on project budgets and the CoC's annual renewal demand (dollar amount for projects eligible for renewed grant funding).[15] Based on this provision, the CoC must develop a competitive process to identify the projects that the CoC will submit to HUD for its annual funding.

Funding procurement regulations mark an early opportunity in the process for inequities to develop. While statutory authority is designed to be explicit, it is not designed to necessarily be *specific*. For instance, in the case of CoCs, the Interim Rule, which provides implementation requirements for the CoC program established by the HEARTH Act, gives HUD the power to establish the funding process as it sees fit, and the CoC may designate any entities it sees fit to submit applications. Further, the Interim Rule outlines requirements such as community engagement but does not specify methods or scope, such as the number or qualifications of persons to sit on the CoC's board. Although HUD will publish the annual Notice of Funding Opportunity (NOFO) with requirements and even HUD policy—recently including language encouraging or requiring documentation of racial equity[16]—each community is ultimately responsible for ensuring an equitable nondiscriminatory process specific to their jurisdictional needs. Without policy providing guidance or direction, ongoing freely and eas-

10. 2 C.F.R. pt. 200, subpt. D (2018).

11. 24 C.F.R. pt. 578 (2018); *see* 42 U.S.C. § 11382 (2018).

12. 24 C.F.R. § 578.9 (2018).

13. *Id.*

14. *Id.*

15. *Id.* § 578.17.

16. *See generally* HUD, Continuum of Care Program Competition Awards (Mar. 25, 2024), https://www.hud.gov/program_offices/comm_planning/coc/awards (listing prior year NOFOs with application questions, instructions, and references to the advancement and demonstration of equity in local CoC processes).

ily accessible technical assistance, monitoring and enforcement of equitable standards, or study of the outcomes of CoC competitions, CoCs are left using their best judgment, existing resource capacity, and self-identified priorities. To date, this silence has not worked to regularly produce equitable processes or equitable access and service provider representation for local community members.

The next point where inequity may develop is in the CoC's development and implementation of the competitive process. Due to numerous factors, including expertise and capacity, CoCs may rely on external technical assistance providers to develop and improve these competitive processes for them, with the mistaken belief that these entities are all aware of the risks of procurement inequities or know how to mitigate or engineer competitive processes that are equitable in the first place. Additionally, the process design, if not reviewed often and without guidance on equity and nondiscrimination, may contribute to inequities across various decision points, such as transparency, notice, local eligibility criteria, scoring, review panels, compliance, project evaluation, and appeals.

Finally, community priorities for funding are another key opportunity to address inequities before and during the competitive process. Guidance and support about what this means and how it translates into competition process or decision points, projects, and applicants are crucial to building equitable processes that are holistic and effective. Further, inequities can arise due to a lack of clarity about establishing and using local priorities, such as when priorities should be established and how to align a process with existing priorities or enable fair notice and participation when a competitive process introduces new priorities or compliance rules.

The majority of regulatory guidance and policy support are focused on downstream effects where inequities appear after programs are already funded and implemented. A holistic review of homeless systems and institutions makes clear that there are multiple upstream opportunities within procurement to identify and address where those and other inequities may begin.

c. What Inequity Looks Like Beyond Program Outcomes

Understanding equity is the best way to identify and address inequity. According to PolicyLink, equity is the "just and fair inclusion into a society in which all can participate, prosper, and reach their full potential. Unlocking the promise of the nation by unleashing the promise in us all."[17]

Systems and procurement policies that deny fair inclusion, limit participation, and enable only a few to prosper or innovate within those systems effectively restrain individuals and communities from benefiting from and contributing to the work that is intended to support them and those with their shared lived experience.

17. PolicyLink, The Equity Manifesto (2024), https://www.policylink.org/about-us/equity-manifesto.

In CoC Programs and housing services inequity appears in systems and procurement policies, communities, and their economies, and at the individual level for community members. Tremendous documentation, study, and visible evidence, including from HUD,[18] demonstrates inequity and its impacts on persons being served by homeless service systems and institutional structures like the CoC Program.[19]

However, less often discussed is the direct impact of those structural and systemic inequities born of the ameliorative efforts on the community members and communities where homelessness and homeless services exist. These community members include the persons and nonprofit businesses and leaders who are under resourced, underrepresented, and frequently identify as Black, Indigenous, and other People of Color (BIPOC). Of that group, those most directly impacted by the systemic and structural inequities of procurement policies are the homeless service providers that share lived cultural, economic, and other experiences with those experiencing homelessness in their community. They are largely excluded from the billion dollar industry that presumes to be available to "solve homelessness" *for* their communities and people who look like them.

The scope of the economic impact of the CoC (federal, state, and local) system procurement inequity is massive. The inequitable systems, policies, and approaches silo resources that are intended to be used locally in the coffers of large and segregated entities, often creating local service provider monopolies that are rarely inclusive of BIPOC organizations.[20] This inequity has the added effect of reducing the resources and power available to community members closest to the problems from implementing solutions driven by that shared lived experience. It also reduces access and choice by persons seeking services to find those most applicable to their needs and experiences. This is how structural and systemic inequity is born and perpetuated: artificial reductions or redirections of access, power, choice, and resources.

The result is that the system designed to empower communities and fund homeless solutions is evolving rapidly into a system that capitalizes on and perpetuates existing inequities: restricting access to resources and power for those with preexisting resources by using inequitable

18. *See* HUD, Racial Equity (2024), https://www.hudexchange.info/homelessness-assistance/racial-equity/#coordinated-entry-equity-initiative.

19. *See* Jeffrey Olivet, Catriona Wilkey & Regina Cannon, *Racial Inequity and Homelessness: Findings from the SPARC Study*, 693 ANNALS Am. Acad. Pol. & Soc. Sci. 82 (2021); Matthew Z. Fowle, "Racialized homelessness: A review of historical and contemporary causes of racial disparities in homelessness, 32 Hous. Pol'y Debate 940 (2022); Jennifer E. Mosley, *Cross-Sector Collaboration to Improve Homeless Services: Addressing Capacity, Innovation, and Equity Challenges*, 693 ANNALS Am. Acad. Pol. & Soc. Sci. 246 (2021).

20. *See* CoC Program, *supra* note 2. All data regarding the organizations funded in each CoC by the HUD CoC Program year over year is publicly available online. The agency names and funding amounts are listed, making further research into this hypothesis possible.

determinations of readiness, capacity, and value in procurement policy and practice. This is not just an issue of unfairness or a need for inclusion, study, or training. This issue illustrates that disparities within local homeless systems and the CoC Program structure are not limited only to program outcomes or what can be measured by system data. Therefore, disparities should not be defined solely in those terms or with responses limited by those operational factors.

The disparities are indicative of discriminatory procurement practices that affect both system participants and, critically, *non*participants too. These disparate impacts are a potential Title VI[21] trigger and need just as much attention as inequities in downstream homeless services and outcomes.[22]

d. Why Local Business Operated by Disadvantaged and BIPOC Persons Is Important

Minority-owned small businesses contributed almost $193 billion in economic output per year according to 2019 Census data—exceeding the annual GDP of eighteen U.S. states.[23] As of 2017 there were more than 1 million businesses led by people of color ("minority businesses"), generating over $1.4 trillion and employing 8.9 million people.[24] In 2021 the U.S. Department of Commerce Minority Business Development Agency issued a report on the Contribution of Minority Business to the U.S. Economy and found the contribution of those entities to U.S. GDP is projected to increase three-fold by 2060, reaching 7.4%.[25] Local Initiatives Support Corporation (LISC) makes the case that procurement can be leveraged for economic equity, including increasing business and job opportunities and improving the quality and competitiveness of projects and contracts.[26] While these contributions are specific to for-profit enterprises, the scope and impact of BIPOC business leadership on local communities and the ability to provide economic stability and progress are illuminating.

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21. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq*.

22. 42 U.S.C. § 2000.

23. Press Release, Cal. Office Small Bus. Advoc, California's Minority-Owned Small Businesses Contribute $192.8 Billion in Economic Output and Support Over 2.5 Million Jobs Annually, New Report Shows (Oct. 10, 2023), https://calosba.ca.gov/californias-minority-owned-small-businesses-contribute-192-8-billion-in-economic-output-and-support-over-2-5-million-jobs-annually-new-report-shows/#:~:text=Minority%20small%20businesses%20contribute%20nearly,million%20jobs%20annually%20across%20California.

24. U.S. Dep't of Commerce, Minority Bus. Dev. Agency, The Contribution of Minority Business Enterprises to the US Economy (Sept. 2021), https://www.mbda.gov/contribution-minority-business-enterprises-us-economy.

25. *Id.*

26. Local Initiatives Support Corp., Leveraging Procurement for Economic Equity (2024), https://www.lisc.org/our-resources/resource/leveraging-procurement-economic-equity.

HUD's 2023 Equity Action Plan emphasizes the importance of using "small, local businesses and creating opportunities for sustainable entrepreneurship to build and retain individual and community wealth."[27] The Plan also states that "HUD is in a unique position in which it can encourage its grantees to work with local small businesses by sharing effective models from programs as varied as Choice Neighborhoods and Community Development Block Grants (CDBG) Disaster Recovery."[28] This statement is applicable to nonprofit service providers in local homeless systems. After all, through the CoC Program, NOFO alone designates more than $3 billion per year specifically for not-for-profit, government, and tribal use and procurement.

In recent years, as the homeless services industry has moved towards more equitable approaches, one of the rallying cries and policy shifts has been "nothing for us without us."[29] This statement specifically addresses the need to include persons with lived experience in planning and decision-making processes. That "us" must be inclusive of the communities in which homelessness is an issue and the full range of local service providers with similar shared experiences of the system's participants, including affordable housing developers and landlords. This is especially so if resolving homelessness and system inequities is truly a community-wide commitment.

Furthermore, homeless systems must begin using proximate leaders who are adept at creating asset-based assessments and solutions for community members. Thus, the leaders who are proximate to the communities and issues that they serve "have the experience, relationships, data, and knowledge that are essential for developing solutions with measurable and sustained impact . . . [and] ability to recognize and leverage assets within communities that are often overlooked or misunderstood when viewed through a dominant culture lens."[30] Systems should use leaders from communities who can define human potential beyond deficits or traumas and observe more nuance and root causes of issues.

In this context, homeless service providers need the ability to recognize the expertise and assets of those being served. The professionals who design and run social sector programs should be leading systems change and programing, not merely providing input or feedback, or helping to document the race of the persons served. Identifying and selecting providers cannot be based only on familiarity or safe bets using methods, strategies, and certifications that are industry standards. Enhanced systemic

27. HUD, HUD's Equity Action Plan (2023), https://www.hud.gov/equity.

28. *Id*.

29. *See* Donald Whitehead, *"Housing Not Handcuffs" Rally*, Nat'l Coal. for the Homeless (2023), https://nationalhomeless.org/author/kenia.

30. Angela Jackson, John Kania & Tuaine Montgomery, *Effective Change Requires Proximate Leadership*, Stan. Soc. Innovation Rev. (2020), https://ssir.org/articles/entry/effective_change_requires_proximate_leaders#.

interventions that leverage untapped expertise and innovation require a nonstandard, diversified approach.

II. Recent Government, Local, and Industry Responses

a. Race and Outcomes Focus

To date the regulatory, local, and industry responses to inequities in homeless services have been largely focused on the most visible inequities, such as racial representation within the system (e.g., identifying and comparing the number and rate of persons of color and disabled accessing the CoC's resources, permanent housing placements, etc.). This starting point has many benefits, whether due to knowledge, capacity, or strategy. Those benefits include addressing the immediate experience of system participants and actors, shifting assumptions and beliefs, and producing data that will help investigate sources of inequities and interrogate ongoing responses.

These priorities, when combined with intentional ongoing action and attention, creates significant downstream impacts. However, to change structural and systemic inequities, the response must also include upstream action—rebuilding foundations and frameworks that we have relied on for generations as the "right way" for the government and community to coordinate, collaborate, allocate resources, and make decisions.

To date the regulatory, local, and homeless industry responses to inequities have been heavily race-focused or race-based with an early emphasis on Diversity, Equity, and Inclusion (DEI) training and analysis. Data analyses, changes, and requirements, while relevant, have also garnered significant attention and resources. These are often outcomes driven with a specific focus on funded programs and system outcomes. Another valid approach has been to make space for new voices and provide "seats at the table." This approach represents a broad array of efforts inclusive of diverse advisory and governance boards, separate and integrated lived experience advisory and leadership groups, and broader efforts at engagement and feedback at the community level, within programs, and as part of system governance and operations. For example, during the COVID-19 pandemic, HUD published a wide array of racial equity resources inclusive of many of these ideas as options to identify disparities and address overrepresentation largely aimed at downstream activities and decision making.[31]

b. Biden-Harris Executive Orders Lead to Agency Equity Action Plans

More recently, the Biden-Harris Administration issued two Executive Orders specific to advancing and furthering racial equity and support for underserved communities through the federal government with focuses on agency activities and procurement. The first Executive Order issued on January 20, 2021, directed federal agencies to assess how their policies and

31. HUD Exch., Racial Equity (2024), https://www.hudexchange.info/homelessness-assistance/racial-equity/#covid-19.

programs perpetuate barriers for underserved communities and to develop strategies for removing those barriers.[32] The second Executive Order issued February 16, 2023, intended to further the prior order, called for "a multi-generational commitment" and puts the responsibilities on agencies across the federal government to advance a "whole-of-government approach to racial equity and support for underserved communities," with an explicit emphasis on procurement.[33]

The first Executive Order resulted in federal agencies developing agency equity action plans and assessments. HUD's 2023 Equity Action Plan (Plan) specifically identified access to federal contracting as opportunities that support economic growth and wealth building for underserved communities.[34] While that reference was distinct from HUD's homelessness strategy, it is still relevant for procurement within the HUD-funded CoC Program. Also relevant is what the Plan identified as an early accomplishment: developing a partnership framework with philanthropic support to help local communities increase equity in deployment of federal funding,[35] which is another explicit reference to CoC Program local procurement processes. While the plan purports to focus on "widening the base of small and disadvantaged business" through means such as outreach and tracking successes,[36] it does not go so far as to be inclusive of strategies to direct Title VI-compliant decision-making or ensure the inclusion of not-for-profit BIPOC service providers as grantees.

Similarly, the U.S. Interagency Council on Homelessness (USICH), an interagency partnership formed to prevent and end homelessness using a multi-year interagency roadmap and providing state and private sector support, also developed an Equity Action Plan. As part of the agency's 2022 Federal Strategic Plan, USICH highlighted an "upstream" approach focused on racial equity that requires "an all hands-on-deck response" around multiple pillars: equity, data, and collaboration, housing and supports, and homelessness response and prevention.[37] The Equity Action Plan is intended to be a mechanism to center racial equity and evidenced-based work done as part of the federal strategic plan. It focuses on addressing the overrepresentation of BIPOC persons in homeless systems, providing support to Indian tribes, and embedding racial equity into USICH internal

32. Exec. Order 13985 (Jan. 20, 2021).

33. Exec. Order 14091 (Feb. 16, 2023); *see also* Letter from Jason S. Miller, Deputy Dir. for Mgmt., Exec. Office of the President, Memorandum for the Heads of Executive Departments and Agencies: Advancing Equity in Federal Procurement (Dec. 2, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/12/M-22-03.pdf.

34. HUD's Equity Action Plan, *supra* note 27.

35. *Id*.

36. *Id*.

37. U.S. Interagency Council on Homelessness, What Is the Federal Strategic Plan 10 (Dec. 2022), https://www.usich.gov/federal-strategic-plan/overview.

operations and decision-making processes.[38] Again, it has noteworthy and potentially useful responses, but it is missing critical upstream practices.

Integral to both upstream and downstream action is holistic action addressing inequities or disparities that occur internal and external to systems and institutions. The system participants and its actors cannot be the only focus, especially if the program mandate is to promote a "community-wide commitment," which encompasses community members currently without equitable access to HUD-funded opportunities.[39] The Equity Action Plans move closer to this holistic approach, but specific direct action—related to procurement and the communities in which persons will or have resided—is necessary to make lasting, meaningful individual, system, *and* community progress.

III. What Does Systems Change Through Procurement Mean?

In 2021 the White House produced an issue brief on the benefits of increased equity in federal contracting focused on small disadvantaged for-profit business and based on recent federal policy and procurement practices.[40] Changing the system through procurement also means diversifying the pool of vendors and improving service delivery, building wealth and social capital,[41] and understanding disparities. A community's willingness to embark on these procurement changes is a direct reflection of their willingness to share power and resources beyond their existing partners and with the communities that they intend to serve.

a. Freeing the System from Reliance on Standard Operating Procedures

Continued conversation and informational brochures cannot change inequitable processes. Investment and accountability to change operating procedures are necessary. This is the opportunity to create new standard operating procedures. An ideal starting place is acknowledging that nonprofits are businesses that should benefit from federal and local approaches to equitable procurement and service investments similar to what for-profit enterprises enjoy. It has long been theorized that government agencies and nonprofits have a critical relationship in the form of a longstanding partnership (or interdependence) in human services where they have agreed to share responsibilities to meet the unsatisfied demand for collective goods, such as homeless services delivery.

38. U.S. Interagency Council on Homelessness, How USICH Plans to Advance Equity (Apr. 14, 2022), https://www.usich.gov/equity.

39. CoC Program, *supra* note 2.

40. US White House, Issue Brief: The Benefits of Increased Equity in Federal Contracting (Dec. 1, 2021), https://www.whitehouse.gov/cea/written-materials/2021/12/01/the-benefits-of-increased-equity-in-federal-contracting.

41. Nat'l League of Cities, Building Wealth Through Equitable Municipal Procurement (2021), https://www.nlc.org/wp-content/uploads/2021/11/YEF-Equitable-Economic-Mobility-InitiativesProcurement_Brief_FNL-Procurement-4.pdf.

That shared responsibility spans multiple decision points, all of which require shared investment, action, and accountability for equitable procurement. Some key CoC Program decision points include monitoring and reporting, local competitive process and contracting, identifying local and HUD priorities, providing training guidance and technical assistance, and researching opportunities for future funding. Within the local competitive process are additional key decision points where most disparities in procurement are triggered, such as transparency, local eligibility criteria, scoring, review panels, project evaluations, and appeals. We must specifically address how these activities operate in contravention to equitable policies and current regulations against unfairness and disparate impacts.

b. Beneficial Impact on Individuals, Systems, and Communities

In the context of CoCs and homeless services, the benefits are communal, systemic, and individual. First, these investments will create access, opportunity, and power (for choice, self-determination, and decision making) on multiple levels that will make a functional difference in the lives of those in the community and its homeless service participants. Second, procurement processes that reward hyperlocal activity and advocacy, lived experience leadership, multicultural local partnerships, and nontraditional programing, will ensure that community resources are dispersed more broadly and to relevant community members. Third, the system will be enhanced by a more diverse and responsive set of local resources and providers that can offer localized and relatable solutions and programing that otherwise would go unaddressed or under implemented due to lack of knowledge, familiarity, and seriousness given to ideas generated by those with lived and shared experience. Fourth, it will offer persons seeking services more opportunities to successfully address their needs within their community of choice and with community members understanding of their plight. Fifth, investments in local and BIPOC organizations are investments in local communities and all their community members.

IV. Call to Action

This is a prime opportunity to affect real systems change. The menu of options that follows offers refreshed and equitable procurement goals and opportunities for action for various homeless service system actors that directly address and purposely further existing federal and local equity efforts.

a. Federal Government Entities

i. HUD

HUD's procurement goals can be updated to mandate not only ongoing efforts to address racial and other inequities but also its Equity Action Plan. The goals should ensure that CoCs are compliant with Title VI. They should aim to address the following: (1) commit to creating equitable procurement and grant administration by updating HUD local competition

and grant administration standards and policies; (2) identify key decision points where inequities may develop in procurement and opportunities to support communities with Title VI compliance; and (3) encourage equitable procurement by supporting efforts to codify needed changes.

Opportunities to put these into action include:

- Updating local monitoring requirements to embrace the collection of agency demographic data and plans to address contracting disparities.
- Identifying specific considerations and approaches for equitable procurement to be used in local CoC NOFO and HUD-funded local competitive application processes.
- Establishing demonstration projects and specialized subcontracting opportunities for disadvantaged nonprofit leadership, with emphasis on providers with two or fewer direct CoC or government funded grants or contracts.
- Investing in education and technical assistance for CoCs and new service providers related to Title VI compliance, equitable procurement standards and competitive processes, HUD CoC Program opportunities, project requirements and development, and grant administration.
- Updating match,[42] disbursement, and reimbursement requirements. Reducing up-front costs, which require providers to bring significant funds to the table to start the project, creating approval, start time, and contract fulfillment barriers.
- Investing in downstream research, asking and answering the questions below, and converting them into policy and funding guidance.
- Looking to sister agencies like the Department of Transportation for support in updating CoC Program procurement requirements.

ii. USICH

USICH can update its procurement-related priorities pursuant to its purpose, Federal Strategic Plan, and Equity Action Plan. It should continue researching inequities and interrogating the data and system responses. USICH should (1) advocate and support coordinated, holistic, and innovative approaches; and (2) connect federal agencies with existing successful equitable procurement processes with USICH agencies for procurement process and policy revision support.

Opportunities to put these priorities into action include:

- Updating the homeless research agenda, asking and answering some of the following questions.

42. *Id.* § 578.73 (2018).

- Coordinating investments in procurement education and demonstration projects.
- Establishing an equitable procurement working group to review studies, best practices, and recommendations about existing equitable procurement policies and strategies in place.[43]
- Tasking working group with commissioning a study of current data (particularly on grantees and unawarded applicants), identification of metrics for future study, and developing a coordinated and collaborative revised procurement process, proposed regulatory language if necessary, and monitoring, reporting, and enforcement standards.

b. State and Local Governments

State and local government objectives for equitable procurement should (1) ensure that CoCs are compliant with Title VI for all federal funds disbursed through the state; (2) encourage equitable procurement by supporting efforts to codify needed changes; and (3) use lessons learned at state and local levels to improve procurement for homeless services.

Opportunities to put these into action include:

- Updating match, disbursement, and reimbursement requirements. Reducing up-front costs and delays in payments.
- Establishing working groups and demonstration projects directing funding at new and unfunded service providers.
- Providing full-cost funding or increased administrative funding and support to providers.
- Providing technical assistance for CoCs, local jurisdictions, and applicants to learn about procurement, funding opportunites, Title IV compliance, and project development.
- Reviewing procurement processes for ways to improve equity and ensure compliance with Title VI.

c. CoCs

CoCs and their lead agencies play the largest role. Their priorities should include (1) increasing the diversity of providers locally; (2) ensuring compliance with Title VI and all procurement regulations; and (3) building system capacity to provide breadth and depth of service necessary to meet the needs of all participants.

Opportunities to put these into action include:

43. Denise Fairchild & Kalima Rose, Inclusive Procurement and Contracting: Building a Field of Policy and Practice (2018), https://www.policylink.org/resources-tools/inclusive-procurement-and-contracting.

- Setting aside funding to support required match or unpredictable operational costs that may be needed for new projects by disadvantaged new providers.
- Updating match, disbursement, and reimbursement requirements.
- Reducing up-front costs and delays in payments.
- Identifying disadvantaged, and BIPOC agencies that could be partners or subcontractors.
- Supporting partner and project matching with experienced funded service providers.
- Prioritizing and seeking out applicants and projects with multiple partners, particularly those partnering with new and disadvantaged local entities.
- Reviewing the CoC application and other CoC procurement processes and identify opportunities to correct inequities.
- Learning about Title VI compliance to avoid disparate impacts, and monitoring and updating NOFO processes, contracts, and subcontracts.
- Seeking out neighboring jurisdictions and sister agencies that successfully updated their procurement or CoC NOFO process for guidance and lessons learned.
- Collaborating with the CoC Board and lived experience advisory bodies to identify new providers and local resources that could complement existing service provision, and getting additional perspective and feedback on service providers and the competitive process.
- Beginning procurement early and prioritize developing eligible and competitive applicants and projects by training new agencies to local processes and project needs.
- Revising the application process: streamlining and reducing unnecessary questions, using interviews to supplement information, asking about project impact on local community and inequity upstream.

d. Philanthropic Partners

Government funding is not sufficient to cover the full costs of addressing homelessness and its adjacent issues. Nor is it sufficient to ensure the full operational and administrative costs underpinning nonprofit homeless service projects. Philanthropic partners seeking to make holistic and equitable impacts in community development, BIPOC leadership, and disadvantaged organizations should consider full-cost grantmaking and investments in nonprofit leadership and operational capacity. These partners can support

reductions in systemic racial inequities and barriers to entry and ensure nonprofit entity stability for project and mission success.

Opportunities to put these into action include:

- Providing operational funding to supplement government contracts and grants.
- Providing match funding for proposed projects as a show of early support and collaborative investment in the project, entity, and community.

e. A Few Cautionary Notes

i. Equitable Funding Opportunities, Not Perceived Incapacities

Approaches to address what is deemed to be the incapacity of some local as-yet unfunded disadvantaged agencies should not devolve into large-scale training treadmills with forced participation in local coordinated access processes. Equitable funding is the issue, not the perceived incapacity of entities that have not been funded before.

ii. System Coordination Requirements Without Remuneration or Resources

Requiring coordination, which includes resource-intensive placements, referrals, or expenditures for participants in the homeless system, without companion resources to ensure that coordination is viable (not harmful to the agency's operations), is much the same as asking people with lived experience to provide free training, direction, and assistance. Any nonprofits participating in the system, and providing the same or similar work as the currently funded agencies, should receive resources needed to participate because they are not otherwise benefiting from the revolving homeless system capital.

iii. Subcontracting Should Lead to Direct Contracting

While subcontracting is a good first step, efforts must be made to ensure that disadvantaged agencies are not permanently regulated to this status or overrepresented as subcontractors for extended periods. Systems must also be vigilant about the appropriate allocations of funding to subcontractors while monitoring the success of subcontracts. Subcontractor funding should not be punitive, *de minimis*, or otherwise reduced simply because the subcontractor is not the lead entity on the contract. That too could lead to discriminatory and disparate impacts.

V. Questions for Further Study

This issue presents many complexities. Those complexities are opportunities to research and explore questions that can lead us to renew our priorities for dismantling inequities in homeless services and improve community development outcomes for all, including disadvantaged and underrepresented local businesses like homeless services nonprofits.

As a starting point, improving homeless service procurement and administration can benefit by addressing some questions on metrics. First, what are the demographics of HUD's CoC program's direct grantees and subcontractors? How do BIPOC, underrepresented, and other disadvantaged service providers compare with white and white women-led service providers, in terms of the frequency and dollar value of awarded CoC Program funding year over year and to date? Is there enough data to make this assessment?

Second, how much funding has gone to repeat CoC Program service providers (excluding UFAs and CoC Lead agencies), including the following: (1) how many repeat service providers are funded year over year and to date?; (2) what is the average annual award amount?; (3) what is the total award amount to date?; (4) what types of projects go most often to repeat service providers?

As for the impact of inclusive and equitable procurement policies, questions include how do we sufficiently quantify the activities, performance, or impact of BIPOC and disadvantaged nonprofits generally? Second, how do repeat nonprofit service provider monopolies impact service provision? What is the rate and success of innovation and where are these new models and approaches originating? Later, when CoC Programs are demonstrating increased diversity and equity of service provision through procurement, questions should ask whether BIPOC and underrepresented leadership increase the rate and success of local housing services and placements for BIPOC and overrepresented participants.

