

# AFFORDABLE HOUSING, LAND TENURE, AND URBAN POLICY: THE MATRIX REVEALED

*J. Peter Byrne and Michael Diamond\**

## I. INTRODUCTION

Housing provides a necessary foundation for physical and social life. It provides shelter, security, recreation, and wealth. It plays a central role in the health and well-being of its occupants and also supports their employment and educational endeavors. Among the poor, there is a severe shortage of adequate, affordable housing. Because housing is central to the social and economic needs of all people, it is not surprising that national policy has long proclaimed the goal of a “decent home and a suitable living environment for every American family.”<sup>1</sup> Indeed, although in recent decades government spending for relief of poverty has been curtailed, in part because of doubt about the efficacy of transfer programs, spending in support of housing subsidies for low-income persons has persisted.<sup>2</sup> Even though federal funding for affordable housing has shrunk, many state and local governments seem firmly committed to increasing the availability of affordable housing through a variety of innovative subsidy programs, many of which involve partnerships with private non-profit and for-profit entities.<sup>3</sup>

---

\* J. Peter Byrne is Professor, Georgetown University Law Center. Michael Diamond is Senior Academic and Policy Fellow and Associate Director of the Harrison Institute for Public Law, Georgetown University Law Center. We wish to thank Jonathan Flynn and Sachin Gupta for excellent research support. Many of the anecdotes in this Article arose from the representation by the Harrison Institute of low-income residents in transactions purchasing their buildings, using many of the financing devices discussed.

1. Housing Act of 1949, Pub. L. No. 81-171, 63 Stat. 413 (codified at 42 U.S.C.A. § 1441 (West 2007)).

2. See DEBORAH LUCAS ET AL., FEDERAL SUBSIDIES AND THE HOUSING GSES 23 (John Skeen, Congressional Budget Office 2001); see also Kathleen A. Kost & Frank W. Munger, *Fooling All of the People Some of the Time: 1990's Welfare Reform and the Exploitation of American Values*, 4 VA. J. SOC. POL'Y & L. 3, 32 (1996) (suggesting that welfare reform of the 1990s, particularly under the Clinton administration, concentrated on reduced spending).

3. See Jennifer Cohoon McStotts, Note, *Dwelling Together: Using Cooperative Housing to Abate the Affordable Housing Shortage in Canada and the United States*, 32 GA. J. INT'L & COMP. L. 131, 135 (2004) (recounting that federal funding for existing affordable housing programs was withdrawn in the 1980s and 1990s).

Even when using federal money distributed through block grants,<sup>4</sup> state and local programs generally permit a wider range of approaches to housing without as much bureaucratic complexity as federal programs.<sup>5</sup> These varied programs persist alongside continuing federal programs, in particular the traditional public housing program, Section 8 vouchers, and housing built with the Low-Income Housing Tax Credit.<sup>6</sup> Thus, an unprecedented array of approaches to subsidized housing exists today in practice. An observer may be excited by the creativity shown by affordable housing developers but confused about the goals they may be pursuing. The variety of means employed in different housing programs calls for clarification of the many social goals subsidized housing may achieve.

This Article describes the policies advanced by housing programs and shows where tension between the policies and programs exists. For example, traditional public housing has at times provided very poor people with decent, affordable shelter, but often results in concentrating the misery and hopelessness of poverty in large, segregated projects that are toxic to neighboring property values and, in many cases, to the residents of public housing.<sup>7</sup> Similarly, some contemporary programs use subsidies to sell homes to low-income people at below market prices. This approach has many advantages, including the possibility of building wealth for the recipients. Such wealth creation does not preserve the affordability of the housing for future residents, however, as the housing may subsequently be sold at its market price.<sup>8</sup>

This Article attempts to organize and clarify the relationships among various goals of subsidized housing policy and the elements

---

4. Community development block grants are federal funds distributed to states and qualifying local jurisdictions with relatively few strings for use primarily in state and local programs to assist the poor. See U.S. Dep't of Hous. and Urban Dev., Community Development Block Grant Program-CDBG, <http://www.hud.gov/offices/cpd/communitydevelopment/programs/> (last visited Apr. 2, 2007).

5. See Paulette J. Williams, *The Continuing Crisis in Affordable Housing: Systemic Issues Requiring Systemic Solutions*, 31 FORDHAM URB. L.J. 413, 456 (2004).

6. See *infra* Part II.H for an explanation of these programs.

7. See Michael H. Schill, *Distressed Public Housing: Where Do We Go From Here?*, 60 U. CHI. L. REV. 497, 507-08 (1993) [hereinafter Schill, *Where Do We Go From Here?*] (stating that demographic changes and policies have resulted in the concentration of poverty in public housing).

8. See Deborah Kenn, *Paradise Unfound: The American Dream of Housing Justice for All*, 5 B.U. PUB. INT. L.J. 69, 91-92 (1995) [hereinafter Kenn, *Paradise Unfound*] (suggesting sale of subsidized housing at market prices may provide equity for the owner but will remove the housing from low-income housing stock).

2007] *AFFORDABLE HOUSING AND LAND TENURE* 529

of programs adopted to meet them. Our purpose is primarily explanatory, even taxonomic. The profusion of housing subsidy programs can be better understood and managed if the variety of policy objectives is admitted and the ability of different programs to further those policies assessed. Frank recognition of the variety of goals pursued through housing policy and of the tensions among them also may facilitate further policy innovation, a topic we return to at the end of this Article. In general, we favor housing programs that offer residents some economic stake and real management responsibilities in their dwellings, which should be located in economically diverse neighborhoods. Program design for any project should reflect local needs and opportunities of the program's sponsors and residents, as well as local market and political conditions.<sup>9</sup> Indeed, tradeoffs among different goals and program features should be directly confronted.

As part of this introduction, we address why public expenditures should be devoted to subsidized housing for poor persons rather than simple wealth transfers. Although this subject has been addressed before,<sup>10</sup> our extended discussion helps one to appreciate the range of policies different projects may pursue. Subsequently, we elaborate on certain policies and explore how they interact with each other.

First, housing is a basic human need. Physically, we need shelter from the elements and from dangers, and a place to perform basic human functions.<sup>11</sup> Socially, the home is the center of intimate relations and family life. None of these assertions need to be belabored. Like food, housing is so essential that both charitable entities and governments long have felt that every person should have it without regard to ability to purchase it in the market.

---

9. A principal conclusion of the large Brookings Institution study is that "the best strategies are those that match local conditions (political realities) and respond to community input and expectations." BRUCE KATZ ET AL., *THE BROOKINGS INST., RETHINKING LOCAL AFFORDABLE HOUSING STRATEGIES: LESSONS FROM 70 YEARS OF POLICY AND PRACTICE* 12 (2003).

10. See, e.g., Quentin Palfrey, *Federal Housing Subsidies*, 37 *HARV. J. ON LEGIS.* 567, 574-75 (2000) (acknowledging the preference for demand-oriented subsidies); Michael H. Schill, *Privatizing Federal Low Income Housing Assistance: The Case of Public Housing*, 75 *CORNELL L. REV.* 878, 891-92 (1990) [hereinafter Schill, *Privatizing Federal Low Income Housing Assistance*].

11. Even Thoreau, who famously investigated what minimum possessions were required for a decent life, grudgingly admitted housing as a necessity. See HENRY DAVID THOREAU, *WALDEN* (1854), *reprinted in THE PORTABLE THOREAU* 283 (Carl Bode ed., Penguin Books 1982) (1962) ("Man wanted a home, a place of warmth, or comfort, first of physical warmth, then the warmth of the affections.").

Whether or not it is useful to declare a right to housing,<sup>12</sup> it is easier to argue that the community should assist with housing than to simply provide a minimum income.

Second, paternalism favors housing subsidy. The community may not trust the recipient to use public money for essentials, so it provides essential housing instead. This may preserve political support among taxpayers. It also benefits the recipient's dependents, who share the housing; indeed, providers cannot assist the recipient's children without assisting the recipient. Decent housing provides a foundation for improvement in other aspects of the recipient's life. Affordable housing allows beneficiaries to preserve money for other needs. It makes attainment of employment or education more likely, and may improve physical and mental health. Moreover, housing can be a durable asset that sustains the recipient over time. Thus, housing is a necessary, if not sufficient, element for escaping poverty.<sup>13</sup>

Third, homelessness or inadequate housing imposes negative externalities on others. Public health officials long have campaigned against slum housing, viewing it as a breeding ground for disease and crime.<sup>14</sup> In no small part, this effort has been directed at protecting the wider community against harms emanating from substandard or deteriorated housing. Thus programs that attack inadequate housing may have benefits for those who fund them.<sup>15</sup>

Fourth, it is widely accepted that the market will not provide housing that meets community standards.<sup>16</sup> As we discuss in greater detail below, housing codes and land use regulatory measures raise the costs of even the most basic new housing to levels above what poor people can pay. More generally, the high fixed, upfront costs of any new housing encourage developers to seek higher returns by marketing to the more affluent. Even older

---

12. The affirmative case is made in *A RIGHT TO HOUSING: FOUNDATION FOR A NEW SOCIAL AGENDA* (Rachel Bratt ed., Temple Univ. Press 2006). The classic article is Frank I. Michelman, *The Advent of a Right to Housing: A Current Appraisal*, 5 *HARV. C.R.-C.L. L. REV.* 207 (1970).

13. This is related to the larger point that U.S. poverty often involves more than the absence of money. This need not always be the case. Mohammad Younas, winner of the Nobel Peace Prize, said of the Bangladeshi women to whom he lent money, "[t]heir poverty was not a personal problem . . . but a structural one: lack of capital." Alan Jolis, *The Good Banker*, *INDEP.* (London), May 5, 1996, at 15.

14. See, e.g., Colin Gordon, *Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight*, 31 *FORDHAM URB. L.J.* 305, 308 (2004).

15. See discussion *infra* Part II.D (discussing the spillover of positive externalities).

16. See, e.g., Schill, *Privatizing Federal Low Income Housing Assistance*, *supra* note 10, at 891.

2007] *AFFORDABLE HOUSING AND LAND TENURE* 531

housing that might “trickle down” to the poor must meet basic standards and can be renovated profitably in strong markets for resale to the affluent. While some of these regulations may be improvident or even exclusionary, most still reflect the values implicated in the first three points above.

For the foregoing reasons, there is broad consensus that housing for the poor, at least in urban areas,<sup>17</sup> should be addressed through subsidy rather than through deregulation, a consensus that has not formed around other important commodities. Housing subsidies, therefore, will remain a cornerstone of approaches to poverty and to urban planning. This Article conceptualizes the purposes that housing subsidies pursue in light of the general goals of effectively assisting recipients and promoting urban vitality. In contemporary practice, these goals usually are joined. Nonetheless, tensions may appear among the purposes of any particular programs. Indeed, the limits of program design, local needs, institutional priorities, and resources frequently require program designers to choose among purposes. The Article seeks to manifest these tensions for the purpose of enhancing debate about housing programs. One of the conclusions we reach is that it is impossible to assess the cost-effectiveness of a housing program design without placing values on the range of benefits it may accomplish.

We proceed by detailing eight possible objectives of subsidized housing and consider how different housing programs may or may not accomplish these objectives. The central portion of the Article is divided into sections based on the eight objectives: 1) decent shelter; 2) wealth creation; 3) social integration; 4) urban vitality; 5) civic engagement; 6) training; 7) institution building; and 8) efficient use of public funds. At the end we provide general reflections on these purposes. We conclude that developers of specific projects should think carefully about the priority of goals they hope to accomplish and adapt their programs to meet those goals, recognizing that they may have to sacrifice other beneficial competing goals in the process.

---

17. In rural areas, lower land costs and manufactured housing may meet the housing needs of many low-income people if development regulations do not preclude it.

## II. PURPOSES AND PROGRAMS

### A. Decent Shelter

The chief goal of government housing policy towards the poor has been the provision of decent shelter at affordable prices.<sup>18</sup> At least since the large scale industrialization of cities and the influx of immigrants after the Civil War, reformers have sought to ameliorate the harsh physical conditions under which the urban poor lived.<sup>19</sup> Inadequate light, plumbing, and heat, unsafe wiring, and poor ventilation presented urgent issues of public health. New York enacted successive tenement laws, regulating construction design and basic utilities, which were emulated by other cities and states.<sup>20</sup> As late as 1968, the Kerner Report identified overcrowded and substandard housing to be a major cause of urban civil disorders and urged a “massive” program to produce more decent affordable housing.<sup>21</sup> Modern housing codes, which mandate minimum standards for health and safety for all private dwellings, have become ubiquitous, due in part to federal encouragement offered by the Housing Act of 1954.<sup>22</sup>

The federal government began to fund the construction of publicly-owned and managed housing for low-income persons in the 1930s.<sup>23</sup> In his second inaugural address, President Roosevelt

---

18. See Harry J. Wexler, *HOPE VI: Market Means/Public Ends*, 10 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 195, 199 (2001) (specifically observing that the first phase of the public housing movement during the Great Depression was embodied by the desire to provide struggling workers with temporary shelter as they attempted to reestablish themselves financially and socially).

19. See PETER HALL, *CITIES OF TOMORROW* 13-46 (1990).

20. See RICHARD PLUNZ, *A HISTORY OF HOUSING IN NEW YORK CITY* 21-49 (Columbia Univ. Press 1990). As early as 1856, the New York State Legislature established a formal commission to study the problem of unhealthy, substandard housing. *Id.* at 21. A decade later, a comprehensive law setting standards for building construction was passed, followed in 1867 by the first Tenement Housing Act. *Id.* at 22. The Tenement Housing Act Laws 1901, ch. 334 § 112 (1901) was subsequently amended and expanded upon in 1879, 1901, and again in 1919. *Id.* at 27, 85, 123.

21. COMM'N ON CIVIL DISORDERS, *REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS* 467-83 (1968) [hereinafter *KERNER COMM'N REPORT*]. The absence of modern plumbing was a major criterion for housing being rated substandard. *Id.* at 467 n.33; see also Wexler, *supra* note 18, at 199-200 (discussing the historical and social context in which public housing decisions of the 1960s were made).

22. See generally ROBERT ELLICKSON & VICKI BEEN, *LAND USE CONTROLS* 468-69 (3d ed. 2005).

23. Under legislation enacted as part of the New Deal, the Public Works Administration built close to 21,000 public housing units between 1933 and 1937. ELIZABETH WOOD, *THE BEAUTIFUL BEGINNINGS, THE FAILURE TO LEARN: 50 YEARS OF PUBLIC*

2007] *AFFORDABLE HOUSING AND LAND TENURE* 533

evoked “one third of a nation ill-housed,”<sup>24</sup> and Congress soon passed the Wagner-Steagall Public Housing Act of 1937.<sup>25</sup> This initiative was bitterly opposed by the private real estate industry and prevailed in no small part because it provided construction work during the Depression.<sup>26</sup> Congress declared in the Housing Act of 1949 a national policy of “a decent home and a suitable living environment for every American family. . . .”<sup>27</sup> The fruits of these acts were the federal funds used for construction of approximately 1.3 million units of modern public housing by 1972.<sup>28</sup>

---

HOUSING IN AMERICA 2-7 (1982); *see also* K.C. Parsons, *Clarence Stein and the Greenbelt Towns*, 56 J. AM. PLAN. ASS'N 161, 161 (1990).

24. Second Inaugural Address of Franklin D. Roosevelt, <http://www.yale.edu/lawweb/avalon/presiden/inaug/froos2.htm> (last visited Apr. 2, 2007). Roosevelt went on to note that “[t]he test of our progress is not whether we add more to the abundance of those who have too much, it is whether we provide enough for those who have too little.” *Id.*; *see also* Alfred M. Clark, III, *Can America Afford to Abandon a National Housing Policy?*, J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 185, 185 (1997).

25. Law of Sept. 1, 1937, ch. 896, tit. I, § 2; 50 Stat. 888 (codified as amended at 42 U.S.C. § 1437 (2006)); *see also* Shilesh Muralidhara, *Deficiencies of the Low-Income Housing Tax Credit in Targeting the Lowest-Income Households and in Promoting Concentrated Poverty and Segregation*, 24 LAW & INEQ. 353, 354-55 (2006).

26. *See* Williams, *supra* note 5, at 427; *see also* Dana Miller, *HOPE VI and Title VIII: How a Justifying Government Purpose Can Overcome the Disparate Impact Problem*, 47 ST. LOUIS U. L.J. 1277, 1279 (2003); Schill, *Where Do We Go From Here?*, *supra* note 7, at 502; Schill, *Privatizing Federal Low Income Housing Assistance*, *supra* note 10, at 904 (“Slum clearance was included in the Housing Act of 1937 largely to placate adversaries of public housing who were concerned about competition from newly constructed publicly owned dwellings.”); Wexler, *supra* note 18, at 199 (linking the federal purpose of providing quality housing to job creation and stimulation of the national economy).

27. Pub. L. No. 81-171, § 2, 63 Stat. 413 (1949) (codified at 42 U.S.C. § 1425(b) (repealed 1990)).

28. *See* Schill, *Privatizing Federal Low Income Housing Assistance*, *supra* note 10, at 880 (stating that the federal government has subsidized the construction of over 1.3 million public housing units that are owned and operated by the public sector); Schill, *Where Do We Go From Here?*, *supra* note 7, at 500; *see also* John J. Ammann, *Housing Out the Poor*, 19 ST. LOUIS U. PUB. L. REV. 309, 310 (2000) (noting that there are approximately 1.3 million occupied public housing units in the United States); Muralidhara, *supra* note 25, at 355 (noting that “from its inception through the peak of construction in the late 1960s and early 1970s, the dominant trend in [low-income housing policy] implementation was the construction of public housing”).

R

R

R

R

R

R

R

While substandard housing persists today, it is far less common.<sup>29</sup> Housing codes, the implied warranty of habitability,<sup>30</sup> and modern construction techniques provide most poor persons today housing with plumbing and heating, and without lead paint and vermin.<sup>31</sup> Mandating that all housing meet minimum standards protects poor residents, their children, neighbors, and society generally by decreasing health care costs, blight, and crime. But such a mandate also raises housing costs and limits supply. Regulating minimum quality effectively may promote homelessness because without subsidies poor people simply will not be able to pay the costs of housing that meets contemporary standards.<sup>32</sup> If society insists on

29. See Schill, *Privatizing Federal Low Income Housing Assistance*, *supra* note 10, at 880. Indeed, some observers have even argued that despite some notable failures, public housing as a whole is “frequently superior to private market alternatives in cost, physical conditions, and management practices, as evidenced by the sound shape of most of the nation’s 1.3 million public housing units, residents’ satisfaction with their conditions, and the long waiting lists at even the most troubled housing authorities.” Chester Hartman, *A Universal Solution to the Minority Housing Problem*, 71 N.C. L. REV. 1557, 1564 (1993) (delivered as part of a symposium entitled, “The Urban Crisis: The Kerner Commission Report Revisited”). *But see* JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., STATE OF THE NATION’S HOUSING 2004, at 25 (2004), available at <http://www.jchs.harvard.edu/publications/markets/son2004.pdf>; Williams, *supra* note 5, at 419 (stating that quality remains a “serious problem” in housing).

R

30. See, e.g., *Javins v. First Nat’l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970). The warranty provides private enforcement of the housing code, and its economic effects have long been debated. To the extent that the warranty is strictly enforced, it must raise rents to account for higher landlord costs and increased demand. Compare RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (Aspen Publishers 6th ed. 2003), with Duncan Kennedy, *The Effect of the Warranty of Habitability on Low-Income Housing: “Milking” and Class Violence*, 15 FLA. ST. U. L. REV. 485, 485-86 (1987) [hereinafter Kennedy, “*Milking” and Class Violence*].

R

31. The U.S. Census Bureau found that 1.7 million American homes lacked complete kitchens (defined as having a sink, refrigerator, and oven or burners). In addition, 1.4 million homes lacked some or all plumbing facilities, with 316,000 having no dedicated bath or shower, and 293,000 having no flush toilet. See U.S. CENSUS BUREAU, *AMERICAN HOUSING SURVEY FOR THE UNITED STATES: 1999 x (2003)*, available at <http://www.census.gov/prod/2000pubs/h150-99.pdf>. With respect to lead paint, the Centers for Disease Control and Prevention, citing the National Health and Nutrition Examination Survey, which compared blood lead levels during the period from 1976 to 1980 with levels from 1991 to 1994, found that the number of at-risk individuals had plummeted from 77.8 percent of children aged one to five, to just over four percent. CDC, *Blood Lead Levels—United States, 1999-2002*, MMWR WEEKLY, <http://www.cdc.gov/MMWR/preview/mmwrhtml/mm5420a5.htm>. For information on the current disparity in housing quality between different ethnic and racial groups, see Hartman, *supra* note 29, at 1557-59.

R

32. See Williams, *supra* note 5, at 421. For more information on affordable housing and homelessness, see generally Barbara Sard, *Housing the Homeless Through Expanding Access to Existing Subsidized Housing Programs*, 36 VILL. L. REV. 1113 (1991).

R



2007] *AFFORDABLE HOUSING AND LAND TENURE* 535

minimum standards, it cannot escape the necessity of providing subsidies to meet the costs of such housing.<sup>33</sup>

Traditional public housing was a direct attempt to provide low cost housing that met minimum standards,<sup>34</sup> with an emphasis on physical improvements. High-rise buildings and garden apartments satisfied contemporary notions of modernity and hygiene, providing modern utilities as well as light and air.<sup>35</sup> Building high rises maximized the number of units that could be produced. High-rise public housing was built in depressed locations for several unfortunate reasons, including racism, but doing so also decreased real estate and unit construction costs and met less political opposition.<sup>36</sup> Even the “equivalent elimination” requirement in the Housing Act of 1937, which required the demolition of one unit of housing for every unit of public housing built, and protected private owners against an increase in supply of low-income housing, had the effect of accelerating the replacement of physically substandard dwellings.<sup>37</sup> Other values, such as integration into functioning neighborhoods, were sacrificed for physical improvements. Despite problems, many public housing projects have been successful in providing decent housing for many years.

At the same time, public housing often has failed even the narrowly drawn goal of providing physically decent housing for the poor. A major problem has been the inadequate maintenance of buildings.<sup>38</sup> The fiscal arrangement for public housing was that the federal government would pay for capital costs and local Public Housing Authorities (“PHAs”) would own the buildings and pay for maintenance from the rents paid by tenants.<sup>39</sup> Congress, however, limited the rents tenants could be charged and failed to ap-

33. See Williams, *supra* note 5, at 423.

34. See Wexler, *supra* note 18, at 196-97 (discussing the historical context in which the HOPE VI housing program was created).

35. See PLUNZ, *supra* note 20, at 21-49; see also HALL, *supra* note 19, at 86-135, 203-40 (discussing the Garden City and Radiant City movements); Wexler, *supra* note 18, at 206-08 (analyzing the Pruitt-Igoe housing project in St. Louis in terms of Le Corbusier’s urban theories).

36. See *infra* text accompanying notes 95-109.

37. Pub. L. No. 75-412, § 10(a), 50 Stat. 888, 891 (1937). This policy prevails today in the HOPE VI program, the only federal program that still provides direct grants for subsidized housing construction requiring the replacement of dysfunctional existing public housing. While the program has many virtues, completion of a project can actually decrease the overall number of units available for very poor people. See Schill, *Privatizing Federal Low Income Housing Assistance*, *supra* note 10, at 904-05.

38. See Schill, *Privatizing Federal Low Income Housing Assistance*, *supra* note 10, at 896-97.

39. See Schill, *Where Do We Go From Here?*, *supra* note 7, at 499-500.

R

R

R

R

R

R

R

propriate adequate funds to reimburse the PHAs. Inadequate funding led to deferred maintenance and building deterioration. In some instances local PHAs have failed to effectively use the funds available for maintenance, and oversight by the Department of Housing and Urban Development (“HUD”) has been ineffective.<sup>40</sup> Failure to address the social dimensions of poverty and discrimination may also have discouraged tenant efforts to maintain buildings.

Other federal programs creating new subsidized housing for the poor focused primarily on the provision of decent shelter. Many of these programs turned to the private sector, both for-profit and non-profit, to own and manage subsidized housing. A major hope was that private entities could build and manage decent housing more cheaply than government entities like PHAs. From 1968 to 1974, Congress implemented a number of mortgage subsidy programs to stimulate private construction of affordable housing.<sup>41</sup> These programs often had an array of tenant subsidy and rent capping provisions. Since 1983, however, Congress has relied primarily on housing vouchers that subsidize the rent paid to private landlords by tenants. Under this approach, the federal government pays the difference between the rent charged by the private landlord, if deemed reasonable by the local PHA, and the tenant’s contribution, which generally aims to be thirty percent of the tenant’s adjusted income.<sup>42</sup> The PHA must inspect any dwelling before a voucher is issued and must ensure during the lease term that the landlord maintains the property at HUD-determined standards of quality, inspecting the premises at least annually.

Despite its advantages, the voucher system has not provided adequate quantities of decent affordable housing for poor people.<sup>43</sup>

---

40. *Id.* at 507-08.

41. Housing and Urban Development Act of 1968, Pub. L. No. 90-448, § 236, 82 Stat. 476, 498 (codified at 12 U.S.C.A. § 1715z-1 (West 2007)) (creating Section 236 program); Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 201(a), 88 Stat. 633, 653 (1974) (codified as amended at 42 U.S.C.A. § 1437 (West 2007)) (creating the Section 8 programs); *see also* Clark, *supra* note 24, at 186-87 (“Under the Housing Act of 1961, Congress enacted the section 221(d)(3), entitled Below Market Interest Rate Program (BMIR), to provide subsidized mortgage rates to private developers constructing new units or substantially rehabilitating existing units for multifamily rental housing.”).

42. *See* Clark, *supra* note 24, at 187-88 (discussing the Section 8 rent subsidies in the context of housing development).

