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Affordable Housing, but for How Long? The Opportunity and Challenge of Mandating Permanently Affordable Housing

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**AFFORDABLE HOUSING, BUT FOR HOW
LONG? THE OPPORTUNITY AND
CHALLENGE OF MANDATING
PERMANENTLY AFFORDABLE HOUSING**

Vincent J. Reina^{*}

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INTRODUCTION

The federal government and local governments have historically tied housing affordability requirements to subsidies designed to promote affordable housing development. In the first half of the 20th century, the federal government promoted affordable housing development through the Public Housing program, which was publicly financed, owned, and managed.¹ With the creation of the

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1. According to the National Housing Law Project. “[t]he United States Housing Act of 1937 (42 U.S.C. § 1437) established the public housing program, which

U.S. Department of Housing and Urban Development (HUD) in the 1960s, the federal government moved toward programs and incentives that promoted private sector ownership and management of subsidized affordable housing units.² Through these programs, owners commit to maintaining affordable units for fixed periods of time in exchange for subsidies.³ But because some owners choose to exit private sector programs after the affordability restriction periods end, it remains unclear what the mandated length of these affordability restriction periods should be.⁴

In light of recent housing affordability challenges, housing advocates have increased calls for “permanent affordability” requirements on housing developments that receive any form of public subsidy.⁵ Permanent affordability means mandating affordability restrictions on a property, or the land on which it is developed, that run in perpetuity — unless the governing agency agrees to release the property from its affordability contract. This Article discusses the role and length of such affordability restrictions,

produced nearly 1.4 million units nationwide.” See *Public Housing*, NAT’L HOUSING L. PROJECT, <https://www.nhlp.org/resource-center/public-housing/> [https://perma.cc/YLB2-K6CL] (last visited Oct. 6, 2019).

2. See generally JACLENE BEGLEY ET AL., NYU FURMAN CTR., STATE OF NEW YORK CITY’S SUBSIDIZED HOUSING: 2011 (2011), <http://furmancenter.org/files/publications/SHIPReportFinal.pdf> [https://perma.cc/T4VP-VYAR].

The Furman Center found that one byproduct of this shift has been the continual loss of guaranteed affordable units to subsidy expirations. *Id.* at 9–10. Between 1962 and 2010, New York City lost over 62,000 units that had been subsidized through HUD financing and insurance, HUD project-based rental assistance, the Mitchell-Lama program, and Low-Income Housing Tax Credits. *Id.* at 19. Going forward, this Article uses “affordable housing” to refer to all units with below market-rate rents, which includes those with a subsidy. In addition, this Article uses “subsidized affordable housing” to refer to units with below market-rate rents due to a public subsidy and the accompanying affordability restriction tied to it.

3. See ALEX SCHWARTZ, HOUSING POLICY IN THE UNITED STATES 203–26 (3d ed. 2015).

4. BEGLEY ET AL., *supra* note 2, at 19. For a review of studies on the effects of affordability restrictions after the time periods elapsed, see Jake Blumgart, *Have We Been Wasting Affordable Housing Money?*, SHELTERFORCE (Feb. 2, 2018), https://shelterforce.org/2016/02/04/have_we_been_wasting_affordable_housing_money/ [https://perma.cc/RM2T-BJ8U].

5. See generally BENJAMIN DULCHIN, ASS’N FOR NEIGHBORHOOD HOUS. DEV., PERMANENT AFFORDABILITY: PRACTICAL SOLUTIONS (2015),

<https://anhd.org/wp-content/uploads/2015/10/2015-Permanent-Affordability-Practical-Solutions.pdf> [https://perma.cc/YFF6-K9D5]. “Permanently affordable” housing is any housing that, when it receives a public subsidy or tax incentives, or is built using public land, must maintain affordable rents or homeownership for the full duration of its existence. See, e.g., *id.* at 4.

and the potential benefits and challenges associated with mandating permanent affordability.

Part I of this Article outlines the current housing affordability problems. Part II then describes where the preservation of subsidized affordable housing sits among other policy responses aimed at addressing current housing affordability problems. Part III defines the concept of “permanent affordability” and Part IV highlights the opportunities and challenges associated with mandating it. Finally, Part V explores the policy implications of a permanent affordability mandate, and Part VI concludes that permanent affordability mandates can be an effective tool in addressing housing affordability in some contexts.

I. THE HOUSING AFFORDABILITY CHALLENGE

There is a plethora of research evaluating the scale and nature of the current national housing affordability problem. Most of this research assesses the severity of housing cost burdens, which is the share of household income spent on housing.⁶ This research points to two distinct realities. First, the level of rent burdens, particularly those faced by the lowest-income households, have escalated dramatically nationwide.⁷ Second, the existing inventory of housing affordable to the lowest-income households is small and shrinking.⁸

6. *Rental Burdens: Rethinking Affordability Measures*, U.S. DEP’T HOUSING & URBAN DEV., https://www.huduser.gov/portal/pdredge/pdr_edge_featd_article_092214.html [https://perma.cc/DAG2-TA8D] (last visited Oct. 6, 2019). HUD defines rent-burdened families as those “who pay more than 30 percent of their income for housing” and who may, as a result, “have difficulty affording necessities such as food, clothing, transportation, and medical care.” *Id.*

7. See JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV., *THE STATE OF THE NATION’S HOUSING* 5 (2018), https://www.jchs.harvard.edu/sites/default/files/Harvard_JCHS_State_of_the_Nations_Housing_2018.pdf [https://perma.cc/D8QA-AXBE]. “The cost-burdened share of renters doubled from 23.8 percent in the 1960s to 47.5 percent in 2016 as housing costs and household incomes steadily diverged, with the largest increases occurring in the 2000s.” *Id.*

8. The Joint Center for Housing Studies found that “[t]he nation’s supply of low-cost rental housing shrank significantly after the Great Recession and has remained essentially unchanged since 2015 [M]ore than 2.5 million units priced below \$800 in real terms — affordable to households earning up to \$32,000 per year — were lost on net between 1990 and 2016.” *Id.* at 28.