Current procurement and CoC administration policies should also be explored for the questions they present, such as how are HUD and federally funded agencies ensuring local CoC Program compliance with Title VI in NOFO competitive processes and planning? How do other public service programs grant administration and procurement policies to ensure Title VI compliance, fair competition, and innovation from diverse and underrepresented groups? How can local, state, and federal government procurement policy adapt or better serve the full cost needs of new and disadvantaged CoC Program nonprofit service providers to ensure project success?

Finally, some process questions will aid the review and improvement of procurement practices. First, are there opportunities to develop certification or standardization for identifying BIPOC and other underrepresented or disadvantaged nonprofits similar to federal and state certifications of disabled, veteran, women, and minority-owned businesses? Second, what can we learn from new and underfunded BIPOC and underrepresented nonprofit organizations (during demonstration projects or as part of early intervention research) about improving grants-based procurement processes to increase access and innovation? Third, in a future state, it should be asked how effective have new or innovative models of equitable procurement been in the context of the CoC competitive NOFO process or for combatting downstream inequities.

While these questions are not exhaustive, they do indicate an untapped path toward equity. Investigating these upstream questions with the same vigor as the current review of program outcomes will provide far-ranging insight and opportunity for equitable system improvements, particularly downstream.

VI. Conclusion

This is an issue of public administration as much as it is an issue of homeless service provision, inequities, and disparate impacts. Doing nothing risks more than potentially harming a diverse set of providers; it risks permanently entrenching inequities into the processes by which programs are created, which directly impacts the quality, availability, feasibility, and utility of housing and services. It further risks disinvestment in the communities from which so many people experiencing homelessness originate and reside, destroying not only the opportunity for their safe and stable permanent return, but the ability of the community to be economically stable and avoid housing loss and displacement. Further research and explicit efforts to be inclusive and equitable upstream can provide communities, persons experiencing homelessness, and homeless service systems with real housing wins.

The Case for a Federal Renter Tax Credit as a Homelessness Prevention Tool

*Michael Santos & Marilyn Harbur**

I. What Is a "Renter Tax Credit"?

A Renter Tax Credit (RTC) uses the federal tax code to deliver targeted relief to struggling renter households. For an RTC to reach the most vulnerable households, the credit must be fully refundable.[1] An RTC could be structured and calculated in various ways. One method is based on the

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idea that no one should have to spend more than thirty percent of their monthly income on housing. A household is considered rent-burdened if they pay more than thirty percent of their income on rent, including utilities. That percentage would be subtracted from one of the following: the amount of rent, the fair market rent (FMR), or the Small Area Fair Market Rent (SAFMR) for the current tax year.[2] The formula would be:

credit amount = rent paid /FMR/SAFMR – 30 percent of income

For example, if Renter A makes $1,000 per month, they should only spend $300 (thirty percent) on monthly rent. If they spend $500 per month on rent, this is $200 more than they should spend, so they would receive a $200 per month RTC.

By providing a less bureaucratic but more direct relief, this policy would effectively cap out-of-pocket rent and utilities, so that households can afford a safe place to live without sacrificing other basic needs. With an RTC, households that are considered "rent-burdened" would receive a tax benefit based on their gross income and how much they spend on rent and utilities.

The federal tax system is a powerful, effective financial tool that can provide a more direct support to struggling renters (compared to other existing subsidies) to reduce housing instability and prevent homelessness. And making the RTC refundable addresses the needs of renters with no or extremely low income.

This essay explains what a renter tax credit is, why it is needed, and how it could work to benefit rent-burdened tenants across the country and serve as another tool to prevent and end evictions and homelessness.

A. We Need an RTC Because It Is Another Tool to Make Safe, Secure, and Affordable Housing Accessible to Many Housing-Insecure and Rent-Burdened Households, Aiding Efforts to End and Prevent Homelessness.

The United States is in the grips of an affordable housing and homelessness crisis that has continued to worsen and evolve, including housing supply and cost problems in both rural and urban environments. This crisis is largely felt by households living in poverty or low-income. As noted, a household is considered rent-burdened when they spend more than thirty

1. As witnessed in 2021, refundable tax credits are effective tools in lifting people out of poverty, especially those in households with very low or no income. Margot L. Crandall-Hollick, Gene Falk & Jameson A. Carter, Cong. Rsch. Serv., R45971, The Impact of the Federal Income Tax Code on Poverty (2020), https://crsreports.congress.gov/product/pdf/R/R45971.

2. *See, e.g.*, U.S. Dep't of Hous. & Urban Dev., Office of Policy Development and Research, Small Area Fair Market Rents, https://www.huduser.gov/portal/datasets/fmr/smallarea/index.html.

percent of their income(s) on housing.[3] Harvard University's Joint Center for Housing Studies found that, in 2022, half of all renter households (22.4 million) were rent-burdened (spending more than thirty percent of income on rent and utilities each month), with 12.1 million households spending more than fifty percent.[4]

High rent costs are a severe burden on low-income renter households.[5] Even before the COVID-19 pandemic, millions of people in the United States struggled to afford housing. Now, rents are skyrocketing, and people are struggling even more to keep up. To make matters worse, wages are not increasing as much as rents. *Moreover, many renters who are low- and middle-income taxpayers are unable to tap into existing housing and homelessness programs.* Some households may not have enough income to qualify for existing federal tax and housing benefits, but they are still paying their share of payroll, social security income, and state and local sales taxes, as well as subsidizing their landlord's payment of property tax, for which the landlord receives a federal tax deduction. As a matter of equity, it is fair for tax monies to provide them with financial relief from the high cost of housing that they need. Even gainfully employed people are unable to afford their rents. To this day, a full-time minimum-wage worker cannot afford a two-bedroom apartment in any state in the United States.[6] On average, according to the National Low Income Housing Coalition (NLIHC), the income needed to afford a two-bedroom home in the United States is nearly four times higher than the federal minimum wage of $7.25.[7]

Rent burden forces people to make impossible choices between housing and other necessities like food or healthcare.[8] Renters are at greater risk of losing their housing than homeowners in part because they are left out of benefits that homeowners, landlords, and developers receive.[9] Renter

3. U.S. Dep't of Hous. & Urban Dev., Office of Policy Development and Research, Rental Burdens: Rethinking Affordability Measures (Sept. 22, 2014), https://www.huduser.gov/portal/pdredge/pdr_edge_featd_article_092214.html.

4. Harvard Univ., Joint Center for Housing Studies, America's Rental Housing (2024), https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard_JCHS_Americas_Rental_Housing_2024.pdf.

5. U.S. Bureau of Lab. Stat., *The Effects of the Rent Burden on Low Income Families*, Monthly Lab. Rev. (Mar. 2018), https://www.bls.gov/opub/mlr/2018/beyond-bls/the-effects-of-the-rent-burden-on-low-income-families.htm.

6. *See generally* Nat'l Low Income Hous. Coal., Out of Reach: The High Cost of Housing (2024), https://nlihc.org/oor.

7. *Id.*

8. Whitney Airgood-Obrycki, Alexander Hermann & Sophia Wedeen, Harvard Univ., Joint Center for Housing Studies, *"The Rent Eats First": Rental Housing Unaffordability in the United States*, 33 Hous. Pol'y Debate 1272 (Feb. 12, 2022), https://www.jchs.harvard.edu/research-areas/journal-article/rent-eats-first-rental-housing-unaffordability-united-states.

9. Some examples of these benefits include the Low Income Housing Tax Credit (LIHTC) and the mortgage interest deduction.

household incomes are lower than their homeowner counterparts, and renters do not have the benefit of a fixed mortgage rate that insulates them from inflation and increasing housing prices.[10]

A strong connection exists between high housing costs, rent burdens, and housing insecurity and homelessness.[11] High rent burden puts households in a vulnerable position, being at the mercy of economic turmoil, such that even a modest financial shock may lead to eviction. And even without going through the formal eviction process, people experience housing insecurity in several ways, including but not limited to:

- Having to double- or triple-up with other families to afford rent;
- "Couch surfing" or scattered housing;
- Living in transitional housing or substandard housing, or having an informal living arrangement without a lease; or
- Living in a car.[12]

None of these experiences fits the "homeless" stereotype—a term that has negative associations—but all of them fit along the spectrum of how the federal government identifies those who are experiencing homelessness.[13] Considering that people live in a home before they go through these experiences of homelessness, a federal renter tax credit would be able to help these struggling renters before they even enter the homelessness system of care.

Putting the country's housing crisis in the global context also reflects the severity of the problem: the United States has the highest eviction rate among wealthy nations in the Organisation for Economic Co-operation and Development.[14] The Eviction Lab has found that "eviction rates in some

10. Peter J. Mateyka & Jayne Yoo, U.S. Census Bureau, Share of Income Needed to Pay Rent Increased the Most for Low-Income Households from 2019 to 2021 (Mar. 2, 2023), https://www.census.gov/library/stories/2023/03/low-income-renters-spent-larger-share-of-income-on-rent.html.

11. Alex Horowitz, Chase Hatchett & Adam Staveski, *How Housing Costs Drive Levels of Homelessness*, Pew Charitable Trs. (Aug. 22, 2023), https://www.pewtrusts.org/en/research-and-analysis/articles/2023/08/22/how-housing-costs-drive-levels-of-homelessness.

12. Roger M. Nooe & David A. Patterson, *The Ecology of Homelessness*, 20(2) J. Hum. Behav. Soc. Env't 105 (2010), https://doi.org/10.1080/10911350903269757.

13. *See* 42 U.S.C. 11434(a).

14. Gracie Himmelstein & Matthew Desmond, *Eviction and Health: A Vicious Cycle Exacerbated by a Pandemic*, Health Affs. 4 (Apr. 2021), https://www.healthaffairs.org/do/10.1377/hpb20210315.747908/#:~:text=In%20surveys%20conducted%20with%20evicted,%2D%20and%20alcohol%2Drelated%20deaths; *see also* OECD Directorate of Emp., Lab. & Soc. Affs. – Soc. Pol'y Div., HC3.3. Evictions (Apr. 29, 2024), https://www.oecd.org/els/family/HC3-3-Evictions.pdf.

cities are increasing to or surpassing their pre-pandemic levels."[15] One of the quickest ways to get evicted and lose one's housing is if the renter is unable to timely pay rent. And renters will not be able to pay their rent on time if they cannot afford the rents. A federal renter tax credit would be able to help these households.

Alleviating rent burden and preventing housing insecurity, evictions, and homelessness further upstream, through a federal renter tax credit, are necessary to reduce the traumas associated with these conditions, and to reduce the growth of unsheltered population and the strain on supportive services and programs that help them. In the last twenty years, median rent has risen thirteen percent, but the median income has risen less than 0.5 percent.[16] At the same time, federal assistance for new households has decreased.[17] Rental costs have simply become so burdensome that even gainfully employed renters cannot keep up. It is a common myth that a household might get evicted because of job loss and inability to pay rent. But the reverse holds just as, if not more, true: someone gets evicted despite working. Many people already experiencing homelessness (e.g., living doubled up or couch surfing) are still employed, highlighting the potential of a federal renter tax credit to help them with rent affordability. A 2016 Harvard study revealed that "job loss is a weaker predictor of housing loss than vice versa."[18] A 2021 study from the University of Chicago estimated that "[a]bout 53 percent of the sheltered homeless . . . and . . . 40.4 percent of the unsheltered population" had some form of employment while experiencing homelessness.[19]

What this means is that these rent-burdened people are or could be connected to the tax code by way of employment. For this reason, a federal renter tax credit that targets rent-burdened households can help with rent affordability, by supplementing wages that are too low to pay the rent and everything else, thereby helping prevent those who are still working from losing their housing.

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15. *Evictions Are Increasing Dramatically Since the Lifting of Pandemic-Era Protections*, NPR (June 21, 2023), https://www.npr.org/2023/06/21/1183408490/evictions-are-increasing-dramatically-since-the-lifting-of-pandemic-era-protecti.

16. Himmelstein & Desmond, *supra* note 14.

17. From 1981 to 1986, an average of 161,000 new households received federal housing assistance. That average dropped to fewer than 3,000 from 1995 to 2007. Yet, from 1990 to 2006, median asking monthly rent increased by seventy percent. Matthew Desmond and Carl Gershenson, *Housing and Employment Insecurity Among the Working Poor*, 63 Soc. Probs. 46, 47–48 (Feb. 2016), https://doi.org/10.1093/socpro/spv025.

18. *Id.* at 59.

19. Bruce Meyer et al., *Learning About Homelessness Using Linked Survey and Administrative Data*, Univ. of Chi. Becker Friedman Inst. for Econ. (June 23, 2021), https://bfi.uchicago.edu/insight/research-summary/learning-about-homelessness-using-linked-survey-and-administrative-data.

B. The Current State of Federal Housing Interventions Is Inadequate and Insufficient to Address Either the Supply of or Demand for Affordable Housing.

How the United States addresses and manages the housing crisis is quite disjointed, largely because housing traditionally has been an issue relegated to state and local governments. There are a multitude of housing solutions, models, and best practices that could be scaled nationally, but the geographic differences in housing markets and housing costs make this national effort more challenging. A solution or intervention that works for San Francisco, California, likely will not work for Bozeman, Montana. Whatever state and local governments are doing now to address the crisis is insufficient—federal intervention is necessary.

Housing policy, whether on the federal, state, or local level, is complex and multifaceted, targeting different vulnerable groups and populations (e.g., youth, children, families, single adults, and domestic violence survivors). Different housing issues further complicate the housing policy landscape, including but not limited to affordable housing supply, demand-side rental subsidies, public housing, fair housing protections, climate resiliency, community development, homeownership, and the bevy of housing and homeless assistance programs. Likewise, multiple social systems, such as healthcare, legal systems, education, and taxes, often touch and concern housing policy. The RTC would make more housing supply affordable to more people.

II. The RTC Is Needed to Complement Existing Housing Solutions.

Efforts to expand funding for most federal housing assistance programs, including the largest federal rental subsidy known as Housing Choice Vouchers (HCVs), through congressional appropriations have been very slow because of the discretionary nature of the budget process.[20] Accordingly, advocates have only been able to make incremental improvements and fixes to these existing programs every year.

The HCV program is unable to meet the demand for rent affordability, with only one in four eligible households receiving assistance; many potential applicants are turned away or do not bother to seek assistance from closed, lengthy, and unmaintained waitlists.[21] In terms of eligibility, about 1.14 million low-, middle-, and above-median-income families were

20. Nat'l Low Income Hous. Coal., A Brief Historical Overview of Affordable Rental Housing, 2022 Advocs. Guide, https://nlihc.org/sites/default/files/2022-03/2022AG_1-03_Brief-Overview.pdf.

21. Sonya Acosta & Brianna Guerrero, *Long Waitlists for Housing Vouchers Show Pressing Unmet Need for Assistance*, Ctr. on Budget & Pol'y Priorities 1 (Oct. 6, 2021), https://www.cbpp.org/research/housing/long-waitlists-for-housing-vouchers-show-pressing-unmet-need-for-assistance.

severely rent-burdened in 2022.[22] Yet, many of these households do not meet the income requirements to receive HCVs and other forms of housing assistance.

HCVs and other housing programs are also riddled with implementation and enforcement challenges, many of which can be tied back to inadequate funding and lack of participation from landlords willing to rent to voucher holders.[23] For HCV, an audit of the U.S. Department of Housing and Urban Development revealed low utilization rates of housing vouchers due to various factors that include lack of resources, unused and unfunded vouchers, and unrealized leasing potential of agencies that administer the program.[24] In addition, many voucher holders experience source of income discrimination when they look for housing using the vouchers in the private rental market. For those who do eventually receive housing vouchers, the average, nationwide wait time is 2.5 years.[25] But getting a voucher is just the beginning of an often long and arduous process of finding a suitable rental unit and a landlord that is willing to rent to a voucher holder within the sixty-day time period allowed, a Herculean effort particularly for larger households looking for housing in tight rental markets.[26]

Enactment of a federal RTC would provide relief for the lowest income renters waiting in the HCV process and those unable to qualify for HCVs and other similar housing assistance programs.

III. Addressing Demand for Housing Affordability with New Solutions Must Be Part of Any Comprehensive Housing Policy Solution.

The dynamics of the affordable housing crisis are multifaceted and complex but can be simplified using the laws of supply and demand. For every one hundred extremely low-income renters in the United States, only about thirty-three affordable housing units are available.[27] The imbalance

22. About the Gap Report, Nat'l Low Income Hous. Coal. (2024), https://nlihc.org/sites/default/files/gap/2024/Gap-Report_2024.pdf.

23. *See* Sonya Acosta & Brianna Guerrero, *Long Waitlists for Housing Vouchers Show Pressing Unmet Need for Assistance*, Ctr. on Budget & Pol'y Priorities 3 (Oct. 6, 2021), https://www.cbpp.org/research/housing/long-waitlists-for-housing-vouchers-show-pressing-unmet-need-for-assistance.

24. HUD Remains Challenged to Serve the Maximum Number of Eligible Families Due to Decreasing Utilization in the Housing Choice Voucher Program, Office of Inspector General for the US Department of Housing and Urban Development (Sept. 15, 2021), https://www.hudoig.gov/sites/default/files/2021-10/2021-CH-0001_0.pdf.

25. Acosta & Guerrero, *supra* note 23, at 1.

26. U.S. Dep't of Hous. & Urban Dev., Housing Choice Voucher Program Guidebook 8-11, https://www.hud.gov/sites/documents/DOC_35618.PDF (noting that the public housing authority "must issue a voucher for an initial period of at least 60 days"); *see also* HUD Remains Challenged, *supra* note 24.

27. Nat'l Low Income Hous. Coal., The Gap: A Shortage of Affordable Rental Homes (2024), https://nlihc.org/sites/default/files/gap/2024/Gap-Report_2024.pdf.

between the shortage of affordable housing supply and great demand for it (particularly at a time of high inflation) is driving prices even higher. It is crucial that we have both supply- and demand-side solutions to the complex housing crises, and those solutions must be responsive to the needs of our modern society. Moreover, it is important that any comprehensive housing policy solution that addresses both supply and demand include a federal renter tax credit. Even if households can afford their housing, enough units may not be available for them. Conversely, if the market is saturated with affordable housing, it would only be affordable to certain groups and likely leave out the lowest-income households without additional subsidies.[28] Federal rental subsidies help alleviate demand for housing affordability albeit with many limitations, but supply-side solutions have just as many challenges.

By far the most significant supply-side measure aimed at supporting low-income tenants is the federal Low-Income Housing Tax Credit (LIHTC).[29] Though the LIHTC has been successful by many measures, affordability is dictated by statutory formula not tailored to renters' individual income level.[30] As a result, LIHTC units end up being shallow subsidies that are often unaffordable to very low-income renters.[31] Demand-side assistance is, therefore, crucial to ensure that LIHTC units are affordable to very low-income tenants. Some renters use federal assistance like Housing Choice Vouchers to help pay for LIHTC units,[32] but many eligible tenants do not have access to tenant vouchers. The RTC would make more LIHTC units affordable and available to renters.

IV. Limited State and Local Efforts to Address the Affordable Housing Crisis.

Many communities at both the state and local levels are taking steps to address the affordable housing crisis, but these actions are not enough to ensure that everyone who needs housing assistance receives it. State and local programs are often funded through revenue from market-driven sources that are limited, vulnerable, and fluctuate.[33] These state and local programs run into the same challenges seen in current federal housing

28. Joint Center for Housing Studies of Harvard Univ., Long-Term Low Income Housing Tax Credit Policy Questions (Nov. 2010), https://www.jchs.harvard.edu/sites/default/files/long-term_low_income_housing_tax_credit_policy_questions.pdf.

29. Alex F. Schwartz, Housing Policy in the United States 135, 146–57 (3d. ed. 2014; Low-Income Housing Tax Credits, Nat'l Hous. L. Project (2023), https://www.nhlp.org/resource-center/low-income-housing-tax-credits.

30. Corianne Payton Scally, Amanda Gold & Nicole DuBois, Urb. Inst., The Low-Income Housing Tax Credit: How It Works and Who It Serves 2–3 (July 2018), https://www.urban.org/sites/default/files/publication/98758/lithc_how_it_works_and_who_it_serves_final_2.pdf.

31. *See id.* at 13.

32. *Id*.

33. Brief Historical Overview, *supra* note 20.

assistance programs. A renter tax credit can be structured so that it is fully paid for and that it is slowly phased in over time to mitigate any inflationary effects it may have on the housing market.

State and local elections show that there is an appetite for addressing the affordable housing crisis through state tax codes and for implementing more protections for renters. In 2022, there were almost one hundred ballot measures related to affordable housing across the country, including many that specifically used the tax code.[34] For example, Aspen, Colorado, passed a short-term rental tax, seventy percent of which will be used toward affordable housing projects.[35] East Palo Alto, California, raised the gross receipts tax on landlords who own more than five properties. Revenue from this tax will go to a range of housing aid programs, including tenant rental support.[36]

34. Diane Yentel (@dianeyentel), Twitter (Nov. 9, 2022, 12:42 PM), https://twitter.com/dianeyentel/status/1590399406238756864. *See generally* Nat'l Low Income Hous. Coal., New Report! Voters Choose Housing: A Summary of Housing and Homelessness Ballot Measures in the November 2022 Elections (Dec. 15, 2022), https://nlihc.org/news/nlihc-releases-new-report-housing-and-homelessness-ballot-measures-november-2022-elections.

35. Josie Taris, *Aspen Voters Go for Short-Term Rental Tax Hike*, Aspen Times (Nov. 9, 2022), https://www.postindependent.com/news/aspen-voters-go-for-short-term-rental-tax-hike.

36. *E. Palo Alto, Cal., Measure L, Residential Rental Property Business Tax Measure*, Ballotpedia (Nov. 2022), https://ballotpedia.org/East_Palo_Alto,_California,_Measure_L,_Residential_Rental_Property_Business_Tax_Measure_(November_2022)#:~:text=East%20Palo%20Alto%20Measure%20L%20was%20on%20the%20ballot%20as,receipts%20for%20all%20residential%20units.

States such as Arizona,[37] Colorado,[38] Connecticut,[39] Iowa,[40] Missouri,[41] Montana,[42] New Mexico,[43] North Dakota,[44] Pennsylvania,[45] Rhode Island,[46] and Utah[47] have renter tax credits but limit eligibility to the elderly and/or people with disabilities. Some states, like Arizona,[48] California,[49] Hawaii,[50] Maryland,[51] Michigan,[52] Missouri,[53] Rhode Island,[54] and Utah,[55] have renter tax credits that are not refundable and only reduce a household's tax

37. Ariz. Rev. Stat. § 43-1072, https://www.azleg.gov/ars/43/01072.htm#:~:text=43%2D1072%20%2D%20Earned%20credit%20for,of%20age%20or%20older%3B%20definitions.

38. Colo.Rev.Stat.§ 39-31-101,https://leg.colorado.gov/sites/default/files/images/olls/crs2023-title-39.pdf.

39. Conn. Gen. Stat. ch. 204a, https://www.cga.ct.gov/current/pub/chap_204a.htm#:~:text=Chapter%20204a%20%2D%20Property%20Tax%20Relief,Persons%20with%20Permanent%20Total%20Disability

40. Iowa Code § 425.17, https://www.legis.iowa.gov/docs/code/425.17.pdf.

41. Mo. Rev. Stat. §135.010 et seq., https://revisor.mo.gov/main/OneSection.aspx?section=135.010.

42. Mont. Code Ann. § 15-30-2337, https://www.leg.mt.gov/bills/mca/title_0150/chapter_0300/part_0230/sections_index.html.

43. N.M. Stat. Ann. § 7-2-18, https://nmonesource.com/nmos/nmsa/en/item/4340/index.do#!fragment/zoupio-_Toc100336881/BQCwhgziBcwMYgK4DsDWszIQewE4BUBTADwBdoAvbRABwEtsBaAfX2zgEYAGLgZl4BsADiEcAlABpk2UoQgBFRIVwBPaAHJ1EiITC4Ei5Ws3bd+kAGU8pAEJqASgFEAMo4BqAQQByAYUcTSMAAjaFJ2MTEgA.

44. N.D. Cent. Code § 57-02-08.1, https://www.ndlegis.gov/cencode/t57c02.pdf.

45. 61 Pa. Stat. and Cons. § 401.1, https://www.pacodeandbulletin.gov/Display/pacode?file=/secure/pacode/data/061/chapter401/s401.1.html&searchunitkeywords=rent%2Crebate&origQuery=rent%20rebate&operator=OR&title=null.

46. R.I. Gen. Laws § 44-33-3, http://webserver.rilin.state.ri.us/Statutes/TITLE44/44-33/44-33-3.HTM.

47. Utah Code Ann. § 59-2-12, https://le.utah.gov/xcode/Title59/Chapter2/59-2-P12.html.

48. Ariz. Rev. Stat. § 43-1072.

49. Cal. Rev. & Tax. Code § 17053.5, https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=RTC&sectionNum=17053.5.

50. Haw. Rev. Stat. § 235.557, https://files.hawaii.gov/tax/legal/hrs/hrs_235.pdf.

51. Md. Code Ann., Tax-Prop. § 9-102, https://mgaleg.maryland.gov/mgawebsite/Laws/StatuteText?article=gtp&section=9-102.

52. Mich. Comp. Laws § 206.522, http://www.legislature.mi.gov/(S(tlljzh55ivalofcdzynicc1b))/mileg.aspx?page=getobject&objectname=mcl-206-522.

53. Mo. Rev. Stat. §137.1050, https://revisor.mo.gov/main/OneSection.aspx?section=137.1050&bid=53800&hl=.

54. 44 R.I. Gen. Laws § 44-33-3, http://webserver.rilin.state.ri.us/Statutes/TITLE44/44-33/44-33-3.HTM.

55. Utah Code Ann. § 59-2-12, https://le.utah.gov/xcode/Title59/Chapter2/59-2-P12.html.

liability without providing any cash refund. Similarly, states like Indiana,[56] Massachusetts,[57] and New Jersey[58] have deductions for renters that only reduce taxable income and do not benefit lower-income households. In other states where the cost of living is very high, like California[59] and Hawaii,[60] the renter tax credit is less than $100, which is just inadequate to reduce rent burdens. Some states provide nominal annual increases to the amount of credits, but often fall short in meeting the demand for affordability. Kentucky[61] and Nebraska[62] have introduced legislation for a state-level renter tax credit. In the proposed Kentucky bill, the RTC is limited to households with an income that is at or below 133 percent of the federal poverty line. This RTC will only cover twenty-five percent of annual rent costs and no more than $1,000 per year.[63] Nebraska's proposed bill is slightly larger with a $3,000 cap, but it is just a deduction, not a credit. Meanwhile, in Nebraska, property owners receive a state tax credit.[64]

These state tax schemes should be expanded, and a federal renter tax credit can be layered to complement these measures that provide more rent relief.[65] Unlike these state tax codes, a federal RTC can be structured to account for regional and local housing market differences.

In 2023, some states reported considering similar types of tax mechanisms in their state codes to provide relief to renters. In the Oregon legislature, for example, Republican State Senator Cedric Hayden sponsored Senate Bill 435, which would have created a renter tax deduction in the state and given renters a tax benefit similar to what homeowners receive.[66]

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56. Ind. Code § 6-3-2-6, http://iga.in.gov/legislative/laws/2021/ic/titles/006#6-3-2-6.

57. 830 Mass. Code Regs. § 62.3.1, https://www.mass.gov/regulations/830-CMR-6231-rent-deduction.

