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HOMES AFFORDABLE FOR GOOD: COVENANTS AND GROUND LEASES AS LONG-TERM RESALE-RESTRICTION DEVICES

JAMES J. KELLY, JR.*

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I. INTRODUCTION

The end of President George W. Bush's final year in office marked the end of the 'ownership society' policy program he championed at the end of his first term.¹ The implosion of the secondary mortgage market has occasioned more than one obituary for this economic and civic ideal.² Broad-based homeownership and participation in securities markets were supposed to promote greater economic engagement and empower the American middle class to build wealth.³ The dream of owning the place where you lived resonated with images of pride, security and, over much of the last decade or two, year-after-year of double-digit investment appreciation. Far from being daunted by turn-of-the-millennium stock market sputterings, American investors, large and small, doubled-down and increased their real estate holdings through larger and more complex forms of leveraging.⁴

It is ironic that the newly christened 'ownership society' should run aground because of irrational exuberance in home buying rather than in stock speculation. Ownership of one's own place in the world truly can offer the basis for community stakeholder status that those championing the ownership society claimed for all manner of financial investments.⁵ Home is all about stability. For more than fifty years, Americans have looked to their homes for stability in wealth as well as security of residential tenure. The emphasis over the last decade, on the home as source of money, however, has displaced the in-kind benefits of homeownership and ultimately put them at risk.

In the midst of this crisis in our understanding of homeownership, the movement to create a stock of permanently affordable homes poses a stark sign of contradiction. During the last four decades, inclusionary zoning programs and Community Land Trusts (CLTs) have created and sustained homes that are affordable to not only the original low or moderate-income households that

1. See Press Release, The White House, Office of the Press Secretary, Fact Sheet: America's Ownership Society: Expanding Opportunities (Aug. 9, 2004), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2004/08/20040809-9.html>.

2. See, e.g., Jo Becker, Sheryl Gay Stolberg & Stephen Labaton, *White House Philosophy Stoked Mortgage Bonfire*, N.Y. TIMES, Dec. 21, 2008, at 1, 36, Zachary Karabell, *End of the 'Ownership Society'*, NEWSWEEK, Oct. 20, 2008, at 39.

3. See DEAN BAKER, PLUNDER AND BLUNDER: THE RISE AND FALL OF THE BUBBLE ECONOMY 20, 84–85 (2008) (arguing that Federal government policy encouraging middle class speculative investment extends back to the Clinton Administration).

4. See generally DANIEL MCGINN, HOUSE LUST: AMERICA'S OBSESSION WITH OUR HOMES (2008).

5. See Eduardo M. Peñalver, *Property As Entrance*, 91 VA. L. REV. 1889, 1939–41 (2005); Eduardo M. Peñalver, *Property Metaphors and Kelo v. New London: Two Views of the Castle*, 74 FORDHAM L. REV. 2971, 2972–75 (2006) (contrasting two understandings of the "home as a castle" metaphor: "despotic dominion" and "inherent dignity." Only the latter, he argues, reflects the proper balance of private and public needs with regard to land). See also *infra* Part II.A.

move into them, but also to succeeding generations of income-qualified homebuyers as well. While a general desire to make the tenure benefits of homeownership more generally available has encouraged these efforts, three different types of housing emergencies have necessitated the development of these long-term strategies for creating and sustaining permanently affordable homes. First, inclusionary zoning programs designed to address socioeconomic inequities in the creation of new residential subdivisions have created resale-restricted homeownership units.⁶ Second, urban neighborhood CLTs have fought the displacement brought on by gentrification by preserving the affordability of low-income equity cooperatives and other affordable homes.⁷ Third, smaller cities and towns have used CLTs to create a stock of perpetually affordable single-family homes throughout their communities.⁸

Some metropolitan housing markets have become so thoroughly unaffordable that communities cannot offer conveniently located homes for teachers, police officers, nurses or other essential professional and non-professional workers. While land use and housing subsidy policies that support multi-family rental projects are an important part of the local affordable housing response, affordable single-family homes must be available if these communities wish to complete the workforce housing picture.

In Montgomery County, Maryland, local officials harnessed a burgeoning private housing industry in the region and put it to work to build affordable homes both for rental and ownership. In 1973, the local government instituted an inclusionary zoning system that required new housing developments of a certain density and size to include a small percentage of homes to be made available at below-market rates.⁹ This Moderately-Priced Dwelling Unit (MPDU) program not only created affordable homeownership opportunities but provided for their continued affordability.¹⁰ Rental units were required to be kept affordable for a period of twenty years, but it was not just landlords that were subject to affordability controls.¹¹ Homeownership units were also protected.¹² Homeowners promised when they chose to move, they would make their homes available to other income-qualified households.¹³

6. See *infra* text accompanying notes 10–14.

7. See *infra* text accompanying notes 15–16.

8. See *infra* text accompanying notes 17–19.

9. See Myron Orfield, *Land Use and Housing Policies to Reduce Concentrated Poverty and Racial Segregation*, 33 *FORDHAM URB. L. J.* 877, 914–15 (2006); Montgomery County Dep't of Hous. and Cmty. Affairs, *History of the MPDU Program in Montgomery County*, http://www.montgomerycountymd.gov/dhctmpl.asp?url=/content/dhca/housing/housing_P/mpdu/history.asp (last visited Sept. 12, 2009) [hereinafter *Montgomery County*].

10. See Orfield, *supra* note 9, at 914–18; Montgomery County, *supra* note 9.

11. Orfield, *supra* note 9, at 915.

12. Homeowners buying these subsidized units make two types of enforceable promises designed to ensure the future affordability of housing. First, they place a mortgage on the

In smaller, more community-based settings, housing advocates have used these same subsidy retention devices to sustain affordable homes built by non-profit housing developers. Twenty years ago, the then-fledgling Dudley Street Neighborhood Initiative (DSNI) wanted to secure the permanence of the gains for which they were struggling and planning in their Boston neighborhood of Roxbury. Residents had witnessed the displacement and human devastation that urban renewal and gentrification had inflicted on nearby low-income communities.¹⁴ They wanted to revitalize their disinvested neighborhood without being forced out by skyrocketing land values. In August 1988, they formed Dudley Neighbors, Inc., a community land trust that would hold title to the land underneath all the affordable housing and community space that DSNI was fighting to create.¹⁵

Outside the metropolitan context, smaller, more isolated cities and towns with high land values and low wage bases have turned to the CLT model as a means of creating and sustaining economically diverse communities of choice. In Rochester, Minnesota, the Mayo Clinic sponsored the creation of the First Homes CLT to increase the homeownership opportunities available to a broader range of that area's residents.¹⁶ Resort areas such as the Florida Keys and Jackson Hole, Wyoming have also seen the creation of these long-term stewards of non-profit homes.¹⁷

Whether these homes are subsidized through exactions from developers (as with the inclusionary housing programs) or through public and private capital (as with CLTs), they are sustained through the legal arrangements made with homeowners that uniquely define the parameters of permanently affordable

property that covers the difference between the home's market price and the price they paid for it. This mortgage does not require any payments while the owner lives in the home and is released if the second promise is kept. Subsidized homeowners can stay in the homes as long as they want but promise to pass their good deals on to another generation of qualifying households when they decide it is time to sell. They promise to sell the property to the MPDU program itself or a family approved by it. More importantly, they agree to sell it at a price calculated to give them fair return on their investment without putting the home out of reach for similarly situated homebuyers. See Montgomery County, *supra* note 9.

13. See *id.* (explaining that at first, the MPDU ordinance's resale control period was only 5 years, then in 1981, the resale period was extended prospectively to 10 years and that as of April 2005, new MPDU homeownership units are subject to resale restrictions for 30 years).

14. ELISE M. BRIGHT, REVITALIZING AMERICA'S FORGOTTEN NEIGHBORHOODS: AN INVESTIGATION OF INNER CITY REVITALIZATION EFFORTS 77-78 (2000); PETER MEDOFF & HOLLY SKLAR, STREETS OF HOPE: THE FALL AND RISE OF AN URBAN NEIGHBORHOOD 17-23 (1994).

15. BRIGHT, *supra* note 14, at 81-82; MEDOFF & SKLAR, *supra* note 14, at 126-27.

16. First Homes: Rochester Area Found. Cmty. Land Trust (CLT), <http://www.firsthomes.org/hot.html> (last visited Sept. 12, 2009).

17. Jackson Hole Cmty. Hous. Trust, <http://www.housingtrustjh.org> (last visited Sept. 12, 2009); Middle Keys Cmty. Land Trust, <http://www.mkclt.org> (last visited Sept. 12, 2009).

homeownership.¹⁸ In so doing, they offer a new take on the “ownership society,” one that challenges conventional social and legal notions of property in land. By sharing the equity appreciation attributable to the continuing vitality of the surrounding community, participating homeowners enjoy the full in-kind benefits of homeownership and a stable, albeit capped, return on their financial investments.