In 2017, nearly 31% of all households and 46% of renter households spent over 30% of their income on rent.⁹ According to HUD, households that spend over 30% of their income on housing are housing cost burdened.¹⁰ The situation is far worse for low-income households. In 2017, over 88% of U.S. renters with household incomes less than \$20,000 were rent burdened, whereas only under 1% of households in this bracket spent less than 20% of their income on rent.¹¹ Further, nearly half of all renters suffer from excessive rent burdens.¹² The impact of rent burden is not limited to a particular market, with households in both high-cost markets and relatively low-cost markets carrying high levels of rent burden.¹³ Moreover, while the effects of rent burden are not new, research shows that between 2000 and 2010, the extent of these burdens increased dramatically because increases in rent far outpaced income growth.¹⁴ By 2010, almost every Metropolitan Statistical Area (“MSA”) in the United States reported higher rent burdens than it had ten years earlier.¹⁵

9. See generally U.S. CENSUS BUREAU, 2017 AMERICAN COMMUNITY SURVEY (ACS) 1-YEAR ESTIMATES (2017), <https://www.census.gov/programs-surveys/acs/data/summary-file.html> [<https://perma.cc/M888-L9YH>].

10. MARY SCHWARTZ & ELLEN WILSON, U.S. CENSUS BUREAU, WHO CAN AFFORD TO LIVE IN A HOME?: A LOOK AT DATA FROM THE 2006 AMERICAN COMMUNITY SURVEY 1 (2007).

11. VINCENT REINA, UNIV. OF PA WHARTON PUB. POLICY INITIATIVE, THE U.S. NEEDS A NATIONAL VISION FOR HOUSING POLICY 64 (2019), <https://publicpolicy.wharton.upenn.edu/live/files/314-a> [<https://perma.cc/BRX7-U6XS>].

12. John Landis & Vincent Reina, *Eleven Ways Demographic and Economic Change is Reframing American Housing Policy*, 29 HOUSING POL’Y DEBATE 4, 12 (2019). The American Housing Act of 1949 established 25% as the maximum share of their income that American households should pay for housing; this was raised to 30% in 1973. *Id.* Any percentage in excess of 30% is deemed *excess* housing cost burden. *Id.*

13. In addition to high-rent states like California, New York, and Massachusetts, the list of states with the highest shares of excessively burdened renters includes less-expensive states such as Louisiana, Mississippi, and West Virginia. *Id.* The same is also true of metro areas: the list of metro areas with proportionally more cost-burdened renters includes the usual suspects such as Los Angeles and Washington, D.C., but also less-expensive markets such as Orlando and Richmond. *Id.*

14. See JOINT CTR. FOR HOUS. STUD., *supra* note 7, at 5.

15. See HEATHER L. SCHWARTZ ET AL., RAND CORP., PRESERVATION OF AFFORDABLE RENTAL HOUSING: EVALUATION OF THE MACARTHUR FOUNDATION’S WINDOW OF OPPORTUNITY INITIATIVE 112 (2016), https://www.rand.org/pubs/research_reports/RR1444.html [<https://perma.cc/8XBJ-P582>]. The authors found that between 1990 and 2010, rents increased across most of the 238 largest metropolitan areas in the U.S. and that there was a dramatic increase in rent burdens for households below 80% of area median income. See *id.* at 13 (noting that in the 1990s, rents were not rising but they did go up dramatically in

One of the key drivers of the current affordable housing crisis is the lack of supply of lower-cost housing units. Across the United States, there are only 37 affordable housing units available for every 100 extremely low-income renters.¹⁶ The lack of affordable units available to low-income renters is a national phenomenon.¹⁷ Every MSA in the country has fewer affordable rental units available than needed by extremely low-income households.¹⁸ A common argument against using housing cost burdens as the only measure of housing affordability is that people may choose to spend more on housing.¹⁹ Another critique is that some of these rent burdens are driven by an issue with the sorting of units in most markets. The sorting issue suggests that there are affordable units in a market but some low-income households must rent a higher-cost unit, and thus experience housing cost burdens, because a comparatively higher-income household is renting the more affordable unit. As a result, it is not that there is an insufficient number of units affordable to low-income households in many markets, it is just that some of those units are not available for low-income households to rent. A report published by the RAND Corporation provided a hypothetical matching game to test the impact of sorting on rent burdens in housing markets.²⁰ The RAND study ranked renters along the income distribution within their particular MSA, then ranked all rental units in that market by price, and finally matched each household to the rental unit that had the same rank in the distribution.²¹ The study found that even when

subsequent decades). This resulted in higher levels of renter burden in almost every MSA in the study by 2010. *Id.* at 112.

16. See ANDREW AURAND, NAT'L LOW INCOME HOUS. COAL., *THE GAP: THE AFFORDABLE HOUSING SHORTAGE* 3 (2019), https://reports.nlihc.org/sites/default/files/gap/Gap-Report_2019.pdf [https://perma.cc/3K6F-HYU4]. "Extremely low income" is defined as income at or below the Federal Poverty Guideline or 30% of area median income, whichever is higher. *Id.* at 1.

17. *Id.* at 8.