58. N.J. Rev. Stat. § 54:4-6.3, https://www.nj.gov/dca/divisions/dlgs/programs/tenant_docs/trlaw.pdf.

59. Cal. Rev. & Tax. Code § 17053.5, https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=RTC&sectionNum=17053.5.

60. Haw. Rev. Stat. § 235.55.7, https://files.hawaii.gov/tax/legal/hrs/hrs_235.pdf.

61. An Act Relating to a Tax Credit for Renters, H.B. 696, Gen. Assembly, Reg. Sess. (Ken. 2022), https://apps.legislature.ky.gov/recorddocuments/bill/22RS/hb696/orig_bill.pdf.

62. A Bill for an Act Relating to Income Taxes, L.B. 740, 107th Leg., 2022 Reg. Sess. (Neb. 2022), https://nebraskalegislature.gov/FloorDocs/107/PDF/Intro/LB740.pdf.

63. An Act Relating to a Tax Credit for Renters, H.B. 696, 2022 Ky. Gen. Assembly, Reg. Sess. (Ken. 2022), https://apps.legislature.ky.gov/recorddocuments/bill/22RS/hb696/orig_bill.pdf.

64. A Bill for an Act relating to income taxes, LB740, 107th Leg., Reg. Sess. (Neb. 2022), https://nebraskalegislature.gov/FloorDocs/107/PDF/Intro/LB740.pdf.

65. This would be akin to the federal Earned Income Tax Credit layered in addition to its state-level expansions.

66. *Oregon Lawmaker Proposes an Income Tax Break for Renters*, Portland Bus. J. (Jan. 31, 2023), https://www.bizjournals.com/portland/news/2023/01/31/oregon-renter

Likewise, California State Republican lawmakers are making a push to increase the state's existing renter tax credit.[67]

Outside the United States, other countries like Ireland and Canada have recently created and enacted a renter tax credit to address rent affordability.[68] Expect more scholarship in the future discussing the effectiveness of these programs in those countries, though comparing them to the United States would be limited given that these countries have different housing market conditions and approaches to national housing policies.

While piecemeal and limited, the existence of such programs, and the success of ballot measures to implement more of them, are tacit acknowledgment that current federal assistance is falling short—a problem that can be further remedied or mitigated if the federal government creates additional tools and uses the tax code for renters as well as investing more in housing infrastructure. A federal refundable tax credit, adjusted geographically, would apply a uniform relief comparable to the mortgage interest deduction.

A. There Is No One-Size-Fits-All Solution to Addressing the Affordable Housing and Homelessness Crises for Renters in the United States, but the Federal Tax Code Needs to be a Key Part of Any Solution.

During the COVID-19 pandemic, multiple rounds of economic stimulus payments through advance payments of tax credits and temporary expansions of the Child Tax Credit (CTC) and Earned Income Tax Credit (EITC) proved effective in combating broad and deep impoverishment especially for children.[69] These critical investments, paired with other interventions like eviction moratoria on the federal and state levels, enabled the United States to prevent—at least temporarily—a wave of evictions and improve the food security, mental health and overall family needs of millions of households, including forty percent of impoverished children and

-income-tax-deduction.html. The full text of the bill is available online, https://olis.oregonlegislature.gov/liz/2023R1/Downloads/MeasureDocument/SB435.

67. Tori Richards, *California GOP Caucus Unveils Legislative Priorities for Coming Year*, Denver Gazette (Jan. 28, 2023), https://denvergazette.com/news/nation-world/california-gop-caucus-unveils-legislative-priorities-for-coming-year/article_1c77f134-d16f-55a3-ae99-74d161234b3c.html.

68. Ireland recently implemented a nonrefundable rent tax credit from 2022 until 2025. *See generally* Irish Tax & Customs, Tax and Duty Manual: Rent Tax Credit Part 15-01-11A, https://www.revenue.ie/en/personal-tax-credits-reliefs-and-exemptions/land-and-property/rent-credit/index.aspx. Likewise, the state of British Columbia in Canada also enacted a refundable renter tax credit scheme based on certain income levels that started in 2023. British Columbia Tax Information, at 11, https://www.canada.ca/content/dam/cra-arc/formspubs/pub/5010-pc/5010-pc-23e.pdf.

69. Kris Cox, Samantha Jacoby & Chuck Marr, *Stimulus Payments, Child Tax Credit Expansion Were Critical Parts of Successful COVID-19 Policy Response*, Ctr. on Budget & Pol'y Priorities (June 22, 2022), https://www.cbpp.org/research/federal-tax/stimulus-payments-child-tax-credit-expansion-were-critical-parts-of-successful.

their families.[70] The CTC alone reached over sixty-one million children in December 2021, cutting child poverty by almost thirty percent. Families used this extra income to pay for food, healthcare, childcare, and other necessary expenses including rent. Unfortunately, these effective anti-poverty interventions lapsed and were discontinued.[71] Economists predict that rising rents and home prices are unlikely to slow down anytime soon, putting more pressure on low-income families.[72] More comprehensive sets of these interventions like the RTC and CTC, not fewer, are needed to address the housing affordability crisis.

Using the previously existing mechanisms for the expanded CTC, EITC[73], and Economic Impact Payments (stimulus checks during the first year of the COVID-19 pandemic), it is possible to put money directly into the pockets of people who need it, and it can be done monthly, which complements how households pay their bills. Using the federal tax code this way could reduce the administrative costs and burdens associated with other forms of assistance.

Benefits that flow through the federal tax code, like renter tax credits for lower-income individuals and families, would provide an additional means to defray the cost of rent, particularly at a time when rent increases have outpaced inflation and wage growth. Refundable renter tax credits given directly to renters would immediately and directly help people afford their rent, provide housing stability, and prevent evictions and homelessness.[74] It would also give people the freedom to spend their incomes on other necessities, such as food, clothing, healthcare, and childcare. By providing

70. *See, e.g.*, Samantha Fu & Kathryn Reynolds, *How Cities and Counties Are Using Federal Emergency Recovery Funds to Increase Affordable Housing Supply and Build Long-Term Resilience*, Urb. Inst. (Mar. 6, 2023), https://www.urban.org/urban-wire/how-cities-and-counties-are-using-federal-emergency-recovery-funds-increase-affordable; Samantha Fu, Becca Dedert & Kathryn Reynolds, *Using ARPA Funds to Address Affordable Housing Needs: Six Lessons from Cities and Counties*, Urb. Inst. (Mar. 6, 2023), https://www.urban.org/research/publication/using-arpa-funds-address-affordable-housing-needs.

71. Sanford P. Shatz & Shaun Kevin Ramey, *Supreme Court Strikes Down the CDC's Second Eviction Moratorium*, Bus. L. Today (Sept. 14, 2021), https://www.americanbar.org/groups/business_law/resources/business-law-today/2021-september/supreme-court-strikes-down-the-cdc.

72. *U.S. Home Price Insights*, CoreLogic (June 7, 2022), https://www.corelogic.com/intelligence/u-s-home-price-insights.

73. Note that the expanded EITC was not a monthly payment. It was received as a tax refund when workers filed their 2021 federal tax returns in early 2022, As such, data on how much the expanded EITC reduced poverty for these workers is not yet available.

74. Restoring the Advance Child Tax Credit that was in effect for 2021 as part of the American Rescue Plan Act would also help lift families out of poverty and benefit fifty-five million children, leaving no child behind because their families' incomes are too little. Joe Hughes, *Effects of President Biden's Proposal to Expand the Child Tax Credit*, Inst. on Tax'n & Econ. Pol'y (Mar. 16, 2023), https://itep.org/effects-of-president-bidens-proposal-to-expand-the-child-tax-credit.

housing stability to households, a renter tax credit can help create a more equitable tax code, lift people out of poverty (or prevent them from slipping back into it), and prevent many more Americans from experiencing evictions and homelessness.

B. A Federal Renter Tax Credit That Targets Rent-Burdened, Low-Income Households Can Also Help Achieve Housing, Economic, and Racial Justice.

Households of color are more likely[75] than white households to be renters, and renters of color faced the greatest financial hardship during the pandemic, with over one in seven falling behind in their rent payments.[76] The lack of fair and affordable housing we now see in urban, suburban, and rural communities contributes to housing instability, evictions, and even homelessness, all of which have had a disproportionate impact on communities of color. The COVID-19 pandemic exacerbated these conditions, putting vulnerable communities at an even greater risk of losing their homes at a time when everyone was sheltering in place to prevent the spread of the virus.[77]

Black and Latinx renters in general, and women in particular, are disproportionately subject to eviction threats, actual evictions, and exposure to the negative consequences of eviction, such as bad credit, homelessness, job loss, and depression.[78] Black individuals made up 19.9 percent of all adult renters but 32.7 percent of all defendants in eviction filings.[79] Black individuals are more likely to experience homelessness and to access shelters—they make up thirteen percent of the general population but more than thirty-seven percent of the homeless population.[80] And these racial disparities are even more striking for people in families experiencing homelessness who are disproportionately Black (fifty percent). These disparities extend to other communities in the United States as well: Native Hawaiians and Pacific Islanders also have high rates of homelessness.[81]

Further compounding this housing injustice is economic injustice, including the dearth of tax benefits for renters (many of whom are renters

75. *Housing Burden: All Residents Should Have Access to Quality, Affordable Homes*, Nat'l Equity Atlas (2024), https://nationalequityatlas.org/indicators/Housing_burden.

76. *Over 1 in 7 Renters Not Caught Up on Rent During Pandemic, With Renters of Color Facing Greatest Hardship*, Ctr. on Budget Pol'y & Priorities (2024), https://www.cbpp.org/over-1-in-7-renters-not-caught-up-on-rent-during-pandemic-with-renters-of-color-facing-greatest.

77. *Id*.

78. Peter Hepburn, Renee Louis & Matthew Desmond, *Racial and Gender Disparities Among Evicted Americans*, Eviction Lab (Dec. 16, 2020), https://evictionlab.org/demographics-of-eviction.

79. *Id.*

80. *Homelessness and Racial Disparities*, Nat'l All. to End Homelessness (Dec. 2023), https://endhomelessness.org/homelessness-in-america/what-causes-homelessness/inequality.

81. *Id.*

of color), as compared to billions of dollars in annual aggregate tax benefits for wealthy, largely white homeowners. Many tax benefits, such as the mortgage interest deduction, real property tax deductions, and the exclusion of gain on the sale of a principal residence, disproportionately favor wealthy white homeowners. This disparity exacerbates already enormous racial income and wealth gaps.[82] Similarly, the current state of unavailable affordable rental housing across the United States provides evidence that tax and other economic benefits for landlords, homeowners, and developers do not necessarily get passed down to renters. Prioritizing renters in the tax code is a step in the right direction, but more research and scholarshipare needed to study the distributive impact of these other subsidies and how they may be revised to ensure a more equitable distribution of benefits among different groups in the tax code.

Federal, state, and local tax systems have deep and broad racist histories including systemic designs that were constructed to benefit white households and undermine wealth accumulation for households of color.[83] Recent research shows systemic racial disparities in tax audits, noting that Black tax filers are audited by the IRS at 2.9 to 4.7 times the rate of non-Black taxpayers.[84] Tax programs that should benefit low-income households, like the EITC, increase the likelihood that Black Americans will get audited by the IRS.[85] Federal tax housing subsidies are heavily skewed toward high-income households and wealthy homeowners.[86] But homeownership, unfortunately, remains out of reach for many people of color.[87]

82. Emma Fernandez, Emily McCaffrey, Kimberly Rubens & Carson Whitelemons, *Mortgage Interest Deduction and the Racial Wealth Gap*, Berkeley Pub. Pol'y J. (Aug. 23, 2018), https://bppj.berkeley.edu/2018/08/23/mortgage-interest-deduction-and-the-racial-wealth-gap.

83. Dorothy A. Brown, *How the U.S. Tax Code Privileges White Families*, Atlantic (Mar. 23, 2021), https://www.theatlantic.com/ideas/archive/2021/03/us-tax-code-race-marriage-penalty/618339; Francine J. Lipman, *How to Design an Antiracist State and Local Tax System*, 52 Seton Hall L. Rev. 1531 (2022) Francine J. Lipman, Nicholas A. Mirkay & Palma Joy Strand, *U.S. Tax Systems Need Anti-Racist Restructuring,* 168 Tax Notes 855 (Aug. 3, 2020).

84. Hadi Elzayn et al., *Measuring and Mitigating Racial Disparities in Tax Audits*, Stan. Inst. for Econ. Pol'y Rsch. (Jan. 30, 2023), https://dho.stanford.edu/wp-content/uploads/IRS_Disparities.pdf.

85. *Id.*; *see also* Felix Salmon, *Who Gets Audited the Most*, Axios (Feb. 4, 2023), https://www.axios.com/2023/02/04/who-gets-audited-the-most.

86. Carol Galante, Carolina Reid & Nathaniel Decker, *The FAIR Tax Credit*, Terner Ctr. for Hous. Innovation UC Berkeley (Oct. 7, 2016), https://ternercenter.berkeley.edu/wp-content/uploads/pdfs/FAIR_Credit.pdf.

87. *More Americans Own Their Homes, but Black-White Homeownership Rate Gap Is Biggest in a Decade, NAR Report Finds*, Nat'l Ass'n of Realtors (Mar. 2, 2023), https://www.nar.realtor/newsroom/more-americans-own-their-homes-but-black-white-homeownership-rate-gap-is-biggest-in-a-decade-nar.

Refundable tax credits that benefit and target renters, as part of a more comprehensive policy solution to address our housing crisis, could provide renter households, many of whom are renters of color, with a pathway toward homeownership and with much needed housing stability, reducing their likelihood of getting evicted and experiencing homelessness.

C. A Refundable Federal Renter Tax Credit—Making Housing More Affordable and Preventing Homelessness for Many Renters—Can Be Designed to Better Target Low-Income Renters.

An RTC could be structured and calculated in different ways. One method, as already discussed above, is based on the relationship between a household's income and either the amount of rent they pay, the Fair Market Rent (FMR), or the Small Area Fair Market Rent (SAFMR), whichever is less.[88] A federal RTC should be refundable to ensure that it includes those who pay little or no taxes because their income is too low. If a household's refundable tax credit is larger than the amount of income taxes that they owe, they receive a refund for the difference. By comparison, if the tax credit is not refundable, it provides no benefit to households that have little or no tax liability. It simply would not reach those with the greatest need.[89] As with deductions, non-refundable tax credits are generally only beneficial to people with higher incomes.

Although a federal RTC has not yet been enacted, some members of Congress have introduced refundable RTC legislation.[90] The Terner

88. Office of Pol'y Dev., U.S. Dep't Hous. & Urban Dev., Small Area Fair Market Rents (2024), https://www.huduser.gov/portal/datasets/fmr/smallarea/index.html. FMR is calculated by HUD to determine the reasonable market rate for a modest rental unit in a given area. It is typically based on the fortieth percentile (or occasionally the fiftieth percentile) of rental rates among new leases. One drawback of FMR calculations is that rental rates can vary widely within a single area, and FMR treats entire metro areas homogenously. To remedy this concern, HUD has begun phasing in SAFMR calculations to localize this metric, making programs based on this calculation more equitable. SAFMRs allow localities to determine fair market rent for each zip code, and sometimes an even smaller area if a zip code is especially large and economically diverse.

89. Galante, Reid & Decker, *supra* note 86, at 9.

90. Then Sen. Kamala Harris proposed the Rent Relief Act with a companion bill from Rep. Danny Davis. *See* S. 1106, 116th Cong. (2019–2020), https://www.congress.gov/116/bills/s1106/BILLS-116s1106is.pdf, and H.R. 2169, 116th Cong. (2019–2020), https://www.congress.gov/bill/116th-congress/house-bill/2169/text respectively.

Sen. Cory Booker proposed the Housing, Opportunity, Mobility, and Equity Act, with Rep. Jim Clyburn proposing the same in the House during the following Congress. See S. 3342, 115th Cong. (2017–2018), https://www.congress.gov/bill/115th-congress/senate-bill/3342, and H.R. 4808, 116th Cong. (2019–2020), https://bit.ly/3OZE19w respectively. *See also* Bold Proposals for Renters' Tax Credits, Nat'l Low Income Hous. Coal. (2018), https://nlihc.org/sites/default/files/Factsheet_08022018.pdf. Former Senator Dean Heller (R-NV) also introduced the Seniors Affordable Housing Tax Credit, S.3580, 115th Cong. (2017–2018), https://www.ncsha.org/resource/s-3580-seniors-affordable-housing-tax-credit-act, which would provide a tax credit for

Center for Housing Innovation at the University of California, Berkeley drafted a seminal paper that formed the basis for these various policy proposals in Congress.[91]

With a federal RTC, the tax code could effect long-term structural change that would address historic underinvestment in renters and possibly the impact of existing housing programs in terms of better reaching rent-burdened households. One study found that an RTC would assist two and a half times as many poor renters and nearly three times as many severely cost-burdened renters as existing housing subsidy programs.[92]

There remains a significant amount of work to enact a refundable federal RTC. Politically, it can be challenging to revise the tax code, especially given the current polarized environment in Congress. Like other public systems, the tax code also has some limitations. It is not the perfect or the only solution to rent affordability, but it is part of a more comprehensive solution that embraces the nuances of housing needs in the United States. Outreach efforts would be necessary to guard against fraud and to ensure that as many people as possible have access to and are aware of the renter tax credit (and other similar credits and benefits). Around twelve percent of Americans do not file income taxes, and this group is "disproportionately low-income, elderly, or living with a disability."[93] How the RTC is designed would play a key role in how effective it could be—and this could be tricky if the goal is to provide a tax credit accounting for the regional and local differences in rent burdens across the United States. But these challenges emphasize the need for multiple types of housing assistance available to meet the diverse housing needs of renters across the country, so that if one program cannot reach the targeted household, another one will, with the refundable renter tax credit complementing other housing assistance programs and interventions.

V. Conclusion

Effective housing policy should be a ladder of opportunity.[94] Each rung on the ladder should help people reach their goals, whether that is homeownership; escaping poverty, or preventing people from sliding back into poverty; affording necessities; preventing costly evictions and homelessness;

owners of multifamily rental property who agree to rent their homes to extremely low-income seniors.

91. Galante, Reid & Decker, *supra* note 86.

92. Sara Kimberlin & Christopher Wimer, *A Renter's Tax Credit to Curtail the Affordable Housing Crisis*, 4(2) Russell Sage Found. J. Soc. Scis. (Feb. 2018), https://muse.jhu.edu/article/687579.

93. Galante, Reid & Decker, *supra* note 86, at 15.

94. Building a Better Ladder of Housing Opportunity in the United States, Terner Center for Housing Innovation at UC Berkeley (Feb. 2021), https://ternercenter.berkeley.edu/wp-content/uploads/2021/02/Federal-Framework-Brief-February-2021.pdf.

or moving to a preferred area. However, the ladder of housing policy today is neither complete nor accessible to many who need assistance to afford adequate housing. An RTC that reaches a broad segment of the population complemented by other housing interventions and solutions would provide much needed housing stability that would likely keep adults in the workforce and prevent households from experiencing homelessness.

Tax credits are an additional tool for immediate housing affordability for rent-burdened households. Putting in place a robust refundable federal RTC, in addition to expanding and improving other similar tax credits like the LIHTC, EITC, and CTC, would benefit a broad segment of the population that existing housing and homelessness programs do not reach. Enacting a federal RTC and prioritizing renters in the federal tax code is a step in the right direction of creating a more equitable tax law and helping achieve economic justice, including housing justice for all.

Housing Choice: A Contemporary Theory for Fair Housing Litigation

*Brook Hill**

Introduction

This article is an attempt to articulate a theory that can guide contemporary fair housing legal work in a way that reflects the needs and desires of Black communities and other communities of color who have long been the victims of housing-related injustices.[1] Prior to the passage of the Fair

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1. This article focuses on the Black people and communities in contrast to white people—because of the Black community's unique history of exclusion—while attempting

Housing Act (Title VIII), the housing choices of Black people and other people of color were severely limited and subject to the most extreme forms of exploitation while the choices of white people were greatly expanded by government resources. Title VIII's Declaration of Policy states, "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."[2] For Black people and other people of color, fair housing ought to mean that they have the same housing choices as white people.

In the five decades since the passage of Title VIII, most systemic fair housing litigation and the rhetoric around fair housing advocacy has focused on integration as the foundational pursuit of fair housing.[3] Where Black people and other people of color would choose to live, given options and resources, is often lost in the pursuit of racial balance even as limited housing choices and exploitation persist. There is still not enough housing that is accessible to Black people being built in predominantly white areas. As cities have gentrified in recent decades, some neighborhoods have become more diverse through an influx of white newcomers while displacing thousands of Black residents in a manner that is antithetical to housing choice. Worse, the problems—beyond crime and policing—in majority Black neighborhoods that are not being gentrified are largely ignored, which makes choosing to live in those neighborhoods a choice riddled with quality-of-life compromises. Although it is my hope that individual fair housing attorneys can use this article to help them choose cases, it is also an attempt to reconceptualize fair housing generally.

I argue that fair housing choice should be elevated above integration as the bedrock value that fair housing advocates strive for. For there to be true fair housing choice, Black people and other people of color must have the same menu of choices as white people who are seeking housing. That means that they should be able to choose to move to areas where nonwhites are underrepresented, which requires the removal of barriers to affordability like source of income discrimination and exclusionary zoning. They should also be able to choose to remain in areas that are experiencing

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also to acknowledging that the housing choices of other communities of color and even some ethnic minorities that today might be considered white have also been restricted to some extent because of race.

2. 42 U.S.C. § 3601.

3. Jorge Andres Soto & Deidre Swesnik, *The Promise of the Fair Housing Act and the Role of Fair Housing Organizations*, Am. Const. Soc'y for L. & Pol'y (Jan. 2012), https://www.acslaw.org/wp-content/uploads/2018/04/Soto_and_Swesnik_-_Promise_of_the_Fair_Housing_Act_1.pdf (describing Title VIII's dual purpose of eliminating discrimination and promoting integration); Douglas S. Massey, *The Legacy of the 1968 Fair Housing Act*, 30 Socio. F. 571 (June 30, 2015), *available at* https://onlinelibrary.wiley.com/doi/10.1111/socf.12178 (examining Title VIII's success at desegregating American); Paul A. Jargowsky, Lei Ding & Natasha Fletcher, *The Fair Housing Act at 50: Success, Failures, and Future Directions*, 29 Hous. Pol'y Deb. 694, 695 (Aug. 19, 2019), *available at* https://www.tandfonline.com/doi/full/10.1080/10511482.2019.1639406.

economic revitalization and demographic shifts, which means preventing displacement of longtime residents when neighborhoods are redeveloped or are otherwise gentrified. Finally, they should be able to choose to remain in areas that are majority-minority and not experiencing economic revitalization or demographic shifts without compromising on access to public safety, consumer goods, healthcare, or education.

Most systemic fair housing litigation and advocacy in the decades since the Fair Housing Act was passed have focused on the first prong; the choice to move to areas where non-whites are underrepresented. There have been very few challenges to practices that contribute to gentrification and the displacement of Black people from inner-city neighborhoods or to practices that further disinvestment in majority-minority communities. For there to be real fair housing choices for Black and other people of color, they must be able to make the choice to live in any of the types of neighborhoods described above. Fair housing attorneys can help both through litigation and specialized policy advocacy.

Although policymakers should certainly use this theory to improve pathways through which households of color can move to high-opportunity areas, protect residents of gentrifying neighborhoods from displacement, and invest in majority-minority communities in ways that meet the needs of current residents, this essay is primarily directed at lawyers and the fair housing centers with which they partner. It focuses on how systemic litigation can be used to expand housing choice, but also explores other policy-related tasks with which it may be strategic for a fair housing attorney to assist. I also suggest that fair housing attorneys be willing to engage in impact litigation under statutes other than the Fair Housing Act, in part because they may be better positioned to take those cases than other litigators. I developed this theory with colleagues in the Housing Justice practice at the Washington Lawyers' Committee for Civil Rights as a way to assess what fair housing would look like in a material sense for Black D.C. residents, to measure the impact of particular areas of work, and to describe our work to funders and other stakeholders. It is my hope that other fair housing litigators and advocates can use it in a similar way.

The essay begins by highlighting how government policy provided successive generations of white households the room and resources to choose where to live in contrast to Black households who were denied similar choices and instead forced to live in places that enhanced choices for white households. It goes on to describe ways that housing choice continues to be limited for Black households and the types of cases and or legal work that fair housing lawyers and advocates can take to improve housing choice in each of the three areas listed above.

I. Housing Choice Has Historically Been Expanded for White People and Limited for Black People by Government Resources.

A hallmark of being a white American has long been not only having the freedom to choose where to live but also access to the resources to make the

choice meaningful in a material sense. On the one hand, whether the land grants of the nineteenth century or multilayered subsidies that supported the creation of today's suburban communities, this country has given generations of white households choices about where to live and the resources to effectuate those choices. A hallmark of being Black in America, on the other hand, has been denial of choice about where to live—quite literally as landlords and realtors blatantly denied them the ability to rent and buy property as well as through government enforced housing discrimination.

Much has been written about systemic discrimination in the mortgage and real estate markets over the past century, but white privilege and Black exclusion in housing began much earlier. Prior to the Civil War, several programs transferred land for housing to white households at greatly discounted rates. Notably, between 1776 and 1855, the federal government transferred 61 million acres of land for free in Ohio, Michigan, Illinois, and Louisiana by issuing what were known as "Bounty Land Warrants" to military veterans.[4] By 1855, the government had issued over 500,000 bounty land warrants.[5]

Prior to the Civil War, over ninety percent of African Americans were enslaved,[6] and laws often prohibited free Black people from owning property.[7] Many northern states also placed restrictions on entry by free Black people, and some barred them from entry entirely.[8] Thus, while white settlers before the Civil War were able to take advantage of Bounty Land Warrants or other government programs that transferred land to settlers for free or at discounted rates, the will of slaveholders and discriminatory state laws combined to restrict where both free and enslaved Black people could live and whether they could own property.

This contrast in housing prospects did not change greatly after the Civil War. In 1862, Congress passed the Homestead Act, which transferred over 246 million acres of land to 1.6 million U.S. citizens, the overwhelming majority of whom were white, between 1862 and 1934.[9] For a filing fee

4. Jeffrey Seikan, *Object 2: Bounty Land Warrant*, U.S. Dep't Veterans Affs. (Jan. 7 2022), https://department.va.gov/history/100-objects/object-2-bounty-land-warrant.

5. *Id.*

6. Ellora Derenoncourt et al., *Wealth of Two Nations: The U.S. Racial Wealth Gap 1860-2020* 5 (Nat'l Bureau Econ. Rsch., Working Paper 30101, June 2022), http://www.nber.org/papers/w30101.

7. Roy W. Copeland, *In the Beginning: Origins of African American Real Property Ownership in the United States*, 44 J. Black Stud. 646, 647 (Sept. 2013).

8. *Race Based Legislation in the North 1807–1850*, PBS: Res. Bank, https://www.pbs.org/wgbh/aia/part4/4p2957.html (last visited Feb. 15, 2024); Shirely Ann Wilson Moore, Sweet Freedom's Plains: African Americans on the Overland Trails 1841–1869, at 17–21 (Nat'l Parks Serv. Jan. 31 2012), https://www.nps.gov/oreg/learn/historyculture/upload/Sweet-Freedom-s-Plains-508.pdf.

