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Approaches to resolving displacement concerns in gentrifying, urban neighborhoods

Resistance by local residents to proposals for new housing in their vicinity is the chief, underlying obstacle to reversing the continuing loss of housing affordability for low, moderate, and middle-income Americans.¹ Exclusionary zoning and other regulatory barriers to needed housing growth generally are governmental responses to concerns of current residents about possible adverse effects on them of new development in their vicinity.

A frequent concern of low- and moderate-income city dwellers is displacement from their neighborhoods as a result of gentrification. (That increasingly frequent phenomenon involves an influx of higher-income people into a lower-income neighborhood. Gentrification usually brings economic benefits to a neighborhood, but it also brings rising housing prices, and sometimes the renovation or redevelopment of existing buildings—which can result in displacement of some current residents.)

This report will focus on various measures that can help resolve displacement concerns. It also will summarize other frequent concerns of current residents about new housing in their vicinity—such as the possibility of increased traffic congestion, increased taxes, lower property values, and reduced open space. Responses that may resolve those

¹ See, e.g., Equitable Housing Institute (EHI), *Developing a better “carrot,” to induce residents to support needed, new housing in their communities* 1 (June 2018), posted at: https://equitablehousing.org/images/PDFs/PDFs--2018-/Pursuing_win-win_solutions_with_local_residents.EHI-6-2018.pdf.

See also, e.g., National Apartment Association (NAA), *U.S. Barriers to Apartment Construction Index*, p. 12 (2019). That report gives results of a recent poll covering 59 multi-family housing markets of various sizes. “When survey respondents were asked ‘What are the (one to three) most significant issues affecting multifamily development in your area?’ community involvement /NIMBYism was by far the most common response.” *Id.* About 40% of those responding identified that factor as the most significant one (or among the three most significant ones) affecting multifamily development in their area.

Three of the other four most oft-cited factors also are closely connected to resistance by local residents and voters to permitting needed, new housing in their area. Those three factors are land costs (cited by about 29% of the respondents), land availability (cited by about 27%), and restrictive zoning (cited by about 19%). The only other factor among the top five cited was construction costs (cited by about 33%). *Id.*

concerns will be suggested. A well thought-out housing and infrastructure plan generally can satisfy common concerns—if the ways that those concerns will be met are made clear to local residents.

Some residents’ concerns about the effects of new housing in their area may be legitimate; others are illegitimate. Either way, it is very important to respond to those concerns effectively. After all, the current residents elect the local officials who are ultimately responsible for decisions on housing issues.

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I. MOUNTING LOSS OF HOUSING AFFORDABILITY IN AMERICA AND ITS CITIES

The increasing shortfall of housing supply in the United States, compared to the ever-growing demand, has caused chronic hyperinflation in housing prices and burdensome housing costs for a high and rapidly-increasing proportion of Americans over the last several decades.² Low- and moderate-income people have been hit hardest, and most members of racial and ethnic minorities are on the lower end of the income and wealth spectrums.³

Most low- and moderate-income American households rent their housing, and about 36 percent of U.S. households were renters, as of 2016.⁴ The median rent payment in the United States rose 61 percent between 1960 and that year, while the median income among renters grew only 5 percent (adjusted for inflation).⁵

As a result, the proportion of American rental households that pay more than 30 percent of their household income for housing (the standard definition of “housing cost burdened”) roughly doubled between the 1960s and 2016—from 23.8 percent to 47.5 percent.⁶ About half of those households (11.0 million) had “severe” cost burdens by 2016—that is, they paid more than 50 percent of their household income for housing.⁷

Since 2001, the fastest growth in cost burden shares has been among moderate-income renters. For example, the share of cost-burdened renters

² See, e.g., EHI, *Toward a comprehensive ban on exclusionary housing practices*, pp. 2-5 (2020), posted at: https://www.equitablehousing.org/images/PDFs/PDFs--2018-/EHI-Toward-comprehensive-ban-tech_edits-10-2020.pdf.

³ Douglas S. Massey and Jacob S. Rugh, *Segregation in Post-Civil Rights America: Stalled Integration or End of the Segregated Century*, ANNALS AM. ACAD. POL. SOC. SCI 2 (Mar. 8, 2016), <https://pubmed.ncbi.nlm.nih.gov/26966459/>. From 1970 to 2010, “the socioeconomic gap between whites and minorities has widened, even as many minority members have moved into the middle class.” *The State of the Nation’s Housing 2018* (hereinafter SONH 2018”), JOINT CTR. FOR HOUSING STUD. OF HARV. U., 16 (2018). “Minorities made up half of the nation’s low-wealth households in 2016, up from 39 percent in 1995. They also accounted for more than three-quarters of the growth in low-wealth households between 1995 and 2016.”

⁴ See, e.g., *More U.S. households are renting than at any point in 50 years*, PEW RESEARCH CENTER (July 19, 2017). (as of 2016, there were about 43.3 million rental households and 75 million owner-occupied households). See also SONH 2018 *supra* note 6, at 25 (there was a net increase of about 1.1 million owner-occupied units in 2017, and a net reduction of 180,000 rental households).

⁵ See, e.g., *More U.S. households are renting than at any point in 50 years*, PEW RESEARCH CENTER (July 19, 2017).

⁶ *The State of the Nation’s Housing 2018* (hereinafter SONH 2018”), JOINT CTR. FOR HOUSING STUD. OF HARV. U., 5. (2018). See also, Whitney Airgood-Obrycki, *Even Fully-Employed and Moderate Income Households Struggle to Pay Rent*, JOINT CTR. FOR HOUSING STUD. OF HARV. U., (Jul. 5, 2018), posted at: <https://www.jchs.harvard.edu/blog/even-fully-employed-and-moderate-income-households-struggle-to-pay-the-rent>.

⁷ See SONH 2018, *supra* note 6, at 5, 30.

making \$30,000-\$45,000 (in constant dollars) rose from 37 percent in 2001 to 50 percent in 2016. During the same time frame, the share of cost-burdened renters making \$45,000-\$75,000 nearly doubled from 12 percent to 23 percent.⁸

Cities generally have higher shares of rental households than suburbs and rural areas,⁹ and “cities have historically been the home of disproportionate numbers of the poor and of racial and ethnic minorities.”¹⁰ Among minority groups: “Cost-burdened shares continue much higher among Black (45 percent) and Hispanic households (43 percent) than among Asian and other minority households (36 percent) or White households (27 percent).”¹¹ Even among households within the same income groups, larger shares of minorities than Whites are cost burdened.¹²

Mounting housing cost burdens have severely impacted the ability of households in the bottom quartile of income (most of whom are renters) to pay for food, health care and other basic needs.¹³ About 90% of households with severe housing cost burdens (households that spend more than 50 percent of their household income for housing) are in that bottom quartile. They have incomes of less than \$30,000, and such households constitute a little less than one-quarter of American households.

Between 2001 and 2016, the funds that households in the bottom quartile of income can devote to food, health care and basic needs other than housing declined almost 20%, from \$730 to just \$590 per month, in inflation-adjusted dollars.¹⁴ Families with children need several times that amount to cover essential non-housing expenses, even in the most affordable metropolitan areas.¹⁵

⁸ Whitney Airgood-Obrycki, *Even Fully-Employed and Moderate Income Households Struggle to Pay Rent*, JOINT CTR. FOR HOUSING STUD. OF HARV. U., (Jul. 5, 2018), posted at: <https://www.jchs.harvard.edu/blog/even-fully-employed-and-moderate-income-households-struggle-to-pay-the-rent/>.

⁹ See, e.g., Andrew Soergel, *Renters Are Rocking the Suburbs*, U.S. News (March 8, 2016) (“a greater percentage of people living in major cities rented their homes compared with those who live in the suburbs,” as of 2014); posted at: <https://www.usnews.com/news/articles/2016-03-08/suburbs-have-become-a-haven-for-renters>.

¹⁰ See, e.g., Vicki Been, *City NIMBYs*, 33 J. Land Use, 217, 218 (2018) (“cities have historically been the home of disproportionate numbers of the poor and of racial and ethnic minorities”).

¹¹ SONH 2018, *supra* note 6, p. 31.

¹² *Id.*

¹³ See, e.g., *The State of the Nation’s Housing 2019*, JOINT CTR. FOR HOUSING STUD. OF HARV. U., 5 (2019) (hereinafter SONH 2019).

¹⁴ See SONH 2018, *supra* note 6, p. 5.

¹⁵ *Id.* at 31 (citing Economic Policy Institute’s estimate that families with children need at least \$2,700 per month for non-housing expenses, even in the most affordable metros.) “In sharp contrast, households in the highest quartile saw their incomes climb significantly in 2001–2016 while their monthly housing costs increased only \$20, leaving \$10,600 each month for all other expenses.” *Id.*

Online real estate database company Zillow concludes: “Communities where people spend more than 32 percent of their income on rent can expect a more rapid increase in homelessness.”¹⁶ Zillow’s data, collected from 386 American housing markets, indicates that as rent burdens in a community increase from 32 percent to 50 percent of household income, the incidence of homelessness roughly doubles, to more than one in 200 residents.¹⁷

Even for homeowners, housing price increases were much greater than typical income increases, between 1960 and 2016. The median home value increased 112 percent during that period, while median income for owners rose only 50 percent.¹⁸ For low- and moderate-income homeowners, making the payments for the increasingly limited supply, and rapidly escalating prices, of homes for sale is becoming more and more challenging.

Furthermore, there has been a pronounced increase in residential isolation of Americans by income (“wealth segregation”) over the last 50 years. A study by the Stanford University Center for Education Policy Analysis found that the percentage of families in America’s large metropolitan areas who lived in predominantly “rich” or “poor” neighborhoods more than doubled between 1970 and 2012.¹⁹ The increase was fairly steady, from 15 percent to 34 percent of the overall population of those metros, during that period.²⁰ Those large metros are home to roughly 65 percent of the total U.S. population.²¹

There also was a significant, and fairly steady, increase in residential isolation by income in smaller metropolitan areas during that period, according to that the study.²² Because most minority group members are on the lower end of the income and wealth spectrums,

¹⁶ Chris Glynn & Alexander Casey, *Homelessness Rises Faster Where Rent Exceeds a Third of Income* (Dec. 11, 2018); posted at: <https://www.zillow.com/research/homelessness-rent-affordability-22247/>.

¹⁷ *Id.*

¹⁸ SONH 2018, *supra* note 6, at 5 (the divergence of housing costs and household incomes was fairly steady during that period, for both renters and homeowners, with the most dramatic changes occurring in the 2000s.)

¹⁹ K. Bischoff & S. Reardon, *The Continuing Increase in Income Segregation, 2007–2012*, STANFORD CENTER FOR EDUCATION POLICY ANALYSIS 5 (2016). (The percentage who lived in predominantly “middle-income” neighborhoods declined about 24 percent between 1970 and 2012 (from 85 percent to 66 percent of the residents of those metros).

²⁰ Bischoff & Reardon (2016), *supra* note 17, at 5–6, 17.

²¹ K. Bischoff & S. Reardon, *Residential Segregation by Income, 1970-2009*, STANFORD CENTER FOR EDUCATION POLICY ANALYSIS 7 (2014).

²² In those smaller metros, the percentage of families who lived in predominantly “rich” or “poor” neighborhoods, as opposed to middle-income neighborhoods, rose from 9.6 percent in 1970 to 21.6 percent in 2012, according to the study. *Id.*

the increasing separation of Americans into predominantly “rich” or “poor” neighborhoods has a disproportionate impact on minority groups.²³

This report will touch briefly on the extraordinary—and hopefully temporary—housing problems resulting from the COVID-19 emergency (pp. 18-19). However, the report focuses primarily on a less disruptive time ahead.