18. The number of affordable and available units is as low as 14 for every 100 extremely low-income households in the Las Vegas MSA. *Id.* The MSA with the largest number of units affordable and available to this population is Pittsburgh, which nevertheless has only 51 units for every 100 extremely low-income households. *Id.*

19. MARY SCHWARTZ & ELLEN WILSON, U.S. CENSUS BUREAU, *WHO CAN AFFORD TO LIVE IN A HOME?: A LOOK AT DATA FROM THE 2006 AMERICAN COMMUNITY SURVEY* 2 (2008), <https://www.census.gov/housing/census/publications/who-can-afford.pdf> [https://perma.cc/M4L6-XZ8Y].

20. SCHWARTZ ET AL., *supra* note 15, at 9.

21. *Id.*

households sort themselves perfectly — meaning that if every household was ranked on the income distribution from lowest to highest, and if every rental unit was ranked from cheapest to most expensive, and subsequently matched based on that rank — the majority of low-income renters in almost every MSA in the country would be rent burdened.²²

The United States is losing more affordable rental units than those being produced, with or without a government subsidy, in any given year.²³ This pattern will likely continue going forward considering the inadequate supply response to the demand for rental units in many markets.²⁴ The lack of supply response is only increasing demand and prices throughout the rent distribution in many markets.²⁵ A lack of filtering — meaning the most expensive units becoming more affordable over time as they depreciate²⁶ — is contributing to the current affordability crisis. Further, due to high demand and an inadequate supply response, some units may be “filtering up” — meaning existing units are being upgraded, and prices are going up in units that would traditionally filter down.²⁷ Meanwhile, units at the

22. *Id.* at 10. This study and similar studies highlight a lack of available and affordable units to low-income households across diverse housing markets. See generally NICHOLAS CHIUMENTI, THE GROWING SHORTAGE OF AFFORDABLE HOUSING FOR THE EXTREMELY LOW-INCOME IN MASSACHUSETTS (2019); JOSH LEOPOLD ET AL., THE HOUSING AFFORDABILITY GAP FOR EXTREMELY LOW-INCOME RENTERS IN 2013 (2015); MICH. STATE HOUS. DEV. AUTH., MICHIGAN STATEWIDE HOUSING NEEDS ASSESSMENT 54–77 (2019), https://www.michigan.gov/documents/mshda/MSHDA-Statewide-Housing-Needs-web_653602_7.pdf [<https://perma.cc/YNF8-UVP8>].

23. *What Is Preservation?*, NAT’L HOUSING TR., <https://www.nationalhousingtrust.org/what-preservation> [<https://perma.cc/FEG7-3KEL>] (last visited Sept. 29, 2019) (noting that “for every new affordable apartment created, two are lost due to deterioration, abandonment or conversion to more expensive housing”).

24. JOINT CTR. FOR HOUS. STUD., *supra* note 7, at 5 (finding that even robust rental construction in recent years has not stemmed the loss of affordable rental units). Between 2006 and 2016, “the lowest-cost rental stock shrank by more than 10 percent in 153 of the nation’s 381 metros and by more than 20 percent in 89 metros” as rental demand surged. *Id.*: see also Carolina K. Reid et al., *Addressing California’s Housing Shortage: Lessons from Massachusetts Chapter 40B*, 25 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 241, 241 (2016) (finding that the lack of new construction in California helped push rents up 24 between 2000 and 2016).

25. Reid et al., *supra* note 24, at 241. According to this study, California has added half of the number of units needed over the last three decades, and the lack of new construction in California helped push rents up 24% between 2000 and 2016. *Id.*

26. For a full discussion of filtering, see George Gastler, *William Grigsby and the Analysis of Housing Sub-Markets and Filtering*, 33 URB. STUD. 1797 (1996).

27. See C. Tsurriel Somerville & Christopher J. Mayer, *Government Regulation and Changes in the Affordable Housing Stock*, 9 ECON. POL’Y REV. 45, 50 (2003); see

very bottom of the rent distribution traditionally exit the market due to depleted housing quality, which decreases the supply of the cheapest units.²⁸ In theory, these units can be recapitalized and re-enter the housing supply throughout the rent distribution, but there is clear evidence that this is not happening in many markets.²⁹

For example, in Philadelphia, over 7000 units of affordable housing exited the housing supply between 2014 and 2016 because their cost increased or because they dropped out of the housing stock entirely.³⁰ Meanwhile, the city added close to 3000 high-cost units.³¹ This loss of market-rate affordable housing increased both the number of rent-burdened low-income households and the level of their rent burdens,³² and consequently increased demand for the remaining few subsidized affordable units in Philadelphia.

also D.C. PRES. NETWORK, MAINTAINING ECONOMIC DIVERSITY AND AFFORDABILITY: A STRATEGY FOR PRESERVING AFFORDABLE RENTAL HOUSING IN THE DISTRICT OF COLUMBIA 2 (2014), <https://www.neighborhoodindicators.org/sites/default/files/publications/preservation20strategy20dec20141.pdf> [<https://perma.cc/4VTU-3YQ9>]. In hot markets like Washington, D.C., high demand for rental housing outstrips supply even at high income levels, causing competition and rising prices. *Id.*

Over the last decade, DC has lost 50 percent of its low-cost housing units, largely due to rising housing prices . . . [N]ew housing units are being snapped up as quickly as they are put on the market because the increased supply has not yet caught up to the elevated demand.

Id.

28. MARK TRESKON & CARL HEDMAN, URB. INST., BUILDING AND PROTECTING AFFORDABLE AND ADEQUATE RENTAL HOUSING 4–5 (2018), https://www.urban.org/sites/default/files/publication/98718/building_and_protecting_a_ffordable_and_adequate_rental_housing.pdf [<https://perma.cc/99CF-FYAX>]. In weak markets like Detroit, the rental housing stock is under stress less because of demand than because of lack of capital for housing repairs, deterioration, and abandonment. *Id.* at 5.