9. *Id.*; *see also* Larry Adelman, *A Long History of Racial Preferences for Whites*, PBS: RACE—The Power of an Illusion (2003), https://www.pbs.org/race/000_About/002_04-background-03-02.htm; Andrew Muhammad et al., *African Americans and Federal Land*

of $12 (approximately $300 today), a person could lay claim to 160 acres of land, provided that they cultivated and maintained the land for five years.[10] It is estimated that nearly 50 million Americans, one in four adults, are descendants of somebody who received land under the Homestead Act.[11] The Southern Homestead Act of 1866 was hailed at the time as a vehicle for extending the benefits of homesteading on public land to Black people,[12] but it did not work as intended for a variety of reasons.[13] When Congress repealed the Act in 1876, only 6,000 of nearly 22,000 successful patents went to Blacks.[14]

The inequality associated with the land grant process was not the only way that state actors restricted housing choice for Black people after the Civil War. In the South, vagrancy laws, convict leasing, enticement laws, and emigrant agent laws[15] limited the residential mobility of Black people.[16] Black people who managed to migrate north despite these restrictions were confined by exclusionary zoning ordinances to certain neighborhoods and overcharged for rent.[17]

As the United States struggled to emerge from the Great Depression, disparities in housing choice continued. Beginning in the 1930s, the federal

Policy: Exploring the Homestead Acts of 1862 and 1866, 46 Applied Econ. Persp. & Pol'y 95 (2023), *available at* https://onlinelibrary.wiley.com/doi/10.1002/aepp.13401 (Although Black people were not expressly excluded from the Homestead Act, evidence indicates that few were able to take advantage of the land offered by the Act. Having been released from enslavement penniless and homeless most did not have the means to homestead. Racism and discrimination were also barriers to access. The nine states with the largest number of homesteads are also the states with the lowest present day Black populations.).

10. Muhammad et al., *supra* note 9, at 97.

11. *Id.*

12. *Id.* at 102–05.

13. *Id.* at 6.; *see also* Richard Edwards, *African Americans and the Southern Homestead Act*, 39 Great Plains Q. 103, 105, 113 (2019) (noting that the land was forested or swampy for the most part and not very well suited to agriculture and most of the formerly enslaved did not have the resources to set up farms); Muhammad, *supra* note 9, at 6 (noting that many of the formerly enslaved were bound by wage-labor contracts that made them ineligible); Edwards, *supra*, at 113 (noting that as time went on, Black people became increasingly the targets of white supremist violence).

14. Edwards, *supra* note 13, at 111, 124 (citing Michael L. Lanza, Agrarianism and Reconstruction Politics: The Southern Homestead Act (1990)).

15. David E. Bernstein, *The Law and Economics of Post-Civil War Restrictions on African American Interstate Migration* (George Mason Law & Economics Working Paper No. 96-03, Aug. 6 1996) (Emigrant agent laws regulated recruiters who sought to recruit Blacks to move North for work and greatly restricted the practice.)

16. *Id.*

17. Richard Rothstein, The Color of Law: A Forgotten History of How Our Government Segregated America 44–49 (2017); *compare* Buchanan v. Warley, 245 U.S. 60 (1917) (declaring racial zoning ordinances unlawful), *with* Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365 (1926) (permitting zoning ordinances that prevent apartments from being built in certain neighborhoods).

government used its financial strength to ensure the transfer of even more previously underdeveloped land into the hands of a new generation of white Americans while simultaneously ensuring the same opportunity remained closed to Blacks. In 1934, as part of the New Deal, Congress and the President made mortgage lending much more accessible by creating the Federal Housing Administration (FHA).[18] The FHA and the Veterans Administration (VA) insured bank mortgages up to eighty percent of the home's value,[19] shifting the majority of the risk from the banks to the government.[20] The FHA and VA also insured construction loans taken from banks by developers who were building developments consisting of thousands of homes.[21] By 1948, most housing being constructed across the country was insured by the federal government.[22] By the early 1970s, eleven million Americans had purchased homes with FHA or VA financing.[23]

More than half of mortgage borrowers during this period earned less than the equivalent of $40,000 in today's dollars.[24] Today these homes sell for prices well out of reach for households with annual incomes of $40,000.[25] Families who were able to buy new suburban homes in the 1940s have gained over $200,000 in wealth in the decades since.[26] Low-cost FHA and VA mortgage lending played an outsized role in creating the contemporary American middle class.[27] That middle class was almost entirely white. Between 1934 and 1968, ninety-eight percent of FHA loans went to white borrowers. [28] By 1970, seventy percent of white households owned their own homes, a stark contrast to 1940 when most households of all races were renters, and to Black people, the majority of whom rent their homes to this day.[29]

While the FHA was funding the creation of new suburbs, it refused to guarantee mortgages for Blacks and discouraged banks from making loans in older urban neighborhoods where Black people outside of the South

18. Rothstein, *supra* note 17, at 64.

19. *Id*.

20. Mehrsa Baradaran, The Color of Money: Black Banks and the Racial Wealth Gap 106 (2017).

21. *Id*. at 71.

22. *Id*.

23. Thomas W. Hanchett, The Other Subsidized Housing; Federal Aid to Suburbanization, 1940s-1960s, From Tenements to taylor homes; in search of an urban housing poicy in twentieth century america, The Pensylvania State university press (2000), https://www.historysouth.org/wp-content/uploads/2015/12/The-Other-22Subsidized-Housing22-Federal-Aid-To-Suburbanization-.pdf.

24. Baradaran, *supra* note 20, at 107.

25. Rothstein, *supra* note 17, at 182–83.

26. *Id.*

27. Baradaran, *supra* note 20, at 107.

28. *Id*. at 108.

29. *After 50 Years; How Much Has Changed?*, Nat'l Ass'n Realtors (Sept. 2018), https://www.nar.realtor/sites/default/files/documents/Sept2018.pdf.

were concentrated.[30] Middle- and high-income Black households had to pay more for less—in comparison to white households with similar or lesser economic means who were able to move to growing suburbs—purchasing older homes with higher down payments and interest rates.[31] Over time, Black homeowners gained far less equity in those homes.[32] Families who could not afford the higher down payments were often forced to buy homes on contract sales where they made a monthly payment to the deed holder, but did not accumulate equity and could be easily evicted if they missed a payment.[33] As a result of pervasive lending discrimination mandated by the federal government, Black people were locked out of the prosperous capital building decades of the 1940s through the 1960s.[34] Wealth generated by subsidized land ownership has become the means by which many white people continue to exercise a privileged menu of housing choices. The denial of that wealth and enduring racist attitudes and assumptions about housing and real estate continue to limit the housing choices of Black people and other people of color.

II. The History of Disparate Housing Choice Has Had Lasting Impacts and Continues.

In 1967, in the wake of riots in dozens of cities in the United States, what has become known as the Kerner Commission published the Report of the National Advisory Commission on Civil Disorders.[35] It reported that the riots were caused by white racism, pervasive discrimination, and segregation that had created Black ghettos full of residents that were frustrated by unfulfilled promises, powerlessness, and police brutality.[36] At the time, two-thirds of non-white households lived in neighborhoods characterized by substandard housing and general disrepair.[37] While nearly seventy percent of white households owned their homes, only forty percent of Black households were homeowners.[38] The report recommended that the government pass a national open housing law, reorient federal housing programs to ensure that low-income housing was built outside of ghetto areas, and build six million units of housing affordable for low- and moderate-income families.[39]

30. Rothstein, *supra* note 17, at 65–67.
31. *Id.*
32. *Id.* at 182.
33. *Id*. at 65–67.
34. Baradaran, *supra* note 20, at 127.
35. Report of the Nat'l Advisory Comm'n on Civ. Disorders, U.S. Dep't of Just.: Office of Just. Programs (1967), https://www.ojp.gov/ncjrs/virtual-library/abstracts/national-advisory-commission-civil-disorders-report.
36. *Id.* at 5.
37. *Id.* at 13.
38. *After 50 Years*, *supra* note 29.
39. Report of the Nat'l Advisory Comm'n, *supra* note 35.

In 1968, Congress passed the Fair Housing Act with the goal of promoting fair housing throughout the United States.[40] What the federal government did not do was meaningfully adjust its programs to allow for the creation of low-income housing outside ghetto areas,[41] nor did it invest in the creation of millions of new units of housing for low- and moderate-income households.[42] In fact, in 1973 the Nixon administration announced a moratorium on spending for new public housing.[43] This announcement initiated the government's retreat from public housing and increasing reliance on Section 8 housing vouchers[44] and, later, Low Income Housing Tax Credits, neither of which produced more than tens of thousands of units per year and the latter of which does not target the lowest income renters and often leaves residents struggling with cost burden.[45]

Instead of the subsidized path to suburban homeownership afforded earlier generations of white Americans, Black people got a statute that purported to provide them the choice to move into the suburbs but only if they could afford to do so.[46] Most could not. By the early 1970s, real wages for all Americans had stagnated, and, between 1973 and 1980, they fell for Black people.[47] During the same time, home prices increased by forty three percent.[48] As a result, the ways in which government housing policies have disadvantaged Black people have become nearly permanent.[49]

Stagnant wages and rapidly rising home prices meant that most Black people remained renters, unable to build equity and trapped in declining neighborhoods characterized by increased exposure to violence, decreased exposure to educationally or occupationally successful adults, less accessible healthcare, groceries, and financially strapped schools serving

40. 42 U.S.C. § 3601.

41. Baradaran, *supra* note 20, at 166–67, 219.

42. Sheri Thompson, *Affordable Housing; A Crisis Decades in the Making*, Walker & Dunlop Inc. (Apr. 15, 2023), https://www.walkerdunlop.com/insights/2023/04/15/affordable-housing-crisis-decades-making; *Public Housing History*, Nat'l Low Income Hous. Coal. (Oct. 17 2019), https://nlihc.org/resource/public-housing-history.

43. Eugene J. Morris, *The Nixon Housing Program*, 9 Real Prop., Prob. & Trust J. 2 (1974).

44. United States Department of Housing and Urban Development, Housing Choice Vouchers Facts Sheet (The Housing Choice or Section 8 voucher program is a housing assistance program for low-income households that allows them to find private housing and the federal government pays the portion of the rent that is above 30% of the voucher holders income), available at https://www.hud.gov/topics/housing_choice_voucher_program_section_8.

45. Thompson, *supra* note 42; Nicholas Dagen Bloom, Public Housing That Worked: New York in the Twentieth Century (2009).

46. Rothstein, *supra* note 17, at 183.

47. *Id.* at 181.

48. *Id.*

49. *Id.* at 183.

disproportionately disadvantaged children.[50] Today most Black people are still renters,[51] the racial wealth gap exceeds $200,000 per household,[52] discriminatory policies and practices still limit housing choices for Black people, and the average Black American is still isolated in segregated, devalued neighborhoods.[53]

Black people continue to be largely denied the housing choices available to their white peers. For example, in 2016, the average white, first-time home buyer in Washington, D.C., could afford sixty seven percent of homes for sale in the District, while the average Black, first-time buyer could afford only nine percent of the homes. Most rental units available to very low-income households were in high-poverty, segregated neighborhoods east of the Anacostia River.[54] That both more well-off home seekers who want to buy and those with lower incomes who wish to rent find their choices severely restricted by race is unacceptably familiar. The next section talks about how fair housing attorneys can help to expand the menu of choices available to Black home seekers.

III. Lawyers Can Help to Expand Housing Choice.

Income inequality, lack of wealth, and higher debt remain real barriers to Black homeownership, but so does lower access to credit as a result of lending discrimination.[55] A variety of other public and private housing policies also continue to prevent Black people from choosing to move to areas where they are underrepresented. Economic development fueled by changing white housing preferences and discriminatory redevelopment plans make it hard for Black people to choose to remain living in changing neighborhoods that have been home for decades. In historically Black neighborhoods that are not threatened with gentrification-fueled displacement, generations of disinvestment and a contemporary undervaluing makes remaining in majority Black neighborhoods—by choice or because of lack thereof—a reality riddled with quality-of-life compromises.

50. *Id*. at 187.

51. Herman, Alexander, *In Nearly Every State People of Color Are Less Likely to Own Homes Compared to White Households*, Joint Ctr. for Hous. Stud. of Harv. Univ. (Feb. 8 2023), https://www.jchs.harvard.edu/blog/nearly-every-state-people-color-are-less-likely-own-homes-compared-white-households.

52. Rothstein, *supra* note 17, at 183.

53. Tracy Hadden Loh, Christoppher Coes & Becca Buthe, The Great Real Estate Reset—*Separate and Unequal: Persistent Residential Segregation Is Sustaining Racial and Economic Injustice in the U.S.*, Brookings (Dec. 16, 2020), https://www.brookings.edu/articles/trend-1-separate-and-unequal-neighborhoods-are-sustaining-racial-and-economic-injustice-in-the-us.

54. Leah Hendy & Serena Lei, *A Vision for an Equitable DC*, Urb. Inst. (Dec. 12, 2016), https://www.urban.org/features/vision-equitable-dc.

55. Rashawn Ray et al., *Homeownership, Racial Segregation and Policy Solutions to Racial Wealth Equity*, Brookings (Sept. 1, 2021), https://www.brookings.edu/articles/homeownership-racial-segregation-and-policies-for-racial-wealth-equity.

Addressing centuries of inequality and denial of housing choice will require the efforts of policy makers and legislators, community organizers, academics, and other stakeholders. This essay is directed to attorneys, and what follows is a discussion of how attorneys can help expand fair housing choice for Black people and other people of color.

A. Helping Black people move to areas where they are underrepresented.

Cases that challenge policies and practices that prevent Black people from moving to areas where they are underrepresented is what generally comes to mind when one thinks about fair housing. These cases are still critically important. The Fair Housing Act was passed with the stated goal of helping Black people move out of segregated and declining inner-city neighborhoods.[56] Exclusionary zoning and source of income discrimination are among the most salient policies and practices that prevent Black people from moving to areas where they are underrepresented. Attorneys can help expand choice in this way by representing community-based organizations and non-profit developers seeking to develop affordable housing in suburban or mostly white neighborhoods and by working with fair housing centers and other community-based organizations to challenge source of income discrimination.

1. Source of Income Discrimination

The Housing Choice Voucher (HCV) program was created in part to help low-income households move to neighborhoods that would otherwise be financially inaccessible.[57] Under the HCV program, a voucher holder is responsible for finding housing on the private market that suits their household's needs and a subsidy is paid to the landlord to cover the amount of rent that exceeds thirty percent of the voucher holder's income.[58] Nearly half of all voucher holders are Black,[59] so this program should be a tool that reliably increases housing choice for Black people. However, discrimination against voucher holders by landlords is a pervasive problem that confines many voucher holders to housing that is in racially segregated,

56. NAACP, Boston Chapter v. Secretary of Housing & Urban Development, 817 F.2d 149, 154–56 (1st Cir. 1987); Report of the Nat'l Advisory Comm'n., *supra* note 35.

57. Lance Freeman, *The Impact of Source of Income Laws on Voucher Utilization and Locational Outcomes: Assisted Housing Research Cadre Report*, U.S. Dep't of Hous. and Urb. Dev.: Off. of Pol'y Dev. & Rsch. (Feb. 2011), https://www.huduser.gov/publications/pdf/freeman_impactlaws_assistedhousingrcr06.pdf.

58. U.S. Dep't of Hous. & Urb. Dev., Housing Choice Voucher Fact Sheet, https://www.hud.gov/topics/housing_choice_voucher_program_section_8 (last visited Feb. 15, 2024).

59. U.S. Dep't of Hous. & Urb. Dev., Office of Pol'y Dev. & Rsch., Picture of Subsidized Households, https://www.huduser.gov/portal/datasets/assthsg.html (last visited June 7, 2024).

high-poverty neighborhoods.[60] In places with source-of-income discrimination prohibitions, voucher holders are more likely to move to low-poverty neighborhoods where people of color are underrepresented because those prohibitions protect voucher holders from discrimination that they would otherwise often encounter in low-poverty neighborhoods.[61]

The Fair Housing Act does not explicitly protect against discrimination based on source of income, but discrimination against voucher holders has a clear disparate impact on Black people since they make up forty eight percent of voucher holders,[62] but only fourteen percent of the population.[63] Results in cases where a plaintiff alleged a violation of the Fair Housing Act because of discrimination against voucher holders are mostly negative.[64] The Second, Fifth, and Seventh Circuits have held that the Housing Choice Voucher program is voluntary and landlords cannot be held liable under the Fair Housing Act for disparate effects based on race.[65] However, twenty three states and over one hundred localities prohibit source of income discrimination.[66] Cases alleging violations of the Fair Housing Act have been more successful in jurisdictions where income discrimination has been prohibited.[67]

Where source-of-income discrimination prohibitions exist, fair housing litigators can increase housing choice by working with community-based organizations and fair housing centers to enforce those protections. In the *Equal Rights Center v. Lenkin Co.*, the Washington Lawyers' Committee for Civil Rights and Urban Affairs represented the Equal Rights Center, a fair housing center located in Washington, D.C., in a claim against the

60. Daniel Teles & Yipeng Su, *Source of Income Protections and Access to Low-Poverty Neighborhoods*, Urb. Inst. (Oct. 2022), https://www.urban.org/sites/default/files/2022-10/Source%20of%20Income%20Protections%20and%20Access%20to%20Low-Poverty%20Neighborhoods.pdf; Robert G. Schwemm, *Source-of-Income Discrimination and the Fair Housing Act*, 70 Case W. Rsrv. L. Rev. 573, 576 (2020), https://scholarlycommons.law.case.edu/caselrev/vol70/iss3/4.

61. J. Rosie Tighe, Megan E. Hatch & Joseph Mead, *Source of Income Discrimination and Fair Housing Policy*, 32 J. Plan. Literature 3 (2020), *available at* https://journals.sagepub.com/doi/full/10.1177/0885412216670603.

62. U.S. Dep't of Hous. & Urb. Dev., Picture of Subsidized Households: Query Tool, https://www.huduser.gov/portal/datasets/assthsg.html (last visited Feb. 15, 2024).

63. U.S. Census Bureau, Quick Facts - United States: 2018–2022 ACS Five-Year Estimates, https://census.gov/quickfacts/fact/table/US/RHI225222#qf-headnote-a (last updated Dec. 19, 2023).

64. *Appendix B: State, Local, and Federal Laws Barring Source-of-Income Discrimination*, Poverty & Race Rsch. Action Council (Mar. 2024), https://www.prrac.org/pdf/AppendixB.pdf; Robert G. Schwemm, *Source-of-Income Discrimination and the Fair Housing Act*, 70 Case W. Rsrv. L. Rev. 573, 604–05 (2020), *available at* https://scholarlycommons.law.case.edu/caselrev/vol70/iss3/4.

65. Schwemm, *supra* note 60, at 604–05.

66. *Id.* at 575.

67. *Id.* at 603.

Lenkin Company for source of income discrimination at rental properties it owned or managed in Wards 1, 2, and 3 of D.C., which are located in majority-white parts of the city.[68] The case settled with a Consent Agreement wherein the Lenkin Company agreed not to discriminate against voucher holders, to place language saying as much in its advertisements for apartments, to affirmatively market to voucher holders, and to have its staff trained on applicable fair housing laws.[69]

When source of income protections are not already in place, attorneys can work with community-based organizations and fair housing centers to get legislation passed prohibiting source-of-income discrimination. For example, the Lawyers' Committee for Civil Rights Under Law[70] had discussions with KC Tenants[71], a city-wide tenant union in Kansas City, Missouri, about a source-of-income discrimination prohibition that they were trying to pass. The Lawyers' Committee encouraged advocates to push for language that mirrored the Fair Housing Act with respect to what types of actions would violate the provision and described the importance of a private right of action for enforcement and dedicated resources implementation. That advice was based on the Washington Lawyers' Committee's experience in the District of Columbia. The Lawyers' Committee also wrote a letter to the Kansas City Council encouraging passage of the legislation as a way of combating segregation and meeting the city's obligation under the Fair Housing Act to affirmatively furthering fair housing.

Helping to pass source of income discrimination prohibitions and bringing litigation to enforce those prohibitions are concrete ways that fair housing litigators can help Black households move to areas where they are underrepresented.

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68. Complaint, Equal Rights Ctr. v. Lenkin Co. Mgmt. Inc., 2017-CA-002547-B (D.C. Super. Ct. 2017), *available at* https://www.courthousenews.com/wp-content/uploads/2017/04/DCHousing.pdf; DC Health Matters, 2024 Demographics (2024).

69. Consent Decree, *Equal Rights Ctr. v. Lenkin Co. Mgmt. Inc.*, No. 2017 CA002547 B (D.C. Super. Ct. 2017), https://equalrightscenter.org/wp-content/uploads/erc-lenkin-consent-order.pdf.

70. The Lawyers' Committee for Civil Rights Under Law is a nonpartisan, nonprofit organization, formed in 1963 at the request of President John F. Kennedy to mobilize the nation's leading lawyers as agents for change in the Civil Rights Movement. Today, the Lawyers' Committee uses legal advocacy to achieve racial justice, fighting inside and outside the courts to ensure that Black people and other people of color have the voice, opportunity, and power to make the promises of our democracy real. The Lawyers' Committee implements its mission and objectives by marshaling the pro bono resources of the bar for litigation, public policy, advocacy and other forms of service by lawyers to the cause of civil rights., https://www.lawyerscommittee.org/mission/.

71. "KC Tenants is the citywide tenant union, an organization led by a multigenerational, multiracial, anti-racist base of poor and working class tenants in Kansas City. KC Tenants organizes to ensure that everyone in KC has a safe, accessible, and truly affordable home." KC Tenants (2019), https://kctenants.org/about.

2. Exclusionary Zoning

Exclusionary zoning policies serve as another enduring barrier to Black households choosing to live in many suburban areas.[72] Areas with lower density zoning tend to have higher rates of segregation.[73] Lower-density zoning increases existing home prices and prevents the development of multifamily housing that might be more affordable and even, under the most extreme ordinances, modestly priced single-family homes on small lots.[74] In *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, the Supreme Court described zoning laws that operate to exclude minorities from certain neighborhoods as being "at the heartland of disparate impact liability."[75]

Combatting discriminatory zoning policies is especially important in high-cost regions where gentrification is displacing long-time Black and other residents of color from historically segregated inner-city neighborhoods. Typically, former residents of gentrifying neighborhoods are pushed to areas with greater segregation and concentrated poverty simply for lack of other options.[76] Many residents facing displacement from gentrifying neighborhoods may want to remain and should be able to do so. However, if exclusionary zoning is overcome, allowing affordable housing to be built in high-opportunity suburbs, then at least those being displaced will be able to choose to not move to segregated neighborhoods if that is their preference. Additionally, eliminating exclusionary zoning may reduce gentrification pressure by making it easier for would-be gentrifiers to find housing outside of neighborhoods at risk of gentrification.

In *MHANY Management, Inc. v. County of Nassau*, the Lawyers Committee represented nonprofit development and property management company Mutual Housing Association of New York (MHANY) and grassroots organizing group New York Communities for Change (NYCC).[77] In that case, the Village of Garden City, a wealthy white suburb of New York City, initially accepted a plan developed by a consultant to rezone the site of a former county social services building for residential multifamily use (R–M).[78] However, after multiple public hearings where residents voiced strong opposition to multifamily zoning because of purported traffic and

72. Jonathan Rothwell & Douglass S. Massey, *The Effects of Density Zoning on Racial Segregation in U.S. Urban Areas*, 44 Urb. Aff. Rev. 779–806 (July 1, 2009), *available at* https://oar.princeton.edu/bitstream/88435/pr1gx83/1/nihms453809.pdf.

73. *Id.* at 792.

74. *Id.*

75. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 539 (2015).

76. Olatunde C.A. Johnson, *Unjust Cities? Gentrification, Integration, and the Fair Housing Act*, 53 U. Rich. L. Rev. 835, 843–44 (2019), *available at* https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3719&context=faculty_scholarship.

77. MHANY Mgmt., Inc. v. County of Nassau, 819 F.3d 581 (2d Cir. 2016).

78. *Id.* at 590.

school overcrowding concerns and demanded that the Village guarantee that the site would not be used for affordable housing, the Village changed course.[79] Ultimately, the Village rezoned the property to allow for the construction of residential townhomes (R–T) and not multifamily housing, and the County, which had asked the Village to initiate the rezoning as a precursor to selling off the site, acquiesced to that zoning classification.[80]

MHANY's predecessor New York ACORN Housing Company and NYCC's predecessor New York ACORN had been following the process to rezone the site and objected to the R–T rezoning of the site because it would make building affordable housing impossible.[81] MHANY's objections were unsuccessful, and the County selected a developer who planned to build single family homes as the purchaser for the property.[82] Thereafter New York ACORN and four individual plaintiffs filed suit alleging that the decision to rezone the property for townhomes instead of multifamily housing violated the Fair Housing Act because the decision was racially discriminatory and would have a disparate impact on minority groups.[83] New York ACORN Housing Company would join the case six months later.

With respect to the intentional discrimination claim, the Second Circuit held that the fact that Garden City was almost entirely white, the lack of affordable housing in Garden City, the number of minorities who would have been able to obtain housing in a multifamily development, the forceful and repeated nature of residents' objections to affordable housing and undesirable residents, and the abrupt change of course together supported the conclusion that county officials were knowingly responsive to the residents' racial animus.[84] The Second Circuit also held that plaintiffs had established a prima facie case that the Village's decision violated the disparate impact prong of the Fair Housing Act by showing that by changing the zoning of the site from R–M to R–T decreased the availability of housing to minorities in a municipality where the minority population is less than five percent.[85] On remand, the district court held that the plaintiffs had met their burden of proving that multifamily zoning would have served the Village's interests in not increasing traffic or school crowding and would have been less discriminatory than the zoning designation that only allowed for townhomes.[86]

In light of the fact that Garden City is over ninety-five percent white and has long resisted the development of affordable housing,[87] MHANY's

79. *Id.* at 591–94.
80. *Id.* at 596.
81. *Id.* at 598–99.
82. *Id.*
83. *Id.* at 599.
84. *Id.* at 606–11.
85. *Id.* at 620.
86. *Id.* at 581.
87. *Id.* at 590.

victory is a great example of the type of case that can help increase the ability of Black people and other people of color to live in areas where they are underrepresented. It is worth noting in transitioning to how fair housing attorneys can combat displacement that dismantling exclusionary zoning should be done thoughtfully in a manner that increases the ability of low-income people to move into majority white neighborhoods and not in a manner that increases gentrification and displacement in Black neighborhoods.[88]

B. Preventing displacement related to gentrification

In recent years, many of the nation's largest cities have been experiencing gentrification, which represents a new threat to housing choice for African Americans.[89] Gentrification is the process of wealthy, usually white, newcomers moving into disinvested central city neighborhoods that have been populated predominantly by African Americans or other people of color and transforming those neighborhoods to meet their tastes.[90]

Proponents of gentrification argue that it is good for cities and the poor residents of cities because it promotes investment in disinvested neighborhoods, increases cities' tax bases and ability to provide services, creates jobs for low-income residents, and improves access to consumer goods.[91] Some have even looked to gentrification as a method to achieve integration.[92] Municipalities have also used the economic and racial diversity that comes with gentrification as a justification for developments that will displace Black residents.[93]

Despite hopes of the phenomenon's proponents, the process of gentrification has led to the involuntary displacement of thousands of Black residents from central cities.[94] Some literature questions whether gentrification

88. *Housing Advocates Fight for Equitable Zoning Practices*, All. for Hous. Just. (Dec. 5, 2023), https://www.allianceforhousingjustice.org/post/housing-advocates-fight-for-equitable-zoning-policies.

89. Jason Richardson et al., *Shifting Neighborhoods; Gentrification and Cultural Displacement in American Cities*, Nat'l Cmty. Reinvestment Coal. (Mar. 19, 2019), https://ncrc.org/gentrification; Johnson, *supra* note 76, at 835, 836.