Even in the context of owning one’s own residence, the legal understanding of ownership has long embraced the right to no longer own—that is, the right to sell. The link forged between ownership and unfettered alienability brought down feudalism in the West and spawned a number of legal doctrines that continue to plague many first-year law students partial to the simplicity of freedom to contract. The Rule Against Perpetuities (RAP) invalidates contingent future interests that do not vest by the rule’s deadline.¹⁹ Even if resale restrictions do not trigger this limited, but strict, prohibition, they must contend with a more nebulous common-law review as to the reasonability of restraints on alienation generally.²⁰

All of these organizations have placed subsidies into homes to benefit not only the original qualified homebuyers but successive generations of low and moderate-income households as well. They sustain the affordability of homeownership in their communities not merely by collecting the subsidy back from sponsored households when they sell but also by ensuring that those subsidies can remain at those particular locations. This dedication of specific parcels to perpetually affordable homeownership requires legally enforceable controls over who can purchase those properties and at what price.

Several legal mechanisms control resales of subsidized homes so as to preserve affordability while still providing all aspects of ownership to the subsidized homeowner including a fair return on the homeowner’s own monetary investment.²¹ An argument could be made that, given the broad

18. Even in sustaining the long-term affordability of homes, CLT and IZ programs have differed in approach. Compare David M. Abromowitz, *CLTs and Ground Leases*, 1 J. AFFORDABLE HOUS. & CMTY. DEV. L. 5, 5–6 (1992) (stating CLTs have generally maintained an ongoing reversionary interest in the land upon which the affordable homes are built), with INST. FOR CMTY. ECON., COMMUNITY LAND TRUST LEGAL MANUAL (2d ed. 2002) (stating inclusionary zoning programs generally use covenants accompanying the deed to embody the subsidized homeowners’ resale promises. CLTs put these same provisions into a lease which gives the homeowner a 99-year term).

19. Jesse Dukeminier, *A Modern Guide to Perpetuities*, 74 CAL. L. REV. 1867, 1868 (1986) (quoting J. GRAY, THE RULE AGAINST PERPETUITIES § 201, at 19 (4th ed. 1942)) (“We start with Gray’s classic statement of the Rule: ‘No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest.’”).

20. See generally 3 JOHN A. BORRON, JR., SIMES & SMITH: THE LAW OF FUTURE INTERESTS §§ 1111–1172 (3d ed. 2004) (explaining the rules restricting the creation of future interests including disabling restraints and forfeiture restraints).

21. *Id.* §§ 1111–1117, 1131. See also discussion *infra* Parts III.A.1–2.

public policy considerations supporting affordable homeownership resale restrictions, statutes should be passed that make private or public permanent dedications of land to affordable homeownership beyond the reach of outdated doctrines of alienability.²² I will try to show in this Article, however, that the legal approach that made the market economy in land possible can, through moderate deference to the goals of permanent affordability, encourage a more nuanced approach to permanent affordability that is healthier and more sustainable than more simplistic approaches. Specifically, the conventional doctrinal hostility to “dead hand control” of land pushes those creating permanently affordable homes to provide for stewarding entities that will not merely enforce restrictions as originally written but also apply basic principles to make necessary adjustments to resale policies and ultimately act as a guarantor against fractionated title.

This independent stewardship entity approach to resale control must be distinguished from three other alternatives. First, private dedications of land to a social purpose threatened by market activity often stress permanence and inviolability to the total exclusion of flexibility. Statutorily authorized conservation easements offer an example of, what I will call, the “lockbox” approach to land protection.²³ An irrevocable decision is made to limit development of the land forever. Second, the enactment of a particular set of resale restrictions on land can come directly from publicly enacted statutes and regulations. This command-and-control mode of protecting the affordability of subsidized homes offers a high-level certainty of enforceability, but also raises concerns about the responsiveness of its enacted resale procedures to changing circumstances and individual situations.²⁴ A third affordability protection alternative places the restrictions neither in the estate of the homeowner nor in public statutes and ordinances but in the development documents that create the community of which the affordable home is a part.²⁵ This placement of stewardship authority, if not sole responsibility for protecting affordability, with a party that has landed interest is a significant step to the independent stewardship entity alternative that is the focus of the Article’s final Part.

Both inclusionary zoning programs and CLTs are developing legal arrangements that balance responsiveness to changing circumstances with an immovable commitment to the goods offered by permanently affordable homeownership. At the core of these arrangements is a single legal device that embodies the essential facets of the stewardship approach to permanent

22. *See infra* Part III.B.2.

23. *See infra* Part III.B.1.

24. *See infra* Part III.B.2.

25. *See infra* Part III.B.3.

affordability: the pre-emptive option.²⁶ Whether contained in an inclusionary zoning covenant or in a CLT ground lease, the inclusion of a pre-emptive option provides affordability stewards with an assignable right of first refusal on any attempt by the homeowner to sell the property.²⁷ Most importantly, this ability to have the first opportunity to buy the property when the homeowner sells includes an agreement between the affordability steward and the homeowner as to the sale price.²⁸

As a restriction of the resale of real property, the pre-emptive option must contend with legal doctrines that are hostile to both perpetuities and alienation restraints. Because the pre-emptive option, used to preserve long-term affordability, can affect a sale many decades after its creation, a lawyer who uses the device must be wary of the RAP.²⁹ Since this type of right of first refusal acts to limit both the price and potential buyers for a property, it should be drafted to avoid any law, statutory or judge-made, that invalidates suspensions of or unreasonable restraints on alienation.³⁰ As will be discussed further, the pre-emptive option responds to these challenges better than more direct restraints, public or private, on a homeowner's right to sell because it provides for the continuing re-assertion of the steward's relationship to the property.³¹

Part II will articulate the goal of permanently affordable homeownership and set out the criteria for evaluating different resale restriction devices to achieve it. Part III will begin by articulating the reasons why a stewardship approach to restricting resale is superior to testamentary or regulatory approaches to sustaining the affordability of subsidized homes. Part III will examine the pre-emptive option as the legal device of the stewardship approach and how it facilitates permanently affordable homeownership in a legal environment still hostile to long-term alienation restrictions that do not benefit particular landowners. Part IV concludes with an examination of how the IZ and CLT using pre-emptive options in covenants and leases respectively.

26. See *infra* Part III.B.3 (stating that the pre-emptive option is a right of first refusal that specifies the price at which the option holder can buy the property).

27. Abromowitz, *supra* note 18, at 6; INST. FOR CMTY. ECON., *supra* note 18, at 12-11-12-13, 13-18-13-25; Moderately Priced Dwelling Units Declaration of Covenants For Sale Subdivisions, Art. II, http://www.montgomerycountymd.gov/content/dhca/housing/housing_P/mpdu/pdf/covenants_mpdu_sale_8-9-06.pdf [hereinafter Moderately Priced Dwelling Units].

28. Abromowitz, *supra* note 18, at 6; INST. FOR CMTY. ECON., *supra* note 18, at 12-11-12-13, 13-18-13-25; Moderately Priced Dwelling Units, *supra* note 27, at art. II.

29. See *infra* Part III.A.2. See also BORRON, JR., *supra* note 20, § 1222 (stating the RAP).

30. See *infra* Part III.A.1. See also BORRON, JR., *supra* note 20, §§ 1111-12 (discussing what is a restraint on alienation).

31. See *infra* Part III.C.

II. DEDICATION OF LAND TO PERMANENTLY AFFORDABLE HOMEOWNERSHIP

A. *Why? The Goods of Homeownership*

Homeownership offers stability both in place and in wealth. Socially, the stability of tenure associated with fee simple ownership of land forms a foundation for the household and the participation of its members in their immediate and larger communities. Economically, the home, invariably its owner's principal asset, is a tax-smart, conservative investment structured to encourage automatic saving. Far from competing with one another, the economic and social aspects of stability fostered by homeownership complement each other strongly. Although both the economic and social goods of homeownership are, to some extent, fortified by the ability of resident owners to buy and sell properties freely, the stability in tenure and wealth available through homeownership flows from durable rights to quiet enjoyment rather than its open-ended potential to yield a liquid cash return.

Socially, the stability of tenure associated with fee simple ownership of land forms a foundation for the household and the participation of its members in their immediate and larger communities. Proponents of expanding homeownership have argued that homeowners benefit from improved physical and psychological health and provide better educational environments for children in their households. For decades, scholars have argued that homeowners have improved self-esteem and life satisfaction.³² Home purchase often involves the successful completion of financial goals. The recognition of these accomplishments by self and others would seem to contribute to self-esteem. Even so, studies have not generally been able to demonstrate statistically significant increases in self-esteem that can specifically be attributed to homeownership.³³ The correlation between homeownership and positive educational outcomes has been more promising even when controlling for a variety of other factors.³⁴ These personal and

32. William M. Rohe et al., *Social Benefits and Costs of Homeownership*, in *LOW-INCOME HOMEOWNERSHIP: EXAMINING THE UNEXAMINED GOAL* 381, 386 (Nicholas P. Retsinas & Eric S. Belsky eds., 2002) (quoting Robert M. Rakoff, *Ideology in Everyday Life: The Meaning of the House*, 7 *POL. & SOC'Y* 85, 93 (1977)) [hereinafter Rohe et al., *Social Benefits*]. See generally William M. Rohe & Michael A. Stegman, *The Effects of Homeownership: On the Self-Esteem, Perceived Control and Life Satisfaction of Low-Income People*, 60 *J. AM. PLAN. ASS'N* 173 (1994) [hereinafter Rohe & Stegman, *Effects of Homeownership*].