29. Reid et al., *supra* note 24, at 241.

30. CITY OF PHILA., DEP'T OF PLANNING & DEV., HOUSING FOR EQUITY: AN ACTION PLAN FOR PHILADELPHIA 4 (2018) <https://www.phila.gov/media/20190115161305/Housing-Action-Plan-Final-for-Web.pdf> [<https://perma.cc/J8U7-FZ32>] [hereinafter CITY OF PHILA., HOUSING FOR EQUITY]. According to this report, “low end” units were defined as those with rents at or below \$800. *Id.*

31. Defined as those containing units with rents at or above \$2000. *Id.*

32. CITY OF PHILA., DEP'T OF PLAN. & DEV., FOUNDATION FOR THE FUTURE: DEVELOPING PHILADELPHIA'S HOUSING ACTION PLAN 6 (2018) [hereinafter CITY OF PHILA., FOUNDATION FOR THE FUTURE], <https://www.phila.gov/media/20190124094527/Foundation-for-the-Future-Developing-the-HAP-Final.pdf> [<https://perma.cc/MZ2P-W8VB>]. The combination of a dwindling supply of low-cost units and the stagnation of wages increases the ratio of rents to household incomes, resulting in rent burden among low-income households.

As demand for affordable housing has increased, new threats have emerged to the existing stock of subsidized affordable housing. Many of the existing subsidized affordable housing units across the country will either reach the end of their affordability restriction periods, or require major recapitalization, over the coming decade.³³ Specifically:

Over 590,000 units in Section 8 project-based rental assistance (PBRA) properties where an owner will have the option to renew their subsidy or exist the program; over 450,000 units in Low-Income Housing Tax Credit (LIHTC) properties; and 120,000 units in HOME-financed properties where the subsidy and affordability restrictions are due to expire over the next 10 years [M]any of these properties will renew the subsidy, apply for a new one, or maintain their units as affordable absent any subsidy. How many units will remain affordable, and for how long, is unknown There are an additional 1 million LIHTC units approaching their 15-year disposition period over the next 10 years. While their affordability restrictions do not expire, many of these units will need rehabilitation as part of a normal life-cycle recapitalization.³⁴

At the same time, publicly-owned affordable housing (“public housing”) is also at risk. There is a consistent lack of adequate federal funding for necessary repairs, which leads to severe deterioration of units that affects the health and safety of tenants and can render some units uninhabitable.³⁵ The national backlog for repairs is estimated to be well over \$26 billion.³⁶ At the local level, the consequences and effects of this backlog are well documented in the media. A recent news article claimed that 2500 units in Washington D.C. — close to one-third of the city’s public housing portfolio — require “urgent” attention.³⁷ New York City’s public housing portfolio is also experiencing deteriorating conditions, which

33. Vincent Reina, *The Preservation of Subsidized Housing: What We Know and Need to Know* 1 (Lincoln Inst. of Land Pol’y, Working Paper, No. WP18VR1, 2018), https://www.lincolninst.edu/sites/default/files/pubfiles/reina_wp18vr1.pdf [<https://perma.cc/S2G9-U7LP>].

34. *Id.*

35. For a discussion of public housing’s severe capital needs, see SCHWARTZ, *supra* note 3, at 178–84 (2015).

36. Reina, *supra* note 33, at 4.

37. See Morgan Baskin, *Nearly One-Third of the City’s Public Housing Stock is at Risk of Becoming Uninhabitable*, WASH. CITY PAPER (Dec. 20, 2018, 6:00 PM), <https://www.washingtoncitypaper.com/news/housing-complex/article/21038117/nearly-onethird-of-the-citys-public-housing-stock-is-at-risk-of-becoming-uninhabitable> [<https://perma.cc/QAC5-MMYT>].

has resulted in a multitude of health-related lawsuits.³⁸ The scale of housing quality issues in public housing presents a challenge: policymakers will increasingly need to decide whether to use existing subsidies to develop new subsidized affordable housing or reinvest in the viability and affordability of existing subsidized housing.

This Part has highlighted a potent affordable housing challenge. The question then becomes whether, when, and how a permanent affordability mandate would address some of the factors affecting housing affordability.

II. POLICY RESPONSES

The current affordability crisis requires a multi-pronged policy response. Many researchers and practitioners agree that there is no one solution to the current challenges.³⁹ Instead, a suite of responses must be adopted simultaneously.⁴⁰ These responses often revolve around three main topics: (1) increasing the supply of housing, including those that are market rate and those that enter the market at a lower price point, and are thus affordable to low-income households; (2) preserving the supply and quality of existing affordable housing, including units with and without government subsidies; and (3) protecting low-income households from

38. There are various media reports about the housing conditions, with some specifically focusing on lead exposure. *See, e.g.*, J. David Goodman et al., *Tests Show Children Were Exposed to Lead. The Official Response: Challenge the Tests*, N.Y. TIMES (Nov. 18, 2018), <https://www.nytimes.com/2018/11/18/nyregion/nycha-lead-paint.html> [<https://perma.cc/M5AT-F89H>]. Others focus more broadly on issues of housing quality and inhabitability. *See, e.g.*, Nicole Greenfield, *Inside NYC's Public Housing, Mold and Neglect Are a Dangerous Combo*, NAT'L RESOURCE DEF. COUNCIL (June 25, 2018), <https://www.nrdc.org/stories/inside-nycs-public-housing-mold-and-neglect-are-dangerous-combo> [<https://perma.cc/5TYJ-EET2>].