90. Johnson, *supra* note 76, at 837; Jamie Draper, *Gentrification and Integration*, ___ J. Pol. Phil. ___ (2023) (early view), https://onlinelibrary.wiley.com/doi/epdf/10.1111/jopp.12312; J. Peter Byrne, *Two Cheers for Gentrification*, 46 How. L.J. 405, 406 (2003).

91. Johnson, *supra* note 76, at 841–43; Byrne, *supra* note 90, at 405, 406, 415–23; Lance Freeman & Frank Braconi, *Gentrification and Displacement New York City in the 1990s*, 70 J. Am. Plan. Ass'n 39 (2007), *available at* http://dx.doi.org/10.1080/01944360408976337.

92. Johnson, *supra* note 76, at 835; Draper, *supra* note 90, at 7.

93. City of Norfolk's Memo Re Motion for Summary Judgment, Bryant v. City of Norfolk, No. 2:20-cv-00026-RCY-RJK, 2021 WL 765405, at 14 (E.D. Va. 2020) ("Spending more than $200 million to create a mixed-income, integrated community cannot possibly be considered perpetuating segregation.").

94. Tara Bahrampour, Marissa J. Lang & Ted Mellnik, *White People Have Flocked Back to City Centers—and Transformed Them*, Wash. Post (Feb. 6, 2023), https://www

leads to displacement, but the results are mixed and depend on what is considered displacement.[95] While some neighborhoods may appear to integrate in the early stages of gentrification, many neighborhoods later resegregate as majority white.[96] Black and other residents of color are displaced from gentrifying neighborhoods by rising rents, deteriorating housing conditions, and discriminatory redevelopment plans.[97] Housing choices for displaced residents are severely constrained. Instead of finding new housing options in high-opportunity neighborhoods, most people displaced by gentrification find that they have no choice other than to

.washingtonpost.com/dc-md-va/interactive/2023/us-city-white-population-increase; Margaret Kimberly, *Gentrification and the End of Black Communities*, Hampton Inst. (Aug. 21, 2021), https://www.hamptonthink.org/read/gentrification-and-the-end-of-black-communities; Jason Richardson, Bruce Mitchell & Juan Franco, *Shifting Neighborhoods: Gentrification and Cultural Displacement in American Cities*, Nat'l Cmty. Reinv. Coal. (Mar. 19, 2019), https://ncrc.org/gentrification.

95. *Compare* Kristen Capps, *Study: No Link Between Gentrification and Displacement in NYC*, Bloomberg News (July 31, 2019), https://www.bloomberg.com/news/articles/2019-07-31/did-gentrification-displace-low-income-nyc-kids (study finding that low-income children are less likely to move out of gentrifying neighborhoods than non-gentrifying neighborhoods); *and* Freeman & Braconi, *supra* note 87 (finding low rates of mobility for poor households in gentrifying neighborhoods than non-gentrifying neighborhoods), *with* Ashley J. Quiang, Christopher Timmins & Wen Wang, *Displacement and the Consequences of Gentrification* (Working Paper Nov. 2021), https://sites.duke.edu/christophertimmins/files/2021/11/displacement_paper_2021_11.pdf (finding that low-income renters are more likely to move out of gentrifying neighborhoods), *and* Public Affairs, *New York City Gentrification Creating Islands of Exclusion, Study Finds*, Berkeley News (Apr. 10, 2019) (finding that seventy-one neighborhoods transitioned from low-income to having a median income over two hundred percent of the regional median income between 1990 and 2016).

96. Draper, *supra* note 90; Themis Chronopolis, *"What's Happened to the People?" Gentrification and Racial Segregation and in Brooklyn*, 24 J. Afr. Am. Stud. 549, 550 (Sept. 5, 2020), *available at* https://doi.org/10.1007/s12111-020-09499-y; Daniel Lauber, *District of Columbia Analysis of Impediments to Fair Housing Choice 2006–2011*, D.C. Dep't Hous. & Cmty. Dev. 174 (Apr. 2012), https://ohr.dc.gov/sites/default/files/dc/sites/ohr/publication/attachments/DC%20AI%202012%20-%20FINAL.pdf; Freeman, Lance, *There Goes the Hood; Views of Gentrification from the Ground Up*, at 78, Temple University Press. Philadelphia, 2006; Newman, Kathe et al., *The Right to Stay Put, Revisited: Gentrification and Resistance to Displacement in New York City*, Urban Studies Journal Limited. Vol 43 No. 23. 2006. Sage Publications, https://files.eportfolios.macaulay.cuny.edu/wp-content/uploads/sites/5806/2017/04/16142354/The_Right_to_Stay_Put_Revisited_Gentrification_and.pdf.

97. Eliana Golding, *A Holistic and Reparative Agenda for Ending Displacement in DC*, D.C. Fiscal Pol'y Inst. (Nov. 15, 2023), https://www.dcfpi.org/all/agenda-for-ending-displacement; The Uprooted Project, U. Tex. Austin, *Understanding Gentrification and Displacement*, https://sites.utexas.edu/gentrificationproject/understanding-gentrification-and-displacement (last visited Feb. 15, 2024).

move to economically isolated, racially segregated, high-poverty neighborhoods.[98] Those who are not displaced often are not able to enjoy the benefits commonly associated with integrated neighborhoods as wealthy white newcomers exercise school choice to avoid neighborhood schools and use different neighborhood amenities, such as grocery stores, than longtime residents.[99]

Residential and cultural displacement associated with gentrification make it a modern-day social phenomenon whereby Black housing choice is restricted in order to enhance white housing choices. Helping communities to challenge redevelopment plans that threaten to displace low-income residents of color by ensuring that such plans do not have a racially disparate impact or perpetuate segregation is one way that fair housing litigators can help African Americans choose to remain in gentrifying neighborhoods.

Mt. Holly Gardens Citizens in Action, Inc. v. Township of Mount Holly is an example of a case where fair housing litigation was used to prevent permanent resident displacement. In *Mt. Holly*, residents of the Mount Holly Gardens neighborhood challenged a plan to demolish the homes in their neighborhood and replace them with more expensive homes.[100] Most of the Gardens neighborhood residents were low income and would not be able to afford the newly developed homes.[101] The neighborhood was also home to the only concentration of minority residents in the Township.[102]

Residents of the Gardens neighborhood filed suit alleging that the Township's redevelopment plan violated the Fair Housing Act because it had disproportionately displaced minority residents.[103] The Third Circuit found that the residents had established a prima facie case that the Township's plan violated the Fair Housing Act by showing that a greater percentage of Black and Hispanic Gardens households would be negatively affected than the percentage of white Gardens households and that a greater percentage of white residents in the Township would be able to afford the new units than Black residents.[104] The court found that the Township had a legitimate interest in repairing blighted neighborhoods but also found that the plaintiffs had presented expert testimony showing that those interests could be met without demolishing and reconstructing the neighborhood.[105]

98. Olatunde C.A. Johnson, *Unjust Cities? Gentrification, Integration, and the Fair Housing Act*, 53 U. Rich. L. Rev. 835, 843–44 (2019), https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3719&context=faculty_scholarship.

99. *Id.* at 845–48.

100. Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly, 658 F.3d 375, 377 (3d Cir. 2011).

101. *Id*.

102. *Id*.

103. *Id*. at 380–82.

104. *Id*. at 382.

105. *Id*. at 386–87 (Even though the Third Circuit articulated a standard whereby the burden was on the defendant to prove there was not a less discriminatory alternative that would serve their legitimate interests, the court looked to evidence presented by the

Another example where the Fair Housing Act was used to combat displacement is *Bryant v. City of Norfolk.*[106] In that case, the City of Norfolk and its housing authority planned to demolish a public housing property, consisting of over 600 units and replace it with a development that would include only 200 units of new affordable housing.[107] The public housing was in a neighborhood that directly abutted one of the city's wealthiest and whitest areas.[108] The city planned to supply displaced residents with Housing Choice Vouchers, but doing so would require the city to temporarily prioritize them over an existing waiting list of thousands.[109] Additionally, it was predictable that former residents would not have been able to use their vouchers to move to high-opportunity areas. Several residents impacted by the redevelopment plan, a tenants' organization representing the residents of the three properties, and the community organizing group New Virginia Majority filed suit against the City of Norfolk, the public housing authority, and the U.S. Department of Housing and Urban Development, which awarded the city and the housing authority a competitive grant to fund the redevelopment. The suit alleged that the redevelopment plan violated the Fair Housing Act because it would have a disparate impact on the existing property's residents and would perpetuate segregation by displacing residents to other more segregated parts of the city even more isolated from areas of opportunity.[110]

While summary judgment briefing was pending, the parties settled.[111] The agreement provided a procedure that would maximize the number of former residents who would have the right to return and made substantial improvements to the Housing Choice Voucher program to ensure that those unable to return would enjoy a great deal of choice in finding replacement housing.[112] *Bryant v. City of Norfolk* is an example of a case where the involvement of fair housing litigators was crucial to preventing the permanent displacement of hundreds of Black families. Cases that defend a community's right to stay or return to neighborhoods that are being redeveloped are critical to ensuring fair housing choice for Black and other communities of color.

Plaintiff's expert to show there was a less discriminatory alternative that would meet the Township's stated interests. Under HUD's disparate effects rule, that would likely suffice to carry the Plaintiff's burden of proving a less discriminatory alternative. *See* MHANY Mgmt. v. Cnty. of Nassau, 819 F.3d 581 (2d Cir. 2016).

106. Bryant v. City of Norfolk, No. 2:20-cv-00026-RCY-RJK, 2021 WL 765405 (E.D. Va. 2020).

107. Amended Compl., Bryant v. City of Norfolk, No. 20-cv-00026-RCY-RJK, 2021 WL 765405 (E.D. Va. Mar. 2, 2021), ECF No. 128.

108. *Id*. at 11.

109. *Id*. at 30–35.

110. *Id*. at 5–8 & 53–4.

111. Stipulated Dismissal Ex. A Settlement Agreement, Bryant v. City of Norfolk, No. 20-cv-00026-RCY-RJK, 2021 WL 765405 (E.D. Va. Mar. 2, 2021), ECF No. 291-1.

112. *Id*.

Fair housing litigators can also help communities fighting displacement by supporting efforts to pass legislation that protects communities from displacement and or by joining efforts by community-based organizations and legal service providers to ensure that public housing properties are not disposed of in a way that reduces fair housing choice. For example, the Lawyers' Committee for Civil Rights Under Law[113] supported the Louisville Tenants Union[114] by writing a letter to the Louisville-Jefferson County Metro Council explaining how passing its Anti-Displacement Law would help the city to meet its obligation to affirmatively further fair housing.[115]

C. Lawyers can help Black people live in neighborhoods that are not gentrifying without making quality of life compromises.

Not all segregated, majority Black neighborhoods are gentrifying.[116] In fact, most African Americans today live in neighborhoods that can be characterized as poor or low income.[117] While it is likely true that many Black people would move out of those neighborhoods if given a meaningful choice to do so, it is also true that many Black people are reluctant to move to majority white neighborhoods because of concerns about racial hostility or discrimination or being disconnected from their community.[118] Those neighborhoods that are not experiencing renewed investment driven by an influx of white, wealthy newcomers, continue to be plagued by a variety of problems related to disinvestment such as poor schools, increased crime, and lack of access to healthcare, groceries, and other goods and services.[119] Disinvestment has made subpar housing conditions a widespread problem.[120] Fair housing litigators can address the conditions in segregated

113. Lawyers' Comm. Civ. Rts. Under Law, https://www.lawyerscommittee.org (last visited June 21, 2024).

114. Louisville Tenants Union, https://www.louisvilletenantsunion.org/about (last visited June 21, 2024).

115. Louisville-Jefferson Cnty., MO Metro Gov't Code of Ordinances ch. 169 (2023) (requiring any development including a residential component and receiving metro resources undergo a displacement assessment and requiring any rental housing to be affordable based on the affordability levels identified in the most recent Housing Needs Assessment).

116. Jason Richardson et al., *Shifting Neighborhoods; Gentrification and Cultural Displacement in American Cities*, Nat'l Cmty. Reinv. Coal. (Mar. 19, 2019), https://ncrc.org/gentrification.

117. Baradaran, *supra* note 20, at 187; Christopher Coes et al., *The Great Real Estate Reset: A Data-Driven Initiative to Remake How and What We Build*, Brookings (Dec. 16, 2020), https://www.brookings.edu/articles/the-great-real-estate-reset-a-data-driven-initiative-to-remake-how-and-what-we-build.

118. Draper, *supra* note 90.

119. Rothstein, *supra* note 17, at 187; Baradaran, *supra* note 20, at 217.

120. David E. Jacobs, *Environmental Health Disparities in Housing*, 101 Am. J. Pub. Health (Dec. 2011), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3222490 (noting that 7.5% of African Americans live in substandard housing); Eliana Golding, *A Holistic and Reparative Agenda for Ending Displacement in DC*, D.C. Fiscal Pol'y Inst. (Nov. 15,

neighborhoods using the Fair Housing Act, and, in many jurisdictions, fair housing litigators may be the best suited to pursue cases addressing housing conditions using the implied warranty of habitability and consumer protection statutes because of their familiarity with complex civil litigation.

Fair housing attorneys can help make choosing to continue living in a low-income, majority Black neighborhood a meaningful choice by bringing cases against governments and housing providers for the discriminatory provision of housing facilities and services and for failing to meet their obligation to keep rental property in good repair.

1. Challenging discriminatory services and facilities under the Fair Housing Act

Section 3604(b) of the Fair Housing Act states that it is unlawful "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin."[121] An archetypal example of a case challenging the discriminatory provision of facilities and services by a municipality is *Kennedy v. City of Zanesville*.[122]

In *Zanesville*, residents just outside the city limits of Zanesville, Ohio and a local fair housing center filed suit against the City of Zanesville and Muskingum County alleging that the defendants had engaged in discrimination that violated the Fair Housing Act by passing over their neighborhood (Coal Run) for connection to the municipal water lines in favor of more distant white neighborhoods despite multiple requests by the neighborhood's residents to be connected.[123] While the litigation was pending, the neighborhood was connected to municipal water.[124]

Later the court held that the plaintiffs had established a prima facie case that the defendants had intentionally discriminated against them by showing that they were residents of a protected class neighborhood, they requested public water service, and the requests were rejected, that the defendants provided water services to similarly situated neighborhoods that were not protected class neighborhoods,[125] and that the plaintiffs submitted evidence that the defendants proffered legitimate reasons for the denial of water service were pretextual.[126] This case is an example of how litigation against a discriminatory municipal actor can achieve victories that make the choice to live in segregated neighborhoods like Coal Run more livable

2023), https://www.dcfpi.org/all/agenda-for-ending-displacement (describing poor housing conditions as the second largest factor driving displacement in D.C.).

121. 42 U.S.C. § 3604(b); 24 C.F.R. § 100.65.

122. Kennedy v. City of Zanesville, OH, 505 F. Supp. 2d 456 (S.D. Ohio 2007).

123. *Id.* at 463.

124. *Id.* at 469.

125. *Id.* at 495.

126. *Id.* at 497–98.

The discriminatory provision of facilities and services by private landlords can also be challenged under § 3604(b). *Jimenez v. Tsai* is an example of such a case.[127] Plaintiffs, four Latinx families, successfully stated a claim for racial and national origin discrimination under § 3604(b). In *Jimenez*, the plaintiffs alleged that defendant property managers failed to make timely repairs and neglected habitability problems in an apartment complex with predominantly tenants of color.[128] The plaintiffs showed that the defendants' neglect was motivated by discriminatory animus by using survey data from another one of the defendants' properties, which was predominantly white and had no Latinx residents.[129] Tenants at that property indicated through the survey that they had no issues with repairs in their units and did not have any complaints about the speed with which the repairs were made.[130] The court found this evidence sufficient for the plaintiffs' § 3604(b) claim to survive the defendants' motion to dismiss.[131] *Jimenez* shows that claims brought under § 3604(b) can be a viable way to hold large landlords who may own nice properties in white areas accountable for the condition of their properties in non-white areas.

2. Holding housing providers accountable for neglect with the implied warranty of habitability and consumer protection statutes

Rental housing conditions in segregated Black neighborhoods are often deplorable.[132] The physical condition of much of that rental housing can be traced to the disinvestment experienced by segregated Black neighborhoods.[133] Substandard housing can have a variety of negative health consequences, such as asthma that is aggravated by mold.[134] As described above, Black people end up living in substandard housing because they lack other options. Fair housing litigators can help with this problem through litigation.

Most jurisdictions have an implied warranty of habitability that requires housing providers to keep rental housing habitable even if the lease does

127. Jimenez v. Tsai, No. 5:16-cv-04434-EJD, 2017 WL 2423186, at *18 (N.D. Cal. June 5, 2017).

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Health, Housing and History; For Health Place Matters*, Env't & Health Data Portal, https://a816-dohbesp.nyc.gov/IndicatorPublic/data-stories/housing; Michael Brice-Saddler, *Once a Black Middle Class Haven, a D.C. Apartment Complex Falls into Disrepair,* Wash. Post (June 1, 2021), https://www.washingtonpost.com/local/dc-politics/marbury-plaza-dc-rent-strike/2021/06/11/922c6632-c960-11eb-afd0-9726f7ec0ba6_story.html; Gretchen Morgenson, *These Tenants Fought One of America's Largest Corporate Landlords—and Scored Some Wins*, NBC News (July 5, 2023).

133. *Health, Housing and History*, *supra* note 132.

134. *Id.*

not say the provider has to make repairs.[135] Habitability is usually defined by a local housing or building code.[136] Some jurisdictions also allow tenants to bring claims for repairs under consumer protection statutes.[137] Lawyers can fashion claims for groups of tenants or entire properties based on a violation of contract theory or under consumer laws.

Fair housing attorneys at civil rights organizations may be reluctant to bring these types of cases because they see them as landlord-tenant cases that should be handled by legal aid organizations. This was the case at the Washington Lawyers' Committee for Civil Rights initially. However, because poor conditions disproportionately impact Black people and other people of color[138] and because many Legal Aid organizations are either restricted from taking class action cases or lack the resources to do so, we felt it incumbent on the Committee to take building-wide conditions cases. The examples below illustrate that challenging failures to maintain property under implied warranties of habitability or consumer protection statutes can be important impact cases.

In *Brooks v. S.M.-T.E.H. Realty 10, LLC*, Arch City Defenders represented a class of plaintiffs who were residents of Northwinds Apartments in Ferguson, Missouri. Northwinds Apartments is located in a zip code that is almost ninety percent Black.[139] The plaintiffs in this case were living in apartments with compromised structural integrity, collapsed ceilings, unsecure doors with broken locks, defective plumbing, flooding, and water damage.[140] The suit that they brought requested that the court enjoin the landlord from remaining in breach of their rental contracts by allowing their units to become uninhabitable.[141] The court found that the landlord had breached the implied warranty of habitability and the rental leases and entered a permanent injunction preventing the defendant from collecting rent for the period between October 1, 2019, and January 7, 2021 (the date which the property was sold in a foreclosure sale).[142]

Rodriguez v. Brookland Investments, LLC is an example of a case filed by the Washington Lawyers' Committee on behalf of a group of tenants and a tenants' organization at Franklin Arms Apartments in Northeast DC.

135. *Implied Warranty of Habitability*, Legal Info. Inst., https://www.law.cornell.edu/wex/implied_warranty_of_habitability (last updated Jan. 2023).

136. *Id.*; *see also* D.C. Mun. Regs. tit. 14 § 304.3 (2017).

137. *See* D.C. Code § 28-3901 (2023).

138. David E. Jacobs, *Environmental Health Disparities in Housing*, 101 Am. J. Pub. Health S115 (Dec. 2011), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3222490.

139. Am. Cmty. Survey, 5-Year Estimates (2022), https://data.census.gov/table/ACSDP5Y2022.DP05?q=63136.

140. Complaint ¶¶ 11, 13, Brooks v. S.M.-T.E.H. Realty 10, LLC, No. 19SL-CC0486 (Cir. Ct. St. Louis, MO 2022).

141. Brooks v. S.M.-T.E.H. Realty 10, LLC, No. 19SL-CC0486 (Cir. Ct. St. Louis, MO 2022).

142. *Id.*

The zip code where the Franklin is located is seventy percent Black and ten percent Latinx.[143] The tenants of Franklin Arms live in apartments that have serious mold issues, leaks, broken appliances, and gas leaks, and are infested by roaches and rodents.[144] The elevator in the building often does not work, and the heat and hot water are unreliable.[145] The plaintiffs in that case seek damages and repairs for claims brought under the implied warranty of habitability and the D.C. Consumer Protection Procedures Act.[146] It is pending in the D.C. Superior Court.[147]

Cases such as *Rodriguez v. Brookland Investments, LLC* and *Brooks v. S.M.-T.E.H. Realty 10, LLC* are concrete examples of how fair housing attorneys can bring impact cases around housing conditions. One quality of life compromise that Black people are often forced to make when they live in majority Black neighborhoods can be removed when attorneys take cases that result in improved housing conditions.

IV. Conclusion

It can hardly be argued that the United States does not have a dual tradition of facilitating the housing choices of white people while simultaneously restricting the choices of Black people. That tradition has created an enduring spatial and economic divide between Blacks and whites. In this article, I have argued that, to redress that divide, fair housing advocates should focus on expanding the menu of choices available to Black people instead of focusing on creating racial balance or achieving integration. This article attempts to describe several ways to facilitate Black peoples' choice; to move out of majority Black neighborhoods, to remain in those neighborhoods that are becoming economically and racially diverse because of wealthy, white newcomers, and to remain in majority Black neighborhoods that are not experiencing gentrification without making quality of life compromises. Redressing housing discrimination of the past requires us not only to pursue integration, but to ensure that Black people and other people of color have the room and resources to exercise housing choices that are equal to those that white people are able to make. Litigation cannot achieve this by itself, but it is an important tool to be deployed towards achieving fair housing choice.

143. Am. Cmty. Survey, 5-Year Estimates (2022), https://data.census.gov/table/ACSDP5Y2022.DP05?q=20018.

144. Complaint ¶ 3, Rodriguez v. Brookland Invs., No. 2023-CAB-005703 (D.C. Super. Ct. 2023).

145. *Id*.

146. *Id*.

147. *Id*.

Welcome to the Apartment Hotel California

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Apartment Hotels like the Chelsea Hotel in New York or the Chateau Marmont in Los Angeles have a magical aura, attracting both travelers and those who never leave. Socially, Apartment Hotels were never quite credited for the social progressiveness that they fostered. In fact, despite having played key roles in standardizing residential habitability as well as furthering women's and minority rights, they have always been a controversial housing option. Legally, Apartment Hotels have never been defined functionally as a housing type. Municipalities never described them as, for example, multi-family residential structures offering flexible occupancy types including short, medium and long-term stays. Instead, they have been defined physically, according to building type and unit mix—i.e., *residential structures with two or more dwelling units as wells as six guest rooms. This article provides a brief history of Apartment Hotels in California. Their hybrid nature contributes to identification problems. What are they—apartments, hotels or some sort of mixture of the two? In this article, I argue that, like The Eagle's "Hotel California," Apartment Hotels are, and always have been, an enticing yet illusory idea. They serve both tangible commercial needs and intangible social purposes within the history of American land use law and urbanism. This study kicks off what is hoped to be a wider project that describes a historic building usage that merit meaningful preservation efforts if we are to evade its extinction. The loss of Apartment Hotels is also an important source of middle-class housing, especially for creative professionals such as early-stage artists. This article situates the use and regulation of Apartment Hotels within the broader spectrum of affordable and market rate housing. As such, the story of Apartment Hotels is a social commentary that corelates the legal changes to this land use with fluctuations in California's urbanization over the past couple centuries.*

I. Introduction

Apartment Hotels[1] have all but disappeared from our housing landscape. In this article, I argue that this understudied property type is responsible for transitioning U.S. housing from tenement dwellings to luxury residences between the late nineteenth and early twentieth centuries.[2] Legally, the zoning definition of Apartment Hotels is clear: a residential building with two or more dwelling units and six or more guest rooms.[3] Functionally, however, the commercial use of Apartment Hotels has been flexible:

1. In this article, I used defined terms (i.e., Apartment Houses, Apartment Hotels, Dwelling Units, and Guest Rooms) with Capitalized Letters to remind readers that, although these words are commonly used in English, I am using them in this article as I define them herein.

2. Although there is no book-length history of this usage, several historical studies exist. *See, e.g.*, Paul Groth, Living Downtown: The History of Residential Hotels in the United States 85–87 (1994) (https://publishing.cdlib.org/ucpressebooks/view?docId=ft6j49p0wf&chunk.id=d0e3094&toc.depth=1&toc.id=d0e2963&brand=ucpress).

3. According to the Municipal Code of the City of Los Angeles, Apartment Hotels are residential structures that contain at least two dwelling units and at least six guest rooms (which are basically dwelling units without kitchens). In contrast, Hotels are defined as

they are not simply Apartments or Hotels, because they can be occupied on long-term and short-term bases as well as everything in between. Still a valid land usage, they are a mashup of transient and permanent housing. Apartment Hotels combine flexible housing options—from short to medium to long-term stays—with luxury and affordability in dense urban environments. Ironically, it is not frowned upon by many planning departments for contributing to the housing crisis. However, Apartment Hotels have served and continue to serve as a bridge that normalizes communal city living for immigrants and minorities in the United States. Without minimum or maximum duration stays, guests could check in for one night and check out anytime they like—and could leave as they choose.[4]

Apartment Hotels were designed to provide both the community feel of permanent homes along with the hospitality elements of hotels. Nowhere was this more useful than in the "Golden State," California, to where migrants have traveled for indefinite durations in pursuit of their dreams. In the next section of this article, I trace the history of this usage to the nineteenth century, where it filled a gap in housing needs between tenement homes and hotel hospitality. In the third section I ask what happened to this pioneering multi-family land use; in a few words, the housing crisis. Pressure to provide more affordable housing all but squeezed Apartment Hotels out of residentially zoned neighborhoods. Seen as a zero-sum game, the greater the supply of housing the cheaper it would cost its consumers. Tenant advocacy groups, who advocated for the preservation of as many housing units as possible, viewed the right to provide transient occupancy in residential neighborhoods as a threat to affordable housing.[5] In response, municipalities required more rigorous entitlement processes—such as Conditional Use Permits (CUPs)— to provide transient occupancy in residential zones. Apartment Hotels were never clearly categorized as belonging within either commercial or residential zones.[6] While Hotels and Apartment Houses remained "permitted uses" in both neighborhoods, there was no *specific* mention of how historic Apartment Hotels were to fit in. Not surprisingly, the politics of housing inequity have pressured local planning agencies to "read out" Apartment Hotels from local zoning codes. In Los Angeles, for example, the Planning Department

having fewer than two dwelling units and at least six guest rooms. Apartment Houses are defined as containing more than two dwelling units and fewer than six guest rooms.

4. Thus, vacancies are advertised on nightly, weekly, and monthly bases. *See* Letter and Attached Meeting Notice with U.S. Department of the Interior National Register of Historic Places Registration Form from Julianne Polanco, State Historic Pres. Officer, to L.A. County Bd. of Supervisors 14 (Aug. 22, 2018) (on file with L.A. County at http://file.lacounty.gov/SDSInter/bos/supdocs/128085.pdf).

5. John W. Willis, *Short History of Rent Control Laws*, 36 Cornell L. Rev. 54, 54 (1950); W. Dennis Keating, Rent Control in California: Responding to the Housing Crisis 17 (1983).