43. This is controversial. *See* ELLICKSON & BEEN, *supra* note 22, at 866-67; *see also* Clark, *supra* note 24, at 197-99 (discussing the “current housing crisis” where 5.35 million households, comprised of 12.6 million people, suffer “acute housing needs” despite a recent period of economic expansion); Sagit Leviner, *Affordable Housing*

R

R

R

R

## 2007] AFFORDABLE HOUSING AND LAND TENURE 537

First, it provides, at best, only indirect incentives for constructing new housing. In theory, increased demand through rent vouchers should stimulate housing production. In practice, developers often prefer to build for a more affluent renter at higher rents.<sup>44</sup> Second, annual appropriations for subsidies have reflected political swings and budget exigencies, and do not meet actual need; waiting lists among eligible recipients are long.<sup>45</sup> Finally, tenants often end up paying more than thirty percent of adjusted income because landlords can charge more than the nominal rent upon which the subsidy is based.<sup>46</sup> Such failings reflect problems of supply and affordability rather than the physical conditions.

---

*and the Role of the Low Income Housing Tax Credit Program: A Contemporary Assessment*, 57 TAX LAW. 869, 891 (2004) (contrasting the LIHTC program with voucher programs like Section 8).

44. For example, when Montgomery County, Maryland reopened its wait list for federal housing assistance in 2006, it received over 15,000 applications in under a week in addition to the 8,000 individuals that were already on the list. In the District of Columbia, the waiting list exceeds 30,000 people. Even in relatively affluent, nearby Fairfax County, over 11,000 people have applied for, but not received, federal housing assistance. See Mary Otto, *Rental Aid Outstripped by Demand in Region*, WASH. POST, Aug. 19, 2006, at B01. These problems affect some groups more than others. See BARBARA SARD, CTR. ON BUDGET & POLICY PRIORITIES, FUNDING INSTABILITY THREATENS TO ERODE BUSINESS COMMUNITY'S CONFIDENCE IN THE HOUSING VOUCHER PROGRAM (2004), <http://www.centeronbudget.org/10-14-04hou.htm>; BARBARA SARD ET AL., CTR. ON BUDGET & POLICY PRIORITIES, APPROPRIATIONS SHORTFALL CUTS FUNDING FOR 80,000 HOUSING VOUCHERS THIS YEAR (2005), <http://www.cbpp.org/2-11-05hou.htm>; Susan Milligan, *State Aid Targeted in Bush Budget*, BOSTON GLOBE, Mar. 18, 2006, at A1 (stating that there are nine senior citizens waiting for each federally subsidized housing unit); see also Peter W. Salsich, Jr., *Saving Our Cities: What Role Should the Federal Government Play*, 36 URB. LAW. 475, 475 (2004) [hereinafter Salsich, *Saving Our Cities*] (commenting on how the politics of affordable housing are often "buried" in the mainstream press, even when significant decisions, such as the elimination of HOPE VI and Section 8, are potentially at stake); Schill, *Where Do We Go From Here?*, *supra* note 7, at 500 n.32 (discussing how U.S. housing policy has changed dramatically as political positions have shifted over time; citing the 1973 Nixon moratorium on new construction as an example); David Chen, *HUD Aid Short by \$50 Million*, *City Reports*, N.Y. TIMES, Jan. 27, 2005, at B1.

45. See Muralidhara, *supra* note 25, at 355-56 (stating that by the mid-1980s, Congress had "removed or reduced the benefits of various open-ended real estate investments such as Project-based Section 8," in exchange for various programs that were less focused on providing affordable housing); cf. Schill, *Privatizing Federal Low Income Housing Assistance*, *supra* note 10, at 883-85, 900-03 (discussing the relative merits of public and private development, and concluding that even Section 8 vouchers, as incentives to private development, substantially added to the cost and reduced the profitability of prospective housing projects).

46. The U.S. Department of Housing and Urban Development expressly acknowledges that this situation may arise. See Housing Choice Vouchers Fact Sheet, [http://www.hud.gov/offices/pih/programs/hcv/about/fact\\_sheet.cfm](http://www.hud.gov/offices/pih/programs/hcv/about/fact_sheet.cfm) (last visited Apr. 2, 2007) ("The housing voucher family must pay 30% of its monthly adjusted gross in-

R

R

R

When public housing began, the private market offered poor people affordable housing in physically inadequate dwellings. Public housing raised the standards for habitability. But today, housing codes, modern construction techniques, and the warranty of habitability have removed most substandard dwellings from the private market.<sup>47</sup> While failures of quality persist, the primary problems are supply and affordability. The contemporary justification for public housing must be its ability to address these problems. Housing vouchers can address the affordability of available housing without consigning the poor to substandard dwellings, a possibility that did not exist before 1980.

Congress views public ownership as less efficient in meeting these goals than various subsidies to private ownership.<sup>48</sup> Congress reasonably could hope to encourage more units by leveraging private investment with public subsidies.<sup>49</sup> Perhaps more important are the expected efficiency gains entailed in the incentives that private ownership can generate.<sup>50</sup> Congress first enacted federal programs to directly subsidize private construction of low-income housing projects, but subsequently largely abandoned these efforts.

Since the 1980s the real growth in providing low-income housing has occurred in projects that various local private entities have created. These projects employ a mix of federal and state subsidy pro-

---

come for rent and utilities, and if the unit rent is greater than the payment standard the family is required to pay the additional amount.”); *see also* 24 C.F.R. § 982.505 (West 2007).

47. Although conditions have improved, the problem of poor-quality housing has not been completely eliminated. According to the 2005 U.S. Census Bureau data, 1.2 percent of permanently occupied dwellings lack some or all plumbing facilities, 6.7 percent lack adequate heat, and over nine percent have water that is not safe to drink. U.S. CENSUS BUREAU, AMERICAN HOUSING SURVEY FOR THE UNITED STATES: 2005 x (2006), available at <http://www.census.gov/prod/2006pubs/h150-05.pdf>. Despite these statistics, most housing is safe and healthy, even for those living in poverty. *Id.* (noting that 15.3 percent of dwellings are occupied by individuals living below the poverty line, which is considerably greater than the percentages of individuals living in poor quality housing).

48. *See Salsich, Saving Our Cities, supra* note 44, at 478.

49. Eligibility to obtain federal housing assistance was originally limited by statute to those people “who cannot afford to pay enough to cause private enterprise . . . to build an adequate supply of decent, safe, and sanitary dwelling for their use.” 42 U.S.C.A. § 1402(2) (West 1970); *see also Salsich, Saving Our Cities, supra* note 44, at 504 (discussing the practical limitations to private sector involvement in affordable housing).

50. *See Salsich, Saving Our Cities, supra* note 44, at 479-80 (arguing that the answer to the current affordable housing dilemma is not *either* a public or private solution, but rather a public *and* private solution that encompasses all levels of government, and many aspects of the private sector).

R

R

R

2007] *AFFORDABLE HOUSING AND LAND TENURE* 539

grams that provide both rental and ownership opportunities.<sup>51</sup> Although states receive substantial amounts of money for housing through Community Development Block Grants, many states also have local programs that raise money from dedicated sources, such as the use of a percentage of the housing transfer tax.<sup>52</sup> To no small extent, the growth of local activity has reacted to the federal government's abandonment of a more active role in promoting the production of new units. Ironically, an important catalyst for this development has been the federal Low-Income Housing Tax Credit ("LIHTC"). In order to produce housing through the LIHTC, local private initiative and complex deals are required to turn the tax credits into housing equity.<sup>53</sup> Nonetheless, since 1989, approximately 1.3 million affordable units have been created through the use of LIHTCs, roughly the same as the total number of public housing units ever previously created.<sup>54</sup> LIHTCs are often combined with other subsidies to make projects more afford-

---

51. See Clark, *supra* note 24, at 201-02.

52. The District of Columbia Housing Production Trust Fund (the "Fund") was created in 1989 to serve as a "permanent proprietary revolving fund of identifiable, renewable, and segregated capital . . . to provide assistance in housing production for targeted populations." D.C. Law 7-202 (Mar. 16, 1989) (codified at D.C. CODE § 45-3102 (1981)). Under the terms of the Housing Act of 2002, the Fund began to receive fifteen percent of the real property transfer tax and fifteen percent of the deed recordation tax as of October 1, 2003. D.C. Law 14-114 (Apr. 19, 2002) (codified at D.C. CODE § 42-2802(c)(16) (2007)). This vital statutory change provided the Fund with a reliable source of revenue that it previously lacked. As a direct result, funding for the Fund has grown from virtually nothing in 2002, to \$5 million in 2003, over \$40 million in 2005, and an estimated \$56 million for 2006. IDARA NICKELSON & ED LAZERE, D.C. FISCAL POLICY INST., *TRENDS IN FUNDING FOR AFFORDABLE HOUSING IN THE DISTRICT OF COLUMBIA* (2005), available at <http://www.dcfpi.org/3-7-05hou.pdf>. Nonetheless, disbursements from the Fund do not offset the reductions in federal housing support that have occurred over the past several years. *Id.* at 2.

Eighty percent of the funds disbursed must support housing for "extremely low-income" and "very low-income" households. The remaining twenty percent of the funds may be used to support "low-income households." D.C. CODE § 42-2802(b)(1)-(3) (2007).

The Fund consciously promotes homeownership, but within each fiscal year at least fifty percent of the funds dispersed must assist in the provision of rental housing. The Fund has been used for a great variety of projects, from the acquisition and conversion of a vacant property at Holbrook Terrace into thirty new units that will eventually be owned by their occupants, to the rehabilitation of 205 affordable rental units in a building with an expiring Section 8 contract. See ED LAZERE, D.C. FISCAL POLICY INST., *THE SUCCESSFUL REVIVAL OF DC'S HOUSING PRODUCTION TRUST FUND* (2003), available at <http://www.dcfpi.org/2-24-03hou.pdf>.

53. See Salsich, *Saving Our Cities*, *supra* note 44, at 503-05 (discussing the enormous complexity of affordable housing development).

54. See Williams, *supra* note 5, at 450-51 (providing a somewhat more pessimistic view of the LIHTC).

R

R

R

able, including state housing funds (often derivative of federal Community Development Block Grants), Historic Preservation Tax Credits, and Section 8 vouchers.<sup>55</sup>

A chief goal of the LIHTC is to produce decent housing for poor people. Minimizing costs spreads the government subsidy further. The National Council of State Housing Agencies claims that the LIHTC leverages \$6 billion in private investment each year.<sup>56</sup> This seems too high, however, because equity investors typically put up less money than the amount of tax credit for which they qualify, and additional funds often come from public grants or subsidized loans. Local PHAs must monitor the physical conditions in each building and the income eligibility of residents each year.<sup>57</sup>

The flexibility possible for private developers of subsidized low-income housing permits them to aim for broader goals than the provision of decent, affordable housing.<sup>58</sup> Thus, some non-profit developers may seek to create homeownership among their clients in order to build their clients' wealth, encourage citizenship, or nurture the wholesome incentives owners have to care for their property.<sup>59</sup> We explore many of these social goals below. Here, we only make the preliminary point that pursuit of other goals *may* interfere with pursuit of the traditional goal of providing decent housing either by raising costs or diverting energy. Indeed, the very deference to private planning and market discipline inherent in subsidized mixed-income housing might be said to divert focus from housing the poor. For example, an LIHTC project need only provide either twenty percent of units that are affordable to fami-

---

55. See source cited *infra* note 60.

56. Nat'l Council State Hous. Agencies, Housing Credit Fact Sheet, [http://www.ncsha.org/uploads/20040311\\_HC\\_factsheet.pdf](http://www.ncsha.org/uploads/20040311_HC_factsheet.pdf) (last visited Jan. 21, 2007).

57. THE NAT'L HOUS. LAW PROJECT, HUD HOUSING PROGRAMS: TENANTS' RIGHTS 8/5 (3d ed. 2004).

58. See, e.g., Salsich, *Saving Our Cities*, *supra* note 44, at 502 (quoting Richard Baron, CEO of the major urban home builder McCormack, Baron & Salazar, Inc., as saying that in order for the nation's affordable housing strategy to be successful, "[w]e should increase the amount of resources actually available . . . [because if] we had additional resources, we could increase appropriations for things that have worked reasonably well [such as] broaden[ing] the LITC program in order to allow for a broader range of incomes"); see also Williams, *supra* note 5, at 456 (noting that the hybrid approach contemplated by the LIHTC provides developers with greater flexibility).

59. See Williams, *supra* note 5, at 468-75; see also Michael H. Schill, *The Participation of Charities in Limited Partnerships*, 93 YALE L.J. 1355 (1984) (giving a general overview of the potentially uneasy relationship of limited partnerships between the interests of the partners and their charitable goals).

R

R

R

lies earning fifty percent of Area Median Income (“AMI”) or less, or forty percent earning sixty percent of AMI or less.

Yet there is no doubt that LIHTC projects have contributed substantially to increasing housing for the poor. These projects often include other public subsidies in order to make them affordable to more very low-income people. An important Government Accountability Office (“GAO”) study found that nearly three-fourths of the residents of such projects also received rent subsidies or other housing assistance and had an average income of twenty-five percent of AMI, which compares closely with public housing residents.<sup>60</sup> Moreover, the LIHTC may be a more reliable source of new affordable housing resources than direct subsidies because it does not require an annual appropriation from Congress, thus lessening political uncertainties.<sup>61</sup> This advantage of being “off the books” also applies to inclusionary zoning devices, devices that have grown substantially in recent years. These programs raised the quality of housing for poor people over the years without meeting the total need. But housing provides clients more than shelter, and housing policies have aimed for broader goals.

### **B. Wealth Creation**

Housing subsidy programs by their nature transfer wealth to the recipients. A decent and stable dwelling provides the resident with both material and emotional well-being. Thus, in satisfying a basic need at a below market price, even with a rental apartment, a housing subsidy enhances the wealth of the poor recipient. Also, to the extent that a resident pays a lower percentage of her income for housing, she will have more resources available for other needs. After all, housing subsidies aim to alleviate poverty, transferring resources to the recipient in the form of less expensive housing rather than cash.<sup>62</sup>

Some housing programs have more ambitious goals to combat recipients’ poverty by giving them an ownership interest in their homes. Wealth creation in our society often centers on ownership of assets that endure and appreciate. For most Americans, their home is their most valuable asset. In recent years appreciation in the value of houses was a driving force in the buoyancy of our

---

60. U.S. GOV’T ACCOUNTABILITY OFFICE, TAX CREDITS: OPPORTUNITIES TO IMPROVE OVERSIGHT OF THE LOW-INCOME HOUSING PROGRAM 6 (Mar. 1997), available at <http://www.gao.gov/archive/1997/g597055.pdf>.

61. See THE NAT’L HOUS. LAW PROJECT, *supra* note 57, at 1/64.

62. See *supra* Part II.A discussing the reasons why a poverty program might give a recipient housing instead of money.

economy,<sup>63</sup> and many devices allowed owners to access the money value of their homes.<sup>64</sup> Public policy has long encouraged homeownership through tax benefits, including the deductibility of mortgage interest and real estate tax payments, the avoidance of some capital gains tax upon sale,<sup>65</sup> and through federal support for liquidity of the mortgage market, which helps lower interest rates.<sup>66</sup> These benefits make owning one's residence even more economically attractive. Indeed, these policies are deeply rooted in United States public policy, echoing the social assumptions of Jeffersonian democrats about widely owned property and successive federal public land distribution programs.<sup>67</sup> At the same time, recent stud-

---

63. See Eduardo Porter & Vikas Bajaj, *Economy Sets Fastest Pace Since the Summer of 2003*, N.Y. TIMES, Apr. 29, 2006, at C3.

64. Neil Irwin, *Out on the Horizon; A Housing Slowdown Could Sink Predictions of Sturdy Economic Growth*, WASH. POST, Jan. 1, 2006, at F1 (“[B]ooming housing prices appear to be a major factor in the rapid climb of Americans’ spending in recent years, which many economists argue has been enabled by cash-out refinancings, home equity loans and a sense that they need not save because their homes made them worth so much on paper.”); see also *Federal Reserve Board’s Semi-Annual Monetary Policy Report to the Congress: Hearing Before the H. Comm. on Fin. Servs.*, 108th Cong. 1 (2003) (testimony of Alan Greenspan, Chairman of the Federal Reserve Board) (“Households have been able to extract home equity by drawing on home equity loan lines, by realizing capital gains through the sale of existing homes, and by extracting cash as part of the refinancing of existing mortgages, so-called cash-outs.”), available at <http://www.federalreserve.gov/boarddocs/hh/2003/july/testimony.htm>.

65. See Edward L. Glaeser & Jesse M. Shapiro, *The Benefits of the Home Mortgage Interest Deduction 2* (Nat’l Bureau of Econ. Research, Working Paper No. W9284, 2002), available at <http://www.nber.org/papers/W9284.pdf> (arguing that the benefits of the home mortgage interest deduction accrue primarily to the wealthiest members of society).

66. See, e.g., Fannie Mae, Mission Statement, <http://www.fanniemae.com> (follow “About Fannie Mae” hyperlink; then “Understanding Fannie Mae” hyperlink; then “Our Mission” hyperlink) (last visited Apr. 10, 2007) (“By raising capital from Wall Street and through investors from around the world, Fannie Mae helps keep low-cost mortgage funds flowing to lenders in various communities across the United States.”); Freddie Mac, Mission Statement, [http://www.freddie.com/corporate/about/who\\_we\\_are/mission.html](http://www.freddie.com/corporate/about/who_we_are/mission.html) (last visited Apr. 10, 2007) (“Freddie Mac’s mission is to provide liquidity, stability and affordability to the housing market.”); Ginnie Mae, About Ginnie Mae, <http://www.ginniemae.gov/about/mission.asp?subTitle=About> (last visited Apr. 10, 2007) (“To expand affordable housing in America by linking global capital markets to the nation’s housing markets.”).

67. See generally ROSCOE L. LOKKEN, *IOWA PUBLIC LAND DISPOSAL* (1942). In this classic historical study, Lokken wrote:

The land which the United States sold or gave to the people of the new Territories and States was not wasted. Homeownership is the best form of social security. The pioneers knew this long ago. They did not want loans from the government or houses built at government expense, but they did want the right to own the land they improved, and at a price that a poor man could afford to pay.

*Id.* at 269-70.



2007] *AFFORDABLE HOUSING AND LAND TENURE* 543

ies have emphasized the extent to which poverty involves not just inadequate income but also a paucity of assets.<sup>68</sup>

Some contemporary housing programs emphasize the goal of endowing recipients with ownership of their homes as a way to give them a valuable asset. There are several benefits to this approach. Transferring wealth to poor persons through housing may be more politically acceptable than cash transfers, because it directly meets a basic human need and assists recipients' children. Also, since housing assistance now is accomplished primarily through a variety of indirect subsidies moving through state and local governments and private developers, the transfer of wealth is somewhat obscured.<sup>69</sup> The owner's equity can grow through payments against the principal and appreciation in market value.<sup>70</sup> Because home equity remains less liquid than cash, conveying wealth through homeownership acts as a form of forced savings, encouraging accumulation. Owners can also take advantage of the income tax benefits mentioned above,<sup>71</sup> to the extent that they have enough income to make deductions worthwhile.

More subtly, ownership may encourage a variety of virtues long associated with private property. An owner has significant incentives to take prudent care of her house because she can reap the benefits of expenditures to conserve or improve the value of the home and may suffer the economic consequences of negligent or deferred maintenance. Developing the capacity to gauge long-term benefits and to sacrifice current pleasure to obtain those benefits engenders bourgeois habits and skills that promote success in

---

68. See MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 67-90 (1997); THOMAS M. SHAPIRO, *THE HIDDEN COST OF BEING AFRICAN AMERICAN* 1 (2004).

69. The Low-Income Housing Tax Credit has another additional virtue in that it provides housing subsidies without the need for annual appropriations. It permits only rental housing, however, because investors must own the property to earn the tax credit. See *infra* Part II.H.1 for a description of the LIHTC.

70. Under the terms of a conventional mortgage, principal and interest payments are amortized over the term of the loan such that the borrower incrementally pays off the balance due, and acquires ownership of her property. Initially, the vast majority of each loan payment consists of interest owed on the balance outstanding, with only a small fraction counting as principal. With time, however, these payments toward principal accumulate, reducing the overall loan balance, and therefore reducing the amount of interest owed each month. As the loan matures and approaches the end of its term, the contents of each payment are essentially reversed, as most of the payment is applied towards principal because only a small fraction is needed for interest. Under this common scenario, borrowers are transformed into owners over the period of the loan. See Bob Adams, *Amortization Basics*, INC.COM, June 2000, available at <http://www.inc.com/articles/2000/06/19504.html>.

71. See *supra* note 65 and accompanying text.

a market economy.<sup>72</sup> Dominion over one's property also may encourage a sense of authority in society at large, encouraging participation in civic affairs and intercourse with others in a spirit of equality. Viewed in this way, homeownership can create social capital that enriches one's future earning capacity.

These observations reflect standard liberal views of legal theory, particularly in relation to private property. Even in theory, contingencies can prevent successful realization of benefits. Ownership can be a curse, as well as a blessing. Ownership and attendant management of a complex asset, such as a house, present challenges that a person may not be equipped to deal with due to ignorance or disability. For example, well-meaning programs of homeownership may encourage owners to take on excessive debt service that can siphon limited funds from other important household uses and even precipitate insolvency.<sup>73</sup> Failure as a homeowner can discourage future engagement with the market, working a depletion of limited social capital. Programs must be designed to avoid excessive burdens or risk on intended beneficiaries and to provide adequate training of the sort discussed below.<sup>74</sup>

Empirical studies tend to bear out the benefits of ownership for low-income residents, although with important caveats. Homeowners tend to enjoy better housing for similar costs, and they also enjoy greater economic security because the costs of homeownership tend to decline over time relative to rental costs.<sup>75</sup> The greatest risk for a low-income homeowner is inability to meet the costs,<sup>76</sup> the very risk addressed most directly by subsidy programs. Homeowners also seem to be more satisfied with their homes and neighborhoods, and even controlling for socio-economic factors, they participate more in political and neighborhood affairs.<sup>77</sup> (In

---

72. See Megan J. Ballard, *Legal Protections for Home Dwellers: Caulking the Cracks to Preserve Occupancy*, 56 SYRACUSE L. REV. 277, 287 (2006); see also Dionne Winchester, *Field Guide to Social Benefits of Homeownership*, available at <http://www.realtor.org/libweb.nsf/pages/fg302> (last visited Apr. 10, 2007).

73. See Schill, *Privatizing Federal Low Income Housing Assistance*, *supra* note 10, at 915, 916 n.152.

74. See discussion *infra* Part II.F.

75. See George W. McCarthy et al., *The Economic Benefits and Costs of Homeownership: A Critical Assessment of the Research 7-14* (Research Inst. for Hous. Am., Working Paper No. 01-02, 2000), available at <http://www.housingamerica.org/docs/RIHAwp01-02.pdf>.

76. *Id.* at 28-31.

77. See William M. Rohe et al., *The Social Benefits and Costs of Homeownership, A Critical Assessment of the Research 17, 25* (Joint Ctr. for Hous. Studies, Working Paper No. LIHO-01.12, 2001), available at <http://www.jchs.harvard.edu/publications/homeownership/liho01-12.pdf>.

2007] *AFFORDABLE HOUSING AND LAND TENURE* 545

the next section, we also consider the advantages to communities from designing housing programs with homeownership.) Given the possible advantages of homeownership, both for the poor person and for the community, it seems likely that housing programs will continue to include ownership elements.

Some projects enhance the ownership interest of the resident by providing two-family houses, which gives an owner both ownership of her own residence and an income stream from a second rentable unit.<sup>78</sup> Obviously, this places greater emphasis on the owner's property management skills, opening the possibility of a limited entrepreneurial opportunity. The risk is greater too because vacancy or protracted disputes with tenants can sink the more ambitious effort. At the same time, a two-unit house creates another affordable residence closely monitored by a resident landlord with a large stake in the maintenance of both units. The limitations on the rent the owner can charge to keep the second unit affordable to the tenant also restricts the capacity of the benefited owner to increase her wealth.

Wealth creation through homeownership programs has social costs. Put most simply, the greater the opportunity for the subsidized owners to sell their homes at the market price, the less subsidized housing the same public dollars will produce. Ease of realization of equity converts public housing subsidies to private assets of the benefited person. In an extreme example, if a program allows person A to buy a home for \$100,000, which has a market value of \$200,000, and permits A to sell it immediately, the program would have created wealth for A but failed to provide anyone subsidized housing. In this example, the equity consists of the subsidy (plus any cash put up by the owner), and the quick sale converts the subsidy to cash (minus fees) that the owner can do with as she wishes, largely converting a housing program into a cash transfer program.

Of course, all actual housing programs constrain the ability of the owner to sell at market price to some degree.<sup>79</sup> Some require the owner to wait a certain number of years, others permanently restrict the capacity of the owner to realize all or some of the mar-

---

78. See Richard T. Roberts, *New York City's Housing Preservation and Development Experience*, 10 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 10, 13 (2000).

79. See Peter W. Salsich, Jr., *Solutions to the Affordable Housing Crisis: Perspectives on Privatization*, 28 J. MARSHALL L. REV. 263, 283-88 (1995) [hereinafter Salsich, *Perspectives on Privatization*] (discussing a model for affordable housing based on "social housing").

ket value of the unit.<sup>80</sup> The District of Columbia's Habitat for Humanity ("D.C. Habitat"), for example, through mortgage and note terms, requires a buyer to share all or a percentage of the proceeds of any liquidation of equity in the home for the first fifteen years after closing.<sup>81</sup> Of course, to that extent, programs diminish the wealth creation effects of the ownership element of the program. To state the observation more generally, there seems to be a tension or trade-off between providing durably affordable shelter to poor persons and permitting recipients to experience the property benefits of ownership. The easier it is for the owner to profit from her ownership, the less chance that the unit will be affordable for a future owner; the greater the restrictions in place to maintain the affordability of the unit for a future resident, the less likely that the current owner will realize it as a capital asset.