39. *See* Emily Badger, *How to Make Expensive Cities Affordable for Everyone Again*, WASH. POST (Feb. 19, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/02/19/how-to-make-expensive-cities-affordable-for-everyone-again> [<https://perma.cc/A42Y-C98L>] (discussing the response of various economists, sociologists, and land-use scholars to the question of what happens to housing affordability when non-subsidized housing supply is increased).

40. *See* Jeffrey Lubell, *Preserving and Expanding Affordability in Neighborhoods Experiencing Rising Rents and Property Values*, 18 CITYSCAPE: J. POL'Y DEV. & RES. 131, 132 (2016) (highlighting the need for local governments to focus on six housing strategies: (1) preservation of existing affordable rental units; (2) protections that help long-term residents remain in place; (3) inclusive housing programs that promote mixed-income developments; (4) revenue generation from growth that gets repurposed as a resource for affordable housing; (5) incentives for affordable housing; and (6) the acquisition of existing affordable housing).

displacement.⁴¹ For policymakers, the necessary balance between new construction and preservation varies based on local market conditions. For example, consider Philadelphia, which has an abundant supply of lower-cost units that are uninhabitable or in need of serious repair. The city created a ten-year action plan to develop and preserve over 100,000 units of housing, with 63.5% of that target focused on the preservation of existing affordable housing units.⁴² Conversely, Seattle has seen dramatic rent growth in recent years due to an increase in higher-earning residents and a lack of new units meeting that demand.⁴³ Consequently, the city developed a plan that aims to build or preserve 50,000 units — 60% of that target focused on new market-rate construction, and the remaining 40% devoted either to the development *or* preservation of affordable units.⁴⁴

Both plans reference the preservation of private market units currently at affordable rent levels, and the preservation of existing subsidized housing either at risk of subsidy expiration or in need of repair. In Philadelphia's case, the plan explicitly mentions the nearly 14,500 units of existing subsidized housing that may need support before the year 2030,⁴⁵ whereas the Seattle plan does not specifically mention this portfolio.⁴⁶ Regardless of how explicitly cities and states address this problem, research shows that the number of units in need of preservation far exceeds the number of affordable housing units being created.⁴⁷ The loss of existing affordable units is central to housing advocates' call for mandating all properties receiving any form of local or federal subsidy — either during the development

41. See ALLISON ALBEE ET AL., CHANGE LAB SOLS., PRESERVING, PROTECTING, AND EXPANDING AFFORDABLE HOUSING 18–30 (2015), <https://kresge.org/sites/default/files/Preserving-affordable-housing-policy-tools-April-2015.pdf> [<https://perma.cc/J2LQ-732U>]; Press Release, Local Initiatives Support Corporation, Protect, Preserve and Produce: A Landmark Housing Partnership Arrives in the Bay Area (Jan. 24, 2019), <http://www.lisc.org/our-stories/story/protect-preserve-produce-landmark-housing-partnership-arrives-bay-area> [<https://perma.cc/DT5S-CH9G>].

42. CITY OF PHILA., HOUSING FOR EQUITY, *supra* note 30, at 5.

43. Mike Rosenberg, *After Brief Slowdown, Seattle-Area Rents Surge Back Up Again; When Will It End?*, SEATTLE TIMES (Mar. 27, 2017, 5:25 PM), <https://www.seattletimes.com/business/real-estate/after-brief-slowdown-seattle-area-rents-surge-back-up-again-when-will-it-end/> [<https://perma.cc/SS3V-XG2U>].

44. CITY OF SEATTLE, HOUSING SEATTLE: A ROADMAP TO AN AFFORDABLE AND LIVABLE CITY 2 (2015) [hereinafter CITY OF SEATTLE, HOUSING SEATTLE], https://murray.seattle.gov/wp-content/uploads/2015/07/HALA_ActionPlan_2015.pdf [<https://perma.cc/3BV5-CXN9>].

45. CITY OF PHILA., FOUNDATION FOR THE FUTURE, *supra* note 32, at 8.

46. See CITY OF SEATTLE, HOUSING SEATTLE, *supra* note 44.

47. Reina, *supra* note 33, at 4.

process or in the course of operating the property — become permanently affordable.

III. DEFINING PERMANENT AFFORDABILITY

Before exploring the concept of permanent affordability, it is important to establish the nature of affordability restrictions on housing developments. The federal government rolled out a series of programs that provided subsidies to private owners, in exchange for owners keeping a certain share of units in the development affordable for a fixed period after the creation of HUD in 1965.⁴⁸ The number of units required to be affordable, the level of affordability, and the length of the affordability restrictions vary by program.⁴⁹ This model — the disposition of public subsidies to private owners, conditioned on the development and management of subsidized affordable housing for a fixed period — has become the primary model employed by federal, state, and local subsidized housing programs.⁵⁰ Municipalities increasingly view this as a model for developing new loan and grant programs in their attempt to incentivize owners of existing private market affordable housing to preserve the stock of privately-owned affordable housing.⁵¹

When most federal subsidized housing programs were created during the 1960s through the 1980s, U.S. cities were suffering from decline or disinvestment.⁵² As a result, the structure of these

48. See BEGLEY ET AL., *supra* note 2, at 9, 20; see also SCHWARTZ, *supra* note 3, at 203–23.

49. See *supra* note 48.

50. For example, the federally funded and state administered Low-Income Housing Tax Credit Program (LIHTC) is the “single largest subsidy for the production of low-income rental housing.” SCHWARTZ, *supra* note 3, at 135. Under the program, state agencies award tax credits to investors for low-income rental developments. *Id.* At the local level, increasingly popular inclusionary zoning programs reward developers for producing affordable units with height, density, or other bonuses. See Jenny Schuetz et al., *Silver Bullet or Trojan Horse? The Effects of Inclusionary Zoning on Local Housing Markets in the United States*, 48 URB. STUD. 297, 298 (2011), <https://journals.sagepub.com/doi/pdf/10.1177/0042098009360683> [<https://perma.cc/9W55-EBP9>].