33. Rohe et al., *Social Benefits*, *supra* note 32, at 386; Rohe & Stegman, *Effects of Homeownership*, *supra* note 32, at 180–81. Interestingly, improved physical health outcomes, although modest, are somewhat easier to demonstrate. Rohe et al., *Social Benefits*, *supra* note 32, at 388–89.

34. Rohe et al., *Social Benefits*, *supra* note 32, at 398–99; Donald R. Haurin et al., *Impact of Homeownership on Child Outcomes*, in *LOW-INCOME HOMEOWNERSHIP: EXAMINING THE UNEXAMINED GOAL*, *supra* note 32, at 427, 429–440 (Nicholas P. Retsinas & Eric S. Belsky eds.,

household gains have spillover effects for the immediate and larger communities.³⁵ There is reason to believe that happier and more self-confident household members will be more productive; this multiplication effect is even more evident with higher educational attainment.³⁶

Increased homeownership has more direct social benefits for neighborhoods, metropolitan areas and beyond. The strength of communities, both large and, in particular, small, depend on the level of engagement by their members. Homeowners have consistently made up a disproportionately large share of those participating in neighborhood organizations and local political activities.³⁷ Because the values of their homes depend so greatly on the desirability of the neighborhoods in which they live, local issues dealing with crime, schools and municipal services have financial impacts that incentivize homeowners to pay attention to them.³⁸ More interestingly, the increased attachment a homeowner has to his or her current place, both from the increased costs associated with moving as well as the security of tenure, fosters greater social involvement.³⁹ Community tenure (that is, the hold that a resident has on his or her membership in his or her geographic community) encourages social involvement apart from the individualized financial return coming from public goods.⁴⁰ The social capital that communities, both large and small, gain from homeownership comes from social and economic causes.

The move from renter to homeowner status is not completely without risks, especially for low and moderate-income households. Both the social and economic benefits of homeownership can be displaced completely by costs associated with mortgage default and foreclosure. Although a tenant experiencing eviction can suffer loss of personal property and a security deposit, as well as damage to his or her credit rating, these harms can each be magnified for the homeowner facing the loss of investment and residence through foreclosure. Even the positive health effects attributed to homeownership can give way to negative health outcomes caused by the stress of missed mortgage payments and foreclosure proceedings. In financially desperate circumstances, a homeowner may have more leverage, resources, and, most importantly, time to respond to the imminent loss of the home and

2002). See generally Thomas P. Boehm & Alan M. Schlottman, *Does Home Ownership By Parents Have an Economic Impact on Their Children?*, 8 J. HOUSING ECON. 217 (1999).

35. Rohe et al., *Social Benefits*, *supra* note 32, at 400.

36. *Id.* at 390, 397.

37. *Id.* at 395–96.

38. *Id.* at 395.

39. *Id.* at 393–94.

40. See *infra* Part II.B. (discussing how this disentanglement of security of tenure from homeowner equity appreciation helps us appreciate how a limited equity form of homeownership can still encourage social investment by the homeowner).

can manage relocation than a similarly situated renter.⁴¹ While the dream of homeownership can, and for many recently has, become a financial nightmare, the increased security of tenure can have positive effects in difficult times as well.

Many of the economic and social benefits of homeownership, both to homeowners and their communities, can be more precisely tied to the home as a financial investment. The dependence of the home's value on factors related to the community as a whole frequently draws the owner out of his or her castle to engage in collaborative activities that benefit all.⁴² It is difficult, however, to isolate this financial motivation for community involvement for the in-kind benefits the homeowner as a community member derives from an improved neighborhood and even from the participatory activities themselves. Nevertheless, with expanding homeownership opportunities through public subsidies, it is quite useful to understand more thoroughly how subsidy policies that offer both financial return and security of tenure in residential housing differ from those that offer less of the other or of both. Before turning to the different kinds of homeownership subsidies, I will discuss another possible gain from homeownership subsidy, one critically relevant to the study of long-term resale restrictions: economic diversity among residents of a community.

By supporting first-time home purchases by persons who would otherwise be unable to become homeowners, subsidy providers increase the number of people able to become homeowners generally. Even when such subsidies go to persons who could buy a home, albeit a less expensive one, some of the social and economic benefits can be amplified by increasing the home and neighborhood choices available to them. Both subsidy strategies usually increase the economic diversity, at least as to homeowners, of the communities these new homeowners join.⁴³ The economic range of homeowners in such neighborhoods expands however slightly on the bottom end.⁴⁴ In neighborhoods with very high homeownership rates, these additions will often increase the economic diversity of the neighborhood residents generally.⁴⁵ Even when renters receive a subsidy to buy a home in the area in which they

41. See Stephanie M. Stern, *Residential Protectionism and the Legal Mythology of Home*, 107 MICH. L. REV. 1093, 1100 (2009).

42. See generally Lee Anne Fennell, *Homeownership 2.0*, 102 NW U. L. REV. 1047 (2008) (pointing out that this dynamic is not always socially positive; the economic vulnerability homeowners have to local social and economic factors can create a heightened sense of anxiety in local politics that encourages insularity and even bigotry).

43. Orfield, *supra* note 9, at 915–16.

44. *Id.* at 910.

45. *Id.* at 917.

were already living, their assisted move to homeownership changes marginally the economic character of that community.⁴⁶

Economic diversity within communities has received greater attention in the last two decades as scholars of persistent poverty have turned their attention to the extreme concentration of poor people, especially African-American poor people, that suburbanization has created in America's inner cities.⁴⁷ Although the policy recommendations that have flowed from such research have understandably focused on the strategic use of rental housing subsidies, homeownership subsidies also can be deployed to gain and secure the social benefits of greater economic diversity in neighborhoods and regions.⁴⁸ The CLTs and inclusionary zoning programs that employ resale restrictions use housing subsidies in just this way. As noted earlier, these community development tools have been particularly attractive to communities that would exclude important segments of the population from local homeownership or from residency altogether if not for long-term planning in the placement of subsidies.⁴⁹

Resale restrictions secure these economic diversity objectives of place-based homeownership subsidy. Before discussing how long-term controls on the transfer of privately owned homes balance these community goals with the other benefits that homeownership offers, it is worthwhile setting out the general categories of homeownership subsidies.

B. Shared Equity Resident-Owned Housing as Achieving These Goods

Subsidies, whether funded directly by taxpayers in government investments or indirectly through grants and loans offered by private nonprofits, supplement market forces to create opportunities not available through the conventional workings of supply and demand. Housing subsidies can work on the demand side of the transaction or through its supply aspect. Demand-side subsidies, in the home purchase context, usually involve down payment and closing cost assistance.⁵⁰ Homebuyers receive a pledge of

46. *See id.* at 893.

47. *See generally* DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 51–55 (1993); WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* (1987); PAUL A. JARGOWSKY, *POVERTY AND PLACE: GHETTOS, BARRIOS, AND THE AMERICAN CITY* (1997).

48. Orfield, *supra* note 9, at 931.

49. *See supra* Part II.A.

50. Peter W. Salsich, Jr., *Toward a Policy of Heterogeneity: Overcoming a Long History of Socioeconomic Segregation in Housing*, 42 *WAKE FOREST L. REV.* 459, 504 (2007). *See also* Paulette J. Williams, *The Continuing Crisis In Affordable Housing: Systemic Issues Requiring Systemic Solutions*, 31 *FORDHAM URB. L.J.* 413, 475 (2004) (referring to Individual Development Accounts as subsidized savings program in which funds can be used for home purchase).

assistance and then go out into the market, find a home and purchase it at the market price using the financial help provided to close the affordability gap.⁵¹ Supply-side support for low and moderate-income homeownership generally involves public funding for the creation of new and rehabilitated housing units that are sold at below-market prices to qualified buyers.⁵² Both demand and supply subsidies can support the financial and tenure security benefits of homeownership. How heavily they both promote the former type of benefits may depend on the generosity of the recapture policy of the subsidy provider.⁵³ Most significant subsidies have to be paid back by the homeowner when the home is sold, but many such recapture provisions allow for the homeowner to retain the subsidy as cash if the homeowner has occupied the property for a certain number of years.⁵⁴

Examining the goods offered by homeownership subsidies, we see that many of these goods can be offered by both demand subsidies and supply subsidies. Likewise, within supply subsidies, the personal and broader community advantages offered by demand subsidies can be promoted through all manner of supply subsidies. However, the goods associated with sustained economic diversity are best secured through subsidy retention rather than subsidy recapture devices.⁵⁵

The goods of 'Home as Place' and 'Home as Investment' find themselves in tension in situations where land values have made ownership of an even a modest home unaffordable to median income households in the community. In the regional context, workers that are vital to serving the needs of local residents are forced to live on the outer fringe of the metropolitan regions far from their urban workplaces.⁵⁶ Inner-city neighborhoods are being torn apart as sudden shifts of disinvestment and gentrification cause residents to flee due to falling or rising housing prices.⁵⁷ By separating to some extent the exchange value and use value of the home, inclusionary zoning programs and CLTs are facilitating and sustaining broader access to the stability, both social

51. In 2003, the American Dream Downpayment Act authorized federal use of HOME funds for downpayment assistance. Salsich, Jr., *supra* note 50, at 504; Williams, *supra* note 50, at 475.