II. DEVELOPMENT CONCERNS OF SUBURBANITES, GENERALLY

The motives behind residents’ concerns about proposed, new housing nearby are nothing new, and they are not about to go away.²⁴ Any new housing development or other land use that has a potential, adverse side-effect on existing residents will get a predictable response from them: “How will the development impact me and my family?”²⁵

Resistance in the suburbs is a much-studied phenomenon. Suburbanites’ concerns commonly are focused on the possibility that new housing may lead to things such as:

1. Higher taxes due to greater local spending for schools, roads, and other public infrastructure related to new housing;
2. Increased traffic and parking problems;
3. Reduction of their property’s value; and/or
4. Reduced open space in the area.

When the facts concerning a well thought-out housing plan are analyzed, generally none of those concerns are found to be justified. However, it is crucial to explain the facts effectively to local residents. An EHI report summarizes views of experts on ways to handle common concerns that some current residents have about the effects of new housing in their vicinity, with a focus on frequent suburban issues. EHI, *Developing a better “carrot,” to induce residents to support needed, new housing in their communities*, pp. 1, 3-7 (June 2018), posted at: https://equitablehousing.org/images/PDFs/PDFs--2018-/Pursuing_win-win_solutions_with_local_residents.EHI-6-2018.pdf.

III. DEVELOPMENT CONCERNS OF CITY DWELLERS, GENERALLY

Some city dwellers have the same concerns as suburbanites about proposed, new housing nearby. However, until recently:

²³ Douglas S. Massey and Jacob S. Rugh, *Segregation in Post-Civil Rights America: Stalled Integration or End of the Segregated Century*, ANNALS AM. ACAD. POL. SOC. SCI 2 (Mar. 8, 2016), posted at: <https://pubmed.ncbi.nlm.nih.gov/26966459/>.

²⁴ See, e.g., EHI, *Developing a better “carrot,” to induce residents to support needed, new housing in their communities*, pp. 1, 3-7 (June 2018), posted at: https://equitablehousing.org/images/PDFs/PDFs--2018-/Pursuing_win-win_solutions_with_local_residents.EHI-6-2018.pdf.

²⁵ *Id.*

cities generally have been considered “growth machines” in which land use officials cater to the interests of an elite coalition concerned primarily with economic growth—in contrast to “exclusionary” suburbs and smaller towns, controlled by “homevoters” and their “mercenary concern with property values.”²⁶

Of course, “neither cities nor suburbs have ever had monolithic populations, as many suburbs as well as cities have included both pro-growth and exclusionary factions.”²⁷ Recently, however, several scholars have shown that:

cities have adopted land use practices long associated with suburbs—imposing more restrictions on land through downzonings, charging significant fees for development approval, and taking land off the market through programs to preserve historic landmarks and open space.²⁸

IV. DISPLACEMENT CONCERNS

Increasingly, cities are experiencing substantial opposition to proposed new development, driven, in substantial part, by renters who fear that the development will make their homes less affordable and either cause them to have to leave the neighborhood or change the neighborhood to something less familiar and appealing to them.²⁹

There is some evidence to support renters’ fears. For example, a study of all the nation’s census tracts between the years 2000 and 2016 found:

Most central cities include at least a small number of economically expanding neighborhoods where strong displacement is underway. In a few cities, displacement affects as many or more people than are affected by concentration or abandonment.³⁰

²⁶ Been, *City NIMBYS*, *supra* n. 10 at 219-220, quoting WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT, TAXATION, SCHOOL FINANCE AND LAND-USE POLITICS* 18 (2001) (footnotes omitted).

²⁷ Been, *City NIMBYS*, *supra* n. 10 at 220 (footnote omitted).

²⁸ *Id.* at 221 (footnote omitted).

²⁹ *Id.* at 218. *See also*, e.g., Ingrid Gould Ellen & Gerard Torrats-Espinosa, *Gentrification and Fair Housing: Does Gentrification Further Integration?*, *Housing Policy Debate* (2018) (“Ellen & Torrats-Espinosa 2019”), posted at: <https://doi.org/10.1080/10511482.2018.1524440>. “In almost every American city, long-time residents feel increasingly anxious that they will be priced out of their homes and communities, as growing numbers of higher income, college-educated households opt for downtown neighborhoods. These fears are particularly acute among black and Latino residents . . .” *Id.*, p. 1.

³⁰ Inst. on Metropolitan Opportunity, *American Neighborhood Change in the 21st Century* (“*Neighborhood Change*”), 18 (April 2019). That report analyzes the census tracts, based on changes in the population of low-income and non-low-income individuals. Low-income individuals are defined as those below 200 percent of the federal poverty line, and non-low-income individuals are the remainder of the population. A

According to that study, displacement is “far more common in central cities than in other community types.”³¹ In central cities, “nearly 11 percent of residents live in a neighborhood that has experienced displacement, compared to 3 percent of residents in suburbs.”³² Actual displacement is much more common in a handful of regions, especially economically thriving cities on the East Coast and in California, but it is a significant concern in many regions of the United States.³³

There also is evidence that gentrification has had a positive effect overall, for most low-income residents of most neighborhoods involved. A major study of gentrification nationwide in the 1990s found that, on average:

- There were no higher exit rates from the gentrifying neighborhood, even among the most vulnerable, original residents, and even in neighborhoods experiencing the largest gains;
- The entrance of higher-income residents was an important source of income gains to the neighborhood, and there was some evidence that original residents experienced gains in income following the entry of higher income households;
- Original residents who remained in gentrifying neighborhoods reported greater increases in their satisfaction with the neighborhood than those remaining in other low-income neighborhoods; and
- There was no heightened racial transition in gaining tracts. Rather, gaining neighborhoods were able to avoid the losses of white households that non-gaining tracts experienced, and were thereby more racially stable.³⁴

Because those findings were based on averages, however, the study noted that some neighborhoods would have a different outcome. A follow-up study that also included low-income neighborhoods that were gentrifying in the 1980’s found that “some

tract is classified as strongly economically expanding if: (1) The absolute number of non-low-income individuals increased by more than 10 percent between 2000 and 2016; and (2) The population share of low-income individuals declined by more than 5 percentage points between 2000 and 2016. *Id.* at 5-6.

³¹ *Neighborhood Change*, *supra* n. 30 at 18.

³² *Neighborhood Change* at 18. The study data “suggests that among central cities, Washington, D.C., has experienced the nation’s worst gentrification trend, with nearly 36 percent of its entire population living in an area where strong displacement is underway.” *Id.* “On a regional basis, Los Angeles is experiencing the worst gentrification, and [on] a regional scale, New York, New Orleans, and San Diego also face severe displacement challenges.” *Id.* at 19. Exclusionary housing practices in suburbs intensifies gentrification and displacement pressures in central cities.

³³ *Id.* at 18.

³⁴ Ingrid Gould Ellen and Katherine M. O’Regan. *How low income neighborhoods change: Entry, exit, and enhancement*, Working Paper 2010, FURMAN CTR. FOR REAL EST. & URBAN POLICY, p. 3 (Aug. 8, 2010), posted at: https://furmancenter.org/files/publications/How_Low_Income_Neighborhoods_Change_1.pdf. That study subsequently published at 41 *Regional Science and Urban Economics*, pp. 89-97 (2011). The study was based on the internal Census Bureau version of the American Housing Survey, regarding low-income neighborhoods nationwide that improved economically in the 1990s.

gentrifying neighborhoods that were predominantly minority in 1980 appeared to be on the path to becoming predominantly white,” as of 2016.³⁵

Residents of inner-city, predominantly Black neighborhoods sometimes are receptive to gentrification, because it:

brings their neighborhoods into the mainstream of American commercial life with concomitant amenities and services that others might take for granted. It also represents the possibility of achieving upward mobility without having to escape to the suburbs or predominantly white neighborhoods. These are benefits of gentrification typically not recognized in the scholarly literature.³⁶

However:

Given the tight rental market . . . and the number of households that are already rent-burdened, it is not surprising that renters, especially those in denser cities, are exhibiting the same risk-averseness that NIMBY homeowners have long shown. Further, there is little hard evidence to counter their fear that new development in their neighborhood may increase rents nearby.³⁷

Although it is axiomatic that increasing the supply of housing, compared to demand, results in lower rents and housing costs in the overall area, “many neighborhood residents, advocates, and even some policy-makers are increasingly skeptical that additional supply will help reduce the rate at which rents are increasing across a city.”³⁸ “[N]ew luxury housing may cause dramatic upswings in the price of residential real estate in formerly distressed central neighborhoods, but the lower costs resulting from increased supply may be apparent only at the suburban fringe of the region.”³⁹

Not only do the new units command higher rents, but also the new residents who can afford them spend money in ways that create demand for more lower-wage workers in the area. This, in turn, creates more demand for housing and ultimately raises housing costs.⁴⁰

³⁵ Ellen & Torrats-Espinosa 2019, *supra* n. 29, at 2.

³⁶ LANCE FREEMAN, THERE GOES THE ‘HOOD, 1 (2006).

³⁷ Been, *City NIMBYS*, *supra* n. 10, at 243 (footnotes omitted).

³⁸ Been, *City NIMBYS*, *supra* n. 10, at 244, citing Karen Narefsky, *What’s In My Backyard?*, JACOBIN (Aug. 8, 2017), <https://www.jacobinmag.com/2017/08/yimbys-housing-affordability-crisis-density>.

³⁹ *Inclusionary Housing: Creating and Maintaining Equitable Communities*, p. 14, LINCOLN INST. OF LAND POLICY (2015).

⁴⁰ *Id.*

Another concern about accepting gentrification of their urban neighborhood—most severe in the case of Black Americans, who make up a high proportion of inner-city residents—is that the long history of:

discrimination and institutional racism have seared mistrust of whites and white institutions into the collective memory of blacks. Like any other situation where actors have proved themselves untrustworthy, cynicism will abound. A number of studies have found that trust is in short supply in black and inner-city communities⁴¹

Regardless whether displacement actually is happening in a particular urban neighborhood, concerns of the residents about the mere possibility of displacement—and the fear and mistrust on the part of minority group members about White-dominated development processes—tend to cause resistance. As a result, efforts to achieve the urban housing growth necessary to improve housing stability, fairness, and affordability for low- and moderate-income Americans —and especially for those in minority groups—face strong headwinds.

V. STRATEGIES FOR RESOLVING DISPLACEMENT CONCERNS

Six main housing strategies that cities and other local governments can use to minimize displacement issues related to gentrification were analyzed recently by housing policy expert Jeffrey Lubell.⁴² They are:

1. **Preservation.** Preserving existing affordable rental units.
2. **Protection.** Helping long-time residents who wish to stay in the neighborhood.
3. **Inclusion.** Ensuring that a share of new development is affordable.
4. **Revenue generation.** Harnessing growth to expand financial resources for affordable housing.
5. **Incentives.** Creating incentives for developers of affordable housing.
6. **Property acquisition.** Facilitating acquisition of sites for affordable housing.⁴³

⁴¹ LANCE FREEMAN, THERE GOES THE ‘HOOD, 121 (2006) (citing authorities). *See also, e.g.*, Ellen & Torrats-Espinosa 2019, *supra* n. 29, p. 1 (“The way a lot of African American and Latino people experience gentrification is a form of colonization. The gentrifiers are not wanting to share—they’re wanting to take over.” (quoting comments of former federal prosecutor in Abdallah Fayaad, *The criminalization of gentrifying neighborhoods*, Atlantic Monthly (December 20, 2017), posted at <https://www.theatlantic.com/politics/archive/2017/12/the-criminalization-of-gentrifying-neighborhoods/548837/>.)