51. See, e.g., Elizabeth Ginsburg, *Enterprise and HPD Launch Landlord Ambassadors Program to Preserve Affordable Housing Through Community Engagement*, ENTERPRISE (May 10, 2017), <https://www.enterprisecommunity.org/blog/new-york-landlord-ambassadors-program> [<https://perma.cc/2Z2S-PCVL>].

52. See George Sternlieb & James Hughes, *The Uncertain Future of the Central City*, 18 URB. AFF. Q. 455, 458 (1983); see also Edward Glaeser & Jesse Shapiro, *Is There a New Urbanism? The Growth of U.S. Cities in the 1990s* 2 (Nat'l Bureau of Econ. Research, Working Paper No. 8357, 2001) (finding that, with the exceptions of

programs reflected the government's desire to maximize the number of affordable units developed, the length of affordability of the units, and the number of developers engaged in the production of such units. The Mitchell-Lama program, a middle-income housing program in New York City, best exemplifies this desire.⁵³ The Mitchell-Lama program required a 35-year affordability restriction when it was created in 1955 by the State of New York. The length of this affordability requirement resulted in low participation rates.⁵⁴ The 35-year affordability restriction was subsequently reduced to 15 years in 1959, and then increased to 20 years in 1960.⁵⁵ The reduction in the affordability term subsequently increased participation in the program.⁵⁶ The federal LIHTC program⁵⁷ is another federal subsidy program that subsidizes developers to provide affordable housing.⁵⁸ Created under the Tax Reform Act of 1986, the LIHTC program initially only required a 15-year affordability commitment.⁵⁹ Three years later, in 1989, the restriction period was increased to 30 years.⁶⁰ In many states where the allocation of these credits is highly competitive, the affordability restriction period can be as long as 60 years.⁶¹

An important feature of the affordability restrictions in every subsidized housing program, except for public housing, is the expiration of the affordability period. In some cases, the affordability restriction period is coterminous with the subsidy period, and the

Milwaukee in the 1950s and Columbus in the 1970s, "in the 1950s, 60s, and 70s, almost every Northeastern or Midwestern city with more than 500,000 people shrank in every decade").

53. *Mitchell-Lama*, NYC HOUSING PRESERVATION & DEV., <https://www1.nyc.gov/site/hpd/renters/mitchell-lama.page> [https://perma.cc/EY8V-THUR] (last visited Sept. 30, 2019).

54. *History*, MITCHELL-LAMA RESIDENTS COALITION, <http://www.mitchell-lama.org/history.html> [https://perma.cc/7PBX-CJAU] (last visited Sept. 30, 2019).

55. *Id.*

56. *Id.*

57. See generally *Tax Policy Center Briefing Book: Key Elements of the U.S. Tax System*, TAX POL'Y CTR., URB. INST. & BROOKINGS INST., <https://www.taxpolicycenter.org/briefing-book/what-low-income-housing-tax-credit-and-how-does-it-work> [https://perma.cc/K8D8-XHPS] (last visited Sept. 29, 2019).

58. See SCHWARTZ, *supra* note 3, at 135–59.

59. *Id.* at 135, 150.

60. *Id.* at 151.

61. See JEREMY GUSTAFSON & J. CHRISTOPHER WALKER, URB. INST., ANALYSIS OF STATE QUALIFIED ALLOCATION PLANS FOR THE LOW-INCOME HOUSING TAX CREDIT PROGRAM 18–19 (2002). By 2001, 41 states either required or favored projects with affordability periods of 40 to 60 years, and some have incentivized perpetual affordability, as in the case of Massachusetts, Michigan, and Vermont. *Id.*

owner has the option to renew their subsidy and affordability commitment at the same time.⁶² When a contract expires, an owner can re-commit to a new, limited period contract, during which they continue to receive their subsidy.⁶³ Thus, the owner continues to receive the financial benefit of the subsidy in exchange for prolonged affordability. However, in other programs, such as the LIHTC program, there is no ability to renew the subsidy without reapplying for it directly.⁶⁴

Not all owners who reach the end of their affordability restriction period exit the subsidy programs.⁶⁵ However, the expiration of a development's affordability requirements is a distinct point at which some owners opt to leave subsidy programs.⁶⁶ Property owners in areas where the local housing values are appreciating are more likely to exit subsidy programs.⁶⁷ Furthermore, owners are more likely to exit subsidy programs where properties are located in areas where residential economic opportunities are increasing, housing affordability is declining, and the ability to profitably develop new affordable units is diminishing.⁶⁸ But, evidence shows that the development of subsidized housing increases property values in

62. This is true in the project-based Section 8 program. See *Section 8 Program Background Information*, U.S. DEP'T HOUSING & URB. DEV., https://www.hud.gov/program_offices/housing/mfh/rfp/s8bkinfo [<https://perma.cc/4BDB-PKXU>] (last visited Sept. 29, 2019).

63. See *id.*

64. See JILL KHADDURI ET AL., U.S. DEP'T OF HOUS. & URB. DEV., WHAT HAPPENS TO LOW-INCOME HOUSING TAX CREDIT PROPERTIES AT YEAR 15 AND BEYOND? v-vi (2012), https://www.huduser.gov/publications/pdf/what_happens_lihtc_v2.pdf [<https://perma.cc/R9JT-QVYS>].