Different programs divide the equity value between the provider and the homeowner at many points along temporal and substantive dimensions. Thus, a program might allow the owner to realize the full value of the equity in the house, but only after a number of years and satisfaction of performance criteria. Another program might allow the resident to obtain only a portion of the value of the equity, but make that portion available more quickly. These temporal and substantive limitations may be combined in any number of ways. Limitations on the subsidized owner's equity can be accomplished either by restricting the owner's property right to realize her accrued equity or by granting the owner by contract some limited benefits that mimic small accumulations of equity. D.C. Habitat takes the first course. The "Shared Appreciation" mortgage it uses secures an interest-free loan to finance purchase of the house at a below-market price. The mortgage and accompanying notes provide that if the buyer sells, leases, or mortgages the property, or defaults on the mortgage loan during the first fifteen years, she must also make a "contingent appreciation payment" to D.C. Habitat, an amount equal to a scheduled declining percentage of the market value of her equity in the house.<sup>82</sup> These measures ef-

---

80. Although the text discusses an owner's realization of equity through sale of the home, there are several methods by which a homeowner can cash out equity. For example, the owner might do so through obtaining a second mortgage on the property or through renting the home at a market rate. Housing program sale restrictions are drafted broadly enough to restrict these indirect methods of realization. See, e.g., Kenn, *Paradise Unfound*, *supra* note 8, at 70, 81-82.

81. See *infra* note 82.

82. See D.C. HABITAT FOR HUMANITY, INFORMATION ABOUT YOUR MORTGAGE (on file with authors). D.C. Habitat also enjoys a right-of-first-refusal for the sale of

2007] *AFFORDABLE HOUSING AND LAND TENURE* 547

fectively remove the incentive for the owner to sell during the restricted period. After fifteen years, the buyer can realize the entire market value of the property, and it will become simply a modest market rate house.

A similar result can be obtained through other forms of shared ownership. The Dudley Street Neighborhood Initiative (“DSNI”) in Boston,<sup>83</sup> for example, maintains ownership of the land in an affiliated land trust. The resident owns her own home but only leases the land from the trust. The lease restricts the terms upon which the owner may sell her house, permitting transfer only to another income-qualified buyer.<sup>84</sup> The seller does not realize any profit from the increase in value of the underlying land, which is retained by the trust and leased to the succeeding tenant at a subsidized rent. The owner, at least in theory, can receive a payment that reflects the value of her house, the improvements made, and the quality of her maintenance—although it must be difficult in practice to price these advantages efficiently. Other factors that normally contribute to increases in property values, such as the value of the land and location, do not pass to the buyer but are retained by the land trust. The effect of this is to keep the house as affordable housing for low-income people. The ground lease gives the land trust control over the actions of the owner because it is a necessary party at any settlement.

In place of contractual or ownership-based limits on the owner realizing her equity, a program can transfer wealth to a resident by contractual terms that give the owner rights to an increasing lump sum payment upon termination of a lease. This mimics a limited increase in equity. An often-discussed HOPE VI project, Townhomes on Capitol Hill, uses this approach. Buyers purchase

---

any subject home, during the first fifteen years. Interestingly, Washington, D.C. recently enacted an ordinance that limits the property tax assessed against a home subject to shared appreciation mortgage, in order to reflect the owner’s limited economic interest in the house. *See* Affordable Housing Preservation Tax Assessment Act, 52 D.C. Reg. 4005 7550-52 (Apr. 22, 2005). At the same time, Washington, D.C. enacted analogous provisions to limit property tax on low-income cooperative housing. *See* Limited-Equity Cooperative Tax Fairness Act of 2005, 52 D.C. Reg. 4005 7549-50 (Apr. 22, 2005).

83. DSNI states as its mission: “To empower Dudley residents to organize, plan for, create and control a vibrant, diverse and high quality neighborhood in collaboration with community partners.” Dudley Street Neighborhood Initiative, <http://www.dsni.org> (last visited Dec. 5, 2006).

84. Dudley Neighbors, Inc., Our Mission, <http://www.dsni.org/dni> (last visited Apr. 2, 2007).

shares in a limited equity cooperative (“LEC”).<sup>85</sup> This is an important legal vehicle for providing affordable housing. While giving the owner some of the economic benefits and many of the benign incentives of private ownership, it also preserves the subsidy for the dwelling over many successive residents.<sup>86</sup> Buyers obtain shares in the LEC at a price that is geared towards the economic ability of the buyer; with the ownership share, the buyer obtains the right to occupy a dwelling unit.<sup>87</sup> All buyers share in the governance of the LEC, but subsidized buyers can only convey their ownership rights to a qualified buyer at the same economic level.<sup>88</sup> The price paid to the resident-seller is determined by a schedule which increases the selling price based upon the duration of the ownership adjusted by factors that reflect good stewardship. The price paid to the seller will be less than the market value of the unit, so it can be resold at an affordable price that reflects the continuing value of the original subsidy. The individual owner does not realize gain from the actual increase in value of the underlying real estate, but only from the LEC agreement that increases the sale price based upon longevity and related factors. The owner does not get the economic benefit of appreciation but only a simulacrum.

The LEC thus aims both to give the resident the experience of ownership and preserve the subsidy to keep the property affordable. Obviously, the wealth creation effect of ownership is limited to the extent that the owner realizes less than the market value

---

85. See generally ABT ASSOC., INC., INTERIM ASSESSMENT OF THE HOPE VI PROGRAM: CASE STUDY OF THE ELLEN WILSON DWELLINGS IN WASHINGTON D.C. (Final Report, Mar. 2001) [hereinafter ABT ASSOC., ELLEN WILSON DWELLINGS CASE STUDY], available at <http://www.abtassociates.com/reports/2001409176851.pdf#search=%22ellen%20wilson%20dwellings%22>.

86. See generally Duncan Kennedy, *The Limited Equity Coop as a Vehicle for Affordable Housing in a Race and Class Divided Society*, 46 *How. L.J.* 85 (2002) [hereinafter Kennedy, *The Limited Equity Coop*].

87. In some jurisdictions, including the District of Columbia, the opportunity for low-income tenants to buy a building through the co-op form is created by their statutory right of first refusal. Tenant Opportunity to Purchase Act, D.C. CODE § 42-3404.02 (2006). This delays the owner of a rental building from selling to another landlord, allowing the tenants to organize and secure subsidies to finance their purchase.

88. In many instances, the co-op will have a right of first refusal that will restrict the price at which the dwelling can be sold to a qualified low-income buyer. This solves the problem of where the co-op can get the money to buy the unit at the scheduled price; it is provided by the qualified buyer. Some co-ops actually do purchase and resell units, using reserve funds to finance the interim. Both approaches ensure that the seller's gain is limited, that the price the new buyer pays is set at a subsidized rate, and that the new buyer meets the income requirements of the program.

2007] *AFFORDABLE HOUSING AND LAND TENURE* 549

upon sale. In addition to all the benefits associated with renting a decent, affordable house as discussed above, ownership provides stable expectations of continued affordable occupation.<sup>89</sup> The owner does accumulate some capital that can give her options upon sale. Moreover, she has ownership incentives to participate in the management of the LEC, and so she should affect policies that will bear directly upon her satisfaction in her dwelling and the shared space. Should the LEC use maintenance funds for gutters or paint? How should the LEC respond to delinquent payments by one resident-owner? Participation in such decision-making may better equip her for other social encounters. Getting them wrong may endanger everyone's stake in their collective home.

When organizations foster housing that limits the equity the individual owner can realize, that equity is held by a collective such as an LEC or a land trust. This entity might be a non-profit corporation controlled by residents, community members, outsiders, or a governmental organization of some kind. Unless it is a part of the government, questions will arise about how the wealth accumulated by the entity should be used. This may be analogous to the tension between individual wealth creation and the continued provision of affordable housing. For example, a tenant LEC might be paid a great deal of money by a developer for the LEC's building, which could then be distributed to members or used for other purposes. Financing documents protecting the initial subsidy may constrain the LEC's choice, similar to the restrictions imposed on an individual who purchases from D.C. Habitat. Non-profit entities driven by their missions or that have constituents in addition to residents, like the Dudley Street Neighborhood Initiative, are less likely to return housing to market rates in exchange for cash.

There are arguments for housing programs either favoring more wealth creation for the individual owner or preserving affordable units for subsequent residents. In a thoughtful article, Duncan Kennedy describes how different approaches to this issue may reflect different understandings of the nature of poverty: equity building strives to promote individual mobility within the existing economic system while equity limitations promote group solidarity and sharing, holding the market at bay.<sup>90</sup> As Kennedy points out, debates about the correct character of poverty will not be resolved in our society, even among those who favor progressive goals, but

---

89. Salsich, *Perspectives on Privatization*, *supra* note 79, at 286.

90. Kennedy, *The Limited Equity Coop*, *supra* note 86, at 101-10.

only in specific cases with distinctive facts.<sup>91</sup> We focus here on the factors that may lead project designers to grant individual residents more or less equity in their homes. These will consist primarily of project goals and land market conditions.

Several factors may lead project designers to favor allowing the individual resident more equity in her home. First, the project must place greater value on empowering individual poor persons to escape poverty than on maintaining housing for other poor persons. Some charities may find energy and support in a vision of assisting or supporting individual self-improvement. Stories of individual family success—redemption even—provide an unrivaled mechanism for fund-raising or garnering political support for funding. Organizations may also wish to limit their involvement with maintaining individual buildings as affordable in order to direct their chief energies elsewhere. D.C. Habitat, for example, sees itself primarily as a housing production organization that allocates much effort involving volunteers with hands-on construction and renovation. The Dudley Street Neighborhood Initiative, by contrast, sees itself as supporting the efforts of low-income residents to create and control a just and attractive community, including parks, youth activities, and neighborhood shopping.

Neighborhood economic conditions should play a role in any choice. If a neighborhood is depressed, full equity for the owner has much to recommend it. The stability that ownership may give an owner can provide a bulwark against the stresses of life in a tough neighborhood. Such stability, multiplied by other successful owners, may also help the neighborhood find leadership because owners may claim a greater stake in neighborhood improvements. Moreover, the owner likely will not experience strong inducements to sell prematurely, given the usually slow appreciation, if any, of property values. Of course, persistent poverty in a neighborhood may endanger the owner's investment in her home, including pressuring her to sell and leave. Finally, the entity designing the program or providing the subsidy should readily find other affordable properties to acquire for relatively low-cost development of other affordable homes.

At the opposite pole, promoters of subsidized housing in neighborhoods with rapidly appreciating dwellings may prefer structures that maintain the affordability of units. The owners should benefit very substantially by residing in a neighborhood that has strong

---

91. *Id.* at 121-22.



2007] *AFFORDABLE HOUSING AND LAND TENURE* 551

market appeal, which usually means less crime and increased opportunities for employment, education, and shopping.<sup>92</sup> Residing in a gentrifying neighborhood also should ameliorate the social isolation entailed by economic housing segregation, which some have seen as an important factor in the perpetuation of poverty. At the same time, an owner's inducement to bring her home to market will be magnified by high or rising values, if she can keep the bulk of the increase. Housing developers will face higher prices (increasing subsidies) and lessened supply of alternate land and structures for new affordable housing. Thus, although D.C. Habitat usually conveys full equity to owners after a period of years, it retains control of land in perpetuity in areas where the supply of land for new housing will remain tight, such as in the Florida Keys. Maintaining affordable units may stem the tide or mitigate the displacement effects of gentrification; in an appreciating neighborhood, maintaining subsidized housing may be the only way to maintain economic diversity.<sup>93</sup> These considerations begin to recount the benefits that various approaches to subsidy may have for the larger community, which will be addressed more fully in Part II.D below.

We may characterize the choices that the affordable housing promoter faces as how it understands its role in alleviating poverty and the balance between opportunities and costs. All housing subsidy programs can transfer wealth to residents, and program planners should consider explicitly how much of the value of the subsidy should be transferred to current beneficiaries and how much should be preserved for future residents. How this division is made and how it is implemented will influence the experience of the beneficiaries, the character of the development, and its role in the wider community.

### C. Social Integration

Subsidized housing projects can be large or small, entirely for the poor or for mixed incomes, scattered through various neighborhoods or isolated in special precincts. The nature and location of subsidized housing have significant consequences both for the residents and for the surrounding community. Projects can enhance property values and social experience for neighbors and fellow citizens, or they can undermine them. These economic ripples and

---

92. See J. Peter Byrne, *Two Cheers for Gentrification*, 46 *How. L.J.* 405, 421-24 (2003) [hereinafter Byrne, *Two Cheers for Gentrification*].

93. *Id.* at 427-28.

social tremors have important effects too on the quality of life of subsidized housing residents. They may be shunned and feared, welcomed as neighbors with full citizenship, or greeted with mixed hostile or cooperative feelings. Experience and research suggest that these social realities can have powerful consequences for the fortunes of the residents of subsidized housing.

In this section, we consider the degree of social integration or isolation to which a project may aspire. Primarily we focus on the extent that a project mixes poor people with more affluent residents either by its internal composition or by its location. Economic integration has benefits for residents and neighbors alike, but it also has costs—both real and feared. We draw our observations from empirical studies, economic reasoning, moral reflection, and our own experience. In Part II.D, we will consider related issues about the contributions of subsidized housing to urban vitality.

Traditional public housing constructed dwellings only for the poor. As has often been noted, theorists in the 1930s thought of public housing as providing transitional housing for ordinary Americans afflicted by the Depression; they assumed economic mobility. They established income thresholds and expected families to depart for market rate housing as the economy produced more jobs and their income exceeded the ceiling. At this point, these families would be replaced by others down on their luck.<sup>94</sup> Thus, even though all the residents would be poor, they would represent a diverse cross section of citizens who just happened to be poor at the time of their residence. For many reasons, much traditional public housing, especially in cities, was constructed in poor or marginal areas remote from established neighborhoods or more expensive housing.<sup>95</sup> The law required localities to eliminate one “substandard” unit of housing for each public housing unit constructed.<sup>96</sup> This meant that such public housing predominantly was built in cities, where most dilapidated housing could be found. Political pressure pushed public housing further into the marginal neighborhoods, away from the politically powerful.<sup>97</sup> It may be that these sites were cheaper to acquire, an important considera-

---

94. Michael H. Schill & Susan M. Wachter, *The Spatial Bias of Federal Housing Law and Policy: Concentrated Poverty in Urban America*, 143 U. PA. L. REV. 1285, 1294 (1995).

95. See Miller, *supra* note 26, at 1280.

96. See Schill & Wachter, *supra* note 94, at 1293.

97. *Id.* at 1295.

## 2007] AFFORDABLE HOUSING AND LAND TENURE 553

tion when using public funds for a new program. Finally, in the urban renewal era, there was political pressure to place residents displaced by the bulldozer in new housing within the redevelopment area.<sup>98</sup> Placing public housing in slum areas thus comported with the primary goal of building decent shelter.<sup>99</sup> New subsidized housing was located in areas that would generate the least public economic and political cost.<sup>100</sup>

This isolation of public housing became a much greater liability as the population living in public housing evolved during the 1950s and 1960s.<sup>101</sup> Poverty became more geographically concentrated and persistent, particularly for urban minority populations.<sup>102</sup> While this was a complex phenomenon reflecting changes in employment opportunities, exclusionary suburbanization, and demographic movements, it had drastic effects on urban public housing.<sup>103</sup> Projects contained only very poor persons with limited life prospects and were grouped in depressed parts of town. The increased social isolation magnified the effects of poverty.<sup>104</sup> Poor families had to cope not only with their own poverty, but with the external effects of their neighbors' poverty. To the extent that poor people are more likely to have social problems that affect neighbors, such as unruly children and criminal behavior, concentrating them together will impose on each family not only the deprivations of their own poverty, but the need to cope with an

---

98. Despite initial promises and plans, it was quite rare for public housing to be built in redevelopment areas.

99. See Kennedy, "Milking" and Class Violence, *supra* note 30, at 489 (contrasting the generally good conditions in new public housing projects with the declining quality of private sector tenements being "milked" by landlords seeking to maximize their investment).

100. This model was followed for some urban market rate housing intended for middle-income people as well. Stuyvesant Town in Manhattan was built in significant density by the Metropolitan Life Insurance Company beginning in 1947 for the families of returning veterans. It, too, was racially segregated; blacks were barred until the early 1950s. Charles V. Bagli, *\$5.4 Billion Bid Wins Complexes in New York Deal*, N.Y. TIMES, Oct. 18, 2006, at A1.

101. See Schill & Wachter, *supra* note 94, at 1294.

102. See Florence W. Roisman, *The Lessons of American Apartheid: The Necessity and Means of Promoting Residential Racial Integration*, 81 IOWA L. REV. 479, 492 (1995).

103. See James E. Rosenbaum et al., *Can the Kerner Commission's Housing Strategy Improve Employment, Education, and Social Integration for Low-Income Blacks?*, 71 N.C. L. REV. 1519, 1521-22 (1993).

104. See Michael H. Schill, *Assessing the Role of Community Development Corporations in Inner City Economic Development*, 22 N.Y.U. REV. L. & SOC. CHANGE 753, 759 (1997); see also WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 56-62 (Univ. of Chicago Press 1990) (1987) [hereinafter WILSON, *THE TRULY DISADVANTAGED*].

R

R

environment full of social problems. Projects too often fomented a violent, anti-social culture, becoming ghettos of poverty without resources, role models, or apparent paths to individual success.<sup>105</sup>

Racial discrimination also played a large role. Many early projects were segregated de jure, based on the racist ideology of dominant whites at the time.<sup>106</sup> Indeed, racial segregation in public housing was not different in kind from such segregation in the private market, encouraged by public criteria for mortgage insurance and the like.<sup>107</sup> It was only more complete because all public housing in a community would be under the visible control of the local PHA. After lawful segregation ended, the established patterns of occupation, the location of buildings, and continuing white racism ensured that minorities, especially African-Americans, would continue to experience substantial de facto segregation in public housing. The *Gautreaux* case documents the extent of discrimination against African-Americans in Chicago public housing,<sup>108</sup> for example; the extensive sociological studies of *Gautreaux* families who later moved to integrated suburban communities through creative judicial remedies suggest some of the costs they bore as a result of their prior isolation.<sup>109</sup>

Beginning in the 1960s, the federal government's turn to private suppliers of publicly subsidized housing long had as a goal greater dispersal of subsidized housing across a community in order to decrease social isolation. Section 8 rent vouchers, for example, allow recipients to choose available housing from any willing landlord.<sup>110</sup> Housing acquired with rental vouchers should be more economically heterogeneous than public housing, being dispersed among

---

105. Some communities constructed public housing that was far more socially successful. Smaller and suburban communities that built public housing often had smaller projects in less isolated locations. Also, public housing for seniors long has been received by communities as less threatening or disruptive.

106. See Schill & Wachter, *supra* note 94, at 1295-97.

107. Stuyvesant Town itself was restricted to whites until 1950. See Bagli, *supra* note 100; see also Robin Shulman, *Middle-Class Enclave in N.Y. Is Sold, and Tenants Worry*, WASH. POST, Nov. 12, 2006, at A3.

108. *Gautreaux v. Chicago Hous. Auth.*, 296 F. Supp. 907 (N.D. Ill. 1969).

109. See generally LEONARD S. RUBINOWITZ & JAMES E. ROSENBAUM, *CROSSING THE CLASS AND COLOR LINES: FROM PUBLIC HOUSING TO WHITE SUBURBIA* (2000) (studying advantages and disadvantages for former public housing tenants moving to suburbs).

110. Federal law does not require a landlord to accept a Section 8 tenant. See *Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293, 295 (2d Cir. 1998). Some state and local statutes, however, prohibit landlords to discriminate against a prospective tenant on account of the source of a lawful payment. See, e.g., *Franklin Tower One, L.L.C. v. N.M.*, 725 A.2d 1104, 1115 (N.J. 1999).

R

R

2007] *AFFORDABLE HOUSING AND LAND TENURE* 555

and within market rate buildings. The capacity of recipients to choose a dwelling from those available may also tend to enhance their sense of mobility.<sup>111</sup> To be sure, both the limited funding of Section 8 vouchers, permitting far fewer than the number of persons who qualify for them,<sup>112</sup> and the reluctance of landlords to participate in the Section 8 program, limit its achievement of greater dispersal of poor residents.<sup>113</sup> Buildings enrolled in Section 8 usually are located in the lower income neighborhoods.<sup>114</sup> But there seems little doubt that Section 8 has given many recipients a greater opportunity for integration into a more diverse society than public housing would have afforded them.<sup>115</sup>

The further devolution of the production of subsidized housing to private developers since the 1980s has increased the opportunities for low-income housing to be integrated into the larger community. Such developments can be, and sometimes are, located in desirable or gentrifying neighborhoods.<sup>116</sup> They can and often do include people at different income levels enjoying different levels of subsidy based upon their wealth. While these moves can provide real benefits to the residents, they will also incur substantial costs that potentially limit the available number of units of decent housing.

Mixed-income projects intentionally allocate units to families at different income levels, often in bands based on percentages of

111. See Myron Orfield, *Land Use and Housing Policies to Reduce Concentrated Poverty and Racial Segregation*, 33 *FORDHAM URB. L.J.* 877, 921 (2006).

112. See, e.g., Lynn E. Cunningham, *Islands of Affordability in a Sea of Gentrification: Lessons Learned from the D.C. Housing Authority's HOPE VI Projects*, 10 *J. AFFORDABLE HOUSING & COMMUNITY DEV. L.* 353, 357 (2001) (noting that in Washington, D.C. there are approximately 20,000 low-income households on the waiting list for public housing or Section 8 vouchers).

113. The administration of Section 8 by local housing authorities, sometimes devolving into wholesale corruption, also has frustrated the achievement of the good effects expected. See Cindy Loose, *5 D.C. Housing Employees Charged; Only 10 of 400 New Housing Vouchers Issued Since 1990 Didn't Involve Bribery, Probe Finds*, *WASH. POST*, Apr. 13, 1994, at A1. Indeed, despite the promise of more integrated neighborhoods, few HOPE VI projects have broken free from a long pattern of isolation and exclusion. See Byrne, *Two Cheers for Gentrification*, *supra* note 92, at 430.

114. Michael Lewyn, *The Law of Sprawl: A Road Map*, 25 *QUINNIPIAC L. REV.* 147, 164 (2006).

115. See Mark A. Malaspina, *Demanding the Best: How to Restructure the Section 8 Household-Based Rental Assistance Program*, 14 *YALE L. & POL'Y REV.* 287, 295-97 (1996); see also Byrne, *Two Cheers for Gentrification*, *supra* note 92, at 429 (discussing the merits of Hope VI).

116. See Byrne, *Two Cheers for Gentrification*, *supra* note 92, at 428 (discussing the redevelopment of the Ellen Wilson Dwellings on Capitol Hill in Washington, D.C. into a 134-unit mixed-income project). *But see generally* Cunningham, *supra* note 112 (criticizing the same project).

R

R

R

R

area median income.<sup>117</sup> Of the 153 units in the Townhomes on Capitol Hill, for example, 134 of them are subsidized and included within a limited equity cooperative and thirteen are sold outright at market rates.<sup>118</sup> Among the subsidized units, twenty-five percent are available to families earning no more than twenty-five percent of the AMI, twenty-five percent to residents earning between twenty-five percent and fifty percent of AMI, and the remaining fifty percent to families earning between fifty percent and eighty percent of AMI, although twenty units in the last band could be occupied by families earning up to 115 percent of AMI.<sup>119</sup> In such projects, the poorest persons need not suffer from an environment full of the social pathologies of poverty. Rather they can learn skills from association with wealthier people, who in turn develop a less stereotyped attitude toward the needy.<sup>120</sup> This effect may be enhanced in cooperative housing where the residents must cooperate to make decisions for the management of their buildings.

Mixed-income housing, however, often means that less housing will be provided to the neediest.<sup>121</sup> Within a project of a fixed size, providing some units to higher-income residents means that there are fewer available for poorer residents who lack alternatives. Any improvement in the quality of living in such a replacement project entails a reduction in quantity.<sup>122</sup> The federal government's only continuing program for directly funding new subsidized housing, HOPE VI, has been roundly criticized for actually decreasing the number of housing units available for the poorest tenants.<sup>123</sup> HOPE VI provides funds to demolish distressed traditional public housing and replace it with mixed-income projects.<sup>124</sup> Typically,

---

117. The prototype of the successful, modern mixed-income development is Harbor Point in Boston. See generally JANE ROESSNER, *A DECENT PLACE TO LIVE: FROM COLUMBIA POINT TO HARBOR POINT* (2000).

118. See ABT ASSOC., *ELLEN WILSON DWELLINGS CASE STUDY*, *supra* note 85, at 13. R

119. *Id.* Each member of the co-op makes an initial payment set at five percent of annual income (which is treated approximately as equity) and then makes a monthly payment of thirty percent of the monthly income at the center of her band.

120. See J. Peter Byrne, *Are Suburbs Unconstitutional?*, 85 GEO. L.J. 2265, 2281-82 (1997) [hereinafter Byrne, *Are Suburbs Unconstitutional?*].

121. See Cunningham, *supra* note 112, at 357 (arguing that for people waiting for affordable housing, projects like The Townhomes "look like another tool . . . to reduce the number of affordable units"). R

122. See Marc Seitles, *The Perpetuation of Residential Racial Segregation in America: Historical Discrimination, Modern Forms of Exclusion, and Inclusionary Remedies*, 14 J. LAND USE & ENVTL. L. 89, 119 (1998) (using Chicago as an example).

123. See Cunningham, *supra* note 112, at 353. R

124. See discussion *infra* Part II.H.2.

2007] *AFFORDABLE HOUSING AND LAND TENURE* 557

the replacement contains far fewer units for the very poor than the original project. Indeed, the Townhomes on Capitol Hill (the “Townhomes”) illustrate this very tradeoff. The public housing on the site (which actually had been abandoned in 1988) contained 134 units, all of which were given to the poorest families, while in the new development only twenty-five percent of the 134 “replacement” units were available to the poorest.<sup>125</sup> The need for housing by the poorest families far surpasses the supply. Another HOPE VI project in Washington, D.C., the Arthur Capper/Carrollsborg project, shows one way past this dilemma. It guarantees replacement housing in the new mixed-income project under construction to the same number of very poor residents who had qualified to live in the demolished public housing.<sup>126</sup> The new project will be considerably larger and denser than the old project.