⁴² Jeffrey Lubell, *Preserving and Expanding Affordability in Neighborhoods Experiencing Rising Rents and Property Values*, Cityscape, Vol. 18, No. 3, 131 (2016). Lubell is Director of Housing and Community Initiatives at Abt Associates, a global consulting firm. Formerly, he was Executive Director of the Center for Housing Policy. *See also, e.g.*, Ingrid Gould Ellen and Jeffrey Lubell, *Through the Roof: What Communities Can Do About the High Cost of Rental Housing in America*, Lincoln Inst. of Land Policy, pp. 33-42 (2021) (giving illustrations of promising policies being used by many cities and other local governments to increase supply of affordable units and protect low- and moderate-income residents).

⁴³ Lubell (2016), *supra* n. 42 at 132.

Here, we will focus on aspects of the “Protection” and “Inclusion” strategies. Six specific forms of direct protection for low-income residents who wish to stay in their gentrifying, urban neighborhoods are identified by Lubell:

- a. **Condominium conversion protections**, such as rights of first refusal by a building’s tenants to purchase the building, or their units in it, upon conversion.
- b. **Rent stabilization**, in which rent increases to current tenants are limited.
- c. **Good-cause eviction protections**, under which landlords must demonstrate “good cause” for eviction, such as nonpayment of rent or intentional damage to the unit. Protection of tenants from unjustifiable evictions is crucial in neighborhoods that are subject to gentrification, because landlords sometimes evict their low-income tenants to redevelop the property or otherwise take full advantage of its rising property value.
- d. **Property tax protections**, because homeowners with low or moderate incomes may be faced with escalating property taxes due to increases in assessed home values in the neighborhood.
- e. **Promoting affordable ownership policies**, such as community land trusts, limited equity cooperatives, and deed-restricted homeownership, that are designed to provide both initial and lasting affordability by limiting the swings in value of homes owned in those forms.
- f. **Housing Choice Voucher homeownership**. In certain jurisdictions, tenants who are fortunate enough to obtain housing choice vouchers may use them to pay for homeownership costs, such as mortgage payments and property taxes, rather than for rent.⁴⁴

Below, we will discuss three anti-displacement programs that we believe can be instrumental in reassuring existing, low-income city residents and thus facilitating needed housing growth. Those programs are: (1) rent stabilization, (2) inclusion of new housing units affordable to low- and moderate-income residents who otherwise would be displaced, and (3) community preferences for those residents, to facilitate their placement in those affordable units.

A. Rent stabilization

Limiting rent increases can enable renters in gentrifying communities to stay in their housing units amid rapidly rising rents and other living costs. Economists are almost universal in their opposition to so-called “hard” or “first-generation” rent controls.⁴⁵ Those “rent controls” imposed a freeze on rents, usually for an indefinite period of time. Such laws were imposed in the United States during World War II (and for awhile

⁴⁴ *Id.* at 136-138.

⁴⁵ See, e.g., Richard Arnott, *Time for revisionism on rent control?*, 9 *Journal of Economic Perspectives* 99, 100 (1995).

afterwards), in Europe during both World Wars, and in many major cities elsewhere, since then.⁴⁶

There has been widespread agreement that rent controls discourage new construction, cause abandonment, retard maintenance, reduce mobility, generate mismatch between housing units and tenants, exacerbate discrimination in rental housing, create black markets, encourage the conversion of rental to owner-occupied housing, and generally short-circuit the market mechanism for housing.⁴⁷

However, a “second generation” of rent-stabilizing laws has attempted to avoid or minimize those adverse outcomes. The leading economic analysis of those measures is by Prof. Richard Arnott.⁴⁸ He concluded that “second-generation controls should be judged on the empirical evidence and, since the programs are so varied, on a case-by-case basis.”⁴⁹ He found that those controls did not produce perceptible, adverse economic effects.⁵⁰

Leading land use economist William A. Fischel concurs: “Moderate rent control (with periodic adjustments to market) does not have much adverse effect and may help tenants accept other reforms.”⁵¹ Those reforms include the positive changes brought about by gentrification, including upgraded, redeveloped housing. The moderate rent stabilization that Prof. Fischel favors protects current tenants but allows rents to return to market rates after those tenants leave.⁵²

The same basic, rent stabilization measures suggested above may be appropriate for local businesses that provide important services to current residents and are part of the fabric of a neighborhood. Enabling those local businesses to continue paying moderate rents can avoid cultural displacement of current residents⁵³ and build support for the addition of needed housing.

⁴⁶ See, e.g., Arnott, *supra* n. 45, at 100 & nn. 1-3

⁴⁷ *Id.*, p. 99.

⁴⁸ *Id.*

⁴⁹ *Id.* at 118.

⁵⁰ *Id.* (“My reading of the empirical evidence is that many of the claimed [adverse economic] effects of second-generation controls are imperceptible. And those effects that are perceptible have ambiguous efficiency and welfare implications.”)

⁵¹ William A. Fischel, e-mail exchange with EHI President Tom Loftus, Dec. 31, 2020.

⁵² *Id.*

⁵³ See, e.g., Heather Way, *et al.*, *Uprooted: Local Efforts to Mitigate Displacement in Gentrifying Neighborhoods*, 28 J. Aff. Housing 39, 42 (2019) (“Cultural displacement occurs as the scale of residential change advances; shops and services shift to focus on new residents, and remaining residents may feel a sense of dislocation despite remaining in the neighborhood.”) (footnote omitted).

Rent stabilization by local governments actually is not permitted under the laws of most States of the Union.⁵⁴ Given the national scope of the problem of inadequate housing supply, especially for low- and moderate-income people, an Economic Fair Housing Act may need to include authorization for sensible, “second-generation” rent stabilization measures in cities and other areas with housing shortages. There simply is a lack of empirical support for complete bans on moderate, “second-generation” rent stabilization measures.

Of course, rent stabilization is only a limited form of tenant protection. Most such policies “allow owners to raise rents to cover investments in capital improvements, so the policies cannot offer full protection from large rent increases in areas experiencing an influx of higher-income residents.”⁵⁵ Also, such policies often apply only to older buildings.⁵⁶

In fact, rent stabilization generally doesn’t prevent the owner(s) from converting their properties to owner-occupied housing, such as condominium or co-op ownership, or from demolishing a building and adopting a different land use. Thus, tenant protections should address numerous issues beyond those curable through rent stabilization.

Among those issues are ways of providing affordable new units—hopefully in or near the current neighborhood—for renters whose homes are subjected to conversion or demolition. We discuss that subject next.

B. Increasing the supply of below-market-rate housing in gentrifying neighborhoods

Numerous methods have been created to prevent or minimize displacement, by producing new housing or rehabilitating existing housing in or near a gentrifying neighborhood. For example:

- The LIHTC program has produced millions of rental units affordable to low- and moderate-income, and almost half of those units have been provided in low-income and gentrifying neighborhoods.
- Inclusionary housing programs have produced more than 100,000 housing units, most of them rental units in urban neighborhoods.
- Permanent affordability has been provided for tens of thousands of American households by community land trusts and similar programs that remove housing units from the volatile, private land market.

⁵⁴ See, e.g., National Multifamily Housing Council, *Rent control by state* (Summer 2020).

⁵⁵ Lubell (2016), *supra* n. 42 at 137.

⁵⁶ *Id.*

Such programs can be, and sometimes are, used together.⁵⁷

1. Low-income housing tax credit (LIHTC) program

a. Provisions and accomplishments

“The Low-Income Housing Tax Credit (LIHTC) is the most important resource for creating affordable housing in the United States today.”⁵⁸ “Between 1987 and 2015, at least 46,000 LIHTC transactions have been completed . . . to construct or preserve a total of 2.3 million unique units across 38,000 specific properties.”⁵⁹

LIHTC funded 21 percent of all multifamily developments in the nation over the period 1987-2008.⁶⁰ “The average project size has increased from 34.1 units between 1987 and 1994 to 79.7 units between 2000 and 2018.”⁶¹

Almost half of all LIHTC units have been produced in central cities.⁶² Housing developers often prefer to build their LIHTC projects in low-income, central city neighborhoods because:

land is cheaper, it is easier to market new apartments to renters in the immediate vicinity, and there is less political opposition to additional housing for minorities and lower-income families. These conditions ensure that tax credit projects will have a disparate impact on African Americans, reinforcing neighborhood segregation.⁶³

⁵⁷ See, e.g., Freeman & Schuetz 2017, p.226, n. 4 (LIHTC can be used in conjunction with the three largest statewide affordable housing programs—California, Massachusetts, and New Jersey).

⁵⁸ U.S. Dep’t of Housing and Urban Development (HUD), *LIHTC Fact Sheet from HUD User*, posted at: <https://www.huduser.gov/portal/elist/2020-sep-09.html> (accessed April 17, 2021).

⁵⁹ Corianne Payton Scally, et al., *The Low-Income Housing Tax Credit: Past Achievements, Future Challenges*, pp. 24 (July 2018) (“LIHTC Achievements and Challenges”) citing HUD, *National Low Income Housing Tax credit (LIHTC) database: Projects Placed in Service through 2015* (2017).

⁶⁰ Rebecca Diamond and Tim McQuade, *Who Wants Affordable Housing in their Backyard?*, p. 5 (Dec. 2017), posted at: https://web.stanford.edu/~diamondr/LIHTC_spillovers.pdf. (The final version of that article appears in 127 J. Pol. Econ. Vol. 3 (2019).)

⁶¹ HUD, *LIHTC Fact Sheet from HUD User*, *supra* n. 58.

⁶² See, e.g., Diamond and McQuade, *supra* n. 60, Table 1, pp. 7, 58 (46% of all LIHTC developments were in central cities, through 2012). See also, Benjamin Field, *Why Low-Income Housing Tax Credits Are Flowing to Gentrifying Neighborhoods*, p. 21 (2016) (“Field 2016”) (in case study of Philadelphia, PA, “LIHTC-funded developments and units are moderately more likely to be placed into gentrifying census tracts.”); posted at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2778182

⁶³ RICHARD ROTHSTEIN, *THE COLOR OF LAW*, p. 190 (2017).

There are other incentives for using the LIHTC program in gentrifying, low-income urban neighborhoods. For example, “the improving amenities and vibrant housing markets of gentrifying neighborhoods create strong market incentives”⁶⁴

Also, because the owner of LIHTC units is free to convert them to market-rate units after the rent affordability period (at least 30 years) expires, the owner may reap a sizable, long-term gain if the neighborhood continues to gentrify.⁶⁵ The bonus tax credits that a developer gets under LIHTC for providing housing in high-poverty areas (Qualified Census Tracts (QCTs)) may provide another incentive.⁶⁶ And state Housing Finance Agencies’ (HFAs’) project selection processes also may draw developers toward projects in gentrifying neighborhoods.”⁶⁷

Many housing advocates urge that more LIHTC units be produced in high-opportunity areas outside of central cities. For example, Richard Kahlenberg, Senior Fellow at The Century Foundation, deplors the fact that such a large proportion of benefits under LIHTC and the other, major low-income rental housing program—Housing Choice Vouchers (previously known as “Section 8” vouchers)—go for housing in central cities. He argues that because minority groups tend to predominate in central cities, both of those programs “tend to perpetuate economic and racial segregation.”⁶⁸

Studies have shown that children who moved from public housing to lower-poverty neighborhoods when they were young had improved health and lifetime earnings.⁶⁹ One

⁶⁴ Field 2016, *supra* n. 62, p. 27.

⁶⁵ Corianne Payton Scally, *et al.*, *The Low-Income Housing Tax Credit: How It Works and Who It Serves*, p. 8 (Urban Institute, July 2018). “Forty-one states included a requirement or a preference for longer affordability—ranging from 40 years to ‘in perpetuity,’ like in Michigan, Vermont, and Massachusetts—as of 2001.” *Id.*, p. 17 n. 7.