52. See BARRY G. JACOBS, HDR HANDBOOK OF HOUSING AND DEVELOPMENT LAW, §§ 4:72, 4:73 (2008).

53. JOHN EMMEUS DAVIS, SHARED EQUITY HOMEOWNERSHIP: THE CHANGING LANDSCAPE OF RESALE-RESTRICTED, OWNER-OCCUPIED HOUSING 55 (2006), <http://www.burlingtonassociates.com/resources/archives/SharedEquityHome.pdf>.

54. JACOBS, *supra* note 52, § 4:74 (discussing the amount of time required in home tied to amount of money provided in subsidy).

55. DAVIS, *supra* note 53, at 80–81.

56. JESSE MINTZ-ROTH, JOINT CTR. FOR HOUS. STUD. OF HARVARD UNIV., LONG-TERM AFFORDABLE HOUSING STRATEGIES IN HOT HOUSING MARKETS 3 (2008), http://www.nw.org/network/pubs/catalog/documents/mintz-roth_fellowship_paper_05-08.pdf.

57. See James J. Kelly, Jr., *Land Trusts that Conserve Communities*, 59 DEPAUL L. REV. (forthcoming 2009).

and economic, that homeownership offers communities and their constituent households.⁵⁸

CLTs and most inclusionary zoning programs preserve the affordability of stable homes indefinitely. They do so by keeping the subsidy that made the home affordable in place at same location through multiple generations of homeowners. Housing policy commentators have labeled this strongly place-based approach to subsidizing housing as subsidy retention.⁵⁹ While it shares many important features with other approaches to long-term housing subsidies, subsidy retention can be best understood by examining how it differs from two approaches to affordable housing protection: rent regulation and subsidy recapture. Like subsidy retention, both are—or, at least, can be—long-term in their approach to housing subsidy management. Rent-regulation maintains place-based subsidy but does not deal with homeownership. Subsidy recapture manages homeowner subsidies but does not necessarily maintain them in place.

Basically, a homeownership subsidy retention device has two essential features that together preserve the availability of a subsidized property to future generations of eligible households. First, it preserves the subsidy for continued investment in its original housing purpose, as opposed to allowing it to be converted to the recipient's unrestricted private use.⁶⁰ Second, it preserves that subsidy in-kind. That is, it ensures that, when the property is resold, it will pass to another income-qualified household at a price that will be affordable to those eligible homebuyers. Controlling the price will normally require not only claiming the subsidy originally invested but also limiting the equity appreciation—particularly, but not exclusively, the appreciation on the subsidy portion of the home's market value—to make sure the subsidized homeowner's investment gain does not put the property out of reach for the next generation of qualifying homebuyers.

Rent regulation regimes such as New York City's Rent Stabilization Code may not seem to have anything in common with inclusionary zoning or CLT programs. Tenants, including those whose tenure rights are enshrined in statutes, are not homeowners in the typical sense. They do not build up equity in their homes and generally cannot make alterations or improvements.⁶¹ On the 'home as place' side of the ledger, however, the similarities between a fee-simple single-family home in Fort Lee, New Jersey and a rent-stabilized two-bedroom apartment across the river in Manhattan are striking. The statutory tenant can look to the apartment as his or her home indefinitely without fear

58. DAVIS, *supra* note 53, at 61–62.

59. *Id.* at 80–81.

60. *Id.* at 81. This is also true of subsidy recapture mechanisms. *Id.* at 82.

61. FERN FISHER & ANDREW SCHERER, RESIDENTIAL LANDLORD-TENANT LAW IN NEW YORK § 8:79 (2008).

that the landlord will simply not want to renew the lease. Lease renewals are guaranteed by law, and the renewal rent increases are set by a local administrative process based on landlord costs.⁶² Statutory tenants facing eviction for nonpayment of rent are even afforded the same equity of redemption that homeowners seek to preserve in foreclosure proceedings.⁶³ Tenants can pass their leasehold rights onto family members who have shared the apartment with them.⁶⁴

If subsidy retention seeks stability of resident tenure, even across generations, rent regulation provides a powerful example of how price-controlled housing can establish policies to promote it. On the stable creation of wealth, however, rent regulation does not offer the same advantages as homeownership, even equity-limited homeownership. While tenants are entitled to savings account interest on their security deposits,⁶⁵ there is no significant investment steadily growing, by appreciation or loan amortization. More importantly, the renter misses out on the federal income tax subsidy on residential mortgage interest and property tax payments.⁶⁶

The comparison between subsidy recapture and subsidy retention is more straightforward. Both usually involve a stated formula by which the owner's return on his or her investment is calculated when he or she chooses to sell and move on. The subsidy recapture provision may provide only for repayment of the actual subsidy plus nominal interest, but it can also use the same mortgage device to recoup some of the appreciation in market value during the homeowner's occupancy.⁶⁷

The subsidy retention device invariably reserves for the subsidy provider a portion of the appreciation in the homeowner's monetary investment, but, more significantly, it also keeps hold of the land. With respect to preserving the economic diversity of certain blocks or neighborhoods, specific parcels of land can be unique, even irreplaceable, goods. Even if a silent second mortgage effectively recaptures the subsidy for those dedicated to preserving affordability, there may be no opportunity to reinvest that money in the target area. By recycling the financial assistance in place, programs using the subsidy retention approach preserve footholds that earlier investments have gained in communities that are otherwise becoming increasingly exclusive.

62. N.Y. COMP. CODES R. & REGS. tit. 9, § 2522.5(g) (2009); FISHER & SCHERER, *supra* note 61, § 4:183.

63. 248 *Sherman Avenue Corp. v. Coughlin*, 222 N.Y.L.J. 13, 26 (1999).

64. § 2204.6(d) (discussing rent control succession); § 2523.5(b) (discussing rent stabilization succession); FISHER & SCHERER, *supra* note 61, § 4:205.

65. FISHER & SCHERER, *supra* note 61, § 2:26.

66. I.R.C. § 163(h)(3) (West 2009); § 164(a)(1).

67. Aaron Lewis, *Affordable Real Estate Transactions*, 20 PROB. & PROP. 56, 59 (2006).

Advocates of the subsidy retention device have shown how the maintenance of these forward-looking investments can pay large dividends into the future.⁶⁸

III. TWO APPROACHES TO RESALE RESTRICTIONS: LOCKBOX AND STEWARDSHIP

In order to make subsidized homes available to future qualified homebuyers, CLTs, inclusionary zoning programs and other affordability measures, stewards must have the legal power to control the resale of the property. Ultimately, to meet the goals of subsidy retention, the property must end up in the hands of another income qualified household at a price that a family can afford, and the system that assures this must be able to replicate this result over the long-term.

What sets different types of subsidy retention mechanisms apart from another, is not necessarily the apportionment of equity appreciation shared with a homeowner and appreciation retained with the property. This crucial policy decision can be made independently of the selection of the type of subsidy retention device to be used.⁶⁹ Instead, they are differentiated by how they go about creating enforceable resale restrictions. The choice of how to keep the subsidy—as opposed to, how much of the subsidy to keep—with the land should be made in response to the current legal doctrines on alienability of real property as well as be guided by the policy decisions that do, or at least should, inform those doctrines.

A. *The Legal Challenges for Long-Term Resale Restrictions*

1. Restraints on Alienation

Before classifying the overall approaches to resale restriction, our discussion would benefit with a brief review of the conventional classification of restraints on alienation. The placement of a particular resale restriction mechanism within a specific category of alienation restraints may have significant consequences for its enforceability.

There are three types of direct restraints on alienability: disabling, forfeiture and promissory.⁷⁰ All three straightforwardly prevent, or otherwise limit, the ability of a parcel's owners to sell it to others. A disabling restraint acts with particular directness in preventing property transfers; it purports to nullify all, or at least some, of the transfers made by the owner.⁷¹ A forfeiture restraint, on the other hand, causes the owner to lose his interest in the property

68. DAVIS, *supra* note 53, at 81.

69. The ease, however, with which a resale formula can be changed once established, does vary from one approach to another. See *infra* Part III.A.