6. L.A. Hous. Dep't, Home Sharing Ordinance (July 1, 2019), https://housing2.lacity.org/articles/home-sharing-ordinance.

refuses to permit the continued use of any Apartment Hotel—new or existing—without a *de novo* CUP entitlement process.[7] I will argue that this prohibition of transient occupancy is not based on any legal source since no statute or regulation has ever prohibited the hybrid use within California.

In the final section, I consider the social and legal consequences of local efforts to ban Apartment Hotels, focusing primarily on Southern California, especially Los Angeles. Have Planning Departments effectively and validly dismantled this historic residential use? Does it even possess the authority to do this as a matter of administrative law? This section seeks to answer these questions by taking a few steps back to look at the social and political histories of this endangered residential use. I consider more broadly the impact that the housing crisis is having on historic preservation in California. This section illustrates some of the practical difficulties currently faced by Apartment Hotels owners seeking to operate legally while retaining the original, flexible usage that permitted guests to "check-out any time they like" without worrying about minimum or maximum stays. Indeed, preserving Apartment Hotels would allow for the preservation of a creative and moderately affordable housing type. In contrast, the loss of this housing type will likely result in the polarization of our housing supply—with rental units being categorized binarily as either "affordable" or "market rate."

I will explain that despite once being viewed as the archetype of egalitarian urban lifestyle, the flexibility of transient occupancy in residential zones has come to be feared as a source of housing inequity. Nowhere is this more clear than with the advent of Airbnb, which may be seen as the modern heir of the Apartment Hotel.[8] One would have thought that the passing of the 2018 Home Sharing Ordinance would have clarified matters regarding Apartment Hotels' flexible occupancy type.[9] However, as the concluding section explains, the land-use type was left out of the so-called "Airbnb ordinance." While Apartments Hotels remain in legal and historical limbo, it is hoped that this article will contribute to clarifying their social and legal positions in California.

II. Brief History of Apartment Hotels

Historically, there has been a spectrum of multi-unit housing options—from tenement housing on the lower end to luxury hotels on the higher end. There has also been considerable overlap among housing types such

7. L.A. Dep't of City Planning, City Planning Comm'n, Recommendation Report 3–4 (Sept. 13, 2018), https://planning.lacity.gov/ordinances/docs/HomeSharing/StaffRept.pdf.

8. Roy Samaan, *AirBnB, Rising Rent, and the Housing Crisis in Los Angeles*, L.A. All. for a New Econ. 9 (2015), https://laane.org/research/airbnb-rising-rent-and-the-housing-crisis-in-los-angeles.

9. City of Los Angeles, Ordinance No. 185931 (Dec. 7, 2018), clkrep.lacity.org/onlinedocs/2014/14-1635-S2_ORD_185931_07-01-19.pdf.

as Apartment Houses, Apartment Hotels, and Hotels, which have long shared a function of providing short, long, and flexible term accommodations within a residential setting.[10] Until a few decades ago, the main distinguishing factor between these sub-types of dwellings was the level of appointments in the home that they offered their residents. The Hotel, for example, was *primarily* geared towards temporary housing for its guests and, therefore, provided the highest level of furnishings and amenities; it was, accordingly, the priciest residential offering. In contrast, the Apartment House was *primarily* focused on making its tenants feel as if this was their permanent living quarters; accordingly, apartment living was comparatively affordable to hotels. The Apartment Hotel represented an intermediary housing option, appealing to the overlapping group of those who sought to enjoy both "the home qualities of the apartment house, combined with the service of a hotel."[11] All three housing types have served various sectors of affordable, moderate, and luxury living options.

A key characteristic of Apartment Hotels was always its flexibility. The architectural historian Robert William Sexton (1864–1941) wrote in 1924, which was roughly the heyday of apartment hotels:[12]

The apartment hotel appeals to those who would be relieved of the cares and worries of housekeeping, who rather prefer the service of hotel life, but who enjoy the suggestion of home life which the apartment house offers. The general principle on which the plan of an apartment hotel is based is very similar to that of the legitimate apartment house. It is, perhaps, in the general arrangement of the first floor that the apartment hotel differs most from the apartment house. Here the apartment hotel takes on a greater similarity to

10. R. W. Sexton, American Apartment Houses, Hotels and Apartment Hotels of Today; Exterior and Interior Photographs and Plans 1 (1929) (noting that "they are similar and may be said to serve a similar purpose"). According to one writer, the first Apartment Hotel in the United States came up in Boston as early as 1857: The Pelham. *See* Aline Kaplan, *The Bachelor Apartments on Beacon Street*, Next Phase Blog (Aug. 27, 2022), aknextphase.com/bachelor-apartments-beacon-street; Todd Douglas Gish, Building Los Angeles: Urban Housing in the Suburban Metropolis, 1900–1936, at 62 (Aug. 2007), https://digitallibrary.usc.edu/CS.aspx?VP3=DamView&VBID=2A3BXZ73V8ED6&SMLS=1&RW=1249&RH=1299 (Ph.D. dissertation, Univ. S. Cal.) ("The growth machine trumpeted Los Angeles's houses, but needed its apartments every bit as much. Consequently, multi-family housing was also visible in the external discourse; yet it was characterized in one of two ways, neither of which was conventionally residential. First, multiples of rent were portrayed as the ideal shelter for long-stay tourists. The Chamber of Commerce reported that '[m]any visitors enjoy the more spacious accommodations for light housekeeping afforded by the apartment house.' Typical brochures sent back east by the tens of thousands, describing the region's various charms, routinely classified the housing stock into 'beautiful homes' and the inseparable 'hotels and apartments.'").

11. Sexton, *supra* note 10, at 1.

12. *Apartment Hotels*, Google Books Ngrams Viewer, https://books.google.com/ngrams/graph?content=%22apartment+hotels%22&year_start=1800&year_end=2019&corpus=en-2019&smoothing=3 (last visited Mar. 15, 2024).

the hotel. In order to suggest the peculiar qualities by which the apartment hotel makes its greatest appeal, the treatment of these rooms is more in the character of the private house than in that so typical of the hotel. In other words, the scheme carried out is more informal, not as stately, perhaps, as the hotel, yet ever dignified and comfortable, as the hotel should be.[13]

Indeed, prior to the creation of Apartment Hotels in the late nineteenth century, there was a clear distinction between the two poles of the multi-family housing spectrum in U.S. cities—namely, Tenements for the lower-end, longer-term residents, and Hotels for the high-end, shorter stays.

A. Between Tenements and Hotels

From the beginning, the Apartment Hotel contributed socially to the modern transition from slum-like tenement housing to the modern apartment living. Prior to the advent of Apartment Hotels, there was a stark dichotomy between the ends of the multi-family housing spectrum in dense urban environments: Tenements and Hotels. Both American-made, these residential uses had long histories in the U.S. housing known as "Tenements" as a cheap if dangerous way to house immigrants. These structures—often narrow, low-rise buildings—were frequently unsanitary and lacked indoor plumbing or proper ventilation.[14]

Eventually regulators took note of these unhealthy living conditions. In large part, this was due to journalists publishing articles and photographs on tenement housing.[15] The great accomplishment of the socially progressive "housers" came in 1901 with the passing of the New York Tenement Law of 1901, which set strict building and safety standards for multi-unit dwellings.[16] Thus, during the first century of its life in the United States, multi-unit dwellings were publicly viewed as a lower form—or class—of living. This was in stark contrast to Hotels, the other side of the housing spectrum, which also has a long history in the United States.

The first recognized Hotel in the United States was the City Hotel, which opened in 1794 in New York City. Lavish improvements were made over the years with à *la carte* dining introduced in the 1820s and private baths that had yet to be seen in a hotel in 1888.[17] Over time, Hotels developed into small but luxurious accommodations within cosmopolitan urban cores. The history of hospitality in the United States demonstrates a maturation paralleling structural developments within our urban cores

13. Sexton, *supra* note 10, at 7.

14. *See generally* Robert W. de Forest, *A Brief History of the Housing Movement in America*, 51 Hous. & Town Plan. 8 (1914), *available at* https://www.jstor.org/stable/pdf/1012239.pdf.

15. Gwendolyn Wright, Building The Dream: A Social History of Housing in America 135–36. (1981).

16. *Id.* at 129.

17. Brian McGinty, The Palace Inns: A Connoisseur's Guide to Historic American Hotels 13–20 (1978).

in general. It is a story of "an epochal shift in which people were gradually dissociated from place."[18] Hotels symbolized a place's ability to welcome people: "When a city or town opened a hotel, it was demonstrating its willingness to welcome outsiders."[19] Providing hotels to out-of-town guests was a cultural manifestation of tolerance (or intolerance, as the case may be). As historian A.K. Sandoval-Strausz writes,

The influence of hotel hospitality on everyday life also reached into the American home. The people of the United States had created in the hotel an extraordinarily versatile social technology and soon adapted it for yet another purpose. They began to make homes in hotels, and beginning in the middle of the nineteenth century the hotel became a key architectural and social model for a new type of residence, the apartment building.[20]

When a city provided its guests with transient accommodations, the idea was that everyone was not only welcome but that they could be welcomed luxuriously in a community or multi-unit dwelling house. This modern offering "turned the space of many urban dwellings completely upside down."[21]

B. From French Appartements and English Flats to Apartment Hotels

Like "hotel," the term "apartment" was borrowed from England and France and repurposed by property developers in the United States. In Europe since the mid-seventeenth century, apartments designated "a set of rooms, not necessarily in a building shared with other people."[22] Historians of multi-family living often credit Baron Georges-Eugene Haussmann (1809–1891), Napoleon III's modernizing administrator during "the Second Empire" (1852–1870). Baron Haussmann overhauled urban Paris, bringing it cleaner water, better lighting, and better infrastructure—from parks, schools, and hospitals to asylums, prisons, and apartment buildings. To achieve these ambitious ends, he had to raze much of the historic city, earning him the nickname the "Demolisher." Baron Haussmann evicted many (mostly poor) citizens from their homes, which then had to be torn down.

Wealthy Parisians, however, soon found luxurious and modern multi-unit residential buildings lining the newly widened boulevards awaiting move-in.[23] Baron Haussmann himself lived in one.[24] As Martin Filler writes, "Those endless stone-faced apartment houses—uniform, decorous, and

18. A. K. Sandoval-Strausz, Hotel: An American History 2 (2007).

19. *Id.* at 3.

20. *Id.* at 263.

21. *Id.* at 264.

22. Wright, *supra* note 15, at 136.

23. *See* Beth Harris & Dr. Steven Zucker, *Haussmann the Demolisher and the Creation of Modern Paris*, Khan Acad. (Feb. 25, 2024), https://www.khanacademy.org/humanities/becoming-modern/avant-garde-france/second-empire/a/haussmann-the-demolisher-and-the-creation-of-modern-paris.

24. David P. Jordan, Transforming Paris: The Life and Labors of Baron Haussmann 1–3 (1995).

monotonous—were his quintessential structures, the foundation of his conception of Paris as a paradise for the bourgeoisie."[25] By the late nineteenth century, Parisian *appartements* were known around the world for housing the French bourgeoisie and their design features of stone facades, wrought-iron balconies, high ceilings and large windows.[26] These apartments were a stark contrast to the tenements, which were densely packed and lacked the luxury and amenities provided by Haussmann's modern urban living spaces.

As such, in the nineteenth century, U.S. real-estate investors sought to invoke the European origins of multi-family residences to legitimate the luxurious nature of their projects.[27] Thus, some of America's earliest apartment buildings, such as the Hotel Pelham in Boston and the Stuyvesant Flats of New York, consisted of one continuous roof over separate suites of rooms for a small number of well-to-do families and bachelors."[28] These early apartment developers planned and built multiple-unit homes on the European basis of community living. This approach was very different from the prevailing pattern of owner-occupied detached or row houses for private families. The early apartment buildings on the East Coast of the United States were called "French Flats" or "French Apartment Houses" in order to evoke an international flair of communal life, along with classical architectural themes "and the slightly risqué practice of living in close proximity to one's neighbors."[29] In the postwar era, Apartment Hotels too joined real estate housing offerings by providing centralized services and professional management deemed then to only be available within hotels.[30]

25. Martin Filler, *ARCHITECTURE VIEW; Baron Haussmann, Urban Designer Par Excellence*, N.Y. Times (Mar. 24, 1991), https://www.nytimes.com/1991/03/24/arts/architecture-view-baron-haussmann-urban-designer-par-excellence.html.

26. The term is not indigenously French but comes from Italian "appartare," which means "to set aside or separate." *See Apartment*, Oxford Dictionary of English (3d ed. 2010).

27. Dolores Hayden, The Grand Domestic Revolution: A History of Feminist Designs for American Homes, Neighborhoods, and Cities 106 (1981). Apartment Hotels (also called Resident Hotels) were to be "designed to take the place of the 'club house,' 'flats' and the 'apartment house,' being an improved and enlarged combination of all. Each house will be a distinct home, showing the individuality of its owner within and on the piazza fronting its private entrance, but there will be a restaurant, dining-room, parlor, library, reading room, lecture hall, nursery, and play area, laundry, bath and barber room common to all. From the restaurant, meals may be served in the homes *à la carte* at any hour and in the manner ordered by telephone, or the families may go to the table *d'hôte* served at regular hours in the dining-room."

28. *Id*.

29. *Id*.; *French Apartment Houses: Description of the New Haight House on Fifth-Avenue The Internal Arrangements Rent of Apartments and Cost of Living Plans for the Reduction in the Expenses of Housekeeping*, N.Y. Times (Apr. 16, 1871), https://www.nytimes.com/1871/04/16/archives/french-apartment-houses-description-of-the-new-haight-house-on.html.

30. *Id*. Apartment Hotels arose in the mid-twentieth century in Aparthotels. *See Aparthotels*, Oxford Dictionary of English (3d ed. 2010).

C. Socially Progressive Communities Since 1855

Given its flexible nature, it is challenging to precisely identify the first ever Apartment Hotel that was placed into service. That, however, has not stopped historians from speculating. Some identify the first as having been built in California in 1855 and others in 1905.[31] What is commonly accepted among historians is that, by the First World War, architectural historians recognized its importance and its pioneering origins in the State of California:

> The development of the modern type of Apartment Hotel of recent years has been wonderful. Starting in California . . . with the idea of supplying the tourist with a temporary domicile, it was soon found to be such a convenient and economical way of living that within a short span of time there have been millions of dollars profitably invested in buildings of this character, especially on the Pacific Coast.[32]

In the second half of the nineteenth century, Apartment Hotels provided wealthier families who chose to live in cities with the opportunity to live in "majestic, stately architecture" that was both hotel-like in amenities as well as in architecture.[33] These modern communities provided the convenience of many services and technological features that were not yet available in private homes at the time—such as common area amenities, "Murphy Beds,"[34] centralized kitchens and laundry rooms as well as fireproof construction.[35] By the Roaring Twenties, the Apartment Hotel became a popular building type soon thereafter, not only for welcoming transient guests but also for servicing a rapidly growing population, especially in and around Hollywood. This rise drew the attention of both architectural and social critics. The former explained its success:

> [It has] many advantages in comfort, convenience and economy. It combines the service secured in the better class of family hotels with the convenience of the modern small apartment. The class of service and the appointment of

31. *See* Wright, *supra* note 15, at 136. Others place the first date to 1905. *See* Robert Carroll Cash, Modern Type of Apartment Hotels Thruout United States: Exhibiting Photographic Reproductions of Exteriors and Typical Floor Plans, Together with a Description of the Essential Advantages and the Rental Schedule 1 (1917).

32. Cash, *supra* note 31, at 1.

33. Wright, *supra* note 15, at 94.

34. According to a recent history, Murphy Beds were name after its inventor William Lawrence Murphy (1876–1957) in the twentieth century as a modernization of wall beds from the previous century. *See* Brenden Marquardt, *The Complete History of The Murphy Bed*, LoriBeds (Jan. 24, 2024), https://www.loribeds.com/blogs/murphy-bed-blog/the-complete-history-of-the-murphy-bed.

35. Wright, *supra* note 15, at 2, 94. "The cooperative services, technical advances, and attention to public spaces in the contemporary apartment-hotel made it seem one of the most advanced institutions in American society. Apartments were praised as a way of accelerating the movement toward a better future for everyone." *Id* at 144.

> apartments is governed by the price paid for such accommodations, which makes this kind of living quarters within the reach of many people.[36]

Robert Carrol Cash described this new form of residential life as a "temporary domicile" that provided tourists or new arrivals in a city with living quarters and other services typically only rendered by a Hotel.[37] For these new arrivals, the Apartment Hotel provided extended stay occupancies—with kitchens and other home-like amenities. But it was also an opportunity to live in the New Hollywood, "meeting the expectations of those who came to the city hoping to find an exotic, fantasy fulfilling environment compared to what migrants left behind."[38]

Given the overlap between the sub-uses of Apartment Houses, Apartment Hotels and Hotels, they were often functionally indistinguishable from each other.[39] The term itself, as will be discussed, was not a technical one in the zoning code until 1955—long after the majority of Apartment Hotels had already been built in California. Referred to as Apartments, Hotels, Apartment Hotels, Hotel Apartments, Hotel Residences, Residential Hotels, among other things, these terms continue to be used interchangeably in historic reports to this day.[40] The Bryson Apartment Hotel, built in the Westlake district of Los Angeles in 1911 is paradigmatic of the use.[41] Named after its original owner, Hugh W. Bryson, it was designed to meet the highest expectations of luxury. Bryson was quoted in a *Los Angeles Times* article as stating his intention:

> [My intention is] to make this apartment house in a class by itself on this coast and finer than any other west of New York City. To that end I will

36. Cash, *supra* note 31, at 1.

37. Robert Craik McLean, *The Apartment Hotel in Plan and Purpose*, 29 W. Architect 25 (Mar. 1920), https://www.google.com/books/edition/The_Western_Architect/JKLUAAAAMAAJ?hl=en&gbpv=1&dq=Robert+Craik+McLean+%E2%80%9CThe+Apartment+Hotel+in+Plan+and+Purpose%22+%22Western+Architect%22&pg=RA3-PP12&printsec=frontcover.

38. *El Cabrillo*, National Register of Historic Places Registration Form, Continuation Sheet, sect. 8, at 2, https://npgallery.nps.gov/GetAsset/31a97463-afb8-4ded-8af6-dd0c291bac72 (last visited Mar. 18, 2024).

39. *See* Wright, *supra* note 15, at 94; *see also Winn Apartments*, L.A. Dep't of City Plan. Recommendation Report 49 (2018), https://planning.lacity.gov/StaffRpt/InitialRpts/CHC-2018-3235-HCM-2.pdf (last visited Mar. 18, 2024).

40. "Apartment Hotels" as a term is and has long been used interchangeably with hotels, residential hotels, hotel residences, aparthotels, apartels, suites, etc. *See* Caroline Raftery, Chattel, Inc., on Behalf of 417 S. Ocean Front Walk, Recommendation Report to City of Los Angeles Cultural Heritage Commission (July 5, 2018), https://planning.lacity.gov/StaffRpt/InitialRpts/CHC-2018-3235-HCM-2.pdf. This confusion is evidence on open source websites such as Wikipedia as well. *E.g.*, *Apartment hotel*, Wikipedia, https://en.wikipedia.org/wiki/Apartment_Hotel (last visited Mar. 18, 2024).

41. *Bryson Apartments*, MisterDangerous (June 24, 2016), https://misterdangerous.wordpress.com/2016/06/24/bryson-apartments.

> spare no expense. As an example of the elegance contemplated, I might note that every doorknob will be of cut glass and every door of solid mahogany." Indeed, beyond a traditionally beautiful and large lobby, the top floor contained a large ballroom, sun room, and music room. Bryson's vision was "to appeal to those who find the maintenance of a large private home burdensome. I shall offer every possible convenience and luxury that could be secured in the finest mansion in the city and with a retinue of servants.[42]

Apartment Hotels were hotbeds of creativity and a frequent setting within the American art scene. One of many famous Apartment Hotels was the Chelsea Hotel in New York City. In a recent history of the Chelsea Hotel, Colin Miller and Ray Mock described its fame in the art world as within the "realm of pure mythology."[43] The Chelsea Hotel provided open-ended domicile for literary legends such as Arthur Miller, William Burroughs, Jack Kerouac, and Allen Ginsberg as well as rock gods like Sid Vicious—who almost burned down the place and, in the process, lost his girlfriend, Nancy Spungen (of the "Sid and Nancy" fame). Like tourists, many artists sought refuge of indefinite terms in Apartment Hotels. Unsure of how successful they would be, but often hopeful that their residences would be lengthy, Apartment Hotels provided the appropriate level of comport and flexibility at a competitive price—relative to Hotels.

D. A Residential Community That Has Adapted Over Time

As mentioned, Apartment Hotels served a critical social role in the development of civil rights—including both tenant and women's rights.[44] The transition began because Apartment Hotels represented the first type of luxurious extended stay housing option outside of Hotels.[45] Toward the end of the nineteenth century, there was a buzz about the usage. At that time, writes Gwendolyn Wright, "at least for several decades, the middle-class public was highly ambivalent—suspicious but enthusiastic—about the potential of the apartment building as a means for reorganizing certain aspects of American domesticity."[46] Socially, the acceptance of Apartment Hotels took time. But functionally, they clearly provided a functional living

42. *To Follow New York Models.: Fine Apartment House for Wilshire Corner*, L.A. Times, Mar. 3, 1912, at 6.

43. Colin Miller & Ray Mock, Hotel Chelsea: Living in the Last Bohemian Haven 95 (2019). Another hotbed of Apartment Hotel development during the Roaring Twenties was Chicago, where hundreds were built in that time period. Julia Backracm, *Chicago's Apartment Hotels of the Roaring Twenties*, Julia Backracm (Jan. 6, 2020), https://www.jbachrach.com/blog/2020/1/3/chicagos-apartment-hotels-of-the-roaring-twenties.

44. For a recent article on the role of Hotels in the development of women's rights, see Casey Cep, *When the Barbizon Gave Women Rooms of Their Own*, New Yorker (Mar. 1, 2021), www.newyorker.com/magazine/2021/03/08/when-the-barbizon-gave-women-rooms-of-their-own.

45. Sexton, *supra* note 10, at 1.

46. Wright, *supra* note 15, at 135–36.

space for those who either wanted maximal check-out flexibility or sought out high-end amenities.

In Apartment Hotels, kitchens were not necessarily a part of the home, but rather a service provided by the proprietor. This relationship was more akin to a proprietor-lodger relationship than a landlord-tenant relationship. The food and beverage amenity had a distinct feminist flair to it—and it was criticized as such.[47] If the kitchen was removed from a home that accommodated a husband and wife, that meant that a wife's "place" in the home was not necessarily in the kitchen. In this sense, Apartment Hotels helped take many women out of the (working) kitchen and put them into the (leisurely) dining room. Not surprisingly, an Apartment Hotel that included women—as opposed to catering solely to male bachelors—were controversial since "it was considered a grave threat when women abandoned domesticity; nonetheless, several philanthropists funded such buildings."[48] The early twentieth century sociologist Arthur Calhoun (1885–1979) observed that urbanization was "transforming the United States into a nation of hotels."[49] The criticism was of a sprawling urban environment that lacked homefullness. Eventually, by the twentieth century, the popularity and legitimacy of Apartment Hotels removed the stigma of tenement living.[50] In this way, the amenitizing of tenement housing paved the way for modern day Apartment Houses as acceptable accommodations for civil society.

By the late 1920s, the Apartment Hotel moved on to serve a slightly different social purpose—*i.e.*, providing B-class luxurious accommodations at value pricing.[51] This development coincided with both a golden age of the Hollywood film industry and a housing boom period in Los Angeles, where apartments buildings rose from 8% of construction permits in 1920 to 53% in 1928.[52] In contrast to more elite Hotels (*e.g.*, The Hollywood Roosevelt Hotel) [53] or Apartment Houses (*e.g.*, the Trianon),[54]

47. Laura Fay-Smith, *That Feminist Paradise Palace: Miss Henrietta Rodman's Suggestion of an Apartment House for the Advanced Mother Rouses the Ire of an Unbeliever*, N.Y. Times (Apr. 25, 1915), § 6, at 21; *see also Apartment Hotels in New York City*, Architectural Rec. 85, 91 (1903) ("The apartment hotel is the boarding house at its best and worst. It is the most dangerous enemy American domesticity has yet had to encounter. It could not have become as popular as it now is without the acquiescence of large numbers of women . . . .").

48. Wright, *supra* note 15, at 141.

49. Todd DePastino, Citizen Hobo: How a Century of Homelessness Shaped America 111 (2003).

50. On the impact of zoning on race, see David Samuel Torres-Rouff, Before L.A.: Race, Space, and Municipal Power in Los Angeles, 1781–1894 (2003).

51. Gish, *supra* note 10; Groth, *supra* note 2, at 84.

52. Robert M. Fogelson, The Fragmented Metropolis: Los Angeles 1850–1930, at 151 (1967).

53. Hollywood Roosevelt, https://www.thehollywoodroosevelt.com (last visited Mar. 18, 2024).

54. Trianon Apartments, https://trianonapartments.com (last visited Mar. 18, 2024).

Apartment Hotels began to cater to a middle-class but still glamourous clientele (*e.g.*, The Nirvana).[55] Management companies viewed actors as less than credit-worthy so Apartment Hotels filled a critical supporting role in that industry. For example, The Hillview Hollywood, one of the first "'artist's' highrise," was founded in 1917 by Jesse L. Lasky, co-founder of Paramount Pictures, and his brother-in-law Samuel Goldwyn, co-founder of Metro-Goldwyn-Mayer.[56]

This functionality continued through the 1940s. During this time, the Apartment Hotel played a major role in supporting the Hollywood film industry: "Without this type of building offering homes to those with more limited financial means, the motion picture industry could not have seen the success that it did."[57] The next major change to Apartment Hotels came with the housing crisis of the 1970s, when they came to be viewed as an obstacle to fair housing and an inappropriate use within residential zones, as will be discussed in the next section.[58]

III. Checking Out Anytime You Like

The first systematic zoning ordinance in the United States was passed in Los Angeles in 1908.[59] At that time, Los Angeles was a politically more

55. Letter and Attached Meeting Notice with U.S. Department of the Interior National Register of Historic Places Registration Form from Julianne Polanco, State Historic Pres. Officer, to L.A. County Bd. of Supervisors § 8, p. 9 (Aug. 22, 2018), http://file.lacounty.gov/SDSInter/bos/supdocs/128085.pdf ("This classification is made clear by the use of a builder-architect, rather than two separate firms, the limited amenities, and the professions of the eventual occupants.").

56. *Early Views of Hollywood (1920 +)*, Water & Power Assocs., waterandpower.org/museum/Early_Views_of_Hollywood_(1920_+)_5_of_12.html (last visited May 16, 2024).

57. Letter and Attached Meeting Notice, *supra* note 55 ("This classification is made clear by the use of a builder-architect, rather than two separate firms, the limited amenities, and the professions of the eventual occupants."). But racism was also rampant during midcentury America. *See* Candacy A. Taylor, Overground Railroad The Green Book and the Roots of Black Travel in America (2020).

58. *But see* Daniel Prosser, *Los Angeles Citywide Historic Context Statement; Context: Commercial Development, 1859-1980; Theme: Hotels, 1870-1980*, Survey LA Citywide Historic Context Statement 66 (July 2017), https://planning.lacity.gov/odocument/f492ac7e-4b42-4ab2-95dd-2e27b2336138/Hotels_1870-1980_0.pdf ("Construction of large-scale apartment hotels stopped with the coming of the Great Depression and did not resume after the Second World War. As with the Downtown commercial hotel, the apartment hotel was not well suited to the automobile. Once construction resumed after the war, the motel with kitchenette units took its place."). This assessment misses out that much of the wealth moved West; many if not most apartment hotels became formally or effectively affordable housing in Eastern Los Angeles.