Contemporary projects also often strive to place subsidized housing in more affluent or gentrifying neighborhoods.<sup>127</sup> The Townhomes, discussed above,<sup>128</sup> were constructed on a desirable site in the Capitol Hill neighborhood. Several tenant-purchased cooperatives in D.C. are located in rapidly gentrifying areas around 14th Street and Columbia Road.<sup>129</sup> Locating affordable housing for the poor in such neighborhoods is the opposite of displacement, exclusion, or isolation. Residents of such projects can enjoy the benefits of a relatively safe urban neighborhood with better amenities, such as better shopping, neighborhood schools, and proximity to employment and entertainment. Social science evidence indicates that poor residents place a high value on living in such neighborhoods and benefit from it more than living in mixed-income dwellings.<sup>130</sup> The amenities that come with a good urban location

---

125. See Cunningham, *supra* note 112, at 357.

126. The Capper/Carrollsborg development will replace the current 780 public housing units with 707 new public housing units, as well as an additional 525 affordable rental units and 330 market-rate homes. See D.C. Housing Authority, [http://www.dchousing.org/hope6/arthur\\_capper\\_hope6.html](http://www.dchousing.org/hope6/arthur_capper_hope6.html) (last visited Apr. 2, 2007) (“By replacing all occupied public housing units, the Arthur Capper/Carrollsborg development will be the first HOPE VI site in the country to provide one-for-one replacement of demolished public housing units.”).

127. See Byrne, *Two Cheers for Gentrification*, *supra* note 92, at 428-30 (mentioning the Townhomes).

128. See *supra* text accompanying notes 118-19.

129. See *infra* Parts II.E, F, and G for experiences relating to some of these projects.

130. See Jacob L. Vigdor, *Does Gentrification Harm the Poor?*, 2002 Brookings-Wharton Papers on Urb. Affairs 133, 167-68 (2002), available at [http://muse.jhu.edu/journals/brookings-wharton\\_papers\\_on\\_urban\\_affairs/v2002/2002.1vigdor.pdf](http://muse.jhu.edu/journals/brookings-wharton_papers_on_urban_affairs/v2002/2002.1vigdor.pdf) (providing evidence that gentrification increases a neighborhood’s economic diversity);

R

R

are resources that, like building equity, can help lift benefited residents out of poverty.

Locating affordable housing in more affluent neighborhoods may have large costs as well. Land costs more in affluent neighborhoods, and land costs are a substantial part of the cost of any urban development. Thus, assuming fixed funds for a subsidized housing project, more or larger units can be built in less affluent neighborhoods. This trade-off can be captured by the example of a non-profit owner that rationally sells a building in a gentrifying neighborhood to a profit-seeking developer in order to fund construction of more subsidized units in a depressed neighborhood. It may also often be the case that construction of the same space will be more expensive in an affluent neighborhood. Neighbors may actively oppose housing for poor persons near them, raising regulatory costs.<sup>131</sup> More compliant neighbors still may cite land use or historic preservation laws to demand higher aesthetic quality to the exterior of the project. The Townhomes, for example, were designed by the esteemed architect Amy Weinstein to reflect the building styles of the historic Capitol Hill neighborhood both to help integrate the residents socially into the neighborhood and to help secure neighbors' acquiescence to a new subsidized housing development.<sup>132</sup>

Weighing the trade-offs between locating subsidized housing in affluent or depressed neighborhoods requires consideration of the priorities developers have for their residents and their communities. The higher land costs reflect the greater amenity value of more affluent neighborhoods and may confer real value on those poor residents who can be accommodated. The more aesthetically pleasing exteriors resulting from neighborhood pressure may enhance the self-esteem or simply delight the residents.<sup>133</sup> The developer may view such benefits as essential tools for helping the poor overcome their disadvantages. The developer also may view access to such neighborhoods as an issue of justice to the poor or as an

---

see also Scott C. McDonald, *Does Gentrification Affect Crime Rates?*, 8 CRIME & JUST. 163, 168, 196-98 (1986).

131. See, e.g., Byrne, *Two Cheers for Gentrification*, *supra* note 92, at 429 n.107 (discussing local opposition to the Townhomes project).

132. See ABT ASSOC., ELLEN WILSON DWELLINGS CASE STUDY, *supra* note 85, at 8.

133. Architects and planners have put much thought into the design of low-income housing in recent years with sometimes impressive results. A recent exhibit at the National Building Museum addressed this point. See Nat'l Bldg. Museum, *Affordable Housing*, [http://www.nbm.org/Exhibits/current/Affordable\\_Housing.html](http://www.nbm.org/Exhibits/current/Affordable_Housing.html) (last visited Dec. 21, 2006); see also SAM DAVIS, *THE ARCHITECTURE OF AFFORDABLE HOUSING* (1995).

R

R



## 2007] AFFORDABLE HOUSING AND LAND TENURE 559

important element in building a vital city, an issue to be explored in Part II.D. All these considerations may persuade the developer to undertake the high costs. On the other hand, another developer may believe that since so many people need physically decent housing it should build units where the most can be built at the lowest cost. It simply may not have the money to build except in marginal areas. Institutionally, the developer may be disabled politically from combating the exclusionary forces in more affluent neighborhoods. Or a developer may adhere to the belief that the poor are better off in their own communities where they have informal supportive networks. It may also view the amenities of a more affluent neighborhood with a jaundiced eye, either thinking them unnecessary luxuries or simply alien to the tastes and interests of the populations the developers wish to protect.<sup>134</sup>

Inclusionary zoning laws frequently place affordable units in highly desirable locations, although they also stimulate debates about trade-offs between housing location and quantity. Inclusionary zoning requires developers to offer a certain percentage of the units they construct to lower income people at regulated prices. Jurisdictions such as Montgomery County, Maryland, require that larger developments set aside a higher percentage of units to be offered at regulated prices for households with incomes below some threshold.<sup>135</sup> By such means, government can shift the cost of providing subsidized housing to developers and, perhaps, to market rate buyers of new homes.<sup>136</sup> In a community with strong

---

134. Some theorists contend that poor people should defend their existing neighborhoods as sites where they can aggregate their political power based on shared economic and racial interests. See John A. Powell & Marguerite L. Spencer, *Giving Them the Old "One-Two": Gentrification and the K.O. of Impoverished Urban Dwellers of Color*, 46 HOW. L.J. 433, 489 (2003).

135. Under current law, developers of projects with twenty or more units in a single location must make 12.5 percent of them affordable to persons earning sixty-five percent of area median income. MONTGOMERY COUNTY CODE §§ 25A-1 (2006). Developers in some locations can obtain density bonuses but must offer a larger percentage of affordable units of up to fifteen percent. The units may be rented or sold, at prices determined by an elaborate regulatory process. When the affordable unit is sold, a covenant provides that for thirty years it can be resold only to a qualified buyer and at a resale price set by the County. See Montgomery County Maryland Website, Moderately Priced Dwelling Units Declaration of Covenants for Sale Subdivisions (Aug. 2006), available at [http://www.montgomerycountymd.gov/content/dhca/housing/housing\\_P/mpdu/pdf/covenants\\_mpdu\\_sale\\_8-9-06.pdf](http://www.montgomerycountymd.gov/content/dhca/housing/housing_P/mpdu/pdf/covenants_mpdu_sale_8-9-06.pdf).

136. The literature reflects debate about the extent and the circumstances under which a developer can shift these costs to a buyer. Compare Robert C. Ellickson, *The Irony of "Inclusionary" Zoning*, 54 S. CAL. L. REV. 1167 (1981), with Andrew G. Dietderich, *An Egalitarian's Market: The Economics of Inclusionary Zoning Reclaimed*, 24 FORDHAM URB. L.J. 23 (1996). Some jurisdictions permit density bonuses

demand for new housing, such inclusionary devices can generate many affordable units. Moreover, they can be mixed among the market rate units of the same development, providing two social integrations for the subsidized households: within affluent areas that attract expensive new housing projects and within those projects themselves. Inclusionary devices thus promote some economic integration in those high demand areas where the market is least likely to provide it, including gentrifying neighborhoods, and where direct subsidy with public funds would be most expensive.

At first blush, one might think that there is little reason for a jurisdiction that can impose inclusionary devices not to do so. Inclusionary devices require political will with a local or perhaps a state jurisdiction, so those who for economic or social reasons resist such a measure may be able to prevent it through political action. There are several reasons that might give pause, even to a community persuaded of the value of social integration. First, some scholars have argued that inclusionary devices defeat their own purpose by raising prices for market rate buyers and discouraging builders.<sup>137</sup> While the plausibility of this claim depends upon assumptions that will only apply to certain programs and certain local circumstances, it should be considered by any community. Second, these programs tend to serve primarily moderate-income rather than low-income residents.<sup>138</sup> Obviously, the greater the subsidy, the greater the expense to the developer. Additionally, the poorer the subsidized resident, the greater the risk of resistance to proximity by market-rate buyers. Thus, such programs tend to serve teachers, police officers, and seniors, rather than the very poor.

Developers or communities may prefer paying cash or building affordable units elsewhere, in order to minimize their costs or avoid scaring affluent buyers. The most famous example emerged in New Jersey's 1985 Fair Housing Act (the "FHA").<sup>139</sup> This legislation was enacted in the wake of the second major decision by the New Jersey Supreme Court in the *Mount Laurel* line of cases, which held that the state's municipalities had a constitutional obli-

---

to developers for including affordable units, thus perhaps lessening the excess costs that have been passed on to buyers, but perhaps at the cost of suboptimal planning.

137. See Ellickson, *supra* note 136, at 1187-91.

138. See ARON TROMBKA ET AL., MONTGOMERY COUNTY COUNCIL STAFF, STRENGTHENING THE MODERATELY PRICED DWELLING UNIT PROGRAM: A THIRTY YEAR REVIEW 5-1 to 5-6 (2004); see also Naomi Bailin Wish & Stephen Eisdorfer, *The Impact of I Initiatives: An Analysis of the Characteristics of Applicants and Occupants*, 27 SETON HALL L. REV. 1268, 1296 (1997).

139. N.J. STAT. ANN. § 52:27D-301 (West 2005).

## 2007] AFFORDABLE HOUSING AND LAND TENURE 561

gation to provide a “realistic opportunity” for decent housing for the poor.<sup>140</sup> The prime targets of the court’s decision were exclusionary zoning practices that kept lower income people entirely out of many communities; the remedies were designed to open these communities to this class. As such, social integration of people at different economic levels was an important goal for the court.

The FHA partially muted this goal. It permitted municipalities to transfer up to fifty percent of their affordable housing obligations to other municipalities.<sup>141</sup> In practice, this meant that wealthy towns would pay needy towns to take on some number of the obligated units of the sending jurisdiction. For example, four affluent towns paid New Brunswick a total of \$7.65 million to accept their obligation to provide 406 units.<sup>142</sup>

Understandably, some critics were troubled that these transfers gutted the social integration goals of the *Mount Laurel* rulings. Professor Charles Haar wrote that the transfers “shifted the rationale of the Mount Laurel doctrine away from the broad goal of ending geographic segregation surrounding inner-city minorities and toward the raw provision of low-income housing.”<sup>143</sup> As this Article argues, tensions among goals of decent housing and other social benefits are endemic in subsidized housing. Housing advocates more concerned with providing housing than with social integration can find real virtues in the approach of the FHA. It creates an incentive for wealthier communities to finance construction or rehabilitation of low-income housing by paying other communities to take a percentage of their obligation. This housing can often be built at lower cost in less affluent communities because of lower land costs, more opportunities to rehabilitate existing housing, and lower regulatory costs in municipalities reaching out for subsidized housing. Lower costs mean more units for the same amount of money. The capacity to provide decent low-income housing may also help to stabilize economic or social conditions in the receiving

---

140. *South Burlington County NAACP v. Twp. of Mount Laurel*, 456 A.2d 390 (N.J. 1983). Under the court’s ruling, every municipality had to address decent housing for its current poor residents and every town designated by the state plan as a growth area had to provide its “fair share” of present and expected statewide need for affordable housing. *Id.* at 418-19. There were many other legal twists to the *Mount Laurel* requirements, which are outside the scope of this Article. *See generally* Byrne, *Are Suburbs Unconstitutional?*, *supra* note 120.

141. N.J. STAT. ANN. § 52:27D-312.

142. *See* Byrne, *Are Suburbs Unconstitutional?*, *supra* note 120, at 2281.

143. CHARLES M. HAAR, *SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES* 114 (1996).

R

R

municipality, an issue discussed at length below.<sup>144</sup> Finally, the FHA strikes a balance between integration and housing by permitting no more than fifty percent of the sending municipality's obligation to be transferred.<sup>145</sup>

A similar issue emerged in Montgomery County, Maryland, in recent years. As noted above, the County requires developers of projects with twenty or more dwelling units to make 12.5 percent of them available at "affordable" rates.<sup>146</sup> Developers found it especially costly to provide on-site affordable housing in large condominium projects that also might require other exactions to obtain site approval. Some sought to substitute payments into a county housing fund to finance off-site affordable housing. Although some payments were accepted, the County Council amended the ordinance in 2004 to narrow the use of payments in lieu of on-site units only upon officials making findings of specific exceptional circumstances.<sup>147</sup> In such cases, officials must determine that "the public benefit of additional affordable housing outweighs the value of locating MPDUs [Moderately Priced Dwelling Units] in each subdivision throughout the County."<sup>148</sup>

With inclusionary zoning, governments face the tension between the social benefits of integration and the provision of larger quantities of decent housing. The tension can be resolved only by the clash of principle, politics, and economics within each jurisdiction—or at least those that recognize any obligation to subsidize

144. See discussion *infra* Part II.D.

145. There are many other problems with both the *Mount Laurel* doctrine and the FHA. Although a significant number of affordable units have been constructed, see ELLICKSON & BEEN, *supra* note 22, at 780-81, a study found that very few of the residents were urban blacks. See Wish & Eisdorfer, *supra* note 138, at 1296. Also, in negotiating transfer agreements under the FHA, recipient towns seem to compete against each other to take the most units for the lowest price, a perverse incentive. Despite all of this, Professor John Payne surely is correct to call the FHA "arguably the most progressive piece of housing legislation anywhere in the country." John M. Payne, *Lawyers, Judges, and the Public Interest*, 96 MICH. L. REV. 1685, 1688 (1998).

146. See *supra* note 135.

147. MONTGOMERY COUNTY CODE § 25A-5A (2006). The officials must find either that "an indivisible package of services and facilities available to all residents of the proposed subdivision would cost MPDU buyers so much that it is likely to make the MPDUs effectively unaffordable by eligible buyers"; or that "environmental constraints at a particular site would render the building of all required MPDUs at that site economically infeasible." *Id.*

148. *Id.* § 25A-5A(a)(2); see generally TROMBKA ET AL., *supra* note 138 (explaining the amendments). New Jersey requires that payments in lieu of set asides be supervised by the Council on Affordable Housing under its ongoing certification of a community's plans to meet its affordable housing goals. See generally *Fair Share Hous. Ctr., Inc. v. Twp. of Cherry Hill*, 802 A.2d 512 (N.J. 2002).

R  
R

R

R

housing at all. For individual developers of subsidized housing that are otherwise unconstrained by law, the choice may depend on the programmatic priorities of sponsoring organizations or the economic realities of particular projects. Few should question the benefit to residents of social integration, but many may question whether securing these benefits for a few has greater social value than providing good housing for many. As we consider below, resolution of this issue may turn on consideration of the benefits of different approaches for the community as a whole.

#### D. Urban Vitality

The location and form of low-income housing can have profound consequences for the social and economic dynamics of a community. Enhanced mobility, which allows further distances between workplaces and homes, promotes a sorting function where residents cluster by income groups. Housing prices tend to reflect the overall desirability of different communities, including status, housing quality, and other amenities. Historically, many American suburbs and urban neighborhoods have sought to exclude low-income housing and residents to the extent feasible.<sup>149</sup> Popular fears about reduced property values, increased crime, and higher taxes, combined with racial prejudice, have sometimes fueled zoning and other siting policies that relegate most low-income people to enclaves of poverty within older suburbs or the central city.<sup>150</sup> These patterns of economic sorting, the combined effects of market forces and local control of land use laws and PHAs, persisted until very recent years when new patterns of immigration and renewed residential interest in center cities have complicated the picture.<sup>151</sup>

---

149. The origins of exclusivity in suburbs are described in DOLORES HAYDEN, *BUILDING SUBURBIA: GREEN FIELDS AND URBAN GROWTH* 65-70 (2003), and ROBERT FISHMAN, *BOURGEOIS UTOPIAS: THE RISE AND FALL OF SUBURBIA* 4 (Basic Books 1987) ("From its origins, the suburban world of leisure, family life, and union with nature was based on the principle of exclusion.").

150. See, e.g., SHERYLL CASHIN, *THE FAILURES OF INTEGRATION* 83-124 (2004).

151. Immigrants in the past decade have settled in suburbs as often as in traditional center cities. Today the number of immigrants living in the suburbs exceeds the number living in central cities. See AUDREY SINGER, *THE RISE OF NEW IMMIGRANT GATEWAYS* 10 (2004), available at [http://www.brookings.edu/urban/pubs/20040301\\_gateways.pdf](http://www.brookings.edu/urban/pubs/20040301_gateways.pdf). Immigrants have defied exclusionary zoning by occupying single-family homes at multi-generational densities that make purchase of such dwellings affordable at lower per person incomes. See, e.g., Charisse Jones, *Crowded Houses Gaining Attention in Suburbs*, USA TODAY, Jan. 31, 2006, at A5.

This Part looks at choices regarding the trade-offs faced by policy makers with regard to the location and design of subsidized housing. In Part II.C, we considered the costs and advantages to low-income individuals that could come from social integration, often determined by location and the structure of subsidized housing. Here we consider the consequences for the community as a whole. While there is a normative aversion to exclusion of low-income people from neighborhoods and communities, subsidizing housing in upper income areas is costly both financially and politically, and valid reasons exist for supporting siting such housing in lower income neighborhoods. As with all aspects of subsidized housing, however, attention to trade-offs and priorities can enhance the success of specific ventures.

We begin with discussion of the normative arguments in favor of economic diversity within communities.<sup>152</sup> We must first identify what is meant by diversity, although that rests to some extent on the normative argument that follows. Robert Ellickson has advanced what he terms a “Waring blender” vision of residential diversity, because it would eliminate the distinctive identities of culturally dynamic or attractive subcommunities, such as Italian or gay neighborhoods.<sup>153</sup> The blender model is a strawman, as we are very far from that in economic residential patterns. Moreover, the ethnic and other cultural identities of neighborhoods before 1950, inarguably stronger than today, generally must have also been more economically diverse. African-American neighborhoods, for example, seem to have been far more economically diverse when

---

152. Professor Lee Fennell argues that there may also be an efficiency-based argument for some level of economic diversity within a community. See Lee Anne Fennell, *Exclusion's Attraction: Land Use Controls in Tieboutian Perspective*, in *THE TIEBOUT MODEL AT FIFTY: ESSAYS IN PUBLIC ECONOMICS IN HONOR OF WALLACE OATES* 163 (William A. Fischel ed., 2006). She employs a notion of high value community members who can help co-produce valuable public goods (like successful public education) in a community. She further hypothesizes that very affluent communities are likely to have many more than the optimum level of such persons, which is not reached in a straight line because of the effects of synergy, while poor communities are likely to have few. Thus, the movement of some high value neighbors to poorer neighborhoods likely will provide more value to the poorer neighborhoods than they will detract from the affluent. *Id.* at 184-93. This is an intriguing idea with both theoretic and intuitive appeal that deserves further study.

153. Robert C. Ellickson, *The Puzzle of the Optimal Social Composition of Neighborhoods*, in *THE TIEBOUT MODEL AT FIFTY: ESSAYS IN PUBLIC ECONOMICS IN HONOR OF WALLACE OATES*, *supra* note 152, at 201.

## 2007] AFFORDABLE HOUSING AND LAND TENURE 565

blacks were excluded from many white neighborhoods.<sup>154</sup> In this Article, we argue only for the desirability of a minimum amount of residential diversity adequate to provide greater opportunity for political power and access to essential public goods. While reserving discussion of what degree of economic mixing might be optimal, we feel comfortable arguing that those modest increases that are realistically attainable in the foreseeable future would be beneficial for society at large. Indeed, most arguments for economic residential diversity call only for some “fair share.”<sup>155</sup> The modest support given here to fostering economic diversity is a far cry from any effort to eliminate affluent communities.

Preliminarily, it should be acknowledged that the current degree of economic segregation is a recent phenomenon, promoted in large part by government policies.<sup>156</sup> Employers and workers lived in close proximity to places of work until transportation improvements and greater wealth made greater population dispersal possible.<sup>157</sup> Government measures such as construction of interstate highways, the racist and anti-urban structure of federal mortgage insurance, and the authorization of exclusionary zoning created metropolitan areas where rich and poor rarely interact.<sup>158</sup> The great ethnic diversity of the United States and the availability of land also surely contributed to this segregation. Economic segregation on such a scale, however, is neither a natural nor a traditional feature of American residential patterns.

There are two major arguments for adopting policies that promote residential economic integration. First, extreme economic

---

154. See WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* 38-39, 53-55 (1997) [hereinafter WILSON, *WHEN WORK DISAPPEARS*].

155. The term is derived from *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713, 724 (N.J. 1975), *cert. denied*, 423 U.S. 808 (1975), where the court held that the New Jersey Constitution required every developing municipality to meet its “fair share” of the regional need for low and moderate income housing. See also *supra* note 140.

156. In a completely free market for land development, developers could help poor people pool their resources to build higher density developments even within expensive communities. See Robert Inman & Daniel Rubinfeld, *The Judicial Pursuit of Local Fiscal Equity*, 92 HARV. L. REV. 1662, 1686 (1979); see also Fennell, *supra* note 152, at 173-75 (discussing motives for exclusionary land use controls).

157. See James A. Kushner, *Brownfield Redevelopment Strategies in the United States*, 22 GA. ST. U. L. REV. 857, 862 (2006); Henry R. Richmond, *From Sea to Shining Sea: Manifest Destiny and the National Land Use Dilemma*, 13 PACE L. REV. 327, 329-30 (1993).

158. See generally KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* (1985).

R

R

segregation denies equal citizenship to poor residents, measured both by their lack of access to essential public services and their diminished political power.<sup>159</sup> Public services are those normally produced by the government and enjoyed by all without regard to their ability to pay. Public education is one that many place great import on, but also included are true public goods such as public safety.<sup>160</sup> Residential segregation of the poor excludes them from access to crucial, high quality public services. An entirely affluent suburb can provide quality public schools, recreational facilities, libraries, clean air, and public safety at relatively low cost per person, because they do not have to address even the external costs of poverty mentioned above, such as poor health, less preparation for schooling, less parental involvement, and a greater propensity to mental illness and crime.<sup>161</sup> The poor excluded from a suburb are additionally excluded from the public goods that a suburb exists to provide. Rather, they must dwell in poor suburbs or in center cities that house the vast majority of metro area poor persons. The costs of providing these public goods are higher in cities and such goods barely exist in poor neighborhoods.<sup>162</sup> Poor persons then must cope not only with their poverty but do so without access to valuable public goods, such as education and safety.

Poor segregated residents also lose effective political power in two ways. First and foremost, they have no voice in the decisions of excluding suburbs.<sup>163</sup> Suburban power in state legislatures preserves local power against annexation by cities and statewide land use legislation.<sup>164</sup> Second, the ability to capture all the benefits of public goods created at the local level encourages residents of that suburb to oppose the production of public goods at the state or

---

159. See Byrne, *Are Suburbs Unconstitutional?*, *supra* note 120, at 2265.

160. Public goods are those things that once produced can be enjoyed by all without exhausting the good and from which no one can be excluded; national defense is the classic example. See generally POSNER, *supra* note 30. Mancur Olsen argued that some benefits can be public goods for a distinct group and not serve the interests of society at large. See MANCUR OLSEN, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 15 (1965).

161. See Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 352 (1990) (“Less burdened by poverty, crime, congestion and physical deterioration than big cities, [affluent suburbs] tend to have lower per capita spending needs, while their tax bases are, per taxpayer, more substantial. In addition, local autonomy insulates suburban tax bases from the fiscal needs of city residents.”).

162. See, e.g., ANTHONY DOWNS, *NEW VISIONS FOR METROPOLITAN AMERICA* 60-94 (1994).

163. Richard Thompson Ford, *The Boundaries of Race*, 107 HARV. L. REV. 1841, 1847 (1994).

164. See Briffault, *supra* note 161, at 354.

R

R

R



## 2007] AFFORDABLE HOUSING AND LAND TENURE 567

national level. From their perspective, higher level jurisdictions will tax them to create either public goods that they do not need (because they already produce them locally) or with a higher cost or inferior quality because such goods are designed to be shared with the poor.<sup>165</sup> Thus, arguments by representatives of the poor or cities for state or federal action can be met by seemingly class neutral arguments in favor of local production. U.S. policies exhibit a curious paradox of providing nearly Scandinavian levels of social welfare at the level of affluent local suburbs and adhering at the national level to parsimony in domestic spending to reduce poverty.

The second argument is that residential economic segregation supports a class structure in which current advantages or disadvantages are passed on to succeeding generations. For example, radically better educational or athletic opportunities in an affluent suburb will help a child with a certain genetic endowment achieve more than a deprived child in a ghetto with the same genetic endowment.<sup>166</sup> This diminishment of social mobility weakens the larger society over time, which both over-invests in the rich child and under-invests in the poor child.<sup>167</sup> Lack of actual encounters among diverse individuals also promotes pathologies of stereotyping and prejudice that further isolate the poor from constructive alliances.<sup>168</sup> Rigid class structures are problematic because they deny individuals chances to fulfill themselves, facilitate systematic exploitation of the poorer classes, and invite rebellion.

What are the normative arguments against residential economic diversity? Peter Schuck acknowledges but does not defend “classism,” which he defines as the belief that in a market economy one moves to exclusive or affluent neighborhoods by individual eco-

---

165. Of course, in some situations there can be real production value in producing public goods close to where they will be consumed, but in our system only affluent jurisdictions will fully realize such efficiencies.