70. LEWIS M. SIMES, HANDBOOK OF THE LAW OF FUTURE INTERESTS 237 (2d ed. 1966).

71. *Id.*

if he should try to sell or otherwise transfer, it.⁷² The forfeiture device could be in the form of either a reversionary interest retained by the party that imposed the condition as part of the original grant of title or a conditional grant to a third party.⁷³ While both disabling and forfeiture restraints act to nullify violating grants to third parties, forfeiture provisions take the additional step of providing for contingent future interests in the subject property.⁷⁴ Both of these blocks on alienability can be distinguished from an enforceable promise not to transfer the property.

While the former two types of restraints use, or at least attempt to use, the doctrines of real property law to prevent subsequent transfers by the grantee that were objectionable in the eyes of the grantor, a promissory restraint uses principles of contract law to establish an obligation of the grantee to the grantor not to transfer the property in violation of the agreement.⁷⁵ Since such a contractual promise involves unique property, the remedies for breach may include specific performance as well as money damages.⁷⁶ Also, a promise that meets all the doctrinal requisites of covenants or equitable servitudes may 'run with the land' and thereby be enforceable against subsequent owners of the property.⁷⁷

Some agreements governing the right to sell restrain alienation less directly or less completely. A right of first refusal, for instance, may require an owner subject to it to take any offer to purchase his or her property to the holder of the right and afford them some opportunity to match the price in the offer.⁷⁸ Unless the time period for exercising the preemptive option is exceedingly long, most courts would not see this contractual arrangement as any significant restraint on the owner's ability to sell his or her land. The ordinary right of first refusal may well limit to whom the property will be transferred, but not the price or time at which it will be sold.⁷⁹ As discussed below, if the preemptive right of purchase sets an option price that will require the owner to forego more attractive market-rate offers, then the preemptive option may be judged, and possibly invalidated, under the same criteria applied to direct

72. *Id.* at 238.

73. *Id.*

74. *Id.* at 279 (Both types of forfeiture restraints create future interests conditioned on the grantee's failure to comply with the restraint on alienation. The contingent future interest given to the third party is generally subject to the RAP. The reversionary interest retained by the grantor is not the kind of future interest subject to RAP analysis.).

75. SIMES, *supra* note 70, at 238, 248.

76. *Id.* at 248.

77. *Id.*

78. Cf. Bernard Daskal, Note, *Rights of First Refusal and the Package Deal*, 22 FORDHAM URB. L.J. 461, 461-62 (1995).

79. *Id.*

restraints on alienation.⁸⁰ For the most part, these distinctions among the mechanisms by which alienation restraints act to prevent certain transfers affect but ultimately do not determine their enforceability under the common law doctrine against unreasonable restraints on alienation.

In general, the validity of restraints on alienation is determined by reference to four factors.⁸¹ First, courts are somewhat more likely to enforce alienation restraints imposed by those using them to protect an interest in land.⁸² Second, the reasonability of a restraint on alienation will often depend on the duration of the restraint.⁸³ Third, courts will look to the underlying purpose of the alienability restraint and weigh its importance against the general public policy favoring unfettered alienability of interests in land.⁸⁴ Fourth, the severity of the restraint will be measured by the probability of it preventing likely transfers.⁸⁵

In addition to these common law standards that strike a balance between alienability and competing goals, there are two types of statutes that express a similar legal hostility toward prior restraint on the marketability of land. Many states also have statutory protections that ban outright those legal arrangements that completely deprive a landowner of the ability to transfer the property.⁸⁶ Another common-law doctrine, often codified in statute, creates an absolute bar on future interests that may interfere with alienation far into the future. It is this fixture of law, the RAP, that merits our attention now.

2. Perpetuities

Resale restriction devices face another legal obstacle if they create what the law calls perpetuities. Perpetuities are contingent future interests in property that may remain subject to contingencies far into the future.⁸⁷ The RAP establishes a period of time, usually the span of a life in being at the time of the creation of the interest plus an additional 21 years, against which the remoteness of the vesting of the future interest must be judged.⁸⁸ In the standard formulation of the Rule, if a contingent future interest may still be 'up in the air' at the end of the prescribed perpetuities period, then the future interest is void.⁸⁹

80. RESTATEMENT OF THE LAW OF PROPERTY § 406 (1944) [hereinafter RESTATEMENT].

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. RESTATEMENT, *supra* note 80, § 406.

86. SIMES, *supra* note 70, at 264.

87. *Id.* at 263.

88. Dukeminier, *supra* note 19, at 1868.

89. SIMES, *supra* note 70, at 263.

Both the RAP and the rule against unreasonable restraints on alienation promote the unfettered marketability of property. Contingent future interests created by conditional grants, on the other hand, can create uncertainty in title that go beyond restraints on alienation. One court has found that a right of first refusal can violate the RAP even if it does not present any burden on the alienability of the property.⁹⁰ For the most part, however, these two doctrines have taken different approaches toward the same goal, making land available for voluntary transfer.

The rule against unreasonable restraints of alienation impacts a broad variety of the types of direct and, sometimes, indirection alienability restraints described above.⁹¹ The RAP, on the other hand, impacts only those alienation restraints that create contingent future interests.⁹² Thus, disabling restraints, which may be judged with particular severity against general alienability doctrines, do not pose any perpetuities problems because they do not, as disabling restraints, involve creating new future interests in land. The inclusion in a resale restriction mechanism of forfeiture restraints, however, does warrant awareness of the RAP.

It might appear that any forfeiture provision that could deprive an owner of title at any point in time in the future would violate the Rule, in its basic form. The Rule, however, has been interpreted to limit different types of forfeiture restraints in different ways. A restraint that purports to transfer ownership of the property to a third party in the event that the owner attempts to alienate his or her interest will be subjected to scrutiny under the Rule.⁹³ Reversionary interests back to the original grantor that imposed the condition, however, are generally not considered to be future interests within the scope of the RAP.⁹⁴ Nevertheless, option contracts have been found to be subject to the RAP even when the option to purchase is held by the grantor.⁹⁵ This, then, raises the question as to how indirect restraints, such as the preemptive option, should be treated under the RAP, especially when the holder of the option was the prior owner of the property.⁹⁶

90. *Ferrero Constr. v. Dennis Rourke Corp.*, 536 A.2d 1137, 1142–43 (Md. 1988).

91. *SIMES*, *supra* note 70, at 269.

92. *Id.*

93. *Id.* at 279.

94. *Id.*

95. *Id.* at 281; *Dukeminier*, *supra* note 19, at 1908.

96. Preemptive options contained within leases and governance documents receive more favorable treatment as restraints on alienation and as possible perpetuities. Thus, the modern development of these doctrines will remain relevant to discussion not only of the preemptive option generally but the different legal contexts in which such an option arrangement might be created. *See infra* Part IV.

B. *The Approaches to Long-Term Resale Restrictions*

The doctrines curbing restraints on alienation all express certain policy goals aimed at making the property more available to the market. Subsidy retention focuses on segregating certain parcels of land from the conventional real estate market. It does not follow, however, that every type of resale restriction conflicts with these rules favoring alienability in the same way. Moreover, attempts by permanent affordability advocates to accommodate legal alienability protections need not diminish the effectiveness of the subsidy retention programs they create. Instead, an approach to conserving affordable homeownership over the long term should not merely evade the technical pitfalls created by these old rules but should engage the policy justifications behind them to increase the effectiveness of permanent affordability programs. Resale restrictions take three different legal modes of constraining behavior. I will refer to these, in turn, as “Private Resale Lockbox,” “Public Resale Lockbox” and “Stewardship.”

1. Private Resale Lockbox—Limited Title

Since the subsidy retention approach to housing affordability is essentially an attempt to conserve land indefinitely for affordable homeownership, it is natural to look to the wilderness conservation movement for models as to how to secure the preservation over time. The perpetual conservation easement offers the best example of a legal device that can be used to permanently, and almost irrevocably, sever development rights from ownership rights. A donated conservation easement places the rights to “improve,” or otherwise disturb, pristine natural land into a trust, the heads of which are legally charged to make sure that the land is never developed.⁹⁷ With other in-kind goods donated to other charities, charitable organization directors can decide to dispose of donated valuables as they believe will best meet the organization’s service goals.⁹⁸ But conservation trust managers, under Internal Revenue Service regulations, have no power to trade or otherwise liquidate their easement assets for other goods, including other easements, that they judge to be more valuable to their overall mission.⁹⁹ The irrevocability of the donation of a perpetual conservation easement expresses the idea of natural conservation as an unquestionable, almost eternal, good. Some commentators have questioned the lack of flexibility in conservation easements and recommended

97. Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENVTL. L. REV. 421, 439 (2005); Gerald Korngold, *Solving the Contentious Issues of Private Conservation Easements: Promoting Flexibility for the Future and Engaging the Public Land Use Process*, 2007 UTAH L. REV. 1039, 1044–45 (2007).

98. BRUCE R. HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* 187 (9th ed. 2007).

99. A conservation easement can be transferred only from one qualified steward to another. 26 C.F.R. § 1.170A-14(c)(2) (2008).

doctrines that facilitate appropriate modification.¹⁰⁰ Some advocates of conservation, however, have fought for the development of the conservation mechanism¹⁰¹ precisely because of its resistance to any accommodation or compromise. The idea of a lockbox¹⁰² is designed to address certain goods against apparently irresistible forces. By forever placing the legal power to develop a particular parcel of land, three parties—the property owner, the nonprofit land trust and the Internal Revenue Service—are making a resource allocation decision that will bind all future generations.