⁶⁶ Qualified Census Tracts are areas “where 25 percent or more of the population live in poverty or where at least half have income in the past year under 60 percent of AML.” Corianne Payton Scally, *et al.*, *The Low-Income Housing Tax Credit: Past Achievement and Future Challenges*, p. 8 (Urban Institute, July 2018).

⁶⁷ Field, 2016, *supra* n. 62, p. 26.

⁶⁸ *See, e.g.*, Richard D. Kahlenberg, *An Economic Fair Housing Act*, THE CENTURY FOUNDATION (Aug. 3, 2017) (“TCF 2017”), posted at: <https://tcf.org/content/report/economic-fair-housing-act/>, citing RICHARD ROTHSTEIN, *THE COLOR OF LAW*, pp. 190, 192-93 (2017).

See also, e.g., Kirk McClure, *et al.*, *The LIHTC Program, Racially/Ethnically Concentrated Areas of Poverty, and High-Opportunity Neighborhoods*, 6 Tex. A&M J. Prop. L. 89 (2020).

⁶⁹ *E.g.*, Raj Chetty, *et al.*, *The effects of exposure to better neighborhoods on children: New evidence from the Moving to Opportunity experiment*, 106 Amer. Econ. Rev., 855, 859-860 (2016) (much-heralded study of HUD’s Moving to Opportunity (MTO) experiment of the mid-1990’s found that “moving a child out of public housing to a low-poverty area when young (at age eight on average) using an MTO-type experimental voucher will increase the child’s total lifetime earnings by about \$302,000. This is equivalent to a gain of \$99,000 per child moved in present value at age eight, discounting future earnings at a 3 percent interest rate.”) That study also found that the “increased earnings of children ultimately leads to significant benefits to taxpayers as well,” because those earnings are taxable.

major, recent report found that the public schools near students in segregated, low-income areas generally are poor performers.⁷⁰

Nevertheless, it appears that continuing to build some LIHTC developments in gentrifying, city neighborhoods can be an important tool for minimizing possible displacement, and the fear of it, and thus facilitating the addition of needed, new housing.⁷¹ That new housing would help meet the housing demand from higher-income people and improve the supply affordable to low- and moderate-income people.

The influx of higher-income people tends to increase the racial and ethnic integration of the neighborhood.⁷² It also increases the tax base, and thus tends to improve economic opportunities, as well as funding for schools and other public facilities in the neighborhood.

b. Challenges

i. When tax credits lose value

Private-sector investment is the key to LIHTC’s long-term sustainability. The severe, recent effects of the COVID-19 emergency on the profitability of many businesses likely will cause many private investors to cut back new investments in LIHTC developments for some time—at least, unless sufficient, new incentives are provided. Reduced funding for other federal housing programs also may seriously affect LIHTC production, because

“Previous research evaluating the MTO experiment has found that moving to lower-poverty areas greatly improved the mental health, physical health, and subjective well being of adults as well as family safety.” *Id.*, p. 856 (citing studies).

⁷⁰ TCF 2017, citing Ingrid Gould Ellen and Keren Mertens Horn, “Do Federally Assisted Households Have Access to High Performing Schools?” Poverty and Race Research Action Council, November 2012, 4, Table 1, <https://www.prrac.org/pdf/PRRACHousingLocation&Schools.pdf>. That study described “the elementary schools nearest to households receiving four different forms of housing assistance in the country as a whole, in each of the 50 states, and in the 100 largest metropolitan areas, . . . based on the most recent available data from 2008-09.” Ellen and Horn 2012, p. 1.

LIHTC-assisted households were a bit better off than households assisted by other federal programs, however, based on that study. For example: “One third of LIHTC tenants live near high performing schools, in comparison to just 25 percent of tenants living in Project-based Section 8 developments, 26 percent of voucher holders, and 19 percent of public housing tenants.” Ellen and Horn 2012, p. 5.

⁷¹ LIHTC developments in low-income neighborhoods increase the value of other housing in the neighborhood, according to numerous studies. *See, e.g.*, Diamond and McQuade, pp. 1-2 (“LIHTC construction in neighborhoods with a median income below \$26,000 increases local property values by approximately 6.5% within 0.1 miles of the development site.”). *See also* studies discussed therein (pp. 4-5).

⁷² *See, e.g.*, Ellen & Torrats-Espinosa 2019, *supra* n. 29, p. 11 (of the 930 predominantly minority neighborhoods that gentrified during the 1980s and 1990s, 176 (19%) had become racially integrated by 2016, and 8 others transitioned to predominantly White by 2016). The authors defined “racially integrated” to mean that the non-Hispanic White share of the population was between 25% and 75%. *Id.*, p. 4.

it frequently relies on programs such as HOME and the National Housing Trust Fund to fill gaps in project financing.⁷³

Thus, interim programs may be necessary to avoid a severe cutback in LIHTC projects.⁷⁴ There are precedents for such programs. Two such temporary, federal programs were created in the wake of the Great Recession to offset declining LIHTC investments during that severe economic downturn: the Tax Credit Exchange Program (TCEP) and the Tax Credit Assistance Program (TCAP).

TCEP allowed state housing finance agencies to exchange unused or returned 9 percent credits from 2007 through 2009 for a grant from the US Treasury. TCAP provided \$2.25 billion to HUD [U.S. Dep’t of Housing and Urban Development] to distribute through the federal HOME program, according to a formula, for state housing agencies to use for capital investments in LIHTC projects funded between October 2006 and September 2009.⁷⁵

A similar backstop for LIHTC may be important now, given the economic disruptions of the COVID-19 pandemic.

ii. Lack of permanent affordability

The federal statute now requires 30 years of affordability (although only 15 years of compliance with investment regulations),⁷⁶ and most states require or prefer applicants to commit to an even longer affordability period. As of 2001, 41 states included a requirement or preference for affordability ranging from 40 years to “in perpetuity.”⁷⁷

⁷³ Corianne Payton Scally, *et al.*, *The Low-Income Housing Tax Credit: Past Achievements, Future Challenges*, p. 24 (July 2018) (“LIHTC Achievements and Challenges”).

⁷⁴ See, e.g., National Housing Conference, *The Tax Credit Market During the Great Recession*, posted at: <https://nhc.org/policy-guide/low-income-housing-tax-credit-the-basics/the-tax-credit-market-during-the-great-recession/> (Accessed April 30, 2021) (“The Great Recession of 2008-2009 created a brief but severe disruption in tax credit investment markets. Thanks to timely action by the federal government and quick adaptation by state allocating agencies, essential rental housing projects were completed while tax credit investment markets adjusted. Tax credit investment demand quickly bounced back, and pricing returned to efficient levels.”)

⁷⁵ See, e.g., *LIHTC Achievements and Challenges*, *supra* n. 73, pp. 22-23, citing “Tax Credit Assistance Program,” US Department of Housing and Urban Development, archived April 3, 2017, <https://archives.hud.gov/recovery/programs/tax.cfm>.

⁷⁶ Corianne Payton Scally, *et al.*, *The Low-Income Housing Tax Credit: How It Works and Who It Serves* (“*How LIHTC Works*”), p. 2 (Urban Institute, July 2018). “Monitoring compliance involves regularly certifying that only targeted income-eligible households live in assisted units and are paying associated rents and conducting housing quality inspections. Investors in projects that fail to comply can lose their tax benefit.” *Id.* The LIHTC statute originally required only 15 years of affordability. *Id.*

⁷⁷ *Id.*, p. 17 n. 7.

However, even before the COVID-19 emergency, it was apparent that U.S. housing production would not catch up to household formation in the foreseeable future (absent some major, new, effective approach nationwide).⁷⁸ There was a cumulative deficit in housing production from 2010-2018 of almost 2.5 million units.⁷⁹ That deficit was a continuation of decades of lagging housing supply.⁸⁰

Therefore, it appears that programs that offer permanent affordability may be necessary. We discuss such programs below (pp. 23-29).

iii. COVID-era challenges

(a) COVID-19 and density

The COVID-19 emergency has created or underscored other challenges to adding housing in gentrifying, urban neighborhoods, including questions about the wisdom of increasing housing density in those areas. Scientific literature supports the broad supposition that infectious disease spreads more easily in densely populated urban environments.⁸¹

However, epidemiologists say that airborne infectious disease spreads at a more fine-grained level, such as in crowded churches, military barracks, or homes shared by large families—rather than the city as a whole.⁸² “Some of the world’s most heavily settled spaces — Hong Kong, Seoul, Singapore — have proved to be the most formidable at containing Covid-19. In the U.S., small towns in Georgia and Louisiana suffer along with New York City.”⁸³

⁷⁸ Michael A. Stegman, *The Housing Market Cannot Fully Recover Without a Robust Rental Policy*, 37 B.C. J. L. & SOC. JUSTICE 395, 397 (2017); *see also, e.g.*, Been, *City NIMBYs*, *supra* n. 10, p. 242, citing ALLISON CHARETTE, ET AL., PROJECTING TRENDS IN SEVERELY COST-BURDENED RENTERS: 2015-2025, 8–10 (Joint Ctr. for Hous. Studies Harv. Univ. 2015) (continuing reduction in vacancy rates and hyper-inflated rental costs are likely, due to population conditions).

See also, e.g., Yardi Matrix, *Webinar: 2019 Multi-family Market Update* (Nov. 6, 2019). (U.S. housing production is unlikely to catch up to household formation in the foreseeable future). Yardi Matrix is a real estate consulting company that monitors the nation’s largest (50+ unit) apartment buildings.

⁷⁹ Yardi Matrix, *Webinar: 2019 Multi-family Market Update* (Nov. 6, 2019).

⁸⁰ *See, e.g.*, Peter Ganong & Daniel Shoag, *Why has regional income convergence in the US declined?* 102 JOURNAL OF URBAN ECONOMICS 76, 78-79 (2017). (the tremendous housing cost escalation in wealthier states between 1980 and 2010 was likely caused by increasing growth controls on housing development in high-income areas of those states, because they inhibit the construction of new housing).

⁸¹ Anthony Flint, *The Destiny of Density*, LINCOLN INSTITUTE OF LAND POLICY (June 24, 2020), posted at: <https://www.lincolninst.edu/publications/articles/2020-06-destiny-density-affordability-equity-effects-of-insidious-virus>.

⁸² *Id.*

⁸³ Samuel Kling, *Is the City Itself the Problem?*, CityLab (April 20, 2020), posted at: <https://www.citylab.com/perspective/2020/04/coronavirus-cases-urban-density-suburbs-health-parks-cities/610210/> (“As Covid-19 enlarges the window of policy possibilities, city leaders should remember

A Wall Street Journal analysis found that COVID-19 has spread more widely in places with the most crowded households, which are not necessarily the places with the largest or densest populations. Remote, rural hamlets where extended families live under the same roof have turned deadlier than some of the densest blocks of Manhattan or Chicago, according to that analysis.⁸⁴

Thus, densification seemingly can be consistent with good health. The key, housing-related health issue appears to be overcrowding, which could be alleviated by a sufficient amount of housing affordable to those who now must live in overcrowded conditions.

(b) Other (hopefully, temporary) challenges

Another immediate—and hopefully, short-term—factor cutting against new housing investments in America’s urban neighborhoods is the uptick in crime and civil unrest in major cities last year and, so far, this year.

Major American cities saw a 33% increase in homicides last year as a pandemic swept across the country, millions of people joined protests against racial injustice and police brutality, and the economy collapsed under the weight of the pandemic — a crime surge that has continued into the first quarter of this year.⁸⁵

There also are special economic challenges to new housing production now, such as recent hyper-inflation in the cost of wood products and other building materials, supply-chain disruptions, and overall inflation worries. However, if the economy normalizes, and if issues of racial injustice and policing are addressed more effectively, housing production in America’s gentrifying neighborhoods hopefully can start to reverse the ever-widening gap between supply and demand. Strong anti-displacement measures may be crucial to allowing that to happen.

their problem is the virus, not urban life. They can improve their public health and transportation infrastructure by learning from the dense places that have managed to avoid the harshest impacts of the virus”). Kling is Global Cities Fellow at the Chicago Council on Global Affairs.