65. The decision to opt in or out is associated with property characteristics such as location, property type, size, and age, and the type and level of assistance. See MERYL FINKEL ET AL., U.S. DEP'T OF HOUS. & URB. DEV., MULTIFAMILY PROPERTIES: OPTING IN, OPTING OUT, AND REMAINING AFFORDABLE 67-69 (2006), https://www.huduser.gov/Publications/pdf/opting_in.pdf [<https://perma.cc/A4SZ-6VMH>].

66. See KHADDURI ET AL., *supra* note 64, at xii-xvii, 61-71.

67. See Vincent Reina & Jaclene Begley, *Will They Stay or Will They Go: Predicting Subsidized Housing Opt-Outs*, 23 J. HOUSING ECON. 1, 11 (2014). "[A] one unit . . . increase in the percent change in neighborhood property appreciation over the past five years increases the hazard rate of opt out by 242%." *Id.* at 9.

68. See Michael C. Lens & Vincent Reina, *Preserving Neighborhood Opportunity: Where Federal Housing Subsidies Expire*, 26 HOUSING POL'Y DEBATE 714, 727 (2016). Housing projects subsidized through HUD's project-based Section 8 program and due to expire between 2011 and 2020 are located in higher-opportunity neighborhoods than the average unit leased with a housing voucher. *Id.* at 728.

distressed neighborhoods.⁶⁹ This means that in many cases, public investments in subsidized affordable housing help revitalize neighborhoods, but these units are often converted to market rate once these areas become opportunity neighborhoods.⁷⁰ As a result, housing advocates push for permanent affordability mandates on all properties receiving a public subsidy.⁷¹

There is no set definition for what constitutes permanent affordability. The general premise of permanent affordability is that a public entity, not a private owner, decides when the affordability restrictions on a property expire.⁷² Thus, if a public entity decides a development cannot terminate its affordability requirements, then it is effectively affordable in perpetuity. Emily Thaden captures the concept well:

Permanently Affordable Housing . . . refers to all types of housing with lasting affordability [d]iffering from the shorter affordability periods required by federal programs to support the production of affordable housing, these maintain the affordability of housing over the long-term in order to preserve the affordable housing stock and the public's investment in affordable housing production.⁷³

This definition suggests a system that could be similar to rent control, but also quite different, depending on interpretation. Similar

69. Ingrid Gould Ellen et al., *Does Federally Subsidized Rental Housing Depress Neighborhood Property Values?*, 26 J. POL'Y ANALYSIS & MGMT. 257, 257 (2007).

70. The concept of "neighborhood opportunity" is based on the idea that neighborhood characteristics play a significant role in the life outcomes of the people who live in them. See Ingrid Gould Ellen & Margery Turner, *Does Neighborhood Matter? Assessing Recent Evidence*, 8 HOUSING POL'Y DEBATE 833, 833 (1997). "Opportunity neighborhoods" are therefore neighborhoods in which the social and economic environment favors positive life outcomes such as educational attainment, employment, and income mobility. See Lens & Reina, *supra* note 68, at 716–18.

71. See Dulchin, *supra* note 5, at 1. Note that the Association for Neighborhood and Housing Development (ANHD) has been campaigning for permanent affordability for at least a decade. See generally KELLY ANNE JOHNSTONE, ASS'N FOR NEIGHBORHOOD & HOUS. DEV., PERMANENT AFFORDABILITY: A NATIONAL CONVERSATION (2009), <https://anhd.org/report/permanent-affordability-national-conversation-0> [<https://perma.cc/6ML7-D4CH>].

72. See CHERYL CORT, COAL. FOR SMARTER GROWTH, LONG-TERM HOUSING AFFORDABILITY FOR THE DISTRICT OF COLUMBIA 17 (2017), https://www.smartergrowth.net/wp-content/uploads/2017/03/LongTermAffordability_FINAL_web.pdf [<https://perma.cc/FBG8-MZ3L>].

73. Emily Thaden, *Permanently Affordable Housing: Sector Chart & Glossary of Terms*, NAT'L COMMUNITY LAND TR. NETWORK (2015), <http://cltnetwork.org/wp-content/uploads/2015/01/Permanently-Affordable-Housing-Sector-Chart-Glossary-11-2014-design-update.pdf> [<https://perma.cc/M7TS-5NGF>].

to rent control, a permanent affordability mandate could mean that rents must not increase by more than a certain share in any given year.⁷⁴ Alternatively, it could mean that rent levels must remain lower than the median or mean rent for an area. The third option — and most common interpretation⁷⁵ — is that permanent affordability requires rent to be set at a level which is affordable for households earning a predetermined share of the area median income.⁷⁶ Under this third scenario, permanent affordability is a concept distinct from rent control because it is a requirement to rent units to low-income households, ensuring they spend no more than 30% of their income on rent. A clear theme across all of these definitions of permanent affordability is that rents are restricted in perpetuity, and any determination beyond that will likely reflect the local affordability problem. The resources and political will to address this problem will occur through such mandates.

IV. POTENTIAL OPPORTUNITIES AND CHALLENGES OF PERMANENT AFFORDABILITY

There are potential opportunities and challenges of permanent affordability mandates, and these tradeoffs vary across time and markets.⁷⁷ There are several main arguments in favor of permanent affordability mandates. First, preservation of affordable housing costs less than the construction of new housing, and therefore should be prioritized.⁷⁸ Next, permanent affordability mandates reduce the

74. See, e.g., TIMOTHY COLLINS, NYC RENT GUIDELINES BD., AN INTRODUCTION TO THE NYC RENT GUIDELINES BOARD AND THE RENT STABILIZATION SYSTEM 89 (2018), <https://www1.nyc.gov/assets/rentguidelinesboard/pdf/history/intro.pdf> [<https://perma.cc/5ZYV-7EPB>].