166. See James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 276-80 (1999).

167. Many writers have argued that mobility for inner city poor residents is essential for their and society's well-being. See Peter H. Schuck, *Judging Remedies: Judicial Approaches to Housing Segregation*, 37 HARV. C.R.-C.L. L. REV. 289, 307 nn.71-72 (2002) (contrasting ANTHONY DOWNS, *OPENING UP THE SUBURBS: AN URBAN STRATEGY FOR AMERICA* 138-39 (1973) with GERALD E. FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS* 143-64 (1999), WILSON, *WHEN WORK DISAPPEARS*, *supra* note 154, and Michael H. Schill, *Deconcentrating the Inner City Poor*, 67 CHI.-KENT L. REV. 795, 894 (1991)).

168. CASHIN, *supra* note 150, at 251-52.

conomic effort rather than through placement by government.<sup>169</sup> One of the authors had a student some years ago, an African-American woman and real estate broker, who railed against her teacher's favorable account of the *Mount Laurel* principle, stating that white people were going to change the rules for getting into good neighborhoods now that black people had the means to move there. Schuck surely is right that policy makers must pragmatically take into account such beliefs, but that is very different from accepting the argument as good moral reasoning. The belief that affluent people are entitled to live only with other affluent people rests on a simplistic reduction of arguments for the morality of a market system generally and extrapolates them to the type of controls wealthy people exert on the political process. It ignores political arrangements that enable economic segregation. Vicki Been, commenting on Schuck's work, wrote "[T]he role of government has been so pervasive (and perverse) that it is simply impossible to imagine what neighborhoods would have looked like in a 'free market' that left residential choices up to consumers."<sup>170</sup> Indeed, current policy seems to aspire to a kind of "regressive" structure in which the winners are entitled to control most public goods as well as most private wealth. Classism may be little more than a rationalization of privilege; at a minimum, it lacks a serious reasoned defense.

Finally, if it is factually true that many poor people are better off living outside poor ghettos, then arguments for residential economic diversity partake of the rich arguments for a moral imperative to improve the condition of the poor. These arguments may be based on a fundamental belief in equal citizenship, such as in Rawls's argument about distributive justice.<sup>171</sup> They may also flourish within the strong Judeo-Christian traditions demanding justice, and even a preference, for the poor.<sup>172</sup>

---

169. See Schuck, *supra* note 167, at 294 ("Classism is not only predictable, but normative as well; in a capitalist society, it seems like the natural order of things.").

170. Vicki Been, *Residential Segregation: Vouchers and Local Government Monopolists*, 23 *YALE L. & POL'Y REV.* 33, 35-36 (2005).

171. John Rawls developed the outstanding liberal philosophical argument against economic inequality in his classic work *A Theory of Justice*. While this is not the place to develop any extensive claim against "classicism" or exclusionary zoning, under his approach a principal vice of exclusively wealthy jurisdiction is that it captures the public benefits of economic inequality only for the privileged. See JOHN RAWLS, *A THEORY OF JUSTICE* 60-62 (1971).

172. For a scholarly description and critical affirmation of the centrality of economic justice to Twentieth Century Christian theology, see generally GARY DORRIEN,

2007] *AFFORDABLE HOUSING AND LAND TENURE* 569

This discussion can be taken to affirm that efforts to maintain or achieve economic diversity have some value. The costs of the different means of pursuing these goals, however, may be prohibitive. Moreover, there may be trade-offs of benefits for the poor in preferring economic diversity in particular circumstances. In Part II.C above, we considered these facts from the perspective of the promoters or residents in a housing project. Here, we may consider them from the perspective of a community considering funding or regulatory approvals for subsidized housing in different locations. The metric here is whether the project promotes urban vitality.

Subsidized housing programs often have pursued some notion of urban vitality. Urban renewal demolished “blighted” low-income housing and replaced it with modern public housing. The architects of urban renewal believed that excision of blight, like the surgical removal of a gangrenous limb, would enhance urban vitality.<sup>173</sup> Although in practice blight became a term of elasticity, allowing removal of anything believed to stand in the way of desired projects,<sup>174</sup> it properly denotes sites with a negative economic value. This also takes into account the effects on surrounding properties.<sup>175</sup> These projects had some successes and many legendary disasters. Eliminated buildings sometimes lacked basic plumbing and sanitation, which was always provided in the new public housing, but urban renewal displaced many poor people from functioning communities that helped sustain them.<sup>176</sup> The new construction tended to adopt self-defeating forms of architecture and streetscape that undermined and rendered dangerous public space.<sup>177</sup> Moreover, public housing was confined to specific, less desirable areas, thus increasing the isolation and concentration of poverty. Whatever benefits the concentration of poor persons may have had for distant affluent enclaves, it created zones of misery and crime that gave a repellent face to urban life for over a generation.

---

SOUL IN SOCIETY, *THE MAKING AND RENEWAL OF SOCIAL CHRISTIANITY* (Fortress Press 1995).

173. See HALL, *supra* note 19, at 13-46.

174. See Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 *YALE L. & POL’Y REV.* 1, 6 (2003).

175. See *Berman v. Parker*, 348 U.S. 98, 104 (1954).

176. See generally Marc Fried, *Grieving for a Lost Home: Psychological Costs of Relocation*, reprinted in *URBAN RENEWAL: THE RECORD AND THE CONTROVERSY* 359 (James Q. Wilson ed., 1966).

177. See JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 178-99 (1961).

Today, the creation of new subsidized housing rarely entails demolition of existing structures except in the case of HOPE VI projects. HOPE VI aims to replace dysfunctional public housing projects with mixed-income subsidized housing knit into the existing community. Indeed, substantial portions of the benefit from HOPE VI projects inure to the surrounding neighborhood. One study found that the projects boost property values in gentrifying neighborhoods.<sup>178</sup> In the area surrounding the Ellen Wilson site, discussed above, the replacement of a truly blighted and abandoned public housing site with attractive mixed-income buildings evoking local architecture plainly contributed to rapid escalations in prices in the surrounding blocks during a time of general price increases. What had been a feared and shunned place became a source of neighborhood pride. It is important to recognize that a project like Ellen Wilson benefits the surrounding city as well as its residents.

Well-designed subsidized housing projects affording ownership opportunities may benefit poor neighborhoods as well as affluent or gentrifying ones. The Wheeler Creek HOPE VI project in Washington replaced decayed public housing with 314 mixed-income units, 104 of which were owner-occupied. While it is difficult to assess the effects of the project on the surrounding area, it has created a desirable residential enclave in an area afflicted by poverty and crime.<sup>179</sup> It may have contributed to a changing perception of the area by private developers and their customers, as well as encouraged subsidized developers about the potential for success. Perhaps the most dramatic national success story is the South Bronx, where a sustained emphasis on long-term owner-occupied, small-scale housing projects has over time brought back to civic life an area that had once been a byword for urban despair.<sup>180</sup> These projects have been supported or preceded by substantial neighborhood organizing activities, including the creation of durable com-

---

178. See Elvin K. Wyly & Daniel J. Hammel, *Islands of Decay in Seas of Renewal: Housing Policy and the Resurgence of Gentrification*, 10 HOUSING POL'Y DEBATE 711, 741 (1999), available at [http://www.fanniemaefoundation.org/programs/hpd/pdf/hpd\\_1004\\_wyly.pdf](http://www.fanniemaefoundation.org/programs/hpd/pdf/hpd_1004_wyly.pdf).

179. See Jonathan Weisman, *Door May Close on Housing Program*, WASH. POST, June 21, 2005, at A01.

180. See JILL JONNES, *SOUTH BRONX RISING: THE RISE, FALL, AND RESURRECTION OF AN AMERICAN CITY* 389-440 (2002).

2007] *AFFORDABLE HOUSING AND LAND TENURE* 571

munity development corporations capable of partnering with government agencies.<sup>181</sup>

Housing subsidy approaches that facilitate relatively unrestricted ownership and accumulation of equity through a rise in market value may make the most sense in lower income neighborhoods. Recall the point made in Part II.B, that lower real estate costs allowed for a decreased subsidy in more depressed neighborhoods, and thus the amount of wealth transferred to the resident through full ownership may not be very large. Homeowners in such neighborhoods need to struggle against the negative spillovers of poverty, including engendering greater discouragement about their neighborhood. For this reason, it may be prudent to give them a greater incentive to enhance the value of their property while also providing incentive to undertake the risk that their homes may decline in value. Of course, renters or residents with limited equity may invest in their homes for the reasons discussed above, but there may be more reasons in poorer neighborhoods to enhance the incentives of residents through full ownership.

What may be most significant, however, is the benefit that such a project may create for its surrounding neighborhood. The hope is for a synergy of positive externalities and signals that draw new investment and more affluent residents to the neighborhood. To the extent that owners can successfully defend their property values, they will need to keep their homes in repair, monitor their immediate area for crime, and agitate political figures for municipal services. At a minimum, such activity should abate the negative spillovers that their less fortunate neighbors endure, and perhaps create positive benefits for neighbors who appreciate the aesthetics of landscaped front yards or enjoy dodging kids on bikes rather than drug dealers. Such benefits may be chimerical, however, if drug dealers simply move down the street or into a neighboring building. Thus, the larger benefits may be indirect through their influence on the real estate market.

Successful subsidized housing projects in poor neighborhoods may have several positive effects on the immediate real estate market.<sup>182</sup> Early development projects in the neighborhood can ac-

---

181. See generally Julissa Reynoso, *Putting Out Fires Before They Start: Community Organizing and Collaborative Governance in the Bronx, U.S.A.*, 24 *LAW & INEQ.* 213 (2006).

182. A striking example of the belief that owner-occupied housing can invigorate the real estate market in a depressed neighborhood is a subsidy without any income limit given to buyers of large new single-family homes in a distressed section of Anacostia in Washington, D.C. An official at the D.C. Department of Housing and

quaint developers and lenders with the possibilities of the location. Proximity to a successful project may offer an attractive location for additional projects; the success of the first development makes it easier to market the new site to funders or buyers. Also, if owners in the subsidized project can sell their homes freely in the market, it will draw more affluent buyers into the area. Finally, the positive economic activity may signal to the larger development market the possibilities of the formerly invisible area. None of these effects are certain and all benefit from a critical mass of successful projects, but they suggest the positive directions that the market may take from successful subsidized housing projects in poor neighborhoods, especially projects that emphasize wealth creation for owners.<sup>183</sup>

On the other hand, the role of subsidized housing in affluent or gentrifying neighborhoods may be quite different and suggests a different structure for the project. As discussed above, residents in such locations will obtain enhanced benefits from their access to public goods and amenities, and subsidies will be steeper to cover higher land costs. This suggests that residents in such projects should receive less access to the equity in their dwelling. The contributions such projects can make to urban vitality depend on their capacity to create economic diversity and provide neighborhood continuity.

While we made a normative case for economic diversity, we must still consider what contribution this diversity makes to urban vitality. First, it creates the conditions necessary for cultural creativity because of the enhanced possibilities for exchange of ideas. Residents are drawn to neighborhoods like Brownsville or Adams Morgan due to a sense of greater cultural possibility created by the mix of artists, ethnic foods, performances, and affluent consumers.<sup>184</sup> Jane Jacobs's evocation of the pre-urban renewal city as dynamic diversity draws on a cultural tradition that extends back as

---

Community Development explained, "We're trying to create diversity in the southeast quadrant of the city, to break up pockets of poverty . . . . We're trying to encourage investment in an otherwise blighted area." Lyndsey Layton, *High Hopes, and Higher Home Prices, in Anacostia*, WASH. POST, Oct. 19, 2006, at A1.

183. Some studies caution that subsidizing homeownership in distressed neighborhoods may actually entrench poverty since owners may not be able to sell and leave, and promotion of homeownership will more likely succeed when accompanied by other efforts to reduce crime and improve education. See KATZ ET AL., *supra* note 9, at ix.

184. See, e.g., Erika Kinetz, *Dance's Vanguard Stakes Out Brooklyn*, N.Y. TIMES, Apr. 1, 2005, at E1 (describing growth of dance and performance spaces in Brooklyn).

2007] *AFFORDABLE HOUSING AND LAND TENURE* 573

far as Walt Whitman.<sup>185</sup> Cultural vitality is a public good more likely to be created in economically diverse circumstances. Urban centers mixing rich and poor have been the sites of artistic innovation. For example, American music found its voice in joining European sophistication with folk and ethnic dynamism, exemplified in the work of Ellington, Copeland, or Miles Davis.

Second, such neighborhoods have some edge in the global competition for creative workers. If prosperity is now driven by technological innovation and cultural creativity, “high human capital” workers who support the global, technology-based economy are attracted to culturally vibrant communities. Richard Florida found a correlation in residential concentrations between the culturally creative people (“bohemians”) and high technology industry.<sup>186</sup> Most artists earn little and reside in low-income neighborhoods, often signaling the first stirring of gentrification. We may not think of such persons as “poor,” because of their talents and non-monetary pursuits, but the housing they can afford is the same as that of ordinary low-income people.

Third, provision of housing in desirable neighborhoods will make the urban polity appear to be more just. This can have benign effects on the political life of the city and forestall more damaging efforts to disrupt the market or forces of demographic change. Many concerns about gentrification, for example, disappear when long-time residents can afford to remain in their neighborhoods and enjoy its benefits. This also permits long-time residents to preserve some of the social infrastructure that sustained them before gentrification began. Finally, economic residential diversity allows lower income residents easier access to employment within more affluent areas. This has benefits for both more and less wealthy residents. For lower income residents, it enlarges the employment opportunities to which they can reasonably commute and reduces commuting costs. For higher income residents, it makes more workers available for necessary but lower-paying jobs, from teachers and police to less skilled service workers, which also reduces the costs of employing such workers.

The goal of creating or preserving economic diversity in more expensive areas argues for housing programs that save the subsidy

---

185. See JACOBS, *supra* note 177, at 117-40; see also DAVIS S. REYNOLDS, *WALT WHITMAN'S AMERICA: A CULTURAL BIOGRAPHY* 102-110 (1995).

186. RICHARD FLORIDA, *CITIES AND THE CREATIVE CLASS* 117-28 (2005). Florida discusses the Bohemian Index, which lists occupations of people who make their living from the arts. *Id.* at 118.

rather than permitting the resident to cash it out. Allowing the subsidized resident to sell freely will quickly eliminate existing affordable housing, as bidders drive unit prices up to market rates.<sup>187</sup> The higher cost of subsidized units makes each existing subsidized unit increasingly valuable to the public. Moreover, there is no particular benefit to the affluent neighborhood in allowing this to occur because we presume that the market is robust and public goods plentiful. Rather, increased costs of subsidized units eliminate the economic diversity we seek to attain. The argument for some equity for the resident rests on the incentives it provides for her to care for her property and engage in civic culture.

### E. Enhanced Civic Engagement

Poor communities are often faced with situations, such as the absence of city services or “quality of life” debasements, that either do not arise in more affluent communities or, if they do, are quickly dealt with by individuals or organizations experienced in addressing and resolving such problems. Consider the situation of an urban neighborhood that has suffered years of neglect. Local residents are poor and, to a great extent, outside of mainstream civic society. On a particular street in the neighborhood, there are several buildings, single-family houses, and apartment buildings. Some buildings are occupied, some are not. Many are in poor condition and some are boarded up and vacant. Next to one occupied apartment building is an abandoned, dilapidated single-family structure. It has holes through the exterior walls and tilts towards the apartment building. At some point, and for an unknown reason, the abandoned building is demolished by the owner. Rubble is left on the lot, which soon becomes a dumping ground for the surrounding neighborhood and home to old refrigerators, broken furniture, garbage, and many rodents. The lot is not fenced off and is accessible to anyone, including neighborhood children. The residents of the apartment building are not happy about the situation, but what is to be done?

This story illustrates the kind of problem that re-occurs frequently, in various permutations, in the nation’s poor urban communities. Such problems are an affront to decent living conditions, a daily inconvenience, and reflect a municipal disregard and insensitivity to the problems of poor neighborhoods. How these

---

187. By contrast, a dwelling sold at market price in a poorer neighborhood may still be affordable to many people.



## 2007] AFFORDABLE HOUSING AND LAND TENURE 575

problems are addressed may tell us something about the civic engagement of local residents.<sup>188</sup> We therefore turn now to the participation of local residents in public and private activities.

Democratic participation by citizens in civic affairs is a signature tenet of American society.<sup>189</sup> In the housing field, claims have been made that promoting the provision of decent, affordable housing helps to create better and more involved citizens.<sup>190</sup> These claims, however, are deceptively simple. The term “citizenship” involves a variety of components that run from voting to an individual’s greater participation in civic and political affairs; from a greater involvement in one’s building and greater cooperation with one’s neighbors, to one’s development of enhanced life skills in her day-to-day activities.<sup>191</sup>

The validity of these claims may be examined from a variety of viewpoints. For example, on a purely physical level, better housing may eliminate many of the obstacles to an individual’s participation in civic and political life. Consider several “participation benefits” of improved housing. Housing that offers better amenities and is properly maintained is likely to enhance the health of residents.<sup>192</sup> Less time, therefore, would be consumed in attending to one’s illnesses or to those of one’s family, leaving more time, energy, and attention available for other activities, including civic involvement. In addition, the better physical and emotional

---

188. There are, broadly speaking, several ways in which such problems might be addressed. For example, each resident may believe either that seeking a solution is futile or that some other resident might take the time and trouble to do so, in which case the first resident can free ride on that effort. Second, one or more residents may call the neighboring land-owner and ask her to clean up the lot. Third, one or more residents may call local officials or community organizations for help. Fourth, one or more residents might seek to organize other residents of the building or of the street to put pressure on the owner or the local government to correct the situation. All but the first option calls for residents to assert themselves as individuals or collectively. They each require a degree of resident knowledge, skill, and persistence to have a chance to succeed.

189. See generally SAUL ALINSKY, *REVELLE FOR RADICALS* (Vintage Books 1989) (1946); *BUILDING A COMMUNITY OF CITIZENS* (Don Eberly ed., 1994).

190. See Garrett Power, *The Unwisdom of Allowing City Growth to Work out Its Own Destiny*, 47 MD. L. REV. 626, 641 (1998); see also Jeffrey James Minton, *Rent Control: Can and Should It Be Used to Combat Gentrification?*, 23 OHIO N.U. L. REV. 823, 835 (1997) (arguing that security of tenure makes tenants better citizens and fosters greater community participation).

191. There are various types of participation: the legal relationship between individual and polity; engagement in the life of a community; matters of individual justice; and questions of collective identity. See Linda Bosniak, *Citizenship Denationalized*, 7 IND. J. GLOBAL LEGAL STUD. 447, 455 (2000).

192. See Josephine Gittler, *Hospital Cost Containment in Iowa: A Guide for State Public Policymakers*, 69 IOWA L. REV. 1263, 1276 (1984).

condition—all other things being equal—of those living in better housing permits a higher level of participation, regardless of time used providing care to incapacitated family members.<sup>193</sup>

One might assume, for example, that the planners and architects of traditional public housing believed that housing the poor in modern high-rise buildings would create better citizens by eliminating the vicious effects of disease and overcrowding. Planners took a public health approach to housing and dealt with the physical aspects of where and how people lived.<sup>194</sup> Nevertheless, many argued that the public housing experiment failed. This may be because the management of early public housing facilities was turned over to bureaucrats, who sometimes developed harsh antagonisms toward residents, thus reducing the likelihood of many of the non-shelter-related benefits that might otherwise be obtained from such housing. Moreover, by limiting access to public housing to the poorest families, commentators argued that the chances of meeting successful model neighbors were greatly lessened.<sup>195</sup>

Another possible benefit of improved housing involves the effect that crime, and the fear of it, has on civic participation. In public housing, the culture of drugs and crime that overtook some projects created breeding grounds for the most anti-social outlook.<sup>196</sup> Nevertheless, there is evidence that better housing reduces criminal activity and the fear of such activity.<sup>197</sup> If true, this would make people more likely to leave the relative safety of their homes

---

193. Wendy K. Mariner, *Access to Health Care and Equal Protection of the Law: The Need for a New Heightened Scrutiny*, 12 AM. J.L. & MED. 345, 357-58 (1986) (raising proposition that sound physical and mental condition are necessary for participation).

194. See HOWARD HUSOCK, REPAIRING THE LADDER: TOWARD A NEW HOUSING POLICY PARADIGM 14, Policy Study No. 207, 1996, available at <http://www.reason.org/ps207.pdf> (“The physical maintenance problems which plague public housing are particularly ironic, given the original goal of public housing: to replace slums.”).

195. See, e.g., WILSON, THE TRULY DISADVANTAGED, *supra* note 104; Terry A. C. Gray, *De-Concentrating Poverty and Promoting Mixed-Income Communities in Public Housing: The Quality and Work Responsibility Act of 1998*, 11 STAN. L. & POL’Y REV. 173, 174 (1999) (quoting Massey to the effect that “poor blacks are relatively unlikely to experience regular contact with members of other income groups, particularly the affluent”).

196. See Ngai Pindell, *Is There Hope for Hope VI?: Community Economic Development and Localism*, 35 CONN. L. REV. 385, 400 (2003) (discussing other social problems that have affected public housing).

197. See Charles H. Whitebread & John Heilman, *Increasing Our Effectiveness Against Crime: Expanding the Limits of Law Enforcement*, 93 YALE L.J. 1399, 1399-1401 (1984) (book review) (citing unemployment, poverty, and inadequate housing as sources of crime).

## 2007] AFFORDABLE HOUSING AND LAND TENURE 577

which, in turn, would permit them to spend more time in social intercourse. Getting to know one's neighbors often leads to the creation of networks where common concerns may be discussed, resources identified, and alliances made.<sup>198</sup> These benefits are tied to improved housing conditions regardless of the tenure of the resident. Because owner-occupied housing is normally kept in better repair than rental housing, particularly on the lower end of the cost spectrum,<sup>199</sup> it is possible that the participatory enhancements associated with better housing are strongly linked with owner-occupied housing.

There are, however, benefits of better housing that are not directly associated with the physical condition of the property. Economic, emotional, and psychological benefits play a role in explaining increased active participation in civil society and the greater exercise of political power. Many of these benefits are associated with owner-occupied housing. Studies have found increased participation among lower income homeowners than among similarly situated renters.<sup>200</sup> A variety of reasons suggest why this may be. The explanation usually offered for the increased participation is economic in nature. Homeowners have a significant financial stake in the value of their property and therefore take steps not only to maintain its physical condition but also to make sure the surrounding neighborhood is safe, attractive, and desirable, and that elements that might diminish property values are combated.<sup>201</sup> This leads not only to the maintenance of their

---

198. See Paula A. Franzese, *Building Community in Common Interest Communities: The Promise of the Restatement (Third) of Servitudes*, 38 REAL PROP. PROB. & TR. J. 17, 22 (2003) (suggesting social intercourse with neighbors can result in increase in social capital).

199. See Roberta F. Mann, *The (Not So) Little House on the Prairie: The Hidden Costs of the Home Mortgage Interest Deduction*, 32 ARIZ. ST. L.J. 1347, 1355 (2000) ("Homeowners also maintain their homes in better condition than renters . . ."); see also William T. Mathias, *Curtailing the Economic Distortions of the Mortgage Interest Deduction*, 30 U. MICH. J.L. REFORM 43, 54 (1996).

200. See, e.g., William M. Rohe et al., *The Social Benefits and Costs of Homeownership: A Critical Assessment of the Research* 16-17 (Joint Ctr. for Hous. Studies of Harvard Univ., Working Paper No. LIHO-01.12, 2001) (stating protection of economic interest, transaction costs of moving, and identification with one's home as reasons for increased participation among homeowners).

201. See Terry C. Blum & William Kingston, *Homeownership and Social Attachment*, 27 SOC. PERSP. 2, 159-80 (1984) (homeowners have a financially-rooted interest in enhancing their neighborhood); see also U.S. CENSUS BUREAU, AMERICAN HOUSING SURVEY: 2003 tbl. 2-8 (2004), available at <http://www.census.gov/prod/2004pubs/H150-03.pdf> [hereinafter 2003 HOUSING SURVEY] (showing a correlation between homeownership and a higher overall opinion of one's neighborhood).

own homes, but also the incentive to join with other homeowners in demanding city services and taking action concerning local health and safety issues. These residents are also more likely to stay informed about local political issues and vote for candidates who favor policies that enhance property values.<sup>202</sup>

Nevertheless, while the economic interest of homeowners is a plausible explanation for civic and political participation, it is not the only one and, perhaps, not even the best. We believe there are various shortcomings of the studies that found a higher rate of participation among lower income homeowners. One such shortcoming is the missing causal relationship between ownership and participation. One might ask whether the participation is the result of homeownership or whether people who are inclined to participate are also inclined to purchase homes. Perhaps a more significant critique is that the studies do not test for longevity of residence in a community as a basis for participation. One might argue that people with a stake in a community will participate to maintain or improve that community. In this regard, data indicates that renters move more frequently than homeowners.<sup>203</sup> We do not, however, have good data on whether long-time residence in a rental unit, or in a community, results in greater political and civic participation than more transient renters. If commitment to place is an effective indicator of participation—and participation is a desirable outcome—housing policy might seek to encourage residential stability, although not necessarily through homeownership.

Similarly, research suggests that the “pride of ownership” also plays a role in the greater level of participation by homeowners.<sup>204</sup> While there is some overlap with the economic explanation for why homeowners get more involved in community and local politics, the emotional connection to home may be a separate motivator for

---

202. See WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS* 4-13 (Harvard Univ. Press 2001) [hereinafter FISCHER, *HOMEVOTER HYPOTHESIS*]; Lee Anne Fennell, *Homes Rule: The Homevoter Hypothesis: How Home Values Influence Local Government Taxation, School Finance, and Land-Use Policies*, 112 *YALE L.J.* 617 (2002) (book review); see also Frank B. Cross, *The Folly of Federalism*, 24 *CARDOZO L. REV.* 1, 34 (2002) (noting that homeowners have a particular incentive to monitor government policies that capitalize into property value).

203. See 2003 *HOUSING SURVEY*, *supra* note 201, tbls. 3-8, 4-8.

204. See Cassandra Jones Havard, *To Lend or Not to Lend: What the CRA Ought to Say About Sub-Prime and Predatory Lending*, 7 *FLA. COASTAL L. REV.* 1, 32 (2005) (suggesting that the pride, respect, and self-worth generated from homeownership, in addition to the protection of the homeowner’s hard work and life savings, are factors that create value in homeownership).