⁸⁴ Ian Lovett, *et. al.*, *COVID-19 Stalks Large Families in Rural America*, Wall Street Journal (June 7, 2020), posted at: <https://www.wsj.com/articles/covid-19-households-spread-coronavirus-families-navajo-california-second-wave-11591553896>. See also, *e.g.*, EHI, *Economic Fair Housing Act of 2021: Partial Draft Bill and Comments*, pp. 6-7 (Nov. 30, 2020), posted at: <https://www.equitablehousing.org/images/PDFs/PDFs--2018-/EHI Economic FHA of 2021 draft-rev 11-30-20.pdf>.

⁸⁵ Emma Tucker and Peter Nickeas, *The US saw significant crime rise across major cities in 2020. And it's not letting up*, CNN (April 3, 2021), posted at: <https://www.cnn.com/2021/04/03/us/us-crime-rate-rise-2020/index.html>. “Sixty-three of the 66 largest police jurisdictions saw increases in at least one category of violent crimes in 2020, which include homicide, rape, robbery, and aggravated assault, according to a report produced by the Major Cities Chiefs Association. Baltimore City, Baltimore County and Raleigh, North Carolina, did not report increases in any of the violent crime categories.” *Id.*

2. Inclusionary housing (IH)

a. Programs and accomplishments

Another way to add affordable units is by incentivizing and/or requiring housing developers to include some below-market units in their developments. Most such IH programs (many of which are “inclusionary zoning” (IZ) ordinances) are mandatory and apply to both rental and for-sale units.

Most IH programs also offer developers a density bonus in return for building some below-market IH units. That incentive gives the developer the right to build more, profitable market-rate units than otherwise would be allowed under the zoning ordinance, in order to offset losses on the below-market units.

At the end of 2019, there were 1,019 IH programs in 734 American jurisdictions (almost all of them local governments), according to a newly-released survey.⁸⁶ There were IH programs in 31 states and the District of Columbia—although nearly three-quarters of those programs were in New Jersey (28%), Massachusetts (23%), and California (22%), all of which have statewide affordable housing mandates.⁸⁷ Of those 1,019 programs, 258 provided detailed information to the survey about their outcomes:

These programs report creating a total of about 110,000 affordable units, including 70,000 affordable rental units, 31,000 for-sale units, and 9,000 units with tenure unknown. For the 221 programs that report at least one affordable unit and with known program age, a program produced 27 affordable units per year on average.⁸⁸

Of the 681 IH programs for which the program type and development type were identified, “nine out of 10 programs apply to both for-sale and rental developments.”⁸⁹ Also: “there are two-and-a-half times as many mandatory programs as voluntary programs.”⁹⁰

⁸⁶ Ruoniu Wang and Sowmya Balachandran, *Inclusionary Housing in the United States: Prevalence, Impact, and Practices in Local Jurisdictions as of 2019*, p. 5 (2021).

⁸⁷ *Id.*

⁸⁸ *Id.* That survey produced more granular data from local government sources than its predecessor survey, which had to rely on state-level sources and reported that more than 170,000 units had been produced by IH programs. The predecessor survey is described in Emily Thaden and Ruoniu Wang, *Inclusionary Housing in the United States: Prevalence, Impact, and Practices*, p. 31 (Cambridge, MA: Lincoln Institute of Land Policy, 2017) (Thaden & Wang 2017).

⁸⁹ Wang and Balachandran, *supra* n. 86, p. 23.

⁹⁰*Id.* The nation’s first mandatory IH program (the 1971 program in Fairfax County, Virginia) was ruled unconstitutional because it did not provide just compensation to developers (such as density bonuses), in return for the requirement that they build below-market-price housing units. *Board of Sup'rs of Fairfax County v. DeGross Enterprises, Inc.*, 214 Va. 235, 198 S.E.2d 600, (Va., 1973).

Among the incentives offered to developers to offset the cost of providing affordable units, density bonuses were the most common type reported (57% offered them).⁹¹ The next most common type was other zoning variances (24%), followed by fee waivers or reductions (17%).⁹²

“[S]tudies support that inclusionary housing programs that are mandatory, have greater local political will, and are in stronger markets, are likely to produce more affordable housing units.”⁹³ However, mandatory IZ laws are “increasingly subject to state preemption: as of 2017, 11 states had adopted laws that prevent localities from enacting mandatory IZ or limit their discretion in designing voluntary IZ policies.”⁹⁴

An example of a longstanding, high-achieving IZ program is the Moderately Priced Dwelling Unit (MPDU) program in suburban Montgomery County, Maryland.

b. Montgomery County, Maryland, ordinance

“In 1973, Montgomery County adopted its IZ ordinance that has since served as a model for the rest of the nation. The program has produced more units than any other IZ program in the country.”⁹⁵ That program (“Moderately Priced Dwelling Unit (MPDU)” program) is mandatory, and it produced more than 13,000 units through 2011 (approximately 9,300 for-sale units and 4,000 rental units).⁹⁶

The program offers density bonuses to prevent financial loss to the developer due to including below-market units. As of 2012, the threshold development size for requiring MPDUs was 20 or more housing units, and 12.5 to 15.0 percent of the total units of those developments were required to be MPDUs.⁹⁷ The maximum density bonus allowed was 22 percent.⁹⁸

⁹¹Wang and Balachandran, *supra* n. 86, p. 23.

⁹²*Id.* That report also mentions numerous other incentives offered by certain IH programs. *Id.*

⁹³ Thaden and Wang 2017, *supra* n. 88, p. 3 (citations omitted).

⁹⁴ Kriti Ramakrishnan, *et al.*, *Inclusionary Zoning: What Does the Research Tell Us about the Effectiveness of Local Action?*, p 1 (Urban Inst., 2019), citing Richard Schragger, *State Preemption of Local Laws: Preliminary Review of Substantive Areas* (Legal Effort to Address Preemption (LEAP), 2017).

⁹⁵ Urban Institute, *Expanding Housing Opportunities Through Inclusionary Zoning: Lessons from Two Counties* (“UI 2012”), p. 8 (Dec. 2012).

⁹⁶ UI 2012, *supra* n. 95, p. 16. The program includes detached and semidetached homes (duplexes), townhouses, garden condominiums, and high-rise condominiums and apartments. *Id.*, p. 11.

⁹⁷*Id.*

⁹⁸ *Id.* Also, 40 percent of the MPDUs must be offered for sale to the County’s Housing Opportunities Commission or other nonprofit housing agencies to sell or lease to low-income households.

Notwithstanding the contributions of the MPDU program, however, building permits and construction in the county have not kept up with the demand.⁹⁹ That shortfall was attributed in part to strong “regulatory constraints on housing supply, including limitations on the supply of land, lengthy and complicated approval processes, and low-density zoning.”¹⁰⁰

c. Challenges for IH programs

Despite their successes, IH programs have resulted in relatively modest amounts of new housing across the nation, including in gentrifying markets. A 2017 analysis found that the most widely used IH policies, local inclusionary zoning programs and statewide “fair share” laws “have produced relatively small numbers of affordable units and are therefore unlikely to substantially mitigate the effects of rising housing costs.”¹⁰¹ “More effective policies to develop and preserve affordable housing, particularly in high-opportunity neighborhoods, will require increased public and private funding and political support.”¹⁰²

Furthermore, unless the developer’s economic losses in producing below-market units are fully offset by density bonuses and/or other incentives, the developer will have a financial incentive to produce *fewer* housing units—both market-rate and below-market.¹⁰³ (Also, as mentioned (*supra* n. 90), an early mandatory IH program was ruled unconstitutional because it did not provide just compensation (such as density bonuses) to developers, in return for the requirement to build IH units.) And IH programs face the same challenges discussed above (pp. 16-19), as to long-term affordability and COVID-19-era issues.

Notwithstanding the limitations of local and state IH and affordable housing programs, however, they can be one part of the solution, and they can take advantage of federal funding sources such as LIHTC. The prospect of obtaining an inclusionary, affordable unit in new housing in their gentrifying neighborhood predictably will make residents who are at risk of displacement less inclined to oppose needed additions to the housing supply in the area.

⁹⁹ UI 2012, *supra* n. 95, p. 8.

¹⁰⁰ *Id.* (citations omitted). For example: “In 1980, the county introduced its Agricultural Reserve policy to protect more than 93,000 acres of agricultural land and open space from development. The Montgomery County Planning Department reported that by 2003 the county was close to built out capacity.” *Id.* “In addition to zoning constraints, the county also has an adequate public facilities ordinance that, through development moratoria, further constrains housing development.” *Id.* (citations omitted).

¹⁰¹ Lance Freeman and Jenny Schuetz, *Producing Affordable Housing in Rising Markets: What Works?*, 19 *Cityscape* 217 (2017). *See also, e.g.,* Ramakrishnan, *et al.*, *supra* n. 94, p. 3 (“Estimates of the number of affordable units created nationwide through IZ . . . represent the total number of units created over decades, since the earliest programs in the mid-1970s, and the number of units varies significantly across regions and jurisdictions.”)

¹⁰² *Id.*

¹⁰³ *See, e.g.,* WILLIAM A. FISCHER, *ZONING RULES! THE ECONOMICS OF LAND USE REGULATION*, pp. 280-281 (2015).

3. Approaches to permanent affordability

As summarized above (pp. 3-6), America shows no sign of reversing its ever-increasing housing affordability problems. To change that trajectory, it seems important to increase the number of permanently affordable housing units. A key to permanent affordability is to take the frequent hyper-inflation in urban land prices out of the equation.

a. Controlling land costs

For decades, the cost of residential land generally has been the most inflationary part of rising home prices.

- A study of residential home, construction and land values for 46 large U.S. metropolitan areas from 1984 to 2004 found that, by the end of that period, on average, “the value of residential land accounted for about 50 percent of the total market value of housing, up from 32 percent in 1984.”¹⁰⁴ Those land values rose substantially “over a much wider range of cities than is commonly believed.”¹⁰⁵
- More recently, between 2012 and 2017, “the value of land used for single-family housing in the United States rose almost four times faster than inflation.”¹⁰⁶ The rise in land prices was “especially sharp in the core counties of metros with over a million residents, rising 72 percent to \$360,200 per acre in 2017”¹⁰⁷
- Between October 2018 and September 2019, the median price per acre of American land increased about 22 percent, from \$4,500 to \$5,500.¹⁰⁸ That increase was “primarily due to a greater price-per-acre of residential land with the

¹⁰⁴ Morris A. Davis & Michael G. Palumbo, *The Price of Residential Land in Large U.S. Cities*, p. 1 (May 2006) (“Davis & Palumbo”), posted at: <https://www.federalreserve.gov/pubs/feds/2006/200625/200625pap.pdf>.

¹⁰⁵ *Id.*

¹⁰⁶ Alexander Hermann, *Increasing Land Prices Make Housing Less Affordable*, Harv. JCHS Blog, July 22, 2019, posted at: <https://www.jchs.harvard.edu/blog/increasing-land-prices-make-housing-less-affordable> (citing SONH 2019 (see pp. 8-10 & Fig. 8)). We have not found a direct source for residential land price changes between 2005 and 2012. However, overall home prices posted only a small increase, on net, from 2005-2007, and then those prices declined almost 22% between 2008 and the end of 2011. *S&P/Case-Shiller U.S. National Home Price Index (CSUSHPINS)*, posted at: <https://fred.stlouisfed.org/series/CSUSHPINS>.