59. Marc A. Weiss, The Rise of the Community Builders: The American Real Estate Industry and Urban Land Planning 81 (2002) ("One of the most important initiatives to maintain and market Los Angeles' physical beauty was the creation of zoning laws. Los Angeles led the nation in regulating private land-use under the municipal

liberal city when compared to its northern neighbor, San Francisco. Los Angeles was the regional center of residential, social, and political progressivism.[60] Many stakeholders were frustrated with failed private efforts to improve streets and transportation. Others "feared that as a consequence of uncontrolled development, commerce and industry would encroach on their suburban retreats." [61] Los Angeles became the leading American city for large-scale land developments,[62] which led activists to a focus on public planning efforts from as early as the first decade of the twentieth century. As Robert Fogelson writes, local advocates "demanded a more efficient, orderly, and attractive metropolis—one designed as a prominent city planner urged, 'Not to be simply big; but to be beautiful as well.'"[63] These efforts, however, resulted in only piecemeal legislation.

A. Hotels: U.S.-Styled Hospitality

It was only in 1936 that the city's first zoning code, the Los Angeles Municipal Code (LAMC), was enacted by organizing and codifying all of the previous ordinances into one body of code. One such incorporation was the preexisting definition of the term "hotel." According to the 1908 code, the term was defined according to the physical characteristics of the building; "hotel," it states

> shall mean any building or portion thereof containing six (6) or more guest rooms, used, designed or intended to be used, let, or hired out to be occupied, or which are occupied by six (6) or more guests whether the compensation for hire be paid directly or indirectly in money, goods, wares, merchandise, labor or otherwise, and shall include lodging and rooming houses, dormitories, bachelor hotels, studio hotels, public and private clubs and any such building of any nature whatsoever so occupied, designed or intended to be occupied except jails, hospitals, asylums, sanitariums, orphanages, prisons, detention and similar buildings where human beings are house and detained under legal restraint.[64]

police power by establishing the first major use-zoning law of any American city, a full eight years before the famous New York City ordinance. On September 14, 1908, the Los Angeles City Council passed the 'Residence District Ordinance,' mapping out three large areas. . . ." Note that the Residence District Ordinance was in a sense not the first land-use ordinance because it was predated by others building (e.g.1903/1904 height restrictions related to the Braly/Continental Building); however, the 1908 Residence District Ordinance was the first attempt at comprehensive zoning laws.

60. Stephanie S. Pincetl, Transforming California: A Political History of Land Use and Development 60 (1999); Robert M. Fogelson, The Fragmented Metropolis: Los Angeles 1850–1930, at 247 (1967).

61. Fogelson, *supra* note 60, at 247.

62. Pincetl, *supra* note 60, at 122s.

63. Fogelson, *supra* note 60, at 248; Charles Mulford Robinson, "The City Beautiful," Los Angeles Municipal Art Commission, Report… to the Mayor, the City Council and Board of Public Works (1909).

64. Ordinance 77000 codified the City of Los Angeles regulatory and penal ordinances into the Los Angeles Municipal Code.

While Hotel and other residential uses were defined in Chapter 1 of the 1908 zoning code, Apartment Hotel was not yet a term mentioned therein.

B. Apartment Hotels: A Loosely Defined Term

Fittingly, zoning codes would come to loosely define the term "Apartment Hotel." In fact, under local and state zoning laws, the Apartment Hotel use was undefined and left as a flexible concept (Apartment House–Hotel usage hybrid) until 1955.[65] By the 1940s, the term was in common use as is evidenced in the Meetings of the Los Angeles City Council.[66] But it was not until 1955 that the term Apartment Hotel was included and defined in the LAMC: "A residential building designed or used for both two or more dwelling units and six or more guest rooms or suites of rooms."[67] In zoning terminology, the difference between a guest room and a dwelling unit is a kitchen. Guest rooms may have undersized kitchenettes, but no regular-sized kitchens. A year later, in 1956, the definition was updated to add a minimum number of two dwelling units: "A residential building designed or used for both two or more dwelling units and six or more guest rooms or suites of rooms." This definition has persisted through the years and is still the current definition. In other words, since 1956, Apartment Hotels have been exclusively defined under in the zoning code of the City of Los Angeles in terms of its physical structure: two or more dwelling units and six or more guest rooms.[68]

In addition to physical description—*i.e.*, the number of dwelling units versus guest rooms in a building—there is another difference between Apartment Houses and Hotels: their occupants. Technically, Apartment Houses have "tenants" reside in them, whereas Hotels have "guests" (or "lodgers," "boarders" or "roomers") living in them.[69] As the names suggest, Apartment Houses typically are occupied by longer-term and Hotels by shorter-term occupants. However, this general rule was never rigid until

65. *See generally* Anna Puigjaner, *From the American Apartment Hotel to Nowadays*, Int'l F. on Urbanism (2012), https://upcommons.upc.edu/bitstream/handle/2099/12610/C_89_3.pdf?sequence=1&isAllowed=y. ("Appeared then different housing typologies which, remembering hotel living, combined the European apartment type with the American hotel type. This typology between apartment and hotel allowed to eliminate housekeeping annoyances and thus, to reduce significantly its costs.").

66. Archived City Council Meetings On Demand, https://clerk.lacity.gov/clerk-services/rmd/city-archives-and-records-center/city-council-indexes-1940-1979 (last visited Mar. 18, 2024).

67. L.A., Cal. Mun. Code § 12.03 (2024), https://codelibrary.amlegal.com/codes/los_angeles/latest/lapz/0-0-0-886.

68. *See supra* note 6.

69. As Anna Puigjaner writes, the first major Hotel in New York, the Astor House (1836), was mainly occupied by permanent residents. With restrooms on each floor, the Hotel was considered luxurious since even mansions lacked such facilities at the time. The *New Yorker* published that a half of its rooms were rented to permanent residents: "We hear that half the rooms are already engaged by families who give up housekeeping on account of the present enormous rents of the city." Puigjaner, *supra* note 65, at 2.

relatively recently. To this day, tenants continue to live in Hotels and guests in Apartment Houses and vice versa. The occupancy rights of guests and tenants that have been created since the 1970s are very different as I will discuss further below. However, under local zoning laws, the distinction between these two categories of occupants has been a question of fact, based on the totality of circumstances.[70] After analyzing various editions of land use texts between 1950 and 1980, it is clear to me that these norms were unchanged during that time.[71] While zoning laws were changed and fleshed out with new density districts, etc., uses like Apartment Hotels and Hotels often remained unchanged and indistinguishable from each other. Tenants were permitted to reside in Hotels. Guests were permitted to stay in Apartment Hotels.

Figure I: Hotels, Motels and Apartment Hotels

	Hotel	**Motel**	**Apartment Hotel**
Amenities	Highly amenitized, including pool, restaurant, gym, etc.	Typical amenities include parking and light breakfast; sometimes a pool.	Somewhat amenitized, including fully appointed residences.
Location	Urban and suburban.	Near vehicular thoroughfares.	Urban.
Occupancy	Oriented towards shorter stays with exceptions.	Short stays.	Flexible stays.
Access	Typically through a lobby.	Straight from the parking lot.	Typically through a lobby.
Municipal Code Definition	A residential building designated or used for or containing six or more guest rooms, or suites of rooms, which may also contain not more than one dwelling unit.	Undefined.	A residential building designed or used for both two or more dwelling units and six or more guest rooms or suites of rooms.

70. John L. Goddard, California Landlord Tenant Law and Procedure 4 (3d ed. 1952) (citing Roberts v. Casey, 36 Cal. App. 2d Supp. 767 (1939); Fox v. Windemere Hotel Apt. Co., 30 Cal. App. 162 (1916); Sloan v. Court Hotel, 72 Cal. App. 2d 308 (1945).

71. Goddard, *supra* note 70.

IV. Early Regulation of Apartment Hotels

As a category of land usage, Apartment Hotels are actually not much discussed in local municipal codes and seem to have been presumed to be a hybrid "permitted use." The scope of "permitted uses" is directly connected with zoning designations within a city. A property's zone dictates the uses allowed on that property. For example, in an "R4" zone, "[a]ny use permitted in an R3 zone" is allowed while,"[n]o building, structure or land shall be used and no building or structure shall be erected, structurally altered, enlarged, or maintained . . ." unless expressly exempted.[72] Permitted uses may also be referred to as "use by right," wherein no special permit is required to exercise that use, as opposed to a "conditional use," which requires additional authorization or entitlement by the city.[73] A "use by right" is distinctly different than a special exception use or conditional use, which is only allowed after a review and approval by the appropriate local government board or commission.[74] Certainly until 2018, Apartment Hotels were permitted uses in most, if not all, medium- and high-density residential districts (*e.g.*, R4). Since then, however, the situation has been less clear, as recent litigation has shown.

A. Apartment Hotels in Municipal Codes

As with all things, property designations change with the times and can vary wildly from what we know today. For example, what is now known as "R-Occupancy" was, at least in the early to late twentieth century, referred to as "H-Occupancy."[75] '"H-Occupancy' uses were associated with the following subgroups: subgroup H-2 was for 'Apartment House' use, H-3 was for 'Hotel' use, and H-4 was for 'Apartment/Hotel' use."[76] Furthermore, under the first edition (1927) of the Uniform Building Code (UBC), Occupancy groups were grouped under A–J lettering. "Classification of buildings according to the use or the character of the occupancy allows the application of proper safely features and construction according to the hazard inherent in a particular use or occupancy."[77] This designation did not change until the 1976 edition of the UBS, some ten years prior to the City of Los Angeles' adoption of the UBC. The old code for "Occupancy Classification" read, "Every building, whether existing or hereafter erected, shall be classified by the Building Official according to its use or the character of its occupancy, as a building of Group A, B, C, D,

72. Municipal Code of the City of Los Angeles § 12.11 (6th ed. 2002), https://codelibrary.amlegal.com/codes/los_angeles/latest/lamc/0-0-0-107363.

73. Brad Neumann, *Permitted Uses, aka "Use by Right*," Cmty. Plan. & Zoning (July 25, 2019), https://community-planning.extension.org/permitted-uses-aka-use-by-right.

74. *Id*.

75. People v. Venice Suites LLC, 71 Cal. App. 2d 715 (2021).

76. *Id*.

77. Uniform Building Code, Preface (1927), https://archive.org/details/UniformBuildingCode1927.

E. F, G, H, I, or J, as defined in Chapters 6, 7, 8, 9,10,1 I. 12, 13, 14, and 15, respectively. . . ."[78] Beginning in 1976, the code reads, "Every building, whether existing or hereafter erected, shall be classified by the Building Official according to its use or the character of its occupancy, as a building of Group A, E, I, H, S, R or M as defined in Chapters 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15 . . . ."[79] H became "hazardous," and group R was created to fill its former role of designating "residential" occupancy groups. In one author's opinion, "[w]hile [A–J] gives a general idea of risk to large numbers of occupants, it was not descriptive and did not rank hazardous facilities with a high level of risk. It becomes problematic when a change of occupancy is proposed to a building that was originally permitted under these old occupancy groups."[80] Thus, the change in occupancy group designations was apparently intended to give a better idea of how hazardous a building type is and how it may be used given those hazards.

With the advent of new occupancy types, not only was the City of Los Angeles better able to identify hazardous properties, but it was also able to regulate occupancy groups on grounds *other* than their hazard to the public. Under § 310 of the California Building Code (CBC, which was adopted into the LAMC with few changes), R1 occupancy is "primarily transient in nature." Therefore, at this point in time, occupancy designations not only existed to reduce hazards but *also* to group the designation with subordinate use types. This system allows city departments such as the LACP to limit certain property types on the lines of *occupancy* and use. Historic occupancy designations roughly and merely used A–J to designate risk (A being the highest and J the lowest). It did not consider use, nor did it provide any specific information about a property other than a designation such as "H-4, Apartment Hotel."[81] Hence, the historical progression of occupancy designations to include factors beyond hazard likely contributed in part to the downfall of Apartment Hotels, among other transient housing.

The next question, then, is how can the LACP prohibit an occupancy type when it presides solely over "use"? Occupancy is an issue that is handled by the Los Angeles Department of Building and Safety, which dictates what occupancy group an applicant falls under when obtaining their Certificate of Occupancy (CoO) and Conditional Use Permit (CUP). The occupancy group that is given to an applicant determines the buildout of the building in terms of number of units allowed and physical characteristics of the building. For example, an R-1 determination is classified as "Hotels, motels and apartment houses, congregate residences (each accommodating

78. *Id*.

79. Uniform Building Code 45 (1976), https://shop.iccsafe.org/1976-uniform-building-code-download-1.html.

80. Scott Johnson, *Occupancy Group Classification*, UpCodes (Jan. 1, 2023), https://up.codes/a/occupancy-groups.

81. *Id*.

more than 10 persons)"; where an S-2 determination is classified as, "Low-hazard storage occupancies," including buildings or portions of "buildings used for storage of noncombustible materials."[82] Usage is an issue that is handled by the Los Angeles Planning Department, which determines how a building is to be used. The relationship between the two definitions has been conflated over the years as the Los Angeles Department of Building and Safety (LADBS) began using the definitions provided by the Los Angeles Planning Department. This has led to substantial confusion as to how occupancy determines usage and how usage determines occupancy.

B. Understanding the Authority to Issue Land Use Entitlements vs. Certificates of Occupancy

When suite hotels became increasingly popular in the 1980s and 1990s (including brands such as the Embassy Suites or Residence Inn), local authorities faced pressure to allow kitchens within such structures. Zoning codes did not permit more than one dwelling unit (i.e., a guest room plus a kitchen), within Hotels; other related uses such as Apartment Hotels were thus relied upon to provide accommodations that included cooking areas. As extended-stay business travel increased, there was a greater demand for kitchens in hotel-like accommodations. However, instead of resurrecting an existing use—more Apartment Hotels—the new legislative solution was to create a new sub-use of multi-unit residential living: Transit Oriented Residential Structures (TORS), as will be discussed below.

In retrospect, it appears that the main reason for this is the popular confusion between "uses" and "occupancies" in zoning codes. A key distinction in the regulation of Apartment Hotels is between "uses" and "occupancies." Within zoning codes, the term "use" designates how a building is permitted to be *used*. For example, a structure can be used for residential or commercial purposes. Residential and commercial uses, in turn, include many sub-categories of uses, including single and multi-family or traditional office and shared office spaces, respectively. The term "occupancy," in contrast, is usually a fire-life-safety term that describes how a building or space may safely be *occupied by people or things*.[83] For example, it may mean the number of occupants permitted within a designated area or the

82. Int'l Code Council, 2018 International Building Code § 311 (2018), https://codes.iccsafe.org/content/IBC2018/chapter-3-occupancy-classification-and-use#IBC2018_Ch03_Sec311.

83. The abovementioned distinction between "use" and "occupancy" is mirrored in local municipal codes. Under the Los Angeles Building Code, "Occupancy is the purpose for which a building, or part of a building is used or intended to be used. The term 'Occupancy' as used in this Code shall include the room housing that occupancy and the space immediately above a roof or structure if sued or intended to be used for other than a shelter"; whereas use is "[t]he purpose for which land or a building is arranged, designed or intended or for which either land or a building is or may be occupied or maintained." L.A., Cal. Mun. Code § 91.202 (2024), https://codelibrary.amlegal.com/codes/los_angeles/latest/lamc/0-0-0-173338; *id.* § 12.03.

duration of stays that such people are permitted within structure. Transient occupancy, for example, describes the comparatively short period of time for which a property is being lived in no matter what the use is (Hotel, Hostel, Apartment Hotel, etc.).[84] Both a property's use and occupancy group can change while its zoning designation remains the same. For example, in *People of California v. Venice Suites*, Apartment House owner Carl Lambert was successful in his efforts to change the occupancy type of his Apartment House into a TORS, while the use remained residential within the zoning district (of R-3).[85]

Of course, the terms "use" and "occupancy" are not independent of each other. The Hotel use, for example, will directly implicate the type of occupancy permitted to include short-term stays. Under the California Building Code, "R1" occupancies "contain *sleeping units* where the occupants are primarily transient in nature" such as Hotels and must comply with specific fire-life-safety requirements not otherwise imposed on non-transient occupancies such as Apartment Houses.[86] Thus, the overlap between the simple definitions (in common usage) of the terms "use" and "occupancy" is further compounded by their overlapping natures. Another source of confusion regarding the regulation of transient occupancy is its nomenclature. Uses are inherently zone-dependent. The standardized zoning maps with which many of us are familiar describe where certain uses may be employed within a city. Confusingly, residential zoning districts are also coded with "R." An "R-1" zoning district signifies a low density housing area that is usually limited to the construction of single family homes.

Furthermore, in the current municipal code of Los Angeles, the "use" and "occupancy" terms have been employed imprecisely—in the particular case of TORS. Section 12.03 of the code defines a TORS "as a residential building, *designed or used* for transient occupancies of 30 days or less."[87] This provision defines transient occupancy as both a usage and an occupancy type. As an occupancy type, transient occupancy is the manner in which a building is intended to be used; as a usage type, transient occu-

84. In 1989, the Los Angeles City Code defined a "Transient" as "1. Any person, other than an individual, who exercises *occupancy* or is entitled to occupancy by reason of concession, permit, right of access, license or other agreement, for any period of time, or 2. Any individual who personally exercises *occupancy* or is entitled to occupancy by reason of concession, permit, right of access, license or other agreement, for a period of 30 consecutive calendar days or less, counting portions of calendar days as full days . . . ." L.A., Cal., Mun. Code § 21.7.2(d)(2).

85. This independent change in occupancy was authorized by the California Court of Appeals in *People v. Venice Suites, LLC*, 71 Cal. App. 2d 715 (2021). Note, however, that a property's zoning designation can be changed as well but requires a "zone change" application or amendment.

86. Cal. Code Regs. tit. 24, pt. 2, § 310.2 (2024), https://codes.iccsafe.org/content/CABC2022P3/chapter-3-occupancy-classification-and-use#CABC2022P3_Ch03_Sec310 (incorporating the California Building Standards Code).

87. L.A., Cal., Mun. Code § 12.03.

pancy is the purpose for which a land or building is arranged, designed or intended or for which either land or a building is or may be occupied. It is technically unclear (without using circular reasoning) what then the use of a TORS is as opposed to a property's occupancy.

Perhaps it is this conflation in the TORS law that explains why the City of Los Angeles Department of Planning has misinterpreted the issue of transient occupancy in general. In its report to the City Council of September 13, 2018, the Planning Department defines "Home-Sharing" (such as with TORS, Hotels and Apartment Hotels) as, "an *accessory use* to a residential use."[88] Defining home-sharing as a "use" as opposed to an "occupancy type" such as how the building code defines "transient occupancy" further muddies matters of code interpretation. In contrast, California law is clear on and has preserved the distinction between use and occupancy: "Occupation classification is the formal designation of the primary purpose of the building, structure or portion thereof,"[89] whilst "[u]ses include, but are not limited to, those functional designations specified within the occupancy group descriptions . . . ."[90] The reason for this is straightforward: the former an urban planning issue that is managed by the more politically oriented planning departments, while the latter is a fire-life-safety issue overseen by the more technically minded building and safety departments.

C. Some Institutional Aspects of This Distinction

Municipal law provides for the authority to issue land-use entitlements via Certificates of Occupancy. In each city, the Department of Planning, which is concerned with the politics of urban planning, is tasked with determining those uses that are permitted the various zoning districts within a city.[91] Departments of Planning issue applicants with development entitlements with which the applicants can use to build their projects based on approved plans and specifications. With an entitlement in hand, an applicant can apply to the city's Department of Building and Safety (DBS), which as the name implies, is focused on matters of fire, life, and safety. The DBS has the task of enforcing the health standards by issuing building permits to projects that meet those standards. Once a development is complete, the DBS then issues a certificate of completion (CofC) or certificate of occupancy (CofO), depending on the nature of the project.[92]

88. L.A. City Planning, Recommendation Report A-2 (Sept. 13, 2018), https://planning.lacity.org/ordinances/docs/HomeSharing/StaffRept.pdf (emphasis added).

89. Cal. Code Regs. tit. 24, pt. 2, § 302.1 (2024), https://codes.iccsafe.org/content/CABC2022P3/chapter-3-occupancy-classification-and-use#CABC2022P3_Ch03_Sec302.

90. *Id.* § 302.2.

91. Cal. Dept of Hous. & Cmty. Dev., Zoning for a Variety of Housing Types (2024), https://www.hcd.ca.gov/planning-and-community-development/housing-elements/building-blocks/zoning-variety-of-housing-types.

92. The essential difference between the two documents is that a "CofC will be issued to document when apartment buildings have been converted to condominiums (no change in occupancy)," while a CofO is issued only where the is a change of occupancy;

Usually, the rules of overseeing urban planning and fire-life-safety are easily distinguishable. Planning duties are based on "zoning codes," whereas DBS duties are based on "building codes" within each city's municipal code. In Los Angeles,

Los Angeles City Planning (LACP) reviews project applications, processing entitlements, and approvals to ensure that future decisions about development are aligned with the City's land use policies and proposed land use regulations. LACP is also responsible for administering the Zoning Code, promoting urban design principles, and managing the City's historic resources.[93]

For its part, the "LADBS provides permitting, plan check, inspection, and code enforcement services for construction in the City of Los Angeles."[94] LADBS is tasked with monitoring and approving issues relating to *occupancy and not use*.[95]

LACP manages broader development and zoning issues (*i.e.*, general uses rather than particular occupancy types). For example, it is the LACP's duty to monitor and ensure that properties operate in a manner that meshes with their assigned use designation. By relation, the LACP is further empowered to take administrative *and* legal actions against properties violating the confines of their use designation. In contrast, LADBS is exclusively concerned with the health and safety standards for each particular project. It has broad latitude to inspect each project prior to issuing its CofC or CofO. In the municipal building code, "inspections" are neither defined nor are any indications given as to what an "inspection" entails. In this way, the LADBS can unilaterally determine which inspection is sufficiently "final" to merit the issuing of a CofC or CofO.

In sum, LACP and LADBS were always intended to be two sides of the same construction coin; one deals with use, and the other with occupancy, respectively. This separation was lost in time with TORS's enactment in

further, "new CofO[s] [are] intended to document a modification to an existing building and [are] supplemental to the original existing CofO or building permit." L.A. Dep't Bldg. Servs., Certificates of Completion Versus Certificates of Occupancy for Condominium Conversions and Other Alterations to Apartment Buildings (2020), https://www.ladbs.org/docs/default-source/publications/information-bulletins/building-code/certificates-of-completion-versus-certificates-of-occupancy-for-condominium-conversions-and-other-alterations-to-apartment-buildings.pdf?sfvrsn=4.

93. *See* Los Angeles City Planning, www.planning.lacity.org/about/department (last visited Mar. 18, 2024).

94. *See id.*

95. The Los Angeles Department of Building and Safety's authority is codified in the Los Angeles Municipal Code. Section 91.109.3 states that, "after the receipt and approval of the final inspection report from each of the divisions of the Department, and after the City Engineer has reported that all required public improvements have been completed, the Superintendent of Building shall issue a Certificate of Occupancy, without charge, to the owner of the building. Duplicates of the certificate may be secured upon the payment of the duplication fee required by ordinance."

1992, as mentioned. Given the political pressures being placed on planning authorities to preserve affordable housing stock, even at the expense of historic preservation, it might be a potentially strong tool of historic preservation for building departments to issue CofC for historic buildings: if a DBS issues a CofC affirming a historic occupancy type, it may well not be within the authority of Department of Planning to contest it.

D. Interdepartmental Wars: Housing and Planning Gang Up Against Building and Safety

Permitted uses are often found as an integral part of a "permissive zoning scheme," such as the Los Angeles Municipal Code (LAMC).[96] A permissive zoning scheme is one "where only expressly authorized uses are permitted while all other uses are prohibited."[97] This is to say that in a zone such as a high density (R4 or R5) zone, a museum would usually be prohibited while an Apartment Hotel would be permitted because the former is not an expressly authorized use while the latter is. Permissive zoning is a fluid concept that has led to a swath of legal disputes and general confusion regarding what uses are allowed in which zone. For example, in regard to short-term occupancy, specific time limits are not expressly discussed.[98] Under its permissive zoning scheme, short-term residential stays are not prohibited because the length of stay is not a fundamental zoning consideration. In *People v. Venice Suites LLC* (2021), the City of Los Angeles alleged that Lambert (owner of Venice Suites) operated an "Apartment House" (as defined in the Los Angeles Municipal Code sec. 12.03) that offered short- and long-term housing in violation of local laws. Of note was their argument that, under a "permissive" zoning scheme, Apartment Houses that offer short-term tenancies are *presumptively* banned. Per the court:

> The People allege Venice Suites illegally operates a hotel or transient occupancy residential structure (TORS), defined below, and in a building only permitted to operate as an Apartment House for long-term tenants and not overnight guests or transient renters. Further, the Apartment House is located in a R3 Multiple Dwelling residential zone, which disallows short-term occupancy.[99]

The foundation of the City of Los Angeles' claim is that the Venice Suites is an Apartment House that offers transient occupancy—*i.e.*, short-term housing, which is not a permitted use in the relevant zone in Venice Beach. On its face, the City's argument is valid; however, the code does not *expressly* prohibit TORS or set any affirmative time limits for short- or long-term tenancy. In its brief, the City cites to *Urgent Care Medical Services v. City of Pasadena*, a

96. For a recent discussion, see *Keen v. City of Manhattan Beach*, 77 Cal. App. 5th 142 (2022), where the California court rejects the claim that the concept of permissive zoning applied, under which zoning ordinances prohibit any use they do not expressly permit.

97. People v. Venice Suites, LLC, 71 Cal. App. 2d 715, 725 (2021).

98. *Id*.

99. *Id.*

California district court of appeals case, to contend that "a permissive zoning scheme constitutes an explicit declaration of prohibited uses."[100] In other words, unless a use is prohibited by the code for a usage zone, it is deemed to be permitted. The court rejected the argument of the City of Los Angeles, finding that *Urgent Medical Services* is "distinguishable because, in each of those cases, marijuana dispensaries either did not fall within the city's list of allowable uses or were expressly prohibited."[101] Finally, the court concludes that to adopt the interpretation "in the manner urged by the People would lead to an absurd result where neither short-term nor long-term occupancies would be allowed for an apartment house, apartment hotel, hotel, or residential building because a length of occupancy is "not expressed."[102]

V. Enter: The Housing Crisis

LA City's Rent Stabilization Ordinance (RSO or "rent control") adds another layer of complexity to the preservation discussion of Apartment Hotels. Directed by the Los Angeles Housing Department (LAHD), the RSO regulates all rental properties built before 1978, including all residential building types occupied by a tenant for thirty days or more.[103]

A. Rent Control Protection

Rent control was designed to protect renters.[104] As the state appellate court in *Venice Suites* explains, "The RSO was enacted 'to regulate rents so as to safeguard tenants from excessive rent increases, while at the same time providing landlords with just and reasonable returns from their rental units.'"[105] The court continues,

> It is clear the City Council in Los Angeles enacted the RSO to address a shortage of affordable housing. Its stated purpose is not to resolve a general housing shortage by regulating short-term rentals. *Neither does the RSO state an intent to regulate the occupancy of residential buildings*, as asserted by the People. It merely denies the benefit of rent control to those individuals who rent accommodations at hotels, motels, inns, tourist homes and boarding and rooming houses for 30 days or less.[106]

The court's position can be applied directly to Apartment Hotels. Under this plain interpretation of the RSO, the fact that the RSO applies to Apartment Hotels does not have any bearing on whether it can or cannot be occupied or used as an Apartment Hotel with hybrid long-term and

100. Urgent Care Med. Servs. v. City of Pasadena, 21 Cal. App. 5th 1086, 1094 (2018).

101. *Venice Suites LLC*, 71 Cal. App. 2d 715, 734 (2021).