2007] *AFFORDABLE HOUSING AND LAND TENURE* 579

participation.<sup>205</sup> This may be particularly true in multi-family buildings. In such buildings, the need of resident-owners to interact in order to manage the property coalesces with the personal relationships fostered by such interactions. These exchanges create networks that function in the building and beyond.<sup>206</sup> The interactions also often lead to the development of new and transferable skills and a broader view of society. This increased capacity may enhance the resident's self-esteem and civic engagement.<sup>207</sup> Again, "pride of ownership" may be true regardless of the tenure of the resident. An example of this is HUD's approach to the residents' role in managing properties.<sup>208</sup>

Even where HUD is not involved in a building, the existence of an active tenants' association can pave the way for obvious benefits, such as improved housing and neighborhood conditions. It can also pave the way for less obvious benefits such as social interactions, networks, skills development, and a broadened social environment. Even greater opportunity for such "capacity" enhancement exists in tenant-generated cooperatives where residents as a group own the building and must cooperate to make basic decisions to preserve their homes.<sup>209</sup> The variety of skills developed in such settings—including technical management skills as well as the social skills of speaking, listening, compromise, and

---

205. Curtis J. Berger, *Home Is Where the Heart Is: A Brief Reply to Professor Epstein*, 54 *BROOK. L. REV.* 1239, 1242 (1989) (arguing that a strong emotional connection has developed by the time homeowners' economic stake in their home becomes significant).

206. JOHN EMMEUS DAVIS, *SHARED EQUITY HOMEOWNERSHIP 110* (Nat'l Hous. Inst. 2006), available at <http://www.nhi.org/pdf/SharedEquityHome.pdf> [hereinafter DAVIS, *SHARED EQUITY*] ("Limited equity cooperatives help to create a space to reconnect local activism with the neighborhood by enforcing values of civic participation and creating spaces for interaction. The social and leadership skills that are learned in LECs increase residents' resources and motivation for civic participation.").

207. See Paula A. Franzese, *Does It Take a Village? Privatization, Patterns of Restrictiveness and the Demise of Community*, 47 *VILL. L. REV.* 553, 585 (2002) (suggesting social interaction leads to building of social capital).

208. U.S. Dep't of Hous. and Urban Dev., *Tenant Opportunities Program*, 24 C.F.R. §§ 964.200-964.230 (1994) ("The Tenant Opportunities Program (TOP) provides technical assistance for various activities, including but not limited to resident management, for resident councils/resident management corporations . . .").

209. See Judith Bernstein-Baker, *Cooperative Conversion: Is It Only for the Wealthy? Proposals that Promote Affordable Cooperative Housing in Philadelphia*, 61 *TEMP. L. REV.* 393, 394 (1988).

analysis—are transferable to other spheres of a resident's experience.<sup>210</sup>

Thus, while a positive correlation between housing and participatory citizenship exists, there is a wide range of plausible reasons for that relationship.<sup>211</sup> The tenure of the resident is only one possible rationale, but it seems to have captured a number of policy makers and commentators.<sup>212</sup> Nevertheless, the salience of the connection is subject to serious questioning. Further research is needed to determine the true causal relationship, if any, between housing tenure and participation. Moreover, other factors associated with housing, such as connection to place, extension of self, or economic issues, must be carefully examined. Policies should then be developed to optimize the appropriate connections.

There are also costs associated with civic participation. Many costs are the result of the long-term commitment that is often required of participants, particularly of leaders. Costs include involvement in conflicts with other participants or adverse parties, frustration with participants or with the pace of progress, and separation from family, friends, and other activities. Bearing these costs may result in fatigue, often bordering on exhaustion. In some cases, this may lead to burn out. There are also actual costs, whether out-of-pocket or loss of time from formal employment, that are incurred in organizing others and planning events, buying supplies, preparing mailings, and traveling. While one may hope that some of these costs will be borne by the group as a whole, they often are not. These costs, therefore, are both a disincentive and a burden on those who engage and lead. How they interact with the choice to engage and how they may be ameliorated is part of the policy matrix that should be created after careful study of the deeply intertwined set of options that exist.

---

210. Peter L. Beard & Regina M. Hopkins, *Housing Law Symposium: Building Homes, Building Neighborhoods Family Selection and Family Nurture for Low Income Housing in Two Southern Communities*, 61 *Miss. L.J.* 631, 651 (1991) (suggesting that affordable housing programs must be designed to teach basic skills to families so that families can transfer the lessons they have learned to other areas).

211. See FISCHEL, *HOMEVOTER HYPOTHESIS*, *supra* note 202; see also DAVIS, *SHARED EQUITY*, *supra* note 206, at 108.

212. See Schill, *Privatizing Federal Low Income Housing Assistance*, *supra* note 10, at 920; see generally DAVIS, *SHARED EQUITY*, *supra* note 206; FISCHEL, *HOMEVOTER HYPOTHESIS*, *supra* note 202.

### F. Training as Part of Housing Policy

There is a significant correlation between civic participation, one's self-perception of capacity, and one's actual capacity.<sup>213</sup> Recent literature has devoted considerable attention to the creation of capacity, or "social capital,"<sup>214</sup> which has been defined as "the set of resources that inhere in relationships of trust and cooperation between people."<sup>215</sup>

Gaining capacity in any field involves a combination of talent, motivation, education, and experience.<sup>216</sup> Many adults gain such capacity through their schooling, jobs, and social and civic interactions.<sup>217</sup> If their schooling and employment options have been constrained, however, it follows that their capacity building must be secured in less formal settings. Their place of residence, place of worship, and social or professional associations are the typical sites for civic interaction and the consequential building of interactive and leadership skills. If an individual is not active in such settings, the opportunities for capacity building are limited.

Social capital literature describes the transferability of social capital.<sup>218</sup> Historically, people with social capital—that is physical, educational, or political assets—learn how to use it to achieve their goals and satisfy their preferences. People without it either find alternative means of achieving their goals or fail to achieve them. The use of social capital leads to the creation of wealth and the

---

213. See Hannah C. Halbert, *From Picket Line to Courtroom: The Changing Forum for Regional Resistance, Environmental Reform and Policy Change in Appalachia*, 25 *HAMLIN J. PUB. L. & POL'Y* 375, 381-82 (2004) (suggesting that communities with large civic capacity can proactively address problems and issues within the community).

214. See, e.g., *SOCIAL CAPITAL AND POOR COMMUNITIES* (Susan Saegert et al. eds., 2001).

215. Mark R. Warren et al., *The Role of Social Capital in Combating Poverty*, in *SOCIAL CAPITAL AND POOR COMMUNITIES*, *supra* note 214, at 1, 1 [hereinafter Warren et al., *Role of Social Capital*]. The authors quote James Coleman as saying "unlike other forms of capital, social capital inheres in the structure of relations between persons and among persons. It is neither lodged in individuals nor in physical implements of production." *Id.*

216. See Edward S. Adams & Richard A. Saliterman, *The Trusteeship of Legal Rulemaking*, 30 *HOFSTRA L. REV.* 483, 500-11 (2001) (book review) (discussing the various elements that contribute to social capital including education and work experience).

217. See *id.* at 508-13 (describing Robert Putnam's theories that social capital is gained through social interactions, the workplace, and other means).

218. Warren et al., *Role of Social Capital*, *supra* note 215, at 1, 7, 11-12 (explaining that although it is not an automatic process, social capital can be transferred from one area to another).

achievement of satisfaction, while its absence often leaves individuals struggling to stay afloat or dissatisfied.<sup>219</sup>

A multi-unit apartment building may provide the optimum site for developing social capital. It offers a group setting in which the participants have a credible motivation—the improvement of their housing and neighborhood conditions—and a convenient locale where residents are likely to spend a considerable amount of time. Moreover, the costs, such as the time and effort associated with gathering residents together, is likely less at their residence than in most other settings. Indeed, the organization of tenant groups is a significant aspect of community organization and is often a springboard for other forms of civic action.<sup>220</sup> In an ideal world, a building that has an active group of residents would be a beacon to the rest of the community who would then engage in civic participation as well.

Training is one way to develop social capital. It can provide opportunities for repeated social interactions while also providing trainees with a set of substantive skills that may enhance their effectiveness in other activities. Training may be delivered in many different forms. The training we discuss here is likely to be somewhat formal in that it is planned with materials and activities to be used in the program. Many organizations provide such training, ranging from community groups to universities to local governments. A number of local and national non-profit and some for-profit corporations provide this type of training.

---

219. For example, it is less likely that individuals in lower income communities have bank accounts than individuals in higher income communities. Conversely, it is more likely that children in the higher income communities will grow up knowing more about finances and financial transactions than their counterparts in lower income families. Similarly, higher income families are more likely to have the contacts needed to get problems resolved, such as those associated with housing, jobs, or municipal services, than lower income individuals.

220. See Susan Bennett, *Residents and Placemaking in Public Housing Communities*, 19 ST. LOUIS U. PUB. L. REV. 259, 302 n.211 (2000) (describing and providing an example of residents' determination to use organized civic actions to protect their interests); Kimberly E. O'Leary, *Dialogue, Perspective and Point of View as Lawyering Method: A New Approach to Evaluating Anti-Crime Measures in Subsidized Housing*, 49 WASH. U. J. URB. & CONTEMP. L. 133, 145 (1996) (describing criminal trespass policies instituted by tenant groups to mitigate community drug problems). Additionally, federal regulations encourage the creation of resident councils. See Role of Resident Council, 24 C.F.R. § 964.100 (1994); Funding Tenant Participation, 24 C.F.R. § 964.150 (1994).



2007] *AFFORDABLE HOUSING AND LAND TENURE* 583

Various types of training<sup>221</sup> should be considered in an effort to increase the trainees' social capital. For example, there may be training about one's rights, about a particular activity, or about the nature and use of power. The training we refer to here involves some of these aspects as well as a broader element of group action, the political landscape, and the need for continuity and renewal.

Training as a commodity is subject to the market's pressures. While the need for training is demonstrably great, the actual demand for it may be considerably smaller.<sup>222</sup> Smaller still is the supply of qualified trainers.<sup>223</sup> This makes the availability of training for any particular group problematic. New methods of stimulating demand for and improving the delivery of training must be developed.<sup>224</sup> In order for residents to build durable skills, it is important that they obtain training on many issues, including one that is often neglected—how to operate an organization. Such training would include how to run a meeting; the meaning of, and methods to engage in, strategic planning; the role and responsibility of leadership; and the means to engage in relations with the broader community.<sup>225</sup> To be effective, the training should be regular and ongoing so that new members will be brought up to speed and those previously trained can have their training reinforced. In fact, at some point, former trainees should play a major role in training new trainees.<sup>226</sup>

---

221. Here we consider the organizing activities to be part of the training process. Getting people to discuss their concerns and showing that others have similar concerns is a way of opening communications. Such activity is also an element of educating people about common concerns and possibilities of joining together to resolve those concerns.

222. This may be a function of the economics of training. The costs may be prohibitive for lower income individuals, especially considering other important areas that need immediate expenditure. Moreover, the lack of social capital may itself be a reason for a smaller demand than might otherwise be expected. People without social capital may not realize the need for training or know how to obtain such training, or may lack the resources to mobilize it.

223. See HARRISON INST. FOR PUBLIC LAW OF THE GEORGETOWN UNIV. LAW CTR., *AN ANALYSIS OF THE STRENGTHS AND DEFICIENCIES OF WASHINGTON, D.C.'S TENANT OPPORTUNITY TO PURCHASE ACT 10* (2005), available at <http://www.knowledgeplex.org/showdoc.html?id=183436> [hereinafter HARRISON REPORT].

224. See *id.* at 14; see also MARK WIRANOWSKI, *SUSTAINING HOMEOWNERSHIP THROUGH EDUCATION AND COUNSELING* (2003), available at <http://www.nw.org/network/pubs/studies/documents/sustainingHOthruEdandCslg10-03.pdf>.

225. See HARRISON REPORT, *supra* note 223, at 14; see also Bennett, *supra* note 220, at 286.

226. Their ability to do so can be considered both a result and an implementation of the social capital developed through the previous training they received. See, e.g., ALINSKY, *supra* note 189.

While the tenure of the resident is not relevant to the need for training, it is relevant to the type of training needed. As we will point out in this discussion, renters may require different training from single-family owners who may need different training from tenant owners of multi-family accommodations. For the purpose of this discussion, we will analyze four different categories within training: (1) organizational training; (2) rights training; (3) training in the development process; and (4) operational training. Each element of the training is designed to build social capital and capacity among the trainees. The training should result in individuals having more capacity and that should translate into greater participation, improved living conditions, and a better neighborhood.<sup>227</sup>

In the next sub-parts, we will describe the types of training that will be needed and some examples of the use of such training to improve the capacity of groups of residents.

### 1. *Organizational Training*

Assume that residents have a series of grievances about their living conditions or neighborhood. How should they address their grievances? In affluent communities, individuals or groups might call an appropriate official to complain. Alternatively, they might organize a residents' or community association to address the problem. Their backgrounds might include knowledge of or access to such contacts or participation in similar organizations so taking the appropriate action is not too far from their experience. Moreover, they may have had success in their efforts so the prospect of undertaking another effort is not so intimidating.

The same experiences are less likely to be part of the backgrounds of residents in low-income communities. In many cases, lower income people do not have the appropriate contacts to get problems resolved and are less likely to be heard by strangers and local officials. Equally daunting is the fact that the efforts of highly motivated lower income individuals are less likely to result in satisfactory outcomes. This leads to frustration and a growing unwillingness to make subsequent efforts.

A basic premise of community organizing is that more can be accomplished through group action than through individual action. By creating a group, one is able to leverage the talents, connections, and funds (not to mention the sheer numbers) that an indi-

---

227. See CAROLYN C. LEUNG, RESIDENT PARTICIPATION: A COMMUNITY-BUILDING STRATEGY IN LOW-INCOME NEIGHBORHOODS (2005), available at <http://www.nw.org/network/pubs/studies/documents/residentParticipation-Leung10-2005.pdf>.

2007] *AFFORDABLE HOUSING AND LAND TENURE* 585

vidual typically cannot command.<sup>228</sup> There are several problems associated with creating such organizations including inertia, fear, jealousy, lack of time, and lack of knowledge among the individuals to be organized. The organizer and trainer must focus on and be skilled at overcoming these problems.<sup>229</sup>

Fear and lack of knowledge can often be addressed through organizational training; sometimes inertia and jealousy can as well. Organizational training really encompasses several elements. At a minimum, it should set out the basics of starting and operating an organization. This includes describing why an organization might be beneficial, possible structures for the organization, and how to run a meeting and keep records.<sup>230</sup> In addition, there must be training on the responsibilities of leadership. Far too often a group either lacks adequate leadership or has a leader that is autocratic, despotic or, in the extreme, a rogue.<sup>231</sup>

We do not want to understate the importance of leadership. Developing leaders is a critical function of organizing and training.<sup>232</sup> Leaders galvanize groups. They can create a situation in which options are more easily identified and discussed, where strategies can be developed, and where alliances can be made. Moreover, leadership skills are transferable to other areas and can enhance one's situation.

Despite the importance of leadership, it is also worth noting that less attention has been given to the concept of "followership."<sup>233</sup>

---

228. See generally ALINSKY, *supra* note 189; see Michael Diamond & Aaron O'Toole, *Leaders, Followers, and Free Riders: The Community Lawyer's Dilemma When Representing Non-Democratic Client Organizations*, 31 *FORDHAM URB. L.J.* 481, 486 (2004). R

229. While there is a large literature on community organizing, in this Article we will assume that at least a rudimentary group has been formed and will not discuss the organizing process. For material on community organizing, see for example Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 *UCLA L. REV.* 443 (2001); William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 *OHIO N.U. L. REV.* 455 (1994).

230. There is often a lack of understanding of the importance of good records. In many cases, the absence of good records is a major impediment to a group gaining credibility.

231. See Diamond & O'Toole, *supra* note 228, at 506-07. R

232. Nancy Nye & Norman J. Glickman, *Working Together: Building Capacity for Community Development*, 11 *HOUSING POL'Y DEBATE* 163, 179 (2000), available at [http://www.fanniemaefoundation.org/programs/hpd/pdf/hpd\\_1101\\_nye.pdf](http://www.fanniemaefoundation.org/programs/hpd/pdf/hpd_1101_nye.pdf).

233. Followership involves an active interaction between the leader and the followers. It creates opportunities for skill development among members of the group other than the leader. These skills are also transferable to other areas of the followers' lives. For a discussion of followership, see for example Kingsley R. Browne, *Women*

Not every member of a group can or will take an active leadership position. Most will follow someone else's lead. The role for followers, however, need not be a passive one. There is an ongoing need for the participation of members other than leaders to discuss and evaluate proposals and organizational strategies.

Training in organizational issues both educates residents and encourages them to participate in decision-making. One such training involved a group of residents trying to purchase a small building.<sup>234</sup> The organization was established and run by a single, quite assertive resident, whom we will call Mr. Foxworth. Mr. Foxworth showed a quiet disdain towards the other residents and told others in the neighborhood that the building was "his." He instructed various professionals working with the association about what he wanted them to do, but he never indicated the backing of the other residents. He regularly hired his relatives to do various jobs around the building and would not let the members see the bank records concerning the association's account.

When questioned about his conduct, Mr. Foxworth said that he made the decisions and the others needed to just go along. Many residents were uncomfortable with his leadership, but also seemed reluctant to challenge his positions. One resident asked the attorneys to talk to the resident group about the laws governing corporate operations and about the association's own by-laws.<sup>235</sup> After receiving this information from the attorney, the residents realized

---

*at War: An Evolutionary Perspective*, 49 *BUFF. L. REV.* 51 (2001); Andrew Fenton Cooper et al., *Bound to Follow? Leadership and Followership in the Gulf Conflict*, 106 *POL. SCI. Q.* 391 (1991); Diamond & O'Toole, *supra* note 228, at 496.

234. This example comes from an amalgam of supervised clinical work done by students at the Harrison Institute for Public Law at the Georgetown University Law Center (the "Harrison Institute"). Due to confidentiality issues, we used fictitious names and removed all identifying material.

235. The training, which took place in an organized program for two hours per week over several weeks, involved both the provision of information through oral and written materials and the use of interactive exercises. For example, the trainers might provide information on the creation and operation of committees. After the informational session, trainees would work in small groups to create operating rules for a particular committee or assume the identity of a committee and work to develop a policy on a relevant issue. The small groups would discuss their task among themselves and then develop the procedure or policy. Trainers would sit in with these groups as a resource or facilitator. When this part of the exercise had been completed, the larger group would reconvene and each group would report on what it developed which, in turn, the whole group discussed. The participants gained both an increase in knowledge and an increase in skill. They addressed the substantive problem of developing a procedure or policy, and they also interacted with colleagues, spoke in public, argued their points, and worked towards compromises. All of these are skills that serve them well in a variety of settings.

2007] *AFFORDABLE HOUSING AND LAND TENURE* 587

that Mr. Foxworth was improperly excluding them from the decision-making process. They decided that they wanted a new president and at the next election they ousted Mr. Foxworth and elected the resident who sought the training. Since that time, the residents have participated in all aspects of decision-making and purchased the building, obtained a construction loan and renovated the property, received training in financial management and on managing the manager, and nearly completed the building's renovation.

The training just described is appropriate, regardless of the tenure of the resident. Tenant groups dealing with the landlord or the local government need this training as much as tenant groups in the process of buying their buildings. Certainly resident owners of multi-family housing would benefit from understanding the nature of their organization and its relationship to other residents and to the surrounding community. Similarly, owners of single-family units could benefit from membership in neighborhood organizations and civic groups.

## 2. *Rights Training: Knowledge Is Power*

Assume a neighborhood is rapidly changing. For years it had been occupied by a mix of lower income residents. The elderly and municipal employees made up a large portion of the neighborhood's population, although there were a small number of younger families. Historically, there has been some degree of homeownership and reasonable rents in the area. Recently, however, higher income people recognized the neighborhood's interesting architectural character and its proximity to downtown. These individuals have been buying up the single-family homes in the area and owners of multi-family buildings have considered the benefits of converting to condominiums.

Many of the multi-family buildings were originally built with subsidies from HUD that require an owner to follow established procedures before terminating the federal assistance.<sup>236</sup> Moreover, the jurisdiction has several ordinances protecting the rights of tenants when an owner seeks to convert a rental building to condominium use.<sup>237</sup> There are also state and local laws protecting

---

236. Prepayments and Plans of Action Under the Low-Income Housing Preservation and Resident Homeownership Act of 1990, 24 C.F.R. § 248.169 (1990); Section 8 Project-Based Contract Renewal Under Section 524 of Mahra, 24 C.F.R. § 402.8 (2006); see also Lawrence Geller, *Expiring Use Restrictions: Their Impact and Enforceability*, 24 NEW ENG. L. REV. 155, 183-84 (1989).

237. See, e.g., The Rental Housing Conversion and Sale Act, D.C. CODE § 42-3404.13 (2005).

tenants faced with eviction. Most residents, however, are unaware of either the federal or local rules.<sup>238</sup>

For poor people, having or obtaining rights and understanding how to utilize them has long been at the forefront of empowerment efforts. While obtaining legal rights is not (and, many argue, should not be)<sup>239</sup> the end of political struggles, obtaining and exercising rights is a significant part of improving the conditions of low-income people. In relation to housing, there are several areas of rights, ranging from the abstract<sup>240</sup> to the concrete. Rights such as the warranty of habitability<sup>241</sup> and the Tenant Opportunity to Purchase Act (“TOPA”)<sup>242</sup> have given tenants instruments with which to improve not only their immediate housing conditions, but also their long-term political relationship with the society around them.

Similarly, people living in housing owned, insured, or subsidized by HUD have a variety of rights concerning the operation of the property and in connection with an owner’s decision to opt out of the relationship with HUD. Important among these rights is the

---

238. Once again, the training here is interactive. It is often conducted with lawyers and organizers working together. Tenants are given information about their rights under HUD regulations and local law. In the District of Columbia, this includes information about the tenants’ opportunity to purchase their building if the owner seeks to sell it as well as their rights concerning an attempt by an owner to convert her building to a condominium. The format is again a combination of written and oral materials and interactive small group exercises. There is an emphasis on discussing organizing for group strength and how to use the leverage provided by federal and local law. Many organizations including the Harrison Institute have engaged in training around these issues. At the Harrison Institute, we helped organize and met with tenant groups threatened by a landlord’s attempt to get out from under HUD’s regulatory regime. We have regularly discussed with tenant groups their rights under the District of Columbia’s Tenant Opportunity to Purchase Act, D.C. CODE § 42-3404.02 (2001). In these sessions, we both explain tenant rights and discuss methods of enforcing them.

239. See Michael Diamond, *Community Lawyering: Revisiting the Old Neighborhood*, 32 COLUM. HUM. RTS. L. REV. 67, 79 (2000) (arguing that finding solutions to the concerns of many communities requires engaging in several non-legal activities); see generally STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS* (1974); Michael Diamond, *Law, The Problem of Poverty and the “Myth of Rights”*, 1980 BYU L. REV. 785; Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women’s Movement*, 61 N.Y.U. L. REV. 589, 623-24 (1986) (discussing how the women’s rights movement underscores the limits of a political strategy focused on rights).

240. See Henry A. Span, *How the Courts Should Fight Exclusionary Zoning*, 32 SETON HALL L. REV. 1, 30-31 (2001) (discussing the right to housing based on the abstract right of substantive due process); see also generally Michelman, *supra* note 12 (discussing the existence and scope of a “right to be housed”).

241. *Javins v. First Nat’l Realty Corp.*, 428 F.2d 1071, 1076-77 (D.C. Cir. 1970).

242. Tenant Opportunity to Purchase Act, D.C. CODE § 42-3404.02 (2006).

2007] *AFFORDABLE HOUSING AND LAND TENURE* 589

right to receive information and the right to organize. Tenants also have responsibilities, and there are potential penalties for failing to perform these obligations.<sup>243</sup> In addition to the right to information and the right to organize, residents of public housing also have rights and responsibilities particular to their tenancy.<sup>244</sup>

There have been several recent examples in Washington, D.C. where training residents in HUD-assisted buildings led to tenant organization and opposition to development plans that would have forced them to vacate their homes. In one such property, Kelsey Gardens, tenants litigated over whether the owner of the property properly gave notice of his intent to opt out of HUD assistance and to sell the building to a developer.<sup>245</sup> The residents claimed that the owner also circumvented their TOPA rights in attempting to sell to the developer.<sup>246</sup> The residents' rights training was instrumental in educating the residents and encouraging them to take on the owner in litigation and otherwise.

Although the aforementioned rights training is particularly relevant to tenants concerning their relationship with landlords, it is not exclusively for tenants. There are also rights and responsibilities associated with homeownership, particularly in multi-family ownership such as cooperatives and condominiums. These rights involve relationships with lenders and local government, the ownership group and its individual members, and the group and various contract vendors. Rights involving members include such issues as participation, continued tenure, and house rules (the rules for day-to-day living).

Similarly, there are rights and responsibilities concerning vendors. The most important of the rights is arguably how to manage the manager. Too often cooperative or condominium associations cede control of their buildings to the management company. Consequently, the residents revert to a "tenant mentality" of passivity and dependence. Responsibilities include not only the payment for goods or services received but, in many cases, engagement with the vendors to assure they understand and fulfill the needs of the resident association.

---

243. For more information about tenants' rights and responsibilities, see Nat'l Alliance of HUD Tenants, <http://www.saveourhomes.org> (last visited Apr. 3, 2007).

244. See generally Robyn Minter Smyers, *High Noon in Public Housing: The Show-down Between Due Process Rights and Good Management Practices in the War on Drugs and Crime*, 30 *URB. LAW.* 573 (1998).