¹⁰⁷ Hermann, *supra* n. 106. “[P]rices in the suburban counties of these large metros increased by 37 percent, rising to \$257,700 on average.” between 2012 and 2017. *Id.*

¹⁰⁸ Anthony SanFilippo, *The Value of Land is Increasing*, National Association of Realtors (February 2020), posted at: <https://homeownershipmatters.realtor/issues/the-value-of-land-is-increasing/#:~:text=According%20to%20data%20from%20the,of%20land%20increased%20by%20%241%2C000>.

demand for land to build affordable housing continuing to grow stronger and stronger.”¹⁰⁹

- Even in tumultuous 2020, according to the National Association of Realtors (NAR), residential land sales posted a strong price increase (an average of 6.8%).¹¹⁰ By contrast, commercial real estate prices fell 6% that year, according to the Green Street Commercial Price Index of appraisals of properties held by Real Estate Investment Trusts (REITs).¹¹¹
- For 2021, the biggest increases in land prices are expected once again to be for residential land (5.9%).¹¹² “Sixty-one percent of respondents reported that land zoning ordinances have become more difficult in the past five years” for housing developers.¹¹³

“[F]inding ways to slow the rise in land prices will be an important part of any effort to address the continued challenge of making housing affordable for more people.”¹¹⁴

LIHTC and inclusionary housing (IH) programs can neutralize the inflationary effects of land prices for decades, on the units created under them. However, relatively few of those units offer *permanent* affordability. Below, we discuss several other programs that can create permanently affordable housing units.

b. American public housing

One way to take land prices out of the equation is for the government to house low-income people in large, publicly-owned residential buildings, providing the needed subsidies to make them affordable to the residents. As of 2016, there were 1,067,387 such public housing units in 6,923 properties across the United States, housing a total of 2,156,625 low-income people.¹¹⁵

However, America’s public housing system has become quite controversial.¹¹⁶ Among the major criticisms:

¹⁰⁹ *Id.*.

¹¹⁰ *2020 Land Market Survey*, p. 5, REALTORS® LAND INSTITUTE (April 20, 2021). That survey was based on 314 respondents who reported a land sale in the 2020 commercial real estate quarterly surveys. *Id.*, p. 4.

¹¹¹ *Id.*

¹¹² *Id.*, p. 7.

¹¹³ *Id.*, p. 7.

¹¹⁴ Hermann, *supra* n. 106.

¹¹⁵ Benny Docter and Martha Galvez, *The Future of Public Housing Fact Sheet*, p. 1 (Urban Inst. 2019), citing HUD, *Picture of Subsidized Households*, dataset (2016), posted at: <https://www.huduser.gov/portal/datasets/assths.html>.

¹¹⁶ See, e.g., Jeff Andrews, *Affordable housing is in crisis. Is public housing the solution?*, Curbed, Jan. 13, 2020, posted at: <https://archive.curbed.com/2020/1/13/21026108/public-housing-faircloth-amendment-election-2020>.

1. It usually concentrates low-income people in areas with high poverty rates and a high proportion of minority households.¹¹⁷ The average annual income of a household living in public housing at that time was \$14,444.¹¹⁸
2. It is not cost-effective. “HUD studies have concluded that it’s cheaper to subsidize housing through [Housing Choice Vouchers (formerly Section 8 vouchers)] than it is to operate and maintain public housing units.”¹¹⁹
3. It provides less mobility and choice to tenants as to where to live (although many landlords refuse to accept vouchers).¹²⁰
4. Much of it is in disrepair. For decades, the federal government has not provided nearly enough funding to meet maintenance and repair needs.¹²¹ Most of the public housing stock is more than 45 years old.¹²²

In recent decades, there has been a gradual reduction in the number of people served by public housing.¹²³ In fact, the Faircloth Amendment prevents any net increase in the federally-supported public housing stock above the number of units permitted as of October 1, 1999.¹²⁴

Given the major challenges facing the American public housing system, we will focus on certain other approaches that are getting increased attention.

¹¹⁷ In 2016, the average poverty rate for census tracts that include public housing units was 33 percent. On average, the households in those tracts were 61 percent nonwhite. Docter and Galvez, *supra* n. 115, p. 2, citing census tract data from U.S. Census Bureau, *American Community Survey* (2016): <https://www.census.gov/programs-surveys/acs>.

¹¹⁸ Docter and Galvez, *supra* n. 115, p. 2, citing statistics posted by HUD’s, Public and Indian Housing Information Center, at https://www.hud.gov/program_offices/public_indian_housing/systems/pic/about. Some 91 percent of households that were living in public housing in 2016 had incomes below 50 percent of their area’s median income (AMI), and 72 percent had incomes below 30 percent of AMI. *Id.*

¹¹⁹ Andrews, *supra* n. 116, citing HUD, *Issue Brief: Economic Cost Analysis of Different Forms of Assisted Housing* (2000), posted at: <https://www.huduser.gov/Publications/PDF/economic.pdf>.

¹²⁰ *Id.*

¹²¹ Docter and Galvez, *supra* n. 115, p. 2. A 2010 HUD-sponsored assessment of the nation’s public housing capital needs determined that approximately \$21 billion was needed for unmet maintenance and repairs. Also, as of 2016, roughly 9 percent of all public housing units (about 100,000 units) were in 100- or 500-year floodplains, which suggests that they are vulnerable to severe weather events. *Id.*

¹²² *Id.* (a little more than half of the nation’s public housing units are in projects that finished their last construction before 1975).

¹²³ *Id.* The Center on Budget and Policy Priorities estimates a total loss of more than 200,000 public housing units since the mid-1990s, excluding Rental Assistance Demonstration conversions. *Id.*

¹²⁴ HUD, *Guidance on Complying With the Maximum Number of Units Eligible for Operating Subsidy . . . (aka the Faircloth Limit)*, posted at: <https://www.hud.gov/sites/documents/FRCLTH-LMT.PDF>.

c. Limited-equity housing programs

Under limited-equity housing programs such as community land trusts (CLTs), the land is owned by a nonprofit organization or government agency. The mercurial price of private-market residential land is taken out of the equation. Housing costs are set so as to be affordable to low- and moderate-income people.

Those who buy houses in limited-equity communities are buying only the house, not the land, so the price is lower, and they agree to sell at a price pegged to average median income.¹²⁵ Many of those programs contain rental units as well. As of 2016:

there are approximately 225 CLTs in 46 states and the District of Columbia. Of those, about 60 organizations are start-ups or have no housing units. Roughly 165 CLTs have homeownership units, totaling approximately 12,000 homes. Many CLTs also have affordable rental portfolios, estimated to include 25,000 rental units.¹²⁶

CLT homeowners and renters are relatively immune from foreclosure and eviction resulting from economic downturns. For example, at the peak of the Great Recession, foreclosure rates for subprime loans were about 28 times higher than for CLTs.¹²⁷ Also at that time, conventional loans were eight times more likely to experience foreclosure than community land trust mortgages.¹²⁸ “That’s even more impressive considering most people with [CLT] mortgages have lower incomes than other homeowners.”¹²⁹

CLTs, “along with inclusionary housing policies, can be a bulwark against gentrification as well. Research has shown they provide an outlet for affordable housing amid what are almost inevitably skyrocketing prices at transit-oriented development sites.”¹³⁰ Other

¹²⁵ See, e.g., Greg Beato, *Coming Together to Make Homes More Affordable*, New York Times, Nov. 8, 2015, p. F6.

¹²⁶ Emily Thaden and Tony Pickett, *Community Land Trusts: Combining Scale and Community Control to Advance Mixed-Income Neighborhoods*, Fig. 1, p. 3 (2019), posted at: <https://case.edu/socialwork/nimc/sites/case.edu.nimc/files/2019-10/Thaden.Pickett.%20Community%20Land%20Trusts%20Combining%20Scale%20and%20Community%20Control.%2010.24.19.pdf>.

¹²⁷ Of subprime mortgages, 15.58% were in the foreclosure process in the fourth quarter of 2009, compared to 0.56% of CLT mortgages. Emily Thaden and Greg Rosenberg, *Outperforming the Market: Delinquency and Foreclosure Rates in Community Land Trusts*, p. 4 & Figure 1 (Lincoln Inst. of Land Policy, *Land Lines*, Oct. 2010).

¹²⁸ *Id.*

¹²⁹ George W. McCarthy and Harold Simon, *Faith in land trusts*, Boston Globe, Nov. 13, 2014; posted at: <https://www.bostonglobe.com/opinion/2014/11/13/time-consider-middle-ground-housing/6bxGXAk2UfCbZMXuFFUkmO/story.html>.

¹³⁰ *Id.*

community land ownership strategies that are quite similar to CLTs are limited-equity housing cooperatives and condominiums.¹³¹

d. Social housing

“Social housing” is a prominent form of housing in Europe and much of the rest of the world. It is rental housing, and it usually is owned by government agencies or by nonprofit organizations.¹³² In some countries, however, for-profit owners may participate. They agree to limit their rents to low-income and other targeted groups, in return for government subsidies or other incentives.¹³³ Thus, fluctuations in the price of private land do not directly affect rents in social housing.

A 2015 study found that social housing made up over 20% of the overall housing stock in three of the 12 major European nations studied.¹³⁴ (The Netherlands led the way with 32%, and in Austria and Scotland the figure was 24%.)¹³⁵ That study found that in four other of the nations, social housing constituted a little under 20% of the housing stock (Denmark, Sweden, England and France).¹³⁶ The other five nations studied had less than 10% social housing (Ireland, the Czech Republic, Germany, Spain and Hungary).¹³⁷

A 2016 study found that the median, gross (pre-tax) rent¹³⁸ paid in the US during the Great Recession was 31.1%—higher than in Canada and any of the 10 Western European

¹³¹ See, e.g., John E. Davis, ed., *The community land trust reader*, p. 36 (Lincoln Inst. of Land Policy, 2010). There also are mobile home parks that are co-ops, where the land is community-owned and managed. They are called resident-owned communities (ROCs), but they generally are in non-urbanized areas. See, e.g., ROC-USA, *What Is A ROC? How Is It Different?*, posted at: <https://rocusa.org/whats-a-roc/what-is-a-roc-how-is-it-different/>.

¹³² See, e.g., Michael Carliner & Ellen Marya, *Rental Housing: An International Comparison*, pp. 4-5, JOINT CTR. FOR HOUSING STUD. OF HARV. U. (2016) (“Carliner & Marya”).

¹³³ *Id.*

¹³⁴ Kathleen Scanlon, et al., *Social housing in Europe*, 17 *European Policy Analysis*, p. 4 (2015), posted at: http://eprints.lse.ac.uk/62938/1/Fernandez_Social%20housing%20in%20Europe_2015.pdf.

¹³⁵ *Id.*, p. 3, Table 1.

¹³⁶ *Id.*, p. 3, Table 1.

¹³⁷ *Id.*, p. 3, Table 1. Most of the dozen or so post-Communist, Eastern European countries also would fall into this category, based on the authors’ observations, although those countries were not part of the study.

¹³⁸ “Gross rent,” for purposes of the study, includes “direct payments by tenants for utilities, services, repairs, taxes, and other items associated with the home.” Carliner & Marya, *supra* n. 132, p. 17, note 5.

nations in the study, except for Spain.¹³⁹ And overall economic inequality in the United States was found to be substantially greater than in any of those nations.¹⁴⁰

Also, eviction rates in the United States were substantially higher than in any other of the 37 industrialized nations in the Organization for Economic Cooperation and Development (OECD), as of 2016.¹⁴¹ In the United States, “about 6.1% of rental households faced eviction procedures in 2016.”¹⁴² By contrast:

many European countries recorded far fewer initiated eviction proceedings, ranging between 1 and 2% in Belgium (Flanders and Wallonia), France, Greece and England. . . . At the other end of the spectrum, rates of initiated eviction proceedings were below 1% in Finland, Poland, Spain and Sweden.¹⁴³

e. Challenges

The daunting challenges of public housing in the United States have been mentioned above. As to CLTs, scaling up to meet the huge demand for permanent affordability, free of volatile land costs, will be a major challenge. Less than 40,000 CLT housing units apparently had been produced as of 2016.