102. *Id.* at 23.

103. L.A., Cal., Mun. Code § 151.02.

104. Reviewing its codified version in Chapter XV of the Los Angeles Municipal Code demonstrates this, with a majority of its sections concerning tenants' grievances with their landlords (*see* L.A., Cal., Mun. Code ch. XV).

105. L.A., Cal., Mun. Code § 151.01.

106. *Id.* (emphasis added).

short-term occupancy. A contrary reading of the RSO that limits or prohibits the use or occupancy of Apartment Hotels would thus seem to be inconsistent with the plain wording of the ordinance and its subsequent judicial interpretation.

Without question, rent control has been one of the more important forms of municipal intervention of our urban landscape over the past few decades. Yet, from its first introduction into the zoning laws of Los Angeles, the residential sub-use of Apartment Hotels was not formally restricted at any point within state and local laws or regulations. As a matter of law, the historic category retains usage and occupancy flexibility while affording legal protections to long-term tenants occupying most forms of residential dwellings including Hotels and Apartment Houses.[107] RSO does not regulate transient housing but merely protects tenants from unreasonable rent increases among other things listed in Chapter XV of the LAMC.[108] Furthermore, the protection of the RSO *only* applies to long-term tenants who occupy residences for longer than thirty days.[109] Transient tenants are not provided these protections at all.[110]

By 1992, this flexibility was politically problematic because the availability of transient occupancy within residential neighborhoods was blamed for detracting from the supply of housing stock. The purpose of rent control laws was to foster the long-term rent affordability for tenants. As the housing crisis in California worsened, the political pressure to prevent further losses of the housing stocks increased. When the City of Los Angeles created a new sub-use of TORS in 1992,[111] it was defined rather differently from—and much more strictly than—Apartment Hotels:

> A residential building designed or used for one or more dwelling units . . . and not more than five guest rooms or suites of rooms wherein occupancy, by any person by reason of concession, permit, right of access, license, or other agreement is for a period of 30 consecutive calendar days or less, counting portions of calendar days as full days.

The 1992 definition of TORS clearly distinguishes between short- and long-term occupancies and only permits the former within its use. TORS

107. The RSO applies to "Rental Units," a term defined in L.A., Cal., Mun. Code § 151.02 as "[a]ll dwelling units, efficiency dwelling units, guest rooms, and suites . . . rented or offered for rent for living or dwelling purposes. . . . The term shall not include: . . . Housing accommodations in hotels, motels, inns, tourist homes and boarding and rooming houses, provided that at such time as an accommodation has been occupied as the primary residence of one or more of the same tenants for any period more than 30 days such accommodation shall become a rental unit subject to the provisions of this chapter."

108. L.A., Cal., Mun. Code, ch. XV.

109. *Id*.

110. *Id*.

111. L.A. City Ordinance No. 167689 (Mar. 27, 1992), https://clkrep.lacity.org/onlinedocs/2015/15-0002-S31_misc_3_04-15-2015.pdf.

occupancies shall always be limited to a maximum of thirty days.[112] The political function of TORS in the 1990s was quite different from that of Apartment Hotels in middle of the last century. The kitchens in TORS were additional amenities designed to provide cooking options for transient guests; they were not intended to provide benefits for permanent occupants. Accordingly, TORS projects were mostly (but not exclusively) approved in commercial rather than residential zones. In sum, the approach taken with TORS was a functional one as well as a physical one—based both on how the structure was purposed (i.e., for transient occupancy) and how it was constructed (i.e., maximum of five guest rooms).

In contrast, the regulation of Apartment Hotels remained untouched as a sub-use of multi-family residences.[113] This is consistent with the political cloud that always surrounded Apartment Hotels. As Gwendolyn Wright notes, "For some time, neither legal definitions nor common usage differentiated tenement buildings from apartment buildings. Both were multiple-unit dwellings."[114] Indeed, it was not until a century after their first arrival, in the 1950s, that Apartment Hotels became regulated in the City of Los Angeles as a zoning use that was (and continues to be) defined in terms of its physical structure (*i.e.*, at least two dwelling units and six guest rooms). The Municipal Code has been updated dozens of times since the 1950s; however, Apartment Hotels continue to be defined from a zoning standpoint according to these physical characteristics.[115] Yet, as I will discuss in the next section, very few Apartment Hotels continue to function as they were historically intended—*i.e.*, allowing for flexible stays.

B. The Illusory Status of Apartment Hotels Today

Today, Apartment Hotels are viewed by many planning departments as obstacles rather than vehicles of fair housing. As a result, they are shells of their former selves, no longer providing a similar social function as in the past century. Rather than embracing them as opportunities for flexible housing options, cities have tried to shut them down or convert them to affordable housing facilities. Very few Apartment Hotels still provide any short-term housing at all—and no Apartment Hotels provide any hybrid short-term and long-term housing options. Most of the high-end

112. The current definition of TORS in the Los Angeles Municipal Code, ch. 1, art. 2, sec. 12.03, is this same definition incorporated in1992.

113. And that was the point. As Dror Poleg writes, "At what point does a hotel become an apartment building or vice versa? The question is still not settled." Dror Poleg, Rethinking Real Estate: A Roadmap to Technology's Impact on the World's Largest Asset Class 111 (2019); *see also* Paul Groth, Living Downtown: The History of Residential Hotels in the United States 1, 85–87 (1994).

114. Wright, *supra* note 15, at 94 (1981).

115. They limited the locations of where new apartment hotels could be built or what locations other buildings could be converted to be used as apartment hotels. In addition to this zoning-use limitation, later additional limitations were added when the Los Angeles Department of Building and Safety began using certificates of occupancy.

Apartment Hotel buildings today have been converted to Hotels or Condominiums, and some have been converted into TORSs.[116] The balance of the (more mundane) Apartment Hotels continue to operate exclusively as long-term apartment buildings, including deed-restricted affordable housing. As a result, historic Apartment Hotels where hybrid, flexible living options are offered are all but extinct.

In 2018, the City of Los Angeles enacted a "Home Sharing Ordinance" that was meant to clarify how the Municipal Code regulates short-terms stays such as those advertised on Airbnb.com.[117] After losing local legal battles to prohibit transient occupancies (of under thirty days) within Apartment Houses,[118] the political motivation and legislative intent behind the 2018 law was to prohibit all such stays except within Hotels, Motels, etc. In support of the draft ordinance, the city's Planning Department published a report laying out its argument against short-term stays in any rent-controlled building (including Apartment Hotels): first, they will degrade "long-term" rental housing stock and, ultimately, the availability of affordable long-term housing; second, allowing them in residential neighborhoods would threaten "residential stability"; and, third, residents surrounding short-term stays would bring numerous nuisance complaints/claims.[119]

Just before enacting the 2018 Home Sharing ordinance, the City Council asked its Planning Department how the draft ordinance would apply to Apartment Hotels. The department's response came in two paragraphs:

> A residential hotel is defined as a residential building with six or more guest rooms or efficiency dwelling units being used as long-term primary residences (for more than 30 days). An apartment hotel is also defined as a residential building used for six or more guest rooms but also requires two or

116. TORSs, like Apartment Hotels, are a form of transient housing. The process for this conversion is controlled by the Los Angeles Department of Building Safety. Assuming an Apartment Hotel is made to conform with all aspects of the Los Angeles Municipal Code, the conversion should be assured. The prospective-TORS would be required, under the Los Angeles Municipal Code, to receive a new certificate of occupancy and potentially new certificate of completion, if the building has been altered: "Every change of occupancy to one classified in a different group or a different division of the same group, as described in Division 3, Article 1, Chapter IX of the LAMC, shall require a new Certificate of Occupancy whether or not any alterations to the building are required by this Code. . . . If the building or portion thereof does not conform to the requirements of this Code for the proposed occupancy group or division, the building or portion thereof shall be made to conform." L.A., Cal., Mun. Code § 91.8203 (2018), https://up.codes/viewer/los_angeles/ca-building-code-2016/chapter/new_82/change-of-occupancy-use-and-rating-classification#new_82.

117. The City Council adopted the Home-Sharing Ordinance (Council File No. 14-1635-S2) on December 11, 2018.

118. *See, e.g.*, *infra* note 142.

119. L.A. Dep't of City Planning, City Planning Comm'n, Recommendation Report 3–4 (Sept. 13, 2018), https://planning.lacity.gov/ordinances/docs/HomeSharing/StaffRept.pdf.

> more dwelling units. Guest rooms are habitable rooms (without a kitchen) designed for occupancy by one or more person. Guest rooms and dwelling units located in either a residential hotel or apartment hotel are to be used for long-term tenancy (longer than 30 days). *Therefore*, both uses are subject to all the terms and prohibitions in the proposed Home-Sharing Ordinance, including the prohibition in units subject to the RSO.

There may be some confusion on this point as the RSO provisions explicitly do not apply to "hotels" and other similar uses occupied for 30 days or less (see the definition of "rental unit" in LAMC 151.02). However, despite sharing the word hotel in common, apartment hotels and residential hotels are distinct uses from hotels. *Hotels do not contain dwelling units and allow for either short or long-term stays*. Apartment hotels and residential hotels do not allow for short-term stays at all.[120]

There appear to be two falsehoods in the above-cited statement by the Planning Department (both are italicized above): an invalid conclusion and a false assertion of fact.

Let us break down the logic of the Planning Commission in the first paragraph above:

- **Premise A**: Residential Hotels and Apartment Hotels are both residential buildings that include one or both types of habitable spaces: Dwelling Units (habitable spaces with kitchens) and Guest Rooms (habitable spaces without kitchens).
- **Premise B**: Guest Rooms and Dwelling Units located in either a Residential Hotel or Apartment Hotel are to be used for long-term tenancy (longer than thirty days).
- **Conclusion C**: *Therefore*, both uses are subject to all the terms and prohibitions in the proposed Home-Sharing Ordinance, including the prohibition in units subject to the RSO.

Premise A is correct but misleading. It is correct that Residential Hotels and Apartment Hotels contain Dwelling Units and Guest Rooms. But so do other hotels and apartment buildings. They are grouped together in Premise A in order to mislead the reader into believing that just as Residential Hotels are a type of historic hotel than is no longer used for transient occupancy, so are Apartment Hotels prohibited from being used for transient occupancy.

Premise B is a statement without legal basis. *Why should Guest Rooms and Dwelling Units not be used for long-term tenancies?* There is no support for this assertion—neither in the September 13, 2018, report nor in the Municipal Code, which noted short-term versus long-term stays in the section discussing "occupancy" types (not "usage" types). Apartment Hotels are permitted two occupancy types: R1 (short-term) and R2 (long-term). Indeed, the Muncipal Code is clear that rent control rights ensure in

120. *Id.* at A-16 (emphasis added).

> [h]ousing accommodations in hotels, motels, inns, tourist homes and boarding and rooming houses, provided that at such time as an accommodation has been occupied as the primary residence of one or more of the same tenants for any period more than 30 days such accommodation shall become a rental unit subject to the provisions of this chapter.[121]

Thus, Premise B is false. Further, according to the guidelines of the City of Los Angeles (in the context of motel conversions), existing transient residential structures include both Hotels and Apartment Hotels.[122]

Conclusion C is invalid mainly because Premise B overly generalizes the use of Guest Rooms and Dwelling Units to include only long-term stays without accounting for exceptions or different contexts. The rules applying to such habitable spaces are context-dependent (based on Certificates of Occupancy identifying permitted occupancies—short or long term). Conclusion C overlooks many other permissible possibilities such as Guest Rooms in Hotels that *may* be used both for short-term stays and long-term occupancies.[123] A more accurate conclusion would consider the context-specific nature of Guest Room usage regulations and acknowledge that, while Apartment Hotels may primarily cater to long-term occupancies and Hotels may usually accommodate short-term stays, this separation does not inherently negate the possibility of short-term stays in Apartment Hotels or long-term occupancies in Hotels.

In the second paragraph of the September 13, 2018, report, the Planning Department seeks to clarify "some confusion" regarding the applicability of rent control laws in Los Angeles to Apartment Hotels. Notwithstanding the fact that the word "hotel" is common to both Apartment Hotels and ordinary Hotels, explains the Planning Department, the two are distinct uses: Hotels do not have Dwelling Units and (therefore) allow for both short and long-term stays; whereas Apartment Hotels do not allow for short-term stays at all.

One can unpack the logic of the second paragraph as follows:

- **Premise A**: Hotels do not have Dwelling Units that are subject to rent control laws.
- **Premise B**: Apartment Hotels have Dwelling Units that are subject to rent control laws.
- **Conclusion C**: Apartment Hotels and Hotels are distinct uses.

121. Los Angelese Rent Stabilization Ordinance, No. 152,120, L.A., Cal., Mun. Code § 151.02 (2017) (definitions), https://codelibrary.amlegal.com/codes/los_angeles/latest/lamc/0-0-0-195228#JD_151.02.

122. L.A., Cal., Mun. Code § 14.00.A.12, https://codelibrary.amlegal.com/codes/los_angeles/latest/lapz/0-0-0-12371.

123. At the same time, occupancies of thirty days or longer may trigger rent control rights for its occupants. *See supra* note 121.

The main misrepresentation in the second paragraph is the conflation between occupancy laws and rent control laws, which have distinct purposes and are articulated in different parts of a city's municipal code. Occupancy laws regulate and provide for the safety and security of the people living in the residences.[124] Rent control laws provide for and protect the property rights of the people living in the residences.[125] More critically, the information provide in the paragraph is false. Hotels are defined within the municipal code of Los Angeles as allowing for one dwelling unit.[126] Thus, there is no basis for Conclusion C that Hotels and Apartment Hotels are distinct uses. In fact, the Hotels and Apartment Hotels have overlapping uses insofar as they are both residential and both can provide for short-term and/or long-term housing, depending on their occupancies, as discussed above.

One can assume that the Planning Department knew the Code at least as well as we do. *So why make those statements?* One wonders. The point here is not to speculate as to the motivation for making these erroneous statements but to characterize them as being categorically opposed to attempts to permit any short-term usages within Apartment Hotels in the name of providing more housing. Rather than embracing Apartment Hotels as useful opportunities for flexible housing options, cities such as Los Angeles have sought to shut them down or convert them to affordable housing facilities. This approach is surprising given that few Apartment Hotels still provide any short-term housing at all—and no Apartment Hotels provide any hybrid short-term and long-term housing options.

In sum, the actions taken by the Planning Department of the City of Los Angeles regarding Apartment Hotels in the context of the current housing crisis are noteworthy because they demonstrate just how far some municipal organs will go to quash any perceived obstacles to housing. They will allow Apartment Hotels to become extinct as a historic usage even though only some dozens of such buildings are left—buildings that serve meaningful social and historic purposes as discussed above and pose no real threat to housing Californians. As I will explain in the next section, this anti-preservation trend is not only unnecessary; it is also illegal.

124. *See supra* "Understanding the Authority to Issue Land Use Entitlements vs. Certificates of Occupancy."

125. *See supra* "Enter: The Housing Crisis."

126. "HOTEL. A residential building designated or used for or containing six or more guest rooms, or suites of rooms, which may also contain not more than one dwelling unit . . . . (Amended by Ord. No. 138,685, Eff. 7/10/69." L.A. City Plan. Dep't, Comprehensive Zoning Plan § 12.03, https://codelibrary.amlegal.com/codes/los_angeles/latest/lapz/0-0-0-886.

VI. Federal and state Preservation Law: Collateral Damage?

A. Federal and State Laws Provide for the Restoration of Historic Occupancies

Unlike local regulations surrounding Apartment Hotels, the California Historical Building Code (CHBC)[127] as well as California State Law & Historic Preservation (CSLH)[128] are state laws that are intended to apply uniformly across the state, despite local oppositions. Accordingly, in the event of a conflict between state and municipal laws, the former preempts the latter.[129] The main framework of historic preservation standards and regulations emanate from federal laws, which are intended to facilitate the rehabilitation or restoration of the original or restored architectural elements and features of historic resources, to provide for the safety of the building occupants and other goals.[130] According to these standards, even if the use or occupancy has ended, it shall be restored so long as it meets current historic safety codes:

> The use or character of occupancy of a qualified historical building or property, or portion thereof, shall be permitted to continue in use regardless of any period of time in which it may have remained unoccupied or in other uses, provided such building or property otherwise conforms to all applicable requirements of the CHBC.[131]

The express aim of state law is to facilitate a "change of occupancy so as to preserve" a historic building's original uses and occupancies.

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127. Cal. Code Regs. tit. 24, pt. 8, https://www.dgs.ca.gov/DSA/Resources/Page-Content/Resources-List-Folder/CHBC.

128. Cal. Office of Hist. Pres., Cal. State Law & Historic Preservation (2005), https://ohp.parks.ca.gov/pages/1069/files/10%20comb.pdf.

129. Kracke v. City of Santa Barbara, 63 Cal. App. 5th 1089, 1095 (2021). Preemption can most commonly be found at a federal-state level (*e.g.*, the National Firearms Act of 1934 preempts any subordinate state laws that allow the free distribution and transfer of federally regulated firearms and firearm components), but is just as present at a state-local level. According to the California Department of Pesticide Regulation (CDPR), "The California Constitution also allows the state to preempt local jurisdictions. The Constitution states that city councils or boards of supervisors may pass laws (called ordinances at the local level) provided they *do not* conflict with state law." CDPR, A Guide to Pesticide Regulation in California, ch. 2, p. 9 (2017), https://www.cdpr.ca.gov/docs/pressrls/dprguide/preemption.pdf (emphasis added).

130. The California Historical Building Code, which is codified under the California Health and Safety Code, is meant to provide alternative regulations and standards for the rehabilitation, preservation, restoration (including related reconstruction), or relocation of qualified historical buildings or structures, as defined in Section 18955. https://codes.iccsafe.org/content/CAHBC2022P1/part-8-contains-alternative-regulations-for-qualified-historical-buildings.

131. Cal. Hist. Bldg. Code § 8-302.1, *available at* https://up.codes/viewer/california/ca-historic-building-code-2016/chapter/8-3/use-and-occupancy#8-3. Under § 91.8119, the California Historical Building Code was incorporated into the Los Angeles Municipal Code.

State and federal preservation laws are meant to identify cultural resources that are worthy of preservation and to promote their preservation—despite potential local objections.[132] The National Register of Historic Places is administered by the National Park Service, which is part of the U. S. Department of the Interior. The objectives of the Register are two-fold: "The National Register is an authoritative guide to be used by Federal, State, and local governments, private groups and citizens to identify the Nation's cultural resources and to indicate what properties should be considered for protection from destruction or impairment."[133] One can understand impairment to be in opposition to preservation. "Impairment," is a term of art utilized by the Register to incorporate historic occupancy and use types and to facilitate their restoration. This is to say that the denial of a historic building's (such as an Apartment Hotel's) original occupancy or use designation would seem to *impair* that property in violation of federal law.

B. The Politics of Apartment Hotels

In practice, despite the preservation laws in place, Apartment Hotels face extinction. As favorable as state and federal laws may be, they do not seem to have been applied to affirmatively combat and preempt contradictory local laws that limit Apartment Hotels. Little case law exists. Today, only a handful of functioning Apartment Hotels remain in the County of Los Angeles.[134] One of these is the famous Chateau Marmont, designed by architects Arnold A. Weitzman and William Douglas Lee and completed in 1929. Situated right off of Sunset Blvd., "the Chateau" has been a designated historical monument since 1976.[135] Around that time, Viktor Navasky wrote that the *Chateau Marmont* was "It's Shabby-Genteel But the Stars

132. On the Federal level, the National Park Service (NPS) presides over the National Register of Historic Places, which, in their own words, "is the official list of the Nation's historic places worthy of preservation. . . . The National Register of Historic Places is part of a national program to coordinate and support public and private efforts to identify, evaluate, and protect America's historic and archeological resources." *National Register of Historic Places*, Nat'l Park Serv. (Mar. 20, 2024), https://www.nps.gov/subjects/nationalregister/what-is-the-national-register.htm.

133. 36 C.F.R. § 60.2 (2024).

134. On this author's count, there are six functioning Apartment Hotels in California: The Nirvana in Hollywood and The James (in Hollywood), Chateau Marmont (in the City of Los Angeles), The Breeze (in Venice), and the Embassy Hotel Apartments and The Purser (Santa Monica). The author has not been able to identify more (and there are likely to be more). Even the famous Lido Apartment Hotel (6500 Yucca Street, in Hollywood) is now just an apartment building—note that there is no concrete evidence or statement from the Eagles that the Lido was the inspiration for "Hotel California."

135. L.A. City Plan. Dep't, Historic-Cultural Monument (HCM) List, https://planning.lacity.org/odocument/24f6fce7-f73d-4bca-87bc-c77ed3fc5d4f/Historical%20Cultural%20Monuments%20List.pdf (last visited Mar. 18, 2024).

Love It."[136] To the *New York Times* writer, each major city has its celebrity stomping ground: "Like the Chelsea in New York, the Claridge in Washington, O'Casey's Farms in London, the Marmont is in the tradition of the shabby, genteel, inexpensive hotel with large rooms, high ceilings and low prices that seem to cater to marginal writers and unmarginal showbiz folk."[137] Though originally an Apartment House, by the mid-century, the Chateau already functioned as a hybrid occupancy Apartment Hotel and was formally permitted for transient occupancy in 1985.[138]

The Nirvana is another Apartment Hotel that still offers hybrid housing options.[139] Would occupants be permitted to stay in The Nirvana for both short and long term stays in a manner similar to the Chateau Marmont? Despite being in compliance with historic preservation standards,[140] according to the Planning Department, the answer is "no," because historic Apartment Hotels are subject to rent control and are "therefore" precluded from providing transient occupancies.[141] While a recent California Court of Appeals rejected this policy as having no basis in law, the City of Los

136. Victor S. Navasky, *It's Shabby-Genteel but the Stars Love It*, N.Y. Times (May 5, 1974), https://www.nytimes.com/1974/05/05/archives/its-shabbygenteel-but-the-stars-love-1t-what-hollywood-hotel-is.html.

137. *Id.*

138. André Balazs, Hollywood Handbook (1996).

139. Located around the corner from the Grauman Chinese Theater on Hollywood Boulevard, The Nirvana was designed by E. M. Erdaly in 1925, in the "Oriental Revival" style that was common in that decade of Hollywood construction. A book published after its opening describes a community of furnished and unfurnished residences that combine "the beauty of the Orient with the latest innovations and conveniences of European apartments." Nirvana Apartments, 1775 North Orange Drive, Hollywood, California (1930) (on file at the U.S.C. Architecture and Fine Arts Library).

140. The building is in compliance with its historic requirements as set out by the Department of Interior. *See* Letter from City of Los Angeles to Nirvana Hollywood Skyline LLC (Feb. 1, 2017) (on file with author). SurveyLA, Los Angeles Citywide Historic Context Statement 60 (July 2017), https://planning.lacity.gov/odocument/f492ac7e-4b42-4ab2-95dd-2e27b2336138/Hotels_1870-1980_0.pdf (SUB-THEME: APARTMENT HOTELS, 1900-1930).

141. On November 12, 2019, the building received a "Notice of Code Violation of Home-Sharing Ordinance" from the Planning Department. *See* Letter from City of Los Angeles to Nirvana Hollywood Skyline LLC (Nov. 12, 2019) (on file with author). Wilshire Skyline sought repeatedly to explain to members of the staff of the Planning Department that The Nirvana was an Apartment Hotel and therefore exempt from registration under the 2018 Home-Sharing ordinance. However, the uniform response it received was that all habitable spaces—including Guest Rooms and Dwelling Units—within Apartment Hotels were regulated by the Rent Stabilization Ordinance and therefore only long-term stays were permitted without a new Conditional Use Permit that would change the use in The Nirvana from Apartment Hotel to Hotel. (*See* multiple emails on the topic between ownership and staff members on file with author.)

Angeles has not changed its policy.[142] This conflict—between state preservation and housing laws and local policy—remains in place at the time of writing.

Figure 1: The Chateau Marmont

Figure 2: The Nirvana lobby mural

142. People v. Venice Suites, LLC, 71 Cal. App. 5th 715 (2021), *available at* https://casetext.com/case/people-v-venice-suites-llc.

VII. The Future of Apartment Hotels in California

In this article, I provide a brief history of Apartment Hotels and explain their significance to the evolution of U.S. housing, particularly in California. Apartment Hotels have served as a flexible housing option, offering both short-term and long-term accommodations with the benefits of hotel services, which was especially significant for immigrants and minorities a century ago. I describe the decline of Apartment Hotels, attributing this decline to pressures from the housing crisis and policy changes. I examined the legal and planning department's roles in categorizing these establishments and their impact on urban development and historic preservation.

The politics of residential housing has unfortunately obfuscated the law of transient occupancy. The confusion in applying state housing and preservation laws stems from well-intended local pressure to impose strict rent control laws.[143] As a result, housing providers in California do not appear to have the optionality of the historic Apartment Hotel usage to address modern needs, which often emphasizes flexibility of property rights over property ownership. While maximizing the housing stock under rent control may generally be a social benefit, compressing housing options might not. Many "Generation Z" residents have clear preferences for flexible housing arrangements with minimal strings attached over home ownership or long-term housing stability.[144] This may be especially true among the types of creative professionals who may face higher barriers to home ownership than other, salaried professionals.

Today, furnished housing providers are polarizing into small home-sharing options through platforms such as Airbnb.com and institutional hospitality options like StayAka.com, Sonder.com, and Myroost.com. These new housing providers are disrupting mid-stay hotel options such as TORs and suites in order to provide flexible occupancy options. Whether or not such modern takes on apartment hotel-type living will become the new competitor to hotels will be something to look out for—especially in jurisdictions where flexible, hybrid residential occupancies are clearly legal and where insurance and financing options are therefore more readily available.[145] Historic Apartment Hotels are not the only housing option for middle class residents: co-living and micro-unit options are increasingly

143. The confusion has continued *despite* the built-in flexibility of its definition in the Municipal Code: "A residential building designed or used for both two or more dwelling units and six or more guest rooms or suites of rooms."

144. *See* Daniel McCue, *Move over Millennials, Gen Z Is Driving Rental Demand*, Joint Ctr. for Hous. Stud. Harv. Univ. (Dec. 4, 2023), https://www.jchs.harvard.edu/blog/move-over-millennials-gen-z-driving-rental-demand; *see also* Adam Barnes, *More Than Half of Gen Z Says Renting Is a Better Option Than Buying a Home*, The Hill (Aug. 8, 2022), https://thehill.com/business/4143860-more-than-half-of-gen-z-says-renting-is-a-better-option-than-buying-a-home.

145. Elaine Glusac, *Hotels vs. Airbnb: Has Covid-19 Disrupted the Disrupter?*, N.Y. Times (May 14, 2020), https://www.nytimes.com/2020/05/14/travel/hotels-versus-airbnb-pandemic.html.

popular low-cost options for young professionals. However, some jurisdictions such as Los Angeles are entertainment and art hubs, where there is a strong demand for more Chateau Marmonts and Nirvanas and where "shabby-genteel" quarters are needed to provide art-filled homes to creatives whose residency cannot be forecast in terms of months or years.[146] If California wants to house these artists and other middle-class residents, it will need to bring its land-use and rent-control policies into alliance with its preservation policy.

146. *Id.*