In the context of affordable housing, it may seem tempting to claim that the same market forces that lead to the exploitation and permanent loss of wilderness inevitably threaten and overcome well-intentioned plans to create affordable housing. Even if a “lockbox” can be appropriate for the conservation of natural areas, or even farmland, there are at least two differences that set the preservation of affordable homeownership apart. First, the geographic context in which affordable homeownership operates is much more subject to change than the idyllic settings that make conservation easements relevant.¹⁰³ As important as housing and its affordability are in general, the irreversible decision to dedicate land to that particular purpose presupposes a foresight that the constantly shifting metropolitan reality does not permit. Second, the conservation world has been able to sever the problematic development rights from the rest of the bundle of sticks without interfering with the transferability of those other aspects of title. Affordable homeownership involves not only a particular land use but also dictates the price of transfer and the economic characteristics of appropriate buyers. The creation of a limited estate in which the homeowner can transfer the property only to certain persons bears some similarities to the fee tail arrangement. The need to pass affordable homeownership opportunities to qualified households at an affordable price does not lend itself to a “set-it-and-forget-it” approach to stewardship.¹⁰⁴

In reality, the limited title approach to perpetually affordable homeownership has not been widely adopted. In its simplest form, the

100. McLaughlin, *supra* note 97, at 424–25; Korngold, *supra* note 97, at 1042–43.

101. The common law does not support the enforceability of servitudes in gross. Most conservation easements rely on state statutes based on the Model Conservation Easement Act developed in the early 1980’s.

102. The term “lockbox” was used by then Vice-President Al Gore during his presidential campaign to describe his solution for ensuring the viability of the Social Security system. Governor George W. Bush and Vice President Al Gore Participate in Presidential Debate Commission Debate (Oct. 3, 2000), 2000 WL 1466168 (F.D.C.H.) (corrected copy).

103. See Carol M. Rose, *Servitudes, Security, and Assent: Some Comments on Professors French and Reichman*, 55 S. CAL. L. REV. 1403, 1413–14 (1982); Stewart E. Sterk, *Foresight and the Law of Servitudes*, 73 CORNELL L. REV. 956, 966 (1988).

104. Cf. DAVIS, *supra* note 53, at 69–70.

affordable homeowner “lockbox” could involve a deed restriction that imposes a disabling or forfeiture restraint on the abilities of the homeowner both to sell to anyone at a price higher than the amount set in the resale cap formula and to transfer title to any household that did not meet a certain economic profile. Of all the affordability approaches considered in this Article, the doctrines against unreasonable restraint on alienation would be most severe on such a direct assault on the homeowner’s ability to transfer, especially when the party imposing the restriction might not have any continuing relationship the land, the homeowner, or future buyers whom might themselves subject to the same conditions.¹⁰⁵

2. Public Resale Lockbox—Command and Control Regulation

For the most part, the law’s hostility toward alienation restraints and perpetuities appears in the common law and statutes.¹⁰⁶ The RAP appears in several state constitutions, but a general prohibition against alienation restraints is not usually found at the constitutional level.¹⁰⁷ Thus, one possible solution to securing the affordability of subsidized homes indefinitely might be to enact a law at the state level that governs the resales of the properties subject to it.¹⁰⁸ Although the conservation land trust movement has also embraced this command-and-control approach, the strongest example comes from the world of affordable housing. Rent regulation systems take a strong command and control approach to preserving affordability in private rental markets.

New York’s twin systems of rent regulation show how command-and-control systems can regulate affordability. Rent stabilization is a lease-based approach to statutory tenancies.¹⁰⁹ Landlords and tenants in buildings subject to the Rent Stabilization Law and Code set the specific terms of their tenancies subject to certain generic tenant protection laws.¹¹⁰ The Rent Stabilization Code focuses primarily on capping the maximum rent that can be charge for the regulated unit. Legal rents are determined by the unit’s rent history as affected by the guideline and other rent increases that the rent stabilization

105. See *infra* Part III.B.2.

106. See SIMES, *supra* note 70, at 237.

107. *But see, e.g.*, ARK. CONST. art. II, § 19 (elevating the RAP to the constitutional level); N.C. CONST. art. I, § 34 (elevating the RAP to the constitutional level); OKLA. CONST. art. II, § 32; N.M. CONST. art. IV §§ 26, 38 (elevating the RAP to the constitutional level). See also DEL. CODE ANN. tit. 25, § 503 (2009) (RAP does not apply to wills and trusts); N.J. STAT. ANN. § 46:2F-9 (West 2003) (abolishing the RAP); S.D. CODIFIED LAWS § 43-6-3 (2004) (abolished the RAP); IDAHO CODE ANN. § 55-1522 (2007) (abolishing the RAP).

108. The Maryland General Assembly is currently considering legislation that would do just this.

109. See *infra* notes 111–14.

110. These laws are not different in kind from those in cities without rent regulation. FISHER & SCHERER, *supra* note 61, § 4:1.

administrative apparatus has sanctioned.¹¹¹ Unlike the long-term affordable homeownership programs, the rent stabilization system does not require that protected tenants fall within a narrow range of household incomes.¹¹² The Rent Stabilization Law and Code devote a considerable amount of attention, however, to ensuring that the law protects only those tenants who maintain their units as their primary residences.¹¹³ Even though tenants are provided with access to information to help them enforce the rent caps and landlords are motivated to enforce primary residence restrictions by rent increase opportunities occasioned by tenant turnover, the rent regulation system in New York requires a vast and expensive bureaucracy that can be justified by the large percentage of New York City's housing that is subject to it.

In the context of permanently affordable homeownership, it is difficult to see how a one-size-fits-all system could be developed at the state level that would directly restrict resales of subsidized homes. Most commentators who have advocated for statutory change in this area have focused on laws that provide some assurance that the private arrangements made between subsidized homeowner and sponsor are properly regulated and enforced.¹¹⁴ Even when the statutes that sanction the enforceability of affordable housing resale restrictions also provide local governments with the authority to impose the terms through regulation rather than more private means, local programs have tended to rely on a hybrid form of land use control such as the statutory community association.

3. Resale Stewardship: The Preemptive Option

Thus far, we have considered, in turn, an indelible restriction created by a single grantor and a regulatory scheme imposed by the state or local government or both. The first option simply defies the existing doctrines regarding perpetuities and restraints on alienation and is, therefore, vulnerable

111. *Id.* § 4:99.

112. A change in the Rent Stabilization Law permits landlords to charge market rents in excess of the legal rent to those tenants whose household income exceeds \$175,000 per year and whose regulated rents already exceed \$2,000 per month. N.Y.C. ADMIN. CODE § 26-504.1. This deregulation provision is not the same as one requiring a landlord to rent a stabilized unit to a household with an income below that level.

113. Failure to maintain a rent stabilized apartment can be grounds for eviction or non-renewal of the lease. FISHER & SCHERER, *supra* note 61, § 8:206. Subleasing is strictly limited. *Id.* § 8:162.

114. See, e.g., Christopher A. Seeger, Note, *The Fixed-Price Preemptive Right in the CLT Lease: A Valid Response to the Housing Crisis or an Invalid Restraint on Alienation?*, 11 CARDOZO L. REV. 471 (1989). But see, e.g., Ngai Pindell, *Fear and Loathing: Combating Speculation in Local Communities*, 39 U. MICH. J.L. REFORM 543, 546 (2006) (proposing zoning ordinance amendment that severely restricts resale of residential property for first three years of ownership).

to judicial invalidation. The command-and-control approach, already dependent on statutory enactment, enjoys the ability to simply trump the doctrines that make structuring the conservation of affordable homeownership so challenging. An alternative approach to resale control, however, may accommodate these market-oriented real estate doctrines and produce legal devices for preserving homeownership subsidies in place that are direct, clear and legally enforceable.

Rather than privately or publicly deprive the homeowner of the permanent ability to sell his or her home on the open market to the highest bidder, legal arrangements can be made at the time of the original home purchase to ensure that an entity committed to preserving the affordability of the property has the option of buying the home at a calculated resale price and insuring its transfer to a qualified buyer. This option on the property could be exercised only when the homeowner declares his or her intent to move from or sell the property.¹¹⁵ Like a right of first refusal, it gives the stewardship entity the right to obtain the property when the owner is ready to sell. Because the price is set by a formula already agreed to by the stewardship entity and the homeowner, the stewardship's right to purchase is called a preemptive option.

C. *Why Stewardship is the Better Approach to Resale Restrictions*

Under the preemptive option approach to restricting resale, the only obstacle to full and free alienability depends on the affirmative action of the stewardship entity. Generally, the period of time that the owner must wait to allow the option to be exercised is limited.¹¹⁶ From a process point of view, the burden on alienability is strictly limited.