A great deal of new, dedicated financial resources will be needed, from a combination of public and private sources, to scale up CLTs.¹⁴⁴ Also, the limited number of technical experts in that field remains a significant constraint. Those resources must be sufficient to ensure that nonprofit stewards are financially viable, fiscally responsible, and responsive to residents’ needs. Programs such as CLTs depend on nonprofit managers working with

¹³⁹ *Id.*, p. 17 & Figure 6. (Because only 2% of Spain’s housing stock was social housing, and because of its abnormally high home-ownership rate (85%) Spain was an outlier in the study. The median gross rent for the UK and Belgium, however, were nearly as high as for the US.)

¹⁴⁰ *See, e.g., id.*, pp. 7, 12-13, Table 1 & Fig. 4 & 5 (for example median, gross income of U.S., households in the lowest income quintile was only 24.5% of the gross income of the households in the 50th percentile); and disposable income for the former group was only 26.8% of that for the latter group).

¹⁴¹ Organisation for Economic Cooperation and Development (OECD), *HC3.3.1: Evictions*, p. 2 (Updated Sept. 10, 2020). The OECD consists of 37 industrialized nations, most of them in Europe, but including nations from North, Central and South America, Asia, the Southern Pacific, and the Middle East. *See, e.g.,* <https://www.oecd.org/about/>.

¹⁴² *Id.*

¹⁴³ *Id.* In addition: “The United States recorded the highest rate of eviction orders across the OECD, with 2.3% of all tenant households receiving such notices in 2016. . . . [W]ith the exception of Greece and Italy, with a rate of 1.2% and 1.4% respectively, no European country had an eviction order rate above 1%” *Id.*

¹⁴⁴ *See, e.g.,* Gabriella Velasco, *How Community Land Trusts Can Advance Racial and Economic Justice*, Urban Inst. (February 26, 2020) (interview of Tony Pickett, chief executive officer of the Grounded Solutions Network), posted at: <https://housingmatters.urban.org/articles/how-community-land-trusts-can-advance-racial-and-economic-justice>.

residents to provide high-quality property management, promote sound maintenance and capital investment by residents, and maintain affordability.¹⁴⁵

Among the challenges of adopting a social housing approach in the United States is the cost. European nations tend to spend a much greater portion of their gross domestic product (GDP) on housing assistance than the United States. “The cost of the voucher program in the US represented 0.1 percent of GDP in 2006, while the UK program absorbed 1.1 percent of GDP and the program in France cost 0.9 percent of GDP.”¹⁴⁶ Europeans also tend to pay a much higher share of their incomes and wealth in taxes.

Programs for permanent affordability also face the same headwinds mentioned above (pp. 18-19), due to the COVID-19 emergency.

C. Community preferences (CPs)

In order to prevent or minimize displacement of low- and moderate-income residents of a gentrifying, urban neighborhood, it seems crucial to give those residents who otherwise would be displaced the first opportunities to rent or purchase new, affordable units there. Those “community preferences” (CPs) also may be crucial to minimizing opposition to redevelopment in those neighborhoods.

A CP policy was approved by the U.S. Department of Housing and Urban Development (HUD) for San Francisco in 2016.¹⁴⁷ Numerous other major cities have CP programs. New York City has had such a program since the 1980’s.¹⁴⁸ Austin, Atlanta, Milwaukee, Boston, and other city governments are creating and implementing anti-displacement plans and programs.¹⁴⁹

Despite their importance, however, we believe that community preferences must be tied to an overall strategy well-calculated to affirmatively further fair housing, as well as housing stabilization and affordability. A CP policy cannot be merely a protectionist measure for current residents.

¹⁴⁵ See, e.g., James M. Libby, Jr., *The Challenge of Perpetuity*, in John E. Davis, ed., *The Community Land Trust Reader*, pp. 552-561 (Lincoln Inst. of Land Policy, 2010).

¹⁴⁶ Carliner & Marya, *supra* n. 132. p. 26, citing Peter A. Kemp, *Housing Allowances in Comparative Perspective* (Bristol: The Policy Press, 2007).

¹⁴⁷ See, e.g., Ericka Cruz Guevarra & Matt Beagle, *Federal Officials Approve Preferences at New Senior Housing Complex in S.F.*, KQED News, Sept. 22, 2016 (KQED, 9/22/16), posted at: <https://www.kqed.org/news/11098610/federal-officials-approve-preferences-at-new-senior-housing-complex-in-s-f>.

¹⁴⁸ *COMMENT: Community Preference in New York City*, 47 Seton Hall L. Rev. 881, 884 (2017).

¹⁴⁹ Edward G. Goetz, *Criticisms About Community Preference Policies Are Misguided*, ShelterForce, November 14, 2019.

1. San Francisco program

San Francisco's CP program contains several preferences for City-sponsored affordable housing generally, and others for specific affordable housing projects.¹⁵⁰ For City-sponsored affordable housing generally, the order of priority is:

1. *Certificate of Preference (COP)* program, for former San Francisco residents displaced in the 1960s and 70s, during the San Francisco Redevelopment Agency's federally-funded urban renewal program. The COP program applies to units in portions of the Western Addition and Hunters Point areas.
2. *Displaced Tenant Housing Preference Program (DTHP)*, which applies to properties with 5 or more units in a Mayor's Office housing program. That preference may be used by (a) tenants evicted by Ellis Act [rights of owner in California to convert use of building] or owner move-in, and (b) tenants whose apartment was extensively damaged by fire. A total of "20% of available units can be set aside for applicants with DTHP."
3. *Neighborhood Resident Housing Preference (NRHP)*, for San Francisco residents who currently live in the same Supervisor district as, or within a half-mile from, a new property funded by MOHCD, with 5 or more housing units. A total of "40% of available units can be set aside for applicants with NRHP."
4. *Live or Work in San Francisco*, for persons not covered by another preference.¹⁵¹

For certain affordable housing projects, there are two other preferences:

1. *Former resident of the property* who was displaced due to its renovation.
2. *Rent Burdened / Assisted Housing Preference*, for some properties in the Bayview area. To be eligible: a tenant currently must be: (a) paying more than 50% of income toward housing costs, or (b) living in public housing or project-based Section 8 housing within San Francisco. All available units in those properties can be set aside for persons with those preferences.¹⁵²

2. Debate over CP programs, generally

CP programs have been subject to some controversy. Opponents argue that giving preferences to current residents of a neighborhood when new affordable housing units become available tends to perpetuate residential segregation, in violation of the federal

¹⁵⁰ *Lottery Preference Programs*, Mayor's Office of Housing and Community Development, City & County of San Francisco, posted at: <https://sfmohcd.org/lottery-preference-programs#NRHP> (accessed February 22, 2021).

¹⁵¹ *Id.*

¹⁵² *Id.*

Fair Housing Act (FHA).¹⁵³ New York City’s CP policy is the subject of a longstanding, high-profile federal lawsuit on that subject.¹⁵⁴

San Francisco’s initial CP program was disapproved by HUD on similar grounds, before the plan was amended and gained HUD’s approval.¹⁵⁵ Initially, the city’s program would have given priority to low-income and minority residents of the particular neighborhood in which the new units were built, without regard to displacement risks.¹⁵⁶

HUD said it could not support such a neighborhood preference, because such a policy “could limit equal access to housing and perpetuate segregation.”¹⁵⁷ The city then modified its provisions to prioritize low-income residents who live in city census tracts where there is a *high risk of displacement*.¹⁵⁸ Then, HUD approved the policy.¹⁵⁹

Numerous studies show serious, adverse consequences to many Americans who are displaced through eviction.¹⁶⁰ In a high percentage of neighborhoods where there is an elevated risk of displacement, minority group members constitute a disproportionate share of the population.¹⁶¹ Protecting residents of those neighborhoods seemingly will *avoid* adverse, disparate impacts on minority group members, rather than create them, in the usual situation.

¹⁵³ 42 U.S.C. §§ 3601-3619 (Apr. 11, 1968, as amended).

¹⁵⁴ *Noel, et al. v. City of New York*, No. 1:15-cv-05236-LTS-KHP (USDC, SDNY) (filed July 7, 2015).

¹⁵⁵ Guevarra & Beagle, *supra* n. 147. *See generally, e.g.,* Zachary Freund, *Note: Perpetuating Segregation or Turning Discrimination on its Head? Affordable Housing Residency Preferences as Antidisplacement Measures*, 118 Colum. L. Rev. 833, 849-852 (2018).

¹⁵⁶ *Id.*

¹⁵⁷ *See, e.g.,* Emily Badger, *Why affordable housing in a black neighborhood may not help black residents*, Washington Post, August 19, 2016, posted at: <https://www.washingtonpost.com/news/wonk/wp/2016/08/19/why-affordable-housing-in-a-black-neighborhood-may-not-help-black-residents/>.

¹⁵⁸ Guevarra & Beagle, *supra* n. 147. *See generally, e.g.,* Freund, *supra* n. 155 at 849-852.

¹⁵⁹ *Id.*

¹⁶⁰ *See, e.g.,* Matthew Desmond and Rachel Tolbert Kimbro, *Eviction’s Fallout: Housing, Hardship, and Health*, 94 Social Forces (1):295–324 (2015). Gracie Himmelstein and Matthew Desmond, *Association of Eviction With Adverse Birth Outcomes Among Women in Georgia, 2000 to 2016*, JAMA Pediatr. (2021), posted at: <https://jamanetwork.com/journals/jamapediatrics/fullarticle/2776776>; Alexander C. Tsai, *Home Foreclosure, Health, and Mental Health: A Systematic Review of Individual, Aggregate, and Contextual Associations*, PLoS ONE 10(4): e0123182. doi:10.1371/journal (2015).

¹⁶¹ *See, e.g.,* Emily Badger, *Why affordable housing in a black neighborhood may not help black residents*, Washington Post, August 19, 2016 (discussing long-term, low-income residents in urban neighborhoods that are “growing whiter, more affluent and more expensive,” a pattern increasingly apparent in coastal cities like Los Angeles, San Francisco, New York and Washington); posted at: <https://www.washingtonpost.com/news/wonk/wp/2016/08/19/why-affordable-housing-in-a-black-neighborhood-may-not-help-black-residents/>.

Failure to protect current residents from displacement also predictably will aggravate neighborhood opposition to allowing new development in the neighborhood, including mixed-income housing. As discussed above, local opposition is the chief reason for the steadily worsening shortage of housing supply, compared to demand, in America—including in most of its cities.

So, it appears that the absence of strong anti-displacement policies in gentrifying, urban neighborhoods likely will perpetuate housing segregation, compared to the presence of strong anti-displacement measures, such as a reasonable CP policy. However, to be acceptable in our view, a CP policy must be an effective part of a strategy that is reasonably calculated and implemented to achieve—to the maximum extent possible, and without unnecessary delay:

- adequate, stable housing opportunities for all residents of the jurisdiction at a cost affordable to them, and
- non-discrimination in housing throughout the jurisdiction.

In our view, a CP policy cannot be merely a protectionist measure for current residents.¹⁶²

3. Furman Center CP debate (2015)

An example of the debate among fair housing experts about the merits and legality of CP programs is the discussion conducted by the Furman Center in 2015, and posted on its website.¹⁶³ One of the participants—Prof. Robert G. Schwemm, author of the nation’s leading treatise on housing discrimination law—pointed out that: “Local preferences imposed by predominantly white communities in racially diverse areas may reflect

¹⁶² New York City’s aggressive plan to increase its supply of below-market-rate housing (the “Housing New York” plan), which includes strong CPs, has been criticized for having disparate impacts on minority group members. See, e.g., Pablo E. Zevallos, “*A Statement About Who Deserves to Live Here*”: *The Fair Housing Act Implications of Housing New York*, 52 Colum. J. L. & Soc. Probs. 599 (2019).