245. Dakarai I. Aarons, *Church's Plan to Raze Housing Protested*, *WASH. POST*, July 12, 2004, at B3.

246. D.C. CODE § 42-3404.02.

Rights training may offer residents immediate, concrete knowledge about their legal relationships and provides them with the tools to ensure they receive all promised benefits. It also allows them to understand the nature of the relationship between themselves and their vendors. Finally, training offers members a better knowledge base and greater confidence by increasing the social interaction among residents and building the membership base.

### 3. *Development Process*

The District of Columbia's TOPA statute gives tenants in a rental building whose owner seeks to sell it the opportunity to purchase the building.<sup>247</sup> In the abstract, this is a simple and straightforward right. Consider, however, a group of low-income residents who have never owned property before and are now offered the possibility of buying a multi-family building for \$7,000,000. Keep in mind that these residents have household incomes typically ranging from \$25,000 to \$40,000 per year. Under these circumstances, the idea of purchasing the building and spending several million dollars more to renovate it is daunting, to say the least. Nevertheless, over the past fifteen years many tenant organizations in similar situations purchased, renovated, and successfully operated their buildings.<sup>248</sup>

In some jurisdictions, ownership and development of real property is a realistic option for low-income tenants. As noted in the previous section, Washington, D.C. has a strong and often well-utilized statutory regime for tenant ownership.<sup>249</sup> Developing or redeveloping the property purchased by tenants is a long-term and complex process. While professionals are almost always engaged to do the development work, resident groups have the critical role of deciding what they want to include in the development of their property. For instance, the groups must decide how to ensure the viability of the property. This typically involves modernizing the building systems and adding elements of comfort and convenience

---

247. *Id.*

248. At the time of this writing, the Harrison Institute had seventeen low-income buildings comprising approximately 800 units and \$70-80,000,000 of total development costs in its development pipeline.

249. *See supra* notes 242-43. Many thousands of units have been converted to tenant ownership. Moreover, the resident groups and buildings that have been converted have performed well over the years. *See* COAL. FOR NONPROFIT HOUS. & ECON. DEV., A STUDY OF LIMITED EQUITY COOPERATIVES IN THE DISTRICT OF COLUMBIA (2004) [hereinafter CNHED, COOP STUDY], available at [http://www.cnhed.org/image/123800\\_c\\_su127242\\_s\\_i189945/Coop20%Study20%20PDF.pdf](http://www.cnhed.org/image/123800_c_su127242_s_i189945/Coop20%Study20%20PDF.pdf).



2007] *AFFORDABLE HOUSING AND LAND TENURE* 591

desired by the residents. Offset against the latter elements is the cost of providing those “wish list” items.<sup>250</sup>

Tenant groups who are buying or cooperative members who are renovating multi-family buildings need to know what the development process entails. Residents need to know how much time and inconvenience is involved. More importantly, they need to know the issues about which they will have to make choices, including the relationship between the level of development, its total cost, and the monthly amounts that will be necessary to pay off the debt for that level of development. Residents will have to balance their desires against their ability or willingness to pay for them. Here, as in other training situations, the goal should be to impart information and skills that can be used immediately as well as to prepare residents for ongoing activities, both personal and civic.

Residents must engage professionals to assist them in their development project. They must also interact with lenders, governmental agencies, and in many cases, other community groups. The skills involved in development training, therefore, must include substantive development skills and intragroup relations as well as relations with a variety of outside professionals and organizations. To the extent that the residents take an active part in the development process, these skills will be important. Just as residents not trained in managing the manager might remain passive and rely on a management company to run the building, residents lacking skills needed for development may rely on professionals to make critical choices for them. Training in the development process will reduce the likelihood of such dependence.

There are several inspiring examples of the results of training tenant purchasers in the development process. One such example is the Capitol Manor Cooperative, which was chronicled in a front page series in the *Washington Post*.<sup>251</sup> The story takes the reader through the process of acquisition and development of a low-income building from the residents' point of view, highlighting the

---

250. Certainly the local government will require tenants to bring the building up to code standards. Improving and modernizing systems might be required by lenders, who will want to assure that the building will be desirable to incoming residents and hold its value as collateral for the loan. Items such as a new heating system, new windows, a new roof, or more electrical service may be necessary. The wish list items might include dishwashers or garbage disposals, new kitchen and bathroom fixtures, or a security system.

251. See Debbi Wilgoren, *A Crash Course in Responsibility*, WASH. POST, Dec. 16, 2005, at B01; Debbi Wilgoren, *At Each Hurdle, Stronger Resolve*, WASH. POST, Dec. 15, 2005, at B01; Debbi Wilgoren, *The Purchase of a Lifetime*, WASH. POST, Dec. 14, 2005, at A01.

aspirations, difficulties, and rewards of the process. The series also explained the development of the residents' capacity, particularly among the members of the board of directors, to master and control the process of the \$12,000,000, four-year development of the property.<sup>252</sup>

A second example concerns the residents' association of a large building (we will call the group the Inter-Connected Tenants Association ("ICTA")) where the residents decided to exercise their TOPA rights by creating a partnership with a non-profit developer. The goal was to create a tax credit financed rental property with ICTA as part of the ownership and management structure. The group went from having limited or no conception of financial issues, such as balancing a checkbook, to being conversant in tax credit financing and the management of a multi-million dollar per year business. They participated in every stage of the development decision-making process with ever-increasing understanding and confidence. For example, the board of the resident association negotiated a relationship with the non-profit developer which gave them considerable input into all decisions concerning the development process. The board chose a contractor and participated in defining the scope of the renovations. The board eventually chose a management company and regularly met with the non-profit developer and the management company about the progress of the development and the operation of the property.<sup>253</sup>

#### 4. *Operational Training*

Consider a situation where tenants successfully purchase their building or negotiate an agreement with a building's owner in which the tenants' association has a role in the management of the building. In such situations, tenants typically need management

---

252. An example of this increased capacity might be useful. The group began with a desire to purchase the building but only a vague notion of what might be involved in doing so. Through several years of weekly (and sometimes semi-weekly) meetings, the board obtained not only an understanding of the process but the ability to make choices about very complex issues. Among these choices was the creation of a relocation plan to move seventy-two families between 102 units in three buildings so that the contractors could renovate one empty building at a time. The plan involved emptying one building, providing for the storage of some of the possessions of the occupants, arranging for transferred telephone and cable service, mail delivery, and arranging for off-site residence for two resident families throughout the construction. This process had to be repeated for each of the three buildings while returning some of the families to their original apartments as soon as they were fully renovated.

253. Case documents on file with the authors.

2007] *AFFORDABLE HOUSING AND LAND TENURE* 593

training.<sup>254</sup> Take into account the magnitude of what the residents will be undertaking: operating a building is analogous to operating a business and, depending on the size of the building, annual revenues might be in the hundreds of thousands or even millions of dollars per year with expenses of similar magnitude. Managing a building also involves managing an asset that is worth millions of dollars, but subject to loss in value if poorly managed.

Once a tenant group obtains a building, it must know how to run it. The building assumes a dual role. First, it is the home of the residents. Second, it is a business; in some cases, a substantial business with assets reaching millions or tens of millions of dollars, and an annual budget that may also be in the millions of dollars range. If the business fails, the homes will also be lost. As with any business, a building must be run so that its income equals or (in a for-profit situation) exceeds expenses. This means not only carefully controlling expenses while preserving the value of the asset, but also increasing the revenue stream when needed. The resulting increase in out-of-pocket expense for each resident creates obvious conflicts for a resident-owned building.

In order to manage this asset, the resident group must understand how a building works mechanically and financially. They need not gain the expert knowledge of a plumber, an electrician, or a property manager. They do, however, need to know how to create a budget and how to read monthly reports from the managers and the banks. They need to know that buildings wear down and need maintenance and upgrading. They need to know that these things cost money and the money comes, for the most part, from the monthly charges assessed against residents either through rent or carrying charges, depending on whether the property is a rental building or a cooperative.

Ultimately, the resident group needs to know how to manage the managers. Management companies are normally hired to take care of the day-to-day operation of a building and are given a certain amount of discretion in carrying out their obligations. In doing so they may forget that they are employed by the resident owners and many resident owners, often first-time owners, often defer to the greater knowledge and experience of the managers. This dynamic can cause the owners to revert to a “renter’s mentality.”<sup>255</sup> It is

---

254. See generally HARRISON REPORT, *supra* note 223.

255. See, e.g., Mark Lewis, *Crusaders Keep Homes Affordable—Permanently*, AM. NEWS SERV., May 20, 1997, available at [http://www.villagelife.org/news/archives/5-20-97\\_keephomesafford.html](http://www.villagelife.org/news/archives/5-20-97_keephomesafford.html).

quite important, therefore, for residents to be able to oversee what the managers are doing and to compel the managers to explain and account for their actions. The managers, and often the resident group itself, must employ other professionals to perform tasks and provide services to the building or for the group. Lawyers, accountants, tradespeople, and inspectors are often engaged directly by the group. Thus, the resident association needs to know how to find and form contacts with such specialists and, perhaps most basically, when they are needed.

Recall the tenant association that deposed Mr. Foxworth. That building was small and many of the units were vacant, allowing the renovation of the building to proceed with the residents in place. The seven residents who remained in the building had to operate it while managing the renovation. This became possible because they were trained in basic finance and in managing the manager. They stayed on top of a manager who failed to pay the mortgage on time and paid the real estate taxes late. They were able to do this by reading monthly reports and following up on notices from the lender and from the city. Now in the process of finding a new management company, they succeeded in keeping their project afloat during trying times.

This is not to say that the association can or must manage entirely on its own. Among the things the members learn through training is that there are professionals who can assist them in their efforts. They learn to recognize when they need help and how to obtain it. As association members gain greater experience, they will need less and less outside assistance. It is a mark of every good manager to recognize when there is a problem, and further, when it is one that she cannot handle. The final steps in this progression are to know where the resources are located to assist in solving the problem and how to obtain those resources. These are steps this association can now take.

Earlier, we mentioned the commodification of training. As an element of the market, training creates the same obstacles as other commodities. For example, people who may benefit from training may not know that it is beneficial, or how to obtain it. Others may know how to obtain training but cannot afford it. Still others may know how to obtain it and can afford it, but prioritize it below other market commodities. Because training is so essential to civic participation and to operational issues, creating access to training should be part of a comprehensive housing policy.

### G. Build Durable Institutions

Every social act is an exercise of power, every social relationship is a power equation, and every social group or system is an organization of power.<sup>256</sup>

[T]he Function of a People's Organization is similar to that of any other kind of organization, which is to become so strong, so powerful, that it can achieve its ends.<sup>257</sup>

Many commentators have argued that poverty is not merely a function of a lack of means.<sup>258</sup> Many individuals lack financial wherewithal, but are not necessarily considered impoverished.<sup>259</sup> Lack of access to power and the inability to influence one's environment are also part of the fabric of poverty. There is, of course, a strong connection between power and means—financial means often provide access to power.

Policy makers generally overlook this broader view of poverty. In the past, too many of the programs designed to assist the poor with their housing needs focused on their immediate consumption of housing resources. Such past (and, for that matter, present) housing programs included rent subsidies,<sup>260</sup> interest rate subsidies,<sup>261</sup> and inducement to private investment.<sup>262</sup> Little, if any, thought was given to other elements of poverty. In particular, policy makers have given little attention to the absence of power, or access to it, among those who are defined, and self-defined, as poor.<sup>263</sup> We previously discussed power in the contexts of community organizing<sup>264</sup> and of creating social capital.<sup>265</sup> Here we will tie

256. Amos H. Hawley, *Community Power and Urban Renewal Success*, 68 *AM. J. SOC.* 422, 422 (1963).

257. ALINSKY, *supra* note 189, at 53.

258. For early examples of the connection between poverty and power, see Gordon F. Sutton, *Policy Implications of Some Non-Economic Dimensions of Urban Poverty*, in *POWER, POVERTY, AND URBAN POLICY* 491 (Warner Bollmberg, Jr. & Henry Schmandt eds., Sage Publications 1968).

259. Two examples of this include the typical law student or a member of the clergy. In addition, there are others who have chosen or ended up in thinly remunerated employment whom most people would not identify as "poor."

260. National Housing Act, 42 U.S.C.A. § 1437f (West 2007).

261. 12 U.S.C.A. § 1715z-1 (West 2007).

262. Housing and Community Development Act, 12 U.S.C.A. §§ 1707, 1715(k), (l) (West 2007); Tax Reform Act of 1986, 26 U.S.C.A. § 42 (West 2007).

263. There have been efforts in public housing to create and give voice to resident councils. See Schill, *Where Do We Go From Here?*, *supra* note 7, at 549-51 (describing how efforts to transfer management of public housing projects to tenants has met with some success).

264. See generally ALINSKY, *supra* note 189.

265. See *supra* notes 213-18 and accompanying text.

R

R

R

organizing, training, and participation together to give residents the potential to create durable institutions—those that can obtain and utilize power over time.

By emphasizing the need for institution building, we do not argue that policies designed to offer better housing to lower income individuals or to increase their individual wealth are not valuable. Similarly, we do not argue that policies that lead to the deconcentration of poverty through enhanced individual mobility are inappropriate. We argue, however, that it is too restrictive to focus exclusively, or even primarily, on the individual and her ability to accumulate wealth. We argue for a broader view of the relationship of housing to poverty and community.

Housing policy can encourage the development of durable institutions. Most commentators agree that housing is more than merely the provision of shelter.<sup>266</sup> It also involves, among other things, elements of wealth, security, and the construction of identity. One's sense of self is heavily influenced by the location, appearance, and quality of one's home.<sup>267</sup> In multi-family buildings, housing also provides the opportunity for a variety of regular, albeit often incidental, social interactions. When these contacts are marshaled and utilized to address common concerns, the housing takes on yet another dimension: it becomes the situs for organization and the development of social and political power.<sup>268</sup>

---

266. See Deborah Kenn, *Institutionalized, Legal Racism: Housing Segregation and Beyond*, 11 B.U. PUB. INT. L.J. 35, 51 (2001); Peter W. Salsich, Jr., *Welfare Reform: Is Self Sufficiency Feasible Without Affordable Housing?*, 2 MICH. L. & POL'Y REV. 43, 51 (1997).

267. See, e.g., Joseph Sirgy et al., *Explaining Housing Preference and Choice: The Role of Self-Congruity and Functional Congruity*, 20 J. HOUSING & BUILT ENV'T 329 (2005).

268. Consider the array of institutions commonly thought to exercise power that are typically available in non-poor communities. Homeowner associations and neighborhood groups serve as intermediaries for their members in dealing with the outside world. Several of them take on significant aspects of power, influencing major decisions that impact the membership. In Washington, D.C., for example, the Capitol Hill Restoration Society, an organization of local residents in the Capitol Hill neighborhood, has become an important player in zoning, redevelopment, and business decisions affecting Capitol Hill. Its website includes the following offer regarding businesses operating in the area:

CHRS can help you find out if a business is being operated illegally and can support complaints about nuisance properties. The Society can help you report violations and advise you on the most expeditious process. Such problems may take a long time to resolve, however. This said, it boils down to political pressure. It helps to vote in elections and to pay attention to what local representatives say and do.

Capitol Hill Restoration Society, <http://www.chrs.org/faq.htm> (last visited Apr. 3, 2007).

## 2007] AFFORDABLE HOUSING AND LAND TENURE 597

Consider the potential for transformation. There are a variety of possible responses to unfavorable building or neighborhood conditions by local residents. Among the most common are to endure the conditions without action, to move away, or to attempt to correct the condition. All too often, in poor communities, the response is acquiescence or relocation, often to similar conditions elsewhere. Individual attempts to correct the problem often result in failure and frustration. In fact, many of the problems are systemic and inter-connected so that individual responses are unlikely to succeed. A collective, coordinated, and sustained effort is needed to address the problems. The creation of social and political power is necessary.

The concept of “power,” however, is fluid and not well understood. There is no broadly accepted meaning of the term.<sup>269</sup> Nevertheless, there seems to be general agreement that power involves some form of energy, and that concerted human action can release and focus that energy.<sup>270</sup> As we mentioned in a previous section on participation, a building can be the situs for the kind of organization that leads to coordinated, concerted action. This involves residents organizing themselves into a group, developing and aggregating their social capital, and utilizing the leadership that develops from that capital to further group goals.<sup>271</sup> These goals might involve improving building or neighborhood conditions and the possibility of managing the building, or even owning it.

The concept of institution building is, in fact, a reality and not merely academic theory.<sup>272</sup> Perhaps two examples, both discussed previously, will illustrate the possibility of building durable institutions and their positive effect on people, buildings, and neighborhoods. The first example involves the tenant group that purchased Capitol Manor, three buildings in a highly gentrifying neighborhood in the District of Columbia. The second involves ICTA and a building in another gentrifying neighborhood in the District. As you will recall, ICTA participated in the ownership, development, and management of a tax credit rental building along with a large non-profit developer.

---

269. For a range of definitions by social scientists, see generally Mott, *infra* note 270. For a discussion of the meaning and acquisition of power, see also Michael Diamond, *Community Economic Development: A Reflection on Community, Power, and the Law*, 8 J. SMALL & EMERGING BUS. L. 151, 160-61 (2004). R

270. Paul E. Mott, *Power, Authority and Influence*, in *THE STRUCTURE OF COMMUNITY POWER* 6 (Michael Aiken & Paul E. Mott eds., 1970).

271. *Id.*

272. See generally CNHED, *COOP STUDY*, *supra* note 249. R

Capitol Manor is a 102-unit complex of three contiguous buildings in the Columbia Heights neighborhood, a neighborhood in which mostly African-American and Latino lower income residents lived for many years. The buildings in the area include many once-elegant townhouses and some low-rise multi-family dwellings. In recent years, a subway stop opened nearby, and many wealthier individuals and families, recognizing the quality of the older structures and the convenience offered by the subway, started buying the townhouses while developers started converting the multi-family dwellings to condominiums. Lower income residents were forced to move out of the area that had been their long-time home. When the owner of Capitol Manor decided to sell the buildings, he offered it to the tenants as required by law.<sup>273</sup>

The tenants were primarily low- and very low-income families, many of whom received rental assistance under Section 8 or public assistance. They never owned property before and the \$3.5 million purchase price was daunting, if not terrifying. Nevertheless, a small group of residents were committed to trying to purchase Capitol Manor, and they organized the tenants to take the next steps. They hired a lawyer and a development consultant, and the process of purchasing and renovating the building began. The board went through a variety of training programs to assist them in running meetings, understanding the development process, and operating the building.<sup>274</sup>

During the multi-year process, the residents managed the purchase of the building, the conversion of the rental property to a limited equity cooperative, an \$8 million, in-place renovation that included relocating residents within the complex as renovations progressed through the vacated units, and the operation of a project with a budget of approximately \$1.5 million per year. Currently, they meet regularly with the management company and maintain control over the issues that confront them as owner. They successfully accomplished all these things and more. They now deal effectively with higher income neighbors (who were originally skeptical about having a low-income development on “their” street) on such issues as neighborhood and building security. They assist other tenant groups in the ownership and development pro-

---

273. D.C. CODE § 42-3404.02a (2006).

274. The board is made up of five residents, three African-Americans and two Latinos. Two of the members are retired and two are employed. One set up his own business since the Capitol Manor project began and is successfully operating it while employing several people.



2007] *AFFORDABLE HOUSING AND LAND TENURE* 599

cess and advise city officials on tenant ownership issues.<sup>275</sup> The group has become a major entity in the changing landscape of Columbia Heights and presumably will continue in that role for a long time to come.

As a result of the owner's decision to sell his building, the ICTA residents also organized. Like the Capitol Manor tenants, they obtained outside professional help. This building was even bigger than Capitol Manor (136 units) and was also in a heavily gentrifying neighborhood around the District's (then) new Convention Center. The purchase price for the building was over \$6 million and the total development cost was over \$20 million, an amount that was all but incomprehensible for the low-income residents who called the building home.

Unlike the residents at Capitol Manor, the ICTA group chose to pursue a tax credit development of the property rather than direct ownership. This required ICTA to transfer its right to purchase the building to a new entity, a limited partnership comprised of ICTA and a non-profit developer as the general partners and outside investors as limited partners. The reasoning behind the choice was that more renovation could be accomplished at an affordable cost with the inflow of investor equity than could be accomplished by straight borrowing. This was compelling because the building needed substantial renovation. The choice, however, also included some drawbacks for ICTA. In particular, the residents would not own the building outright and the investors insisted that the non-profit organization, an experienced developer, hold ultimate control of the project.

Despite these limitations and the fact that the tenants entered this very sophisticated form of financing with little knowledge of housing finance and organizational structure and operation, ICTA's membership and board grew tremendously during the several years of project development. As with the Capitol Manor residents, the board became fluent in the development process and housing finance. The residents had the right, by contract, to participate in the management of the development and the operation of the building. They took full advantage of these rights and met frequently, sometimes as often as twice a week, with the developer,

---

275. The president of the group has been an Advisory Neighborhood Commissioner, an officially elected representative of the neighborhood who advises the City Council and government agencies on issues affecting the area. Members of the board of directors met regularly with the Councilmember from the district and with his office staff on issues ranging from neighborhood safety to housing policy.

the architect, and the builder. Subsequently, after the renovations were completed, the board continued to meet with the developer (ICTA's partner) and the management company concerning the operation of the building.

The area surrounding the building remains in flux, with many higher income residents moving in but many long-term, low-income residents remaining. Drug sales and violence persist in the area and centralize around the lower income buildings in the neighborhood. This may be due to the fact that some of the participants in the drug trade live in these buildings, but it may also be because the higher income buildings hired private, around-the-clock security, pushing drug activity to the buildings that cannot afford such security measures.

As a response to this problem, the ICTA board began to organize the lower income residents in area buildings to join together to pressure local police to patrol the area more vigorously, create alternatives for the young people involved in drug activity, and jointly hire private security to patrol local lower income buildings. In addition, the board operates a summer camp for children in the building and an after school program for children through middle school age.<sup>276</sup> Members of the board also speak to residents of other buildings about the possibility of tenant ownership and the need to get involved to improve the quality of the neighborhood.

These examples demonstrate how beginning with housing as an organizing base, a variety of longer lasting community goals can be achieved. Housing is a durable asset, and tenant groups that involve themselves in the affairs of the building and community can be as durable. Participation by residents in such organizations can improve the quality of buildings and communities. Moreover, such participation can develop or enhance skills and produce contacts with others that translate into greater self-confidence and effectiveness in other activities. Neighborhood clean-ups, crime prevention,

---

276. The programs are run in the building's community room. For the summer camp a resident organizes the program, and staff lead activities and take trips with the children. The after school program has a paid director and paid and volunteer staff. Some of the funding for these programs comes from ICTA's partner in the ownership structure of the property. The partner is a non-profit developer with an interest in bringing social and educational programs into properties with which it is involved. The relationship was negotiated between ICTA and the developer and involves them jointly seeking outside funding with a backup promise from the partner to fund the programs at a certain pre-determined level if adequate funding is not otherwise obtained.

and interactions with local agencies, among other things, become more likely and are more likely to be successful.

While there may be more at stake in building a neighborhood for residents who own their homes, ownership is not a pre-requisite for policies that enhance organization and longevity. As shown by ICTA, residents who do not own their homes still effectively create community institutions. Even residents who are not involved directly in management of a building can create and sustain institutions.<sup>277</sup> There have been many examples of resident councils in public housing which have asserted themselves for the improvement of their homes and neighborhood.<sup>278</sup>

Local and federal government can enhance such organization among residents, regardless of tenure, through policies encouraging organization. This can be done through laws that require building owners to permit organization and meetings on the premises and by governments funding training for skills development and building of social capital. As suggested earlier, the existence of social capital makes participation more likely and participation breeds more social capital.

#### **H. Efficient Use of Public Funds**

Throughout this Article, we argued that the proper development of policy concerning the creation or preservation of affordable housing must take into account the goals to be accomplished by the housing created or preserved. The goals and the programs designed to implement them, however, must be balanced against the cost to the public of providing or preserving that housing. Cost is a

---

277. Tenant organizing is often made more difficult by the higher level of turnover among tenants than among homeowners and the potentially more limited stake that renters as a group have in neighborhoods as compared to homeowners as a group. Nevertheless, there have been many examples of institution building for and on behalf of tenants. For example, the National Tenants Union was established in 1980 to help coordinate tenant activities throughout the nation. The Tenant Resource Center is an information, counseling, and advocacy organization that provides assistance to tenants. The Tenant Resource Center Home Page, [http://www.tenantresourcecenter.org/tenant\\_organizing](http://www.tenantresourcecenter.org/tenant_organizing) (last visited Apr. 3, 2007). The National Housing Institute publishes a magazine which deals with many issues of housing, tenancy, and civic participation. See Shelterforce Magazine Online, <http://www.nhi.org/online> (last visited Apr. 3, 2007). Similarly, The National Alliance of HUD Tenants provides information and advocacy for residents of HUD insured or subsidized properties. See National Alliance of HUD Tenants, <http://www.saveourhomes.org> (last visited Jan. 21, 2007). Each of these institutions is long lasting, national in scope, and dedicated to improving the situation for tenants and for the neighborhoods in which they reside.

278. See Bennett, *supra* note 220, at 273 nn.66-67, 302 n.211.

much more complicated calculation than merely measuring the dollars spent (or foregone) under a particular housing program in relation to what would be spent (or foregone) pursuant to a different program. We discussed the non-housing benefits that might derive from decent, affordable housing for lower income residents. These included better health, less crime, greater social capital and more civic involvement, a possible transfer of the skills and confidence derived from these benefits to other areas of a resident's life, and intergenerational wealth creation with its concomitant benefits for families and for society. A proper calculation would consider the costs saved or avoided in other areas as a reduction of costs expended on housing.

Of course, there might be several programs that could achieve similar results, and it would be appropriate to compare these programs to each other to determine which is most efficient. There are two main federal programs other than public housing that are designed to produce affordable housing or to assist lower income people in affording existing standard housing. These programs are LIHTC<sup>279</sup> and the Section 8 program (now called the Housing Choice Voucher program).<sup>280</sup> In addition, the HOPE VI program is designed to replace dilapidated or obsolete public housing with mixed-income housing.<sup>281</sup> In this section, we discuss the efficiencies of these programs in relation to each other and in relation to other possible uses of public funds. We also discuss the use of local programs to provide or preserve affordable housing by examining some of the major local initiatives that have been implemented around the nation.