Depending on the legal vehicle for the preemptive option, the stewardship entity has an ongoing relationship with the land. For options held by homeowners' associations and cooperatives, the link exists by way of the other members' interests in adjoining real property. The CLT employing a ground lease has a direct reversionary interest in the land itself. Courts hostile to alienation restraints held in gross can be assured that enforcement of these types of resale restrictions protect the steward's ongoing interest in the property itself.¹¹⁷

Those qualities that make the preemptive option attractive to courts and policy makers suspicious of dead hand control also require the stewardship entity to function as an attentive and committed guardian of affordability and other social values. If the land trust or community association manager does not respond to a homeowner's notice of intent to sell in a timely manner, the

115. INST. FOR CMTY. ECON., *supra* note 18, at 12-13.

116. Under the Revised Model Ground Lease, the CLT has 45 days from the receipt of the appraisal to exercise its option or the option expires. *Id.*

117. *Id.*

homeowner may be free of the subsidy retention, if not subsidy recapture, devices affecting resale.¹¹⁸ Given the fact that small community-based nonprofits perennially face financial challenges, the possibility that the stewardship might become dormant or cease to exist altogether must be considered when planning a resale stewardship system.

The conservation movement has been drawn to the lockbox approach for protecting wilderness areas because they fear that vacillating political fortunes, in public and even private nonprofit land trusts, may lead to retractions of conservation commitments. By securing an irreversible easement grant from the landowner, the conservation land trust appears to have eliminated the possibility that the land will ever be developed.¹¹⁹ For those who see the preservation of wilderness as an immutable good, the certainty of truly permanent dedication of land seems very attractive.

Those dedicated to the availability of affordable homes may be no less passionate about the rightness of their cause. Like environmental activists, they often see themselves standing against powerful institutions, both private and public, focused on market-generated gains. Because residential affordability in neighborhoods requires constant attention, those committed to permanent affordability in housing hopefully recognize that a simplistic banning of all future market sales cannot guarantee the property remains a safe, decent and affordable home.¹²⁰ Even if a stewardship relationship is supported by broader, self-executing curbs on the subsidized homeowner's ability to sell on the open market, the need for an active steward that manages the need for change and monitors compliance cannot be ignored.¹²¹ Despite the fact that the stewardship approach to resale restrictions places the responsibility of protecting the ongoing affordability of the subsidized home on a single entity, it is better suited to the dynamics of residential real estate markets than the lockbox approach.

118. For this reason, it may be prudent for those community developers employing the preemptive option as the subsidy retention device to backstop it with a subsidy recapture mechanism such as a silent second mortgage. This seemingly redundant structuring may take away any financial incentive the homeowner might have to evade or challenge his or her obligation to sell the property back to the stewardship entity.

119. I say "apparently" because there remains the prospect that the easement could be condemned in eminent domain proceedings. *See generally* McLaughlin, *supra* note 97.

120. *See id.* and accompanying text.

121. Given the possibility of stewardship organizational failure, pre-emptive options should be created to allow them to be exercised by back-up stewards, such as local housing agencies, in the event that the primary steward is unable to exercise them.

IV. STEWARDSHIP FORMS: THE PREEMPTIVE OPTION IN GROUND LEASES AND COVENANTS

The defined-price right of first refusal is the heart of the stewardship approach to retaining homeownership subsidies in place over the long-term. The choice of the pre-emptive option as the mechanism by which resale controls are actualized already gives the stewardship approach meaningful definition. There are, however, several options as to how this particular promise by the homeowner to the stewardship entity can be memorialized. CLTs have made the preemptive option one of many provisions unique to the ground lease that establishes the relationship between a CLT and the supported homeowner. Inclusionary zoning programs have taken advantage of the fact that their affordable units are created as part of a new housing development complete with its own set of covenants and community governance mechanism. In addition to these two examples of long-term affordability stewardship relationships, there exists the possibility of the affordability promise existing as a stand-alone covenant between a fee simple homeowner and a stewardship entity that has no other direct relationship to the property protected.

A. *Preemptive Options in CLT Ground Leases*

Although ground leases are rarely used for small residential properties in most states,¹²² commercial ground leases have become indispensable in the development of shopping centers and malls.¹²³ They have not only facilitated the financing of large projects created and monitored by specialized business enterprises, but they have also maintained the necessary coordination of investment among large and small retailers through alienability restrictions.¹²⁴ Even though commercial ground leasing focused more completely on the free market, anchor tenant leases that severely restrict the ability of these big-name retailers to assign or sublet their space to lesser stores are essential to building confidence in the community of smaller, satellite tenants by which a mall developer makes the bulk of its profits. Although theoretically, a shopping

122. Maryland has a long history of ground leasing on single-family homes. While Pennsylvania and Maryland both used ground leases through the 19th century, diverging legal treatment of the reversionary interests caused Pennsylvania's system to fade while Maryland's ground rent system became an important feature in the development of Baltimore's turn-of-the-century rowhouses. In 1884, Maryland adopted a statutory measure that made ground leases on single-family homes redeemable, essentially relegating them to a financing device that could be fully amortized. MD. CODE ANN. REAL PROP. § 8-110 (West 2009). This has created unique challenges for using the ground lease mechanism to try to use ground leases to create perpetually affordable homeownership in Maryland.

123. See JEROME D. WHALEN, COMMERCIAL GROUND LEASES § 1:2 (2010).

124. See *id.*

center could be developed by granting full title for each store space to the retailer occupying it and using reciprocal covenants to manage the positive and negative spillover effects, the ground lease provides the flexibility and certainty of enforcement that is necessary to maintaining the community of businesses.

In the context of permanently affordable homes, the CLT movement has championed the use of the ground lease for a variety of reasons. Explaining that the home is not just as a "bundle of rights" but also a "bundle of values," the CLT Legal Manual posits that the CLT approach of separating ownership of land and ownership of the improvements reflects the reality that while the homeowner is responsible for the value of his property to the extent it is impacted by the quality of the house on it, much of the owner's equity depends on the desirability of the surrounding community as a place to live. By giving the homeowner full title to the house while retaining a reversionary interest in the land beneath it, CLT proponents argue that they are restoring the natural balance of the private and communal values in the home.¹²⁵

CLT ground leases generally provide for a 99-year term, with at least one renewal at the option of the homeowner.¹²⁶ Although the land trust homeowner does not have fee simple title to the land, the idea of the ground lease is to give the homeowner the same security of tenure that other homeowners enjoy. The lease arrangement departs from fee simple transfers in the two areas that are critical to subsidy retention. During the term of the lease, a leaseholder homeowner must commit to maintaining the property as his or her primary residence. When the homeowner decides to move, the preemptive option on the improvements is triggered. Nothing in the lease prevents leaseholder homeowners from staying in their homes as long as they wish.¹²⁷

These core requirements of primary residence commitment and resale restriction are common to all subsidy retention structures. Differentiating the leasehold approach from the uses of covenants, therefore, involves three other areas: the differences to enforcement of resale restrictions; the differences in term-time questions such as property tax treatment and responses to nuisance and waste; and the consequences of the form choice for the goods associated with homeownership.

125. See generally Kirby White & Charles Matthei, *Community Land Trusts*, in *BEYOND THE MARKET AND THE STATE: NEW DIRECTIONS IN COMMUNITY DEVELOPMENT* 41 (Severyn T. Bruyn & James Meehan eds., 1987).

126. Leases that provide for fixed terms that exceed 99-years are considered fee, rather than leasehold, transfers. Leases, both commercial and residential, that provide for very long-terms must be carefully structured to avoid recharacterization as mortgages or other financing devices. See *Frank Lyon Co. v. U.S.*, 435 U.S. 561 (1978).

127. Leasehold interests are generally inheritable pursuant to the terms of the lease. *INST. FOR CMTY. ECON.*, *supra* note 18, at 12-12.

The stewardship approach generally has shown greater compatibility with existing law than the lockbox approach. Focusing on the enforceability, unassisted by statutory reform, of the preemptive option, the land trust ground lease also has advantages to recommend itself. As noted earlier, preemptive options acquired by transferors of the property are increasingly exempted from being subjected to the RAP.¹²⁸ Likewise, the leasehold preemptive option offers compliance advantages with regard to the rule against unreasonable restraints on alienation. The CLT's reversion creates the strongest stewardship relationship for restricting resales. Because the land belongs to the land trust, a long-term, set-price right of first refusal on the improvements on that land seems quite reasonable to courts reviewing alienation restraints.¹²⁹ The fact that the public purpose behind the resale restrictions is to preserve affordable housing strengthens the enforceability of the option once the perpetuities concern has been eliminated.