Mr. Zevallos specifically criticized the eligibility of relatively high-income people for the plan’s benefits, and the predominantly small unit sizes the plan calls for. Both of those policies skew the plan’s benefits against Black and Latino city residents, in Mr. Zevallos’ view. And because half of the new, affordable units are reserved for applicants from that general neighborhood (“community district”), those CPs compound the disparate impacts.

A housing plan that has an unjustified, disparate impact on minority group members protected by the Fair Housing Act violates that statute. *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519 (2015). However, a CP policy that does not create or compound such disparate impacts seemingly would not offend the statute. As discussed, we believe that a properly limited CP policy can be consistent with the Fair Housing Act and part of the solution in gentrifying, urban neighborhoods generally.

¹⁶³ *Discussion 17: Community Preferences and Fair Housing*, Furman Center, November 2015, posted at: <https://furmancenter.org/research/iri/discussions/community-preferences-and-fair-housing>. The Furman Center, a joint center of New York University’s School of Law and the Robert F. Wagner Graduate School of Public Service, conducts research on housing, neighborhoods, and urban policy.

intentional discrimination.”¹⁶⁴ Even if they do not, he noted, such preferences are subject to FHA disparate-impact claims.

The disparate impact doctrine was endorsed by U.S. Supreme Court in 2015, in its *Inclusive Communities Project* decision.¹⁶⁵ *Inclusive Communities* holds that: (1) a policy that has a disparate impact (causes greater adverse effects) on the protected class than on others violates the FHA, unless (2) that policy is necessary to achieve a valid purpose, rather than an “artificial, arbitrary, and unnecessary barrier,” and (3) that purpose could not be achieved by an alternative policy that has a less discriminatory effect.¹⁶⁶

As to step one of the *Inclusive Communities* analysis, Prof. Schwemm quoted case law holding that “where a community has a smaller proportion of minority residents than does the larger geographical area from which it draws applicants, a selection process that favors its residents cannot but work a disparate impact on minorities.”¹⁶⁷ However, here we are focusing on a different situation—gentrifying urban communities with a *higher* proportion of minority residents protected under the FHA than in the larger geographical area from which it draws applicants. In EHI’s view, the principle Prof. Schwemm quoted does not govern the usual situation in low-income urban neighborhoods that are gentrifying.

Sam Tepperman-Gelfant, a senior staff attorney at Public Advocates Inc., a nonprofit law firm and advocacy organization, argued that a CP policy “could advance fair housing and community stabilization goals in gentrifying neighborhoods,” whereas “a similar policy would perpetuate segregation and inequality in areas that are already wealthy and predominantly white. Our fair housing laws are flexible enough to embrace this reality”¹⁶⁸ In his view:

Gentrification and displacement is the new frontier of racial exclusion, and it is driving re-segregation of cities and regions. As opportunity increases in urban neighborhoods, people of color are generally forced out to low-opportunity suburbs and exurbs. For example, between 1990 and 2010, San Francisco and Oakland lost 35 percent of their African American

¹⁶⁴ Robert G. Schwemm *The Community Preference Policy: An Unnecessary Barrier to Minorities’ Housing Rights*. Furman Center Discussion, November 2015, posted at: <https://furmancenter.org/research/iri/essay/the-community-preference-policy-an-unnecessary-barrier-to-minorities-housin>; citing *United States v. Housing Auth. of Chickasaw*, 504 F. Supp. 716 (S.D. Ala. 1980).

¹⁶⁵ See, e.g. *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519 (2015) (“*ICP*”).

¹⁶⁶ *Id.*, 576 U.S. at 539-543.

¹⁶⁷ Schwemm, *supra* note 164, quoting *Langlois v. Abington Housing Authority*, 234 F. Supp.2d 33, 62 (D. Mass. 2002).

¹⁶⁸ Sam Tepperman-Gelfant, *Local Preferences Require Local Analysis*, Furman Center Discussion, November 2015, posted at: <https://furmancenter.org/research/iri/essay/local-preferences-require-local-analysis>.

residents – 84,000 people – while the overall population grew by 9 percent; and in Silicon Valley, African Americans declined by 46 percent while the region grew by 16 percent.¹⁶⁹

Mr. Tepperman-Gelfant stated that displacement of that type is happening in cities across America.¹⁷⁰ EHI shares his view that a CP policy need not have a disparate, adverse impact on minority group members in gentrifying, urban neighborhoods that already have a large minority population.

Errol Louis, a New York City-based political commentator for CNN, argued in opposition to CPs that a “truly fair housing policy is one that allows all people access to all of our neighborhoods.”¹⁷¹ In EHI’s view, a sensible CP policy actually *promotes* that goal by reducing local opposition to permitting needed, new housing in each neighborhood.

As to step two in the *Inclusive Communities* analysis, CP policies that attempt to prevent unnecessary evictions, foreclosures and resulting displacement of current, low- and moderate-income residents in gentrifying areas serve important public purposes. Housing is a basic human need,¹⁷² and evictions often have serious, adverse consequences for low-income people who suffer them.¹⁷³

In our view, invalidating sensible CP programs in gentrifying, urban neighborhoods where there is a high risk of displacement would tend to stymie progress toward a sufficient supply of housing available to minority group members in integrated neighborhoods. Arguably, a CP policy that protects residents of a gentrifying, urban neighborhood from displacement can be wise policy—the opposite of the “artificial, arbitrary, and unnecessary barriers” to minorities’ housing rights that the FHA condemns.

As to step three in the *Inclusive Communities* analysis, Prof. Schwemm suggested alternative policies that New York City might adopt to foster neighborhood stability, with less tendency to favor current residents. Examples include:

¹⁶⁹ *Id.*

¹⁷⁰ *See, e.g., id.* “While the influx of white professionals into neighborhoods of color might appear to be creating integrated neighborhoods, this is likely to be true only for a short period of time before the process culminates in wholesale displacement and re-segregation. In such cases, local housing preferences can help anchor communities of color which are at risk and promote stable integration over the long term.” *Id.*

¹⁷¹ Errol Louis, *Community Preferences Discriminate*, Furman Center Discussion, Nov. 2015, posted at: <https://furmancenter.org/research/iri/essay/community-preferences-discriminate>.

¹⁷² “Housing is a necessary of life.” *Block v. Hirsh*, 256 U.S. 135, 156 (1921) (per Holmes, J.). The Fair Housing Act was not intended to deprive any American of proper housing.

¹⁷³ *See* sources discussed *supra*, nn. 160-161.

- minimizing the portion of covered residents to 25% (New York City’s current CP policy sets aside 50% of affordable housing units it finances for income-eligible residents of the local community district),¹⁷⁴
- applying the policy differently in neighborhoods that have other stability-enhancing factors in place,
- replacing a total preference for current residents by giving them a “plus” and allowing outsiders to compete with other “pluses” that demonstrate their commitment to the target neighborhood, and
- employing more effective strategies for integrating neighborhoods, and using model programs such as that in Oak Park, Illinois, as guides.

If a set-aside of 25% of new affordable units is sufficient (by itself, or in conjunction with other policies, such as those discussed by Prof. Schwemm) to resolve the displacement issues in a city, that should solve the problem. However, failure to provide sufficient anti-displacement set-asides to calm residents’ understandable concerns seemingly will promote the *status quo* in city housing. That would mean a continued, high degree of *de facto* segregation of minority group members in housing, as well as continued deterioration of the housing supply affordable to low- and moderate-income minority group members.

D. Other approaches

Among the other strategies that may be key to preventing displacement, and fears of it that increase resistance to new development in gentrifying neighborhoods, are:

- Enabling residents at risk of displacement to get legal advice as to their rights and options, from a well-qualified attorney; and
- Holding building owners and their agents fully accountable—including financially accountable—to tenants for violations of their housing rights.

The goal is to provide enough anti-displacement measures to meet the residents’ needs as their neighborhood redevelops, and to create trust among the residents that their needs will be met.

CONCLUSIONS

Increasing development restrictions in the nation’s cities are thwarting production of housing that is needed to provide healthful, affordable homes for low- and moderate-income city residents, and to promote integrated neighborhoods. Those restrictions often flow from concerns of city dwellers about adverse effects on them of new development nearby. Low- and moderate-income city residents have particular concerns about being displaced due to gentrification related to new development.

¹⁷⁴ See, e.g. Rafael Cestero, *An Inclusionary Tool Created by Low-Income Communities for Low-Income Communities*, Furman Center Discussion, Nov. 2015, posted at: <https://furmancenter.org/research/iri/essay/an-inclusionary-tool-created-by-low-income-communities-for-low-income-commu>. Mr. Cestero, President and CEO of the Community Preservation Corporation (CPC), participated in the Furman Center debate.

More than 10 percent of residents in central cities live in a neighborhood that has experienced displacement. Although actual displacement seems to be far more common in certain economically thriving cities on the east coast and in California, it is a concern in many regions of the nation. Combined with fear and mistrust on the part of minority group members about White-dominated development processes, displacement concerns contribute to tremendous neighborhood resistance to the needed increases in urban housing.

We have analyzed several anti-displacement policies that can help overcome resistance by city dwellers to permitting needed, new housing in their neighborhoods. Those policies are: (1) rent stabilization; (2) programs that provide new housing units there that are affordable to low- and moderate-income residents; and (3) “community preference” (CP) policies.

We conclude that each of those policies can be quite helpful to low- and moderate-income people who are at risk of displacement (or who already have been displaced) from their gentrifying, urban neighborhoods. We also conclude that each of those policies can be quite helpful to stepping up production of needed, new housing in those neighborhoods.

- *Moderate rent stabilization measures* (a/k/a “anti-gouging” laws, or “second-generation” rent controls) can help prevent the neighborhood’s gains due to gentrification becoming losses for the current renters. Those measures also can prevent needed, new housing being derailed by opposition from residents.

The evidence to date indicates that well-designed rent stabilization measures have not produced perceptible, adverse economic effects. However, rent stabilization measures are not authorized in most states. That situation ought to change, in order to protect renters and promote the necessary, urban housing growth.

- *Housing construction and preservation programs* to increase the amount of housing affordable to those at risk of displacement in their neighborhoods should be pursued vigorously by city governments. Examples of such programs are the federal Low-Income Housing Tax Credit (LIHTC) statute, state and local inclusionary housing (IH) programs, and community land trusts (CLTs). Programs such as those protect low- and moderate-income tenants and homeowners from hyper-inflation in private sector housing costs, such as the chronic, rapid increases in the cost of urban land.
- “*Community preference*” (CP) policies can give low- and moderate-income residents who otherwise would be displaced the first opportunity to rent or purchase units they can afford in new housing, as close as feasible to where they have been living. A CP policy should not be merely a protectionist measure for current residents. It should be part of an overall strategy that is reasonably calculated, and properly implemented, to achieve—to the maximum extent possible, and without unnecessary delay—

- adequate, stable housing opportunities for all residents of the jurisdiction at a cost affordable to them, and
- non-discrimination in housing throughout the jurisdiction.

Strong anti-displacement policies can avoid the serious, adverse consequences that displacement has for some low- and moderate-income people. Those policies also can relieve debilitating anxieties about the prospect of displacement. We think those policies are the right things to do for people in those circumstances.

Strong anti-displacement measures also can reduce city residents' resistance to needed, new housing in their gentrifying neighborhoods. In our view, those policies can promote a healthier, more stable, affordable, and integrated housing market.