### 1. *Low-Income Housing Tax Credits*

The LIHTC program<sup>282</sup> was designed to provide tax incentives to private investors, individuals, or corporations for investing in affordable housing. Investors provide equity capital to an entity, a limited partnership or a limited liability company ("LLC"), which will construct or renovate rental housing for low-income people.<sup>283</sup>

---

279. Low-Income Housing Credit, 26 U.S.C.A. § 42 (West 2007).

280. U.S. Dep't Hous. and Urban Dev., Housing Choice Vouchers, <http://www.hud.gov/offices/pih/programs/hcv> (last visited Apr. 3, 2007).

281. Arthur M. Wolfson, *Lost in the Rubble: How the Destruction of Public Housing Fails to Account for the Loss of Community*, 9 CHAP. L. REV. 51, 63 (2005).

282. 26 U.S.C.A. § 42.

283. See generally CONGRESSIONAL BUDGET OFFICE, THE COST EFFECTIVENESS OF THE LOW-INCOME HOUSING TAX CREDIT COMPARED WITH HOUSING VOUCHERS: A CBO STAFF MEMORANDUM (1992), reprinted in 56 TAX NOTES 493 (1992) [hereinaf-

2007] *AFFORDABLE HOUSING AND LAND TENURE* 603

The partnership or LLC will then receive an amount of credits calculated by multiplying the depreciable basis of the property by the percentage of the units in the building set aside for low-income tenants.<sup>284</sup> The investors usually receive 99.9 percent interest in the ownership entity in exchange for their equity investment.<sup>285</sup> The program's goal is to increase the level of construction or renovation possible within affordable limits or to lower the ultimate cost of the housing to the eventual residents.

The program has produced nearly one million units of housing, almost all of it going to low-income families.<sup>286</sup> Nevertheless, there has been a good deal of criticism of the program. The Congressional Budget Office ("CBO") concluded that the LIHTC program is economically inefficient, and many more units could be provided at the same cost by a greater utilization of the Section 8 program.<sup>287</sup> Of course, the CBO Memorandum did not analyze whether the units attributable to the LIHTC would have been built without the tax incentive.

The newly constructed or renovated units must meet quality and income standards for at least fifteen years.<sup>288</sup> There are severe financial penalties for the investors if the units fail to meet the standards or are not rented to low-income individuals.<sup>289</sup> Therefore, the program produces higher quality yet affordable housing. In its critique of the efficiency of the LIHTC program, the CBO Memorandum did not address the other, non-directly-financial benefits that derive from this production of better quality affordable units. The value of these benefits, if they exist and can be quantified, may

---

ter CBO REPORT]; *see also* JEAN L. CUMMINGS & DENISE DiPASQUALE, *BUILDING AFFORDABLE RENTAL HOUSING: AN ANALYSIS OF THE LOW-INCOME HOUSING TAX CREDIT* 36 (1998), available at <http://www.cityresearch.com>; Megan J. Ballard, *Profiting from Poverty: The Competition Between For-Profit and Nonprofit Developers for Low-Income Housing Tax Credits*, 55 *HASTINGS L.J.* 211, 218-19 n.32 (2003).

284. *See* CBO REPORT, *supra* note 283.

285. Sheryl A. Kass, *Bankruptcy and Low-income Housing: Where is the Voice of the Tenants?*, 22 *BANKR. DEV. J.* 261, 269 n.63 (2005) (internal citations omitted) (stating that investors typically purchase a ninety-nine percent ownership interest).

286. *See* ABT ASSOC., INC., *UPDATING THE LOW-INCOME HOUSING TAX CREDIT DATABASE: PROJECTS PLACED IN SERVICE THROUGH 2001* (2003), available at [http://www.novoco.com/low\\_income\\_housing/resource\\_files/research\\_center/LIHCdatabase\\_update\\_060104.pdf](http://www.novoco.com/low_income_housing/resource_files/research_center/LIHCdatabase_update_060104.pdf) [hereinafter ABT ASSOC., *UPDATING THE LIHTC DATABASE*].

287. *See* CBO REPORT, *supra* note 283.

288. Internal Revenue Code, 26 U.S.C.A. § 42(a) (West 2007); *see also* Dan Nnamdi Mbulu, *Affordable Housing: How Effective Are Existing Federal Laws in Addressing the Housing Needs of Lower Income Families?*, 8 *AM. U. J. GENDER SOC. POL'Y & L.* 387, 413-14 n.216 (2000).

289. 26 U.S.C.A. § 42(j); *see generally* Mbulu, *supra* note 288.

R

R

R

produce cost savings in other areas of social concern and expenditure such as in health care, education, public safety, and employment.

## 2. HOPE VI

The federal HOPE VI program was created to accomplish two societal goals: to eliminate severely distressed public housing and to reduce social and economic isolation of public housing residents.<sup>290</sup> The idea of mixed-income development has become an increasingly popular motif for planners, politicians, and academics.<sup>291</sup> The program involves demolishing dilapidated or obsolete public housing projects and replacing them with new units available for rental or homeownership, for a range of income levels, including former residents of the demolished public housing.<sup>292</sup> Local PHAs form partnerships with private developers and apply for funding from HUD and other public and private sources.<sup>293</sup>

There are a variety of critiques of the HOPE VI program. One of the most significant criticisms is that the number of replacement units is typically much smaller than the number of public housing units demolished. This problem is exacerbated by the fact that a significant number of the replacement units do not go to the lowest-income people. Thus, there is a net loss of housing and a much greater loss of affordable housing for low- and very low-income residents. Former public housing residents receive Section 8 vouchers to find other housing, but there are insufficient data on the success rates of residents displaced from public housing due to HOPE VI redevelopment.<sup>294</sup> It is, therefore, quite conceivable that the result of displacement from public housing is a mere transfer of pockets of concentrated poverty elsewhere rather than reducing the level of concentrated poverty.

---

290. Purposes of the HOPE VI program include “improving the living environment for public housing residents of severely distressed public housing projects through the demolition, rehabilitation, reconfiguration, or replacement of obsolete public housing projects (or portions thereof)” and “providing housing that will avoid or decrease the concentration of very low-income families.” HOPE VI Program Reauthorization and Small Community Mainstreet Rejuvenation and Housing Act, 42 U.S.C.A. §1437v (West 2007).

291. See ALASTAIR SMITH, MIXED-INCOME HOUSING DEVELOPMENTS: PROMISE AND REALITY 1 (2002), available at [http://www.jchs.harvard.edu/publications/W02-10\\_Smith.pdf](http://www.jchs.harvard.edu/publications/W02-10_Smith.pdf).

292. See Williams, *supra* note 5, at 439.

293. U.S. Dep’t Hous. and Urban Dev., About HOPE VI, <http://www.hud.gov/offices/pih/programs/ph/hope6/about> (last visited Apr. 3, 2007).

294. See Pindell, *supra* note 196, at 405.

### 3. *Section 8*

The Section 8 program, now called the Housing Choice Voucher program, provides financial subsidies to assist eligible recipients to acquire rental housing that meets HUD's housing quality standards and pay, generally, no more than thirty percent of their household income in doing so.<sup>295</sup> The program is administered for HUD by local PHAs.<sup>296</sup> The PHAs are given an allocation of funds to finance the program and take applications from residents seeking supplements, which come in the form of vouchers.<sup>297</sup> Since there is greater demand for vouchers than there is supply, there is a long waiting list of otherwise eligible recipients. Once an applicant receives a voucher, that applicant has a certain period of time within which to find a rental unit (which may be anywhere) that meets HUD's housing quality standards and is within the HUD established maximum Fair Market Rent levels ("FMRs"). The local PHA may also implement some rent ceiling variation.<sup>298</sup> The program is designed to give applicants a choice of units and to pay market rates with the assistance of the voucher. It is also designed to enhance recipient mobility with the goal of assisting in the deconcentration of poverty.

The program is not designed to increase the supply of affordable housing, relying on the voucher recipient finding an acceptable unit from among the existing stock.<sup>299</sup> Therefore, a recipient must find an acceptable unit within the maximum price range. There have been many obstacles to recipients doing this,<sup>300</sup> including the un-

---

295. See MERYL FINKEL & LARRY BURTON, ABT ASSOC. INC., *STUDY ON SECTION 8 VOUCHER SUCCESS RATES, VOLUME I, QUANTITATIVE STUDY OF SUCCESS RATES IN METROPOLITAN AREAS 1-1* (2001), available at [http://www.huduser.org/Publications/pdf/sec8success\\_1.pdf](http://www.huduser.org/Publications/pdf/sec8success_1.pdf) [hereinafter ABT ASSOC., *STUDY ON SECTION 8*].

296. *Id.*

297. *Id.*

298. See Kristin A. Siegesmund, *The Looming Subsidized Housing Crisis*, 27 WM. MITCHELL L. REV. 1123, 1130 (2000).

299. An earlier program, the project-based Section 8 program, did stimulate housing construction. A project was given a contract to subsidize a certain number of units. The subsidy would remain with the unit so long as it was occupied by an eligible resident. Lenders could then use the long-term renewable contract as a basis for calculating certain project income. The voucher program, on the other hand, is not tied to the unit but to the recipient. This means that the voucher is portable and goes with the recipient when she moves. Therefore, it is an unreliable source of future income for any particular project and does not assist a developer in obtaining financing. Project based contracts are no longer available as a general matter and are used rarely in exceptional circumstances.

300. See generally ABT ASSOC., *STUDY ON SECTION 8*, *supra* note 295.

availability of eligible and acceptable units, landlord refusal to accept vouchers, and recipient unwillingness or inability to move.<sup>301</sup> As a result, there is a surprisingly high rate of voucher holders not utilizing their vouchers.<sup>302</sup>

There has been much debate about the use of these programs as a means of developing or preserving affordable housing or for helping to make decent housing affordable to low-income residents. Much of the criticism focuses on programmatic inefficiencies which surface in two ways. First, the cost of the large bureaucratic apparatus that is needed to implement and monitor each of the programs is much higher than the costs in the private sector.<sup>303</sup> Second, the private market is better able to design housing and control its costs than a program with significant governmental involvement.<sup>304</sup> Both the HOPE VI program and the LIHTC program involve private developers designing and building or renovating the housing, albeit with a heavy federal regulatory overlay. Nevertheless, the conclusion of the critics is that in each case the funds involved in the federal programs could be used more productively elsewhere.<sup>305</sup>

These conclusions may be short-sighted. While the HOPE VI, LIHTC, and Section 8 programs are designed to accomplish different goals, commentators have compared them in terms of their efficiency.<sup>306</sup> It has been argued that subsidies provided under Section 8 are more efficient than the new construction or rehabilitation under LIHTC or HOPE VI.<sup>307</sup> As noted previously, however,

---

301. Mark A. Malaspina, *Demanding the Best: How to Restructure the Section 8 Household-Based Rental Assistance Program*, 14 YALE L. & POL'Y REV. 287, 315 (1996) (discussing various obstacles facing Section 8 voucher holders).

302. ABT ASSOC., STUDY ON SECTION 8, *supra* note 295, at 2-3. The national success rate in 2000 for recipients finding a suitable and eligible unit within the permitted time was sixty-nine percent, down from eighty-one percent in 1993. In the same year the success rate in New York City was fifty-seven percent, and in Los Angeles it was forty-seven percent.

303. Peter W. Salsich, Jr., *A Decent Home For Every American: Can the 1949 Goal Be Met?*, 71 N.C. L. REV. 1619, 1637 (1993) (arguing that bureaucratic layers within HUD and PHAs create an inefficient system).

304. See Michael S. FitzPatrick, Note, *A Disaster in Every Generation: An Analysis of HOPE VI: HUD's Newest Big Budget Development Plan*, 7 GEO. J. ON POVERTY L. & POL'Y 421, 445 (2000) (arguing that HOPE VI projects will not be self-sufficient or adequately maintained).

305. See, e.g., Schill, *Privatizing Federal Low Income Housing Assistance*, *supra* note 10, at 948 (arguing that although federal funding should not be reduced, it should be directed towards the private market for more productive use).

306. See, e.g., CBO REPORT, *supra* note 283, at 493; Schill, *Privatizing Federal Low Income Housing Assistance*, *supra* note 10, at 900.

307. See CBO REPORT, *supra* note 283, at 493.

R

R

R

R

R



2007] *AFFORDABLE HOUSING AND LAND TENURE* 607

there are additional factors to the cost of providing housing to consider when analyzing the efficiency of these programs.

Section 8 utilizes the existing stock of housing and expects individuals to find eligible and desirable housing from that stock. When the housing market is tight or when owners refuse to accept vouchers, the benefits of the program are reduced or lost. Similarly, when neighborhoods begin to gentrify, building owners are more likely to obtain rentals equal to or higher than those permitted by Section 8 without having to endure the bureaucratic and regulatory problems caused by HUD and the PHA. Furthermore, the Section 8 program is currently facing stagnant or reduced funding while, at the same time, experiencing an increase in the demand for housing units.<sup>308</sup> Thus, the program seems to be fighting a rear-guard action to preserve affordability for low-income residents. Rents are rising while subsidies are shrinking, leaving fewer families able to benefit from vouchers.

Despite these considerable obstacles, the Section 8 program has had notable success in housing low-income residents in units that at least meet, and often exceed, HUD's minimum housing quality standards.<sup>309</sup> If our arguments about the effect of decent housing on other aspects of a person's life are correct, one would expect a significant number of non-housing benefits to be derived from this program. These benefits, at least in part, can be quantified and enable a better analysis of the overall efficiency of Section 8. Even without this kind of analysis, it is clear that study must be devoted to the question of where minimum quality standards should be set, both in order to define more accurately the nature of adequate housing in a particular area and to reduce the bureaucracy of the highly criticized Real Estate Assessment Centers ("REAC") inspection program.<sup>310</sup>

---

308. See Martin Guggenheim, *Special Spring 2006 Symposium: Ratify the U.N. Convention on the Rights of the Child, But Don't Expect Any Miracles*, 20 EMORY INT'L L. REV. 43, 55 (2006) (discussing increase in wait times in the United States for Section 8 vouchers); Andrea D. Haddad, *Subsidized Housing and HUD Projects: Economic Confinement on Low-Income Families*, 31 NEW ENG. J. CRIM. & CIV. CONFINEMENT 243, 245-46 (2005) (discussing budget cuts to the Section 8 program).

309. ANDREW CUOMO, SECTION 8 TENANT-BASED HOUSING ASSISTANCE: A LOOK BACK AFTER 30 YEARS 17-18 (2000), available at <http://www.huduser.org/Publications/pdf/look.pdf>.

310. See PUBLIC HOUS. AUTHS. DIRECTORS ASS'N, PHADA ANALYSIS OF THE PHAS PHYSICAL INSPECTION SCORING SYSTEM (2000), <http://www.phada.org/01phass.html>. The REAC inspection system has been criticized as arbitrary and not sufficiently related to the quality and safety of the units. HUD has contracted out the inspection function. Since different inspectors have completely different emphases, the owners of inspected properties are typically unaware of what

Similarly, the overall bureaucratic structure of the program needs overhauling, particularly at the local PHA level. There is significant inefficiency in the certification of eligible recipients, the inspection of units for eligibility, the provision of client service, and the reporting and oversight functions.<sup>311</sup> The cost of this bureaucracy acts as a drain on funds available to the poor and as political ammunition for those opposed to the program.<sup>312</sup>

The HOPE VI and LIHTC programs are quite different from Section 8. Both of these programs produce new or renovated housing units that remain affordable to low-income residents for extended periods. Moreover, in the case of new construction under LIHTC, additional units may ease housing shortages in local areas. The efficiency critiques here are similar to those for Section 8—too much bureaucracy exists in the form of regulation and oversight. If left to the private market, critics argue, there would be better designed, more efficiently built housing. Of course, these critics fail to address the fact that there is little or no low-income housing development without these or other governmental subsidies.<sup>313</sup>

Thus, if the efficiency calculation includes the public purpose of providing suitable, affordable housing and the assumption that such housing will not be produced without incentives created by the government, the efficiency argument would be, in purely financial terms, to find the least inefficient way to achieve the public goal. The government benefits economically by providing funds to

---

a particular inspector will focus on. Moreover, the system of points allocated to various components of the inspection is often stated in ranges, and the inspector has the discretion of how to score any particular defect. One example is an affordable cooperative failing a REAC inspection with a score of fifty-nine (sixty is passing) when an inspector took five points off for a mattress being found on the site (in a wooded area that had been inspected and found clear by residents the night before the REAC inspection). The failure of the REAC had serious consequences for the property, including a threatened foreclosure of the HUD held mortgage and termination of the project based Section 8 contract.

311. *See id.*; *see also* Schill, *Privatizing Federal Low Income Housing Assistance*, *supra* note 10, at 903 n.100.

312. Letter from Sunia Zaterman, Exec. Director, Council of Large Public Hous. Auth., to Office of General Counsel, U.S. Dep't Hous. and Urban Dev. (Aug. 23, 1999), available at <http://www.clpha.org/page.cfm?pageID=468>.

313. *See generally* Deborah Kenn, *One Nation's Dream, Another's Reality: Housing Justice in Sweden*, 22 *BROOK. J. INT'L L.* 63 (1996). The author compared housing policy in Sweden and the United States and concluded: "Relying on the private, market-driven sector for provision of adequate housing for low-income people has not worked. There is no evidence that the private sector will produce affordable housing without government support. Solving the housing affordability crisis will only be possible with significant increases in federal funding." *Id.* at 72.

2007] *AFFORDABLE HOUSING AND LAND TENURE* 609

develop affordable housing. Such production creates new construction and maintenance jobs with the concomitant multiplier effect in the community. This brings in additional income tax revenue for both the local and federal governments. Real estate values increase, thereby increasing local real estate tax revenue. Sales taxes will be collected as a result of the increased purchase of materials by builders and, eventually, by residents.

Some costs may be avoided, such as inspections and enforcement costs, health care and policing costs, and a variety of general societal well-being costs. For example, better school performance by children living in decent housing should lead to lower school costs and, ultimately, to graduates attaining better jobs. While some of these benefits might be obtained through other uses of the subsidy funds, the non-financial benefits of decent, affordable housing cannot otherwise be as efficiently obtained. More study, therefore, is needed as to the true cost of the subsidies provided.

There are a number of housing programs developed by state and local governments that should be mentioned. Some of them emulate federal programs such as rent subsidies, but many other types of programs exist as well. These include direct below market interest rate loans for the ownership or rental of low-income housing,<sup>314</sup> various work force housing programs,<sup>315</sup> and, under federal law, a first-time-home-buyer tax credit of up to \$5,000 for District of Columbia home buyers.<sup>316</sup> Inclusionary zoning, described above in Part II.C,<sup>317</sup> has gained a good deal of support over the years because it transfers the job of producing affordable housing to the private sector. Inclusionary zoning requires developers to provide a certain percentage of their units to lower income persons at a reduced price. Because lower cost housing is produced in the same buildings that offer higher cost housing, the program results in economic and often racial integration.<sup>318</sup>

---

314. *See generally* Housing Production Trust Fund, D.C. CODE § 42-2802 (2006); District's First Right to Purchase Section 8 Properties, D.C. CODE § 42-2851.04 (2006); State Housing Initiatives Partnership Program, FLA. STAT. ANN. § 420.9071 (West 2006).

315. Workforce Housing Reward Program, CAL. HEALTH & SAFETY CODE § 50550 (West 2006); Metropolitan Police Housing Assistance and Community Safety Program, D.C. CODE §§ 42-2901 to -2903 (2006); Government Employer-Assisted Housing Program, D.C. CODE §§ 42-2501 to -2507 (2006).

316. 26 U.S.C.A. § 1400c (West 2007).

317. *See supra* notes 135-36, 147-48 and accompanying text.

318. MONTGOMERY COUNTY CODE § 25A-1 (1989). The Montgomery County program produced over 13,000 housing units over the past thirty years. Nicholas J. Brunick, Am. Planning Ass'n, *The Inclusionary Housing Debate: The Effectiveness of*

Typically, inclusionary zoning gives private developers regulatory relief on their new construction or substantial renovation projects in exchange for those low-income units. The relief usually comes in the form of a density bonus for the project, allowing the developer to build a greater number of units than otherwise permitted, though other forms of relief have also been used.<sup>319</sup> Some jurisdictions permit developers to buy their way out of the set-aside requirement by paying an amount into the jurisdiction's housing production fund.<sup>320</sup> These funds, in turn, would be used to create affordable housing elsewhere in the jurisdiction. Of course, there are costs associated with each of these programs, even inclusionary zoning. There have been claims that inclusionary zoning reduces development of housing.<sup>321</sup> Moreover, the greater density or reduced parking space bonuses given to developers cause urban ills such as congestion, noise, and air pollution.<sup>322</sup> Similarly, there is not a significant body of evidence indicating that mixed-income housing actually produces the kind of results its proponents claim.

These programs mandate a timeframe during which the subsidized or otherwise supported units must remain affordable.<sup>323</sup> The affordability restrictions on the units bring to the fore the ongoing

---

*Mandatory Programs over Volunteer Programs*, ZONING PRACTICE (2004), available at <http://www.planning.org/affordablereader/znzp/ZPSep04.pdf>.

"Inclusionary housing has created over 34,000 affordable homes and apartments in California over the past 30 years. As of March 2003, one-fifth of all localities in the state (107 California cities and counties) reported using inclusionary housing . . . ." NON-PROFIT HOUS. ASS'N OF N. CAL. & CAL. COAL. FOR RURAL HOUS., INCLUSIONARY HOUSING IN CALIFORNIA: 30 YEARS OF INNOVATION ii-iii (2003), available at [http://www.nonproffithousing.org/knowledgebank/publications/Inclusionary\\_Housing\\_CA\\_30years.pdf](http://www.nonproffithousing.org/knowledgebank/publications/Inclusionary_Housing_CA_30years.pdf).

The District of Columbia also proposed the implementation of a mandatory inclusionary zoning program to address the need for affordable housing. D.C. Zoning Comm'n, Zoning Commission Order No. 04-33 (2006).

319. These other forms of relief include fee waivers, fast track processing, design flexibility, and subsidies. See, e.g., Nat'l Hous. Conference, *Inclusionary Zoning: The California Experience*, 3 NHC AFFORDABLE HOUSING POL'Y REV. 1, 22-24 (2004).

320. See, e.g., MONTGOMERY COUNTY CODE §25A-5A (1989); see also Robert Chambers, *Pushed Out: A Call for Inclusionary Housing Programs in Local Condominium Conversion Legislation*, 42 CAL. W. L. REV. 355, 368-69 (2006) (discussing in-lieu fees).

321. See, e.g., NICHOLAS BRUNICK, THE IMPACT OF INCLUSIONARY ZONING ON DEVELOPMENT (undated report), available at [http://www.bpichicago.org/rah/pubs/impact\\_iz\\_development.pdf](http://www.bpichicago.org/rah/pubs/impact_iz_development.pdf).

322. See, e.g., JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND CONTROL LAW 110 (1998) (citing Jerold Kayden, *Zoning for Dollars: New Rules for an Old Game?*, 39 WASH. U. J. URB. & CONTEMP. L. 3 (1991)).

323. See, e.g., MONTGOMERY COUNTY CODE § 25A-5A (1989); see also Chambers, *supra* note 320, at 368-69.

2007] *AFFORDABLE HOUSING AND LAND TENURE* 611

debate about preservation of affordable housing for future generations versus wealth creation for the poor. As with so many other issues we have raised, where one stands in this debate depends on the role one believes housing should play in the life of lower income Americans.

### III. CONCLUSION

The greater freedom for private developers and state and local governments to fashion affordable housing projects resulted in an impressive variety of projects and some notable successes. We attempted to identify a range of goals that, directly or indirectly, may be accomplished through housing policy. Much of the relationship between the goals and the policies, such as the goal of greater civic participation or institution building, is not immediately apparent, even to the studied observer. We tried to elucidate these connections.

Our principal undertaking in this Article has not been to suggest which goals ought to be privileged or which policies ought to be implemented. While we obviously have strong views on these matters, we do not believe that any single model meets all legitimate needs. Our more modest objective was to articulate and organize competing goals and policies for affordable housing. These goals may range from such basics as the provision of decent, affordable shelter and wealth creation to the less apparent goals of creating social capital and social integration. Only then can decision-makers appropriate projects to match local needs and available resources. Moreover, it is often the case that to choose one goal means to negate another, even if both are socially and politically laudable. Understanding this reality will, we hope, allow decision-makers to choose consciously and creatively across the spectrum of legitimate goals and available tools.

Today, our affordable housing policy pursues competing social goals. One example is the conflict between the maintenance of affordability and the maximization of wealth creation. Another is balancing the desire to preserve historic buildings and neighborhoods with the cost of doing so since it may reduce the affordability of the housing that is produced. Different people will have different views about which goal should take precedence, but no matter which goal one prefers, we believe the effect on the entire community must be considered. We believe that, too often, policy makers are too narrow in the range of their considerations.

There are several areas where more research is needed. This is particularly true in looking at the efficiency of various public programs for the provision of affordable housing. Again, it is the case that efficiency cannot be measured until the goals are identified. The accomplishment of these goals pursuant to one policy or program can then be measured against their achievement under some other policy or program. Research available today merely compares the financial cost of producing units among various programs and does not look at what other goals beyond the provision of housing might have been intended or achieved. Nor have the costs saved from the provision of affordable housing been factored into the efficiency equation. Importantly, the efficiency literature does not suggest how, in the absence of programs such as Section 8 or LIHTC, more affordable housing units can be created for low-income residents. Without such an analysis, an efficiency calculation of existing programs is unavailing.

In addition to efficiency issues, a great deal of further research is needed. We need research examining the range of benefits residents obtain (or do not obtain) from housing programs with ambitious goals for wealth creation and civic engagement. We need to better understand the costs and benefits of private developers negotiating to build housing projects using public subsidies. We hope that our discussion paves the way for some of that dialog to begin. Public programs for affordable housing will not disappear and may be our most important public intervention to address persistent poverty. These programs should be designed and implemented to achieve consciously identified social goals.