Because all affordability stewards wish to ensure that the property is kept in good condition, it is essential that the homeownership arrangement facilitates this goal. In market-based owner-occupied home situations, the homeowner has strong financial incentives to maintain the property in good order to maximize his or her financial return upon resale. CLTs can also structure the resale to provide this financial incentive for diligent maintenance, but they generally rely upon appraisals, rather than arms-length buyers, to judge the quality of the care. To prevent serious waste during the term, CLTs have a power to intervene that is unavailable to other kinds of affordability stewards.¹³⁰ Hopefully, neither this advantage, nor an enhanced ability to respond to a homeowner's nuisance activity, will be significantly important to a perpetually affordable homeownership program that screens homebuyers and appropriately aligns incentives, but the leasehold arrangement cannot be matched for the potential for active stewardship.¹³¹

The same effective leasehold CLT remedies for homeowner defaults, however, can contribute to a view of the leasehold homeowner as having a tenant rather than an owner-occupant status. Recalling the goods associated with homeownership, we see that some were associated with the house as an investment and others with the home as a stable place within a community. The details of the resale formula, rather than the form of the resale restriction, determine the extent to which the subsidized homeowner receives the same return that a market homebuyer would. The extent to which the leasehold

128. See *supra* note 94 and accompanying text.

129. See *supra* text accompanying notes 27 and 78.

130. INST. FOR CMTY. ECON., *supra* note 18, at 12-10.

131. This ability to quickly respond to homeowner default may prove more useful to the core affordability mission in dealing with disputes over primary residency.

arrangement itself detracts from a CLT homeowner's status is harder to identify.

B. Preemptive Option in Reciprocal Covenants and Organizational Bylaws

Although actual long-term affordability programs have aspects to their programs that draw upon the previous two approaches, the third and fourth types of resale restrictions predominate in current long-term subsidy retention programs in the United States. Maryland's Moderately Priced Dwelling Unit (MPDU) programs have favored the use of community association covenant declarations as the vehicles for establishing restrictions.¹³² As one of the earliest, and still leading, examples of inclusionary zoning in the United States, the MPDU program of Montgomery County creates subsidized affordable homes through large and medium-sized residential developments that are required by law to set aside units as affordable homeownership opportunities.¹³³ The nature of these developments presupposes the creation of a statutory homeowners' association and the declaration of covenants governing land use within the development. The MPDU program has used this legal framework to establish the resale restrictions governing the subsidized homes within the development.

Even though these affordable units are properly thought of as single-family homes owned in fee, the limited-equity housing cooperative in many ways serves as the model for this approach in which reciprocal covenants of affordability are imposed from the inception of the development.¹³⁴ As with MPDU-regulated developments, apartment buildings developed as limited-equity coops involve multiple units, some or all of which are income-restricted and placed in service more or less simultaneously.¹³⁵ The resale restrictions generally appear in the cooperative members' proprietary leases, their stock certificates and the bylaws of the cooperative.¹³⁶ The enforcement of these affordability protections falls to the cooperative board. With both limited-equity cooperatives and MPDU developments, however, there are actually two sets of enforcers for the resale restrictions.

Once a MPDU declaration has been recorded, the community association has the ability to enforce the affordability covenants.¹³⁷ The covenants

132. Moderately Priced Dwelling Units, *supra* note 27.

133. Orfield, *supra* note 9, at 914–15.

134. See Duncan Kennedy, *The Limited Equity Coop as a Vehicle for Affordable Housing in a Race and Class Divided Society*, 46 HOW. L.J. 85, 87 (2002).

135. *Id.* at 86.

136. David H. Kirkpatrick, *Cooperatives and Mutual Housing Associations*, 1 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 7, 7 (1992).

137. See Moderately Priced Dwelling Units, *supra* note 27.

authorize the local housing agency to enforce the resale provisions.¹³⁸ Likewise, cooperatives are primarily responsible for implementing their own resale restrictions, but they are frequently contractually obligated to preserve affordability also.¹³⁹ These guarantees often appear in the financing arrangements the cooperative makes to secure its blanket mortgage.¹⁴⁰ Both these systems envision affordability limitations as reciprocal arrangements like use restrictions. In each case, however, the original sponsors of the subsidized housing do not pretend that the community of homeowners will have the same motivation to enforce the affordability commitments as they do when regulating permitted uses.

The fundamental enforcement structures in both the cooperative and community association contexts provide strong resistance to invalidation under traditional rules against alienability restraints. As residents and decision-makers in a corporate landlord, cooperative members have been given broad latitude to constrain each other's abilities to sell their shares. In the less intimate homeowners' association context, the interdependence of land uses also supports reasonable restraints on alienation.¹⁴¹ Despite the double-layer enforcement system, the fundamental orientation of the alienability restraints toward the interests of the other community stakeholders masks the "in gross" nature of the alienability restriction held by the outside entity committed to long-term affordability.

The MPDU resale restrictions offer another structural accommodation to the rule against unreasonable restraints on alienation. The duration of even the longest resale control periods does not exceed thirty years.¹⁴² The covenants used by the Frederick County MPDU program provide for a single fifteen-year control period starting with a unit's initial sale.¹⁴³ The Montgomery County program, on the other hand, not only provides for a thirty-year resale control period but also for the restarting of the thirty-year clock every time a unit is resold within its control period.¹⁴⁴ Even though this latter approach has the very real potential of keeping most units permanently affordable, the MPDU approach to the declaration of affordability covenants supplies a date certain

138. The local housing agency is also empowered to enforce these restrictions through the local ordinance. Although these restrictions run only for the first 30 years of the unit's existence, this dual protection can be seen as a preemptive option arrangement backed up by a public resale lockbox, albeit a time-limited dedication. *Id.*

139. Kirkpatrick, *supra* note 134, at 7.

140. *Id.*

141. *See id.*

142. Moderately Priced Dwelling Units, *supra* note 29.

143. *Id.* art. III.

144. *Id.* art. II.

for the termination of the covenant for each buyer. This defined time limit speaks directly to the second of the Restatement's four factors.¹⁴⁵

By taking full advantage of the homeowners' association structure created as part of the inclusionary development, the MPDU program creates a partnership relationship to steward the economic diversity of the community. Unlike the rent regulation scenario, in which the landlord and tenant each have financial incentives to police compliance with different aspects of the affordability preservation rules, the community association steward has the relationship to the land but lacks a clear motivation for vigilant oversight of resales by the residents of the affordable homeownership units. The approach taken by the CLT movement is essentially to give the genuine steward of affordability a direct and ongoing relationship to the land.¹⁴⁶ The ability to mix in affordability in existing single-family home neighborhoods requires not only subsidy retention but also devices that do not depend on contemporaneously created community governance.

C. *Preemptive Option in Stand-Alone Covenants*

Even though the inclusionary zoning covenant offers homeowners fee title of both land and house without sacrificing perpetual affordability, the reciprocal covenant option is not as viable for single-family homes developed in existing neighborhoods in terms of enforceability. Vermont, a leader in the development of CLTs, has framed a statutory alternative to ground leasing for controlling resale of subsidized single-family homes. Pursuant to a law passed in 1989, nonprofit developers of subsidized housing can sell properties to qualified homebuyers and subject them to housing subsidy covenants.¹⁴⁷ Although the model covenant in actual use provides for a preemptive option to purchase, the statute clears away all impediments to the enforceability of any kind of resale restriction imposed by a qualifying developer for the purpose of preserving affordability. Interestingly, the Central Vermont CLT, when offered the opportunity to take a fully enforceable lockbox approach to perpetually affordable homeownership still opted for the active stewardship

145. See *supra* note 85 and accompanying text.

146. Several urban CLTs – New Columbia CLT in Washington, DC (<http://www.cdsc.org/ncclt/>), the Rehabilitation Action to Improve Neighborhoods (RAIN) CLT in New York City, and the San Francisco CLT (<http://www.sfclt.org/>) – are preserving affordability through cooperative structures. Essentially, the cooperative keeps the individual apartments affordable and the community land trust ensures that the cooperative maintains its commitment to affordability, usually through a ground lease.

147. VT. STAT. ANN. tit. 27, § 610 (2009).

model more compatible with the legal doctrines protecting freedom of alienability.¹⁴⁸

Although the statutorily prescribed stand-alone perpetual covenant would appear to be the perfect lockbox vehicle for permanently dedicating land to affordable homeownership, the recognition of the need for ongoing monitoring of the resale process has brought even this affordability protection device into the affordability stewardship fold. As a leading commentator on shared equity homeownership has observed, a passive attempt to create a self-enforcing affordability restriction “can be a recipe for disaster.”¹⁴⁹ This Article has focused on how the law related to the enforceability of such affordability restrictions has encouraged an active and ongoing relationship between the affordability steward and the land. Other concerns, such as the compatibility of affordability restrictions with lender requirements, are beyond the scope of the current discussion but also support the need for a vigilant and sophisticated stewardship agent. As the need for economic diversity among homeowners in localities receives greater attention, advocates and policy makers alike will hopefully recognize the importance of viable stewardship arrangements that sustain perpetually affordable homeownership.

148. For information about the Central Vermont Community Land Trust’s Homeland Grant program, see Central Vermont Community Land Trust, Grants, <http://www.cvclt.org/grants.html> (last visited Feb. 11, 2010).

149. Davis, *supra* note 53, at 70.