75. See, e.g., Nico Calvita & Kenneth Grimes, *Inclusionary Housing in California: The Experience of Two Decades*, 64 J. AM. PLAN. ASS'N 150, 151 (1998); Robert Hickey et al., *Achieving Lasting Affordability through Inclusionary Housing* 7–9 (Lincoln Inst. of Land Pol'y, Working Paper No. 14RH1, 2014); CORT, *supra* note 72, at 7.

76. For example, households in project-based Section 8 developments must have incomes below 80% of area median income. See *Policy Basics: Section 8 Project-Based Rental Assistance*, CTR. FOR BUDGET & POL'Y PRIORITIES (Nov. 15, 2017), <https://www.cbpp.org/research/housing/policy-basics-section-8-project-based-rental-assistance> [<https://perma.cc/HJY8-52PU>]. While 80% of area median income is the maximum allowed income for residents of Section 8 project-based rentals, the program further requires that at least 40% of units are available to those households making below 30% of area median income. *Id.*

77. This is a difficulty inherent in developing any universal policy.

78. See Charles Wilkins et al., *Comparing the Life-Cycle Costs of New Construction and Acquisition-Rehab of Affordable Multifamily Rental Housing*, 25 HOUSING POL'Y DEBATE 684, 708 (2015).

gaming of subsidy systems and the administrative costs associated with the existing preservation process.⁷⁹ In addition, these mandates increase household stability and protect, or potentially increase, access to opportunity neighborhoods.⁸⁰ Lastly, they shield existing subsidized affordable housing from the federal government's shifting political priorities.⁸¹

Conversely, such mandates could result in several negative outcomes, including: increasing initial development costs and reducing the number of units being produced; decreasing participation in existing subsidized housing programs; negatively affecting where new subsidized housing units are created; creating future obligations that exacerbate the tradeoffs between allocating funds to preservation versus new construction; and increasing monitoring costs.⁸² Ultimately, while permanent affordability can preserve the affordability of a unit, it does not guarantee the households in those units will not be rent burdened.⁸³

The list of opportunities and challenges discussed in this section highlight the complexity of permanent affordability mandates. However, these potential adverse outcomes do not negate the value of permanent affordability as a policy that municipalities should consider and possibly pursue.

A. The Potential of Permanent Affordability Mandates

One of the primary cases made in support of permanent affordability is the reduced cost associated with maintaining the affordability of existing housing units⁸⁴ — namely, that the per-unit cost of preserving an existing property as affordable is often less than the cost of developing a new affordable unit.⁸⁵ In the short term, the

79. See KHADDURI ET AL., *supra* note 64, at 6.

80. See *infra* notes 97–104.

81. See *infra* notes 105–07.

82. See *infra* notes 108–24.

83. See *infra* notes 125–128.

84. For example, HUD argues that “preserving existing affordable rental housing offers many advantages,” and cites as first among these that “the nation’s stock of government-subsidized affordable rentals represents a taxpayer-funded investment worth billions of dollars” that would cost much less to preserve than rebuild. *Preserving Affordable Rental Housing: A Snapshot of Growing Need, Current Threats, and Innovative Solutions*, OFF. POL’Y DEV. & RES. (2013), <https://www.huduser.gov/portal/periodicals/em/summer13/highlight1.html#title> [<https://perma.cc/8HFP-MJD9>].

85. One study finds that the life-cycle cost of producing new multifamily housing is 25–45% higher than the cost of acquiring and rehabilitating (i.e., preserving) an

preservation of existing affordable housing does not reduce existing rent burden levels but does help ensure that housing affordability problems do not worsen.⁸⁶ In the long term, the preservation of existing affordable housing could potentially increase the number of affordable units because it reduces the number of units exiting the housing stock due to poor physical condition.

Introducing a permanent affordability mandate makes it easier to preserve the affordability of an existing subsidized affordable property. Currently, when affordability restrictions expire, owners of subsidized units can use their actual or potential market return to extract additional resources from public entities hoping to preserve the affordability of those units.⁸⁷ This is true for owners of existing unsubsidized units with rents below the median for a particular market.⁸⁸ Specifically, an owner of an existing subsidized affordable housing development has two options: (1) maintain his or her property as affordable housing with or without a subsidy or (2) have rents follow market demand.⁸⁹ Thus, the owner is always deciding between affordability and the market.⁹⁰ It is not only current market

affordable multifamily property. *See* Reina, *supra* note 33, at 27; Wilkins et al., *supra* note 78, at 704–05.

86. Even residents LIHTC properties are frequently rent burdened. Preserving these properties does not reduce or eliminate these burdens; it merely maintains the existing level of affordability. *See* Anne Williamson, *Can They Afford the Rent? Resident Cost Burden in Low Income Housing Tax Credit Developments*, 47 *URB. AFF. REV.* 755, 791 (2011).

87. *See* KHADDURI ET AL., *supra* note 64, at 48. The owners of LIHTC properties may seek additional tax credit allocations at the end of their contracts because it is profitable. Indeed, “a number of development firms have embraced resyndication and rehabilitation of older affordable properties as a business model.” *Id.* at 55.

88. Atticus Jaramillo, *NOAH: Everything You Need to Know*, CAROLINA PLAN. J. (April 7, 2017), <https://carolinaangles.com/2017/04/07/noah-everything-you-need-to-know/> [<https://perma.cc/EE5V-ZZJN>]. For example, an affordably priced 698-unit apartment complex in Richfield, Minnesota was sold in 2015, and the new owner raised rents and instituted new lease-up requirements, resulting in the displacement of about 80% of the residents. *Id.* This event, on its own, offset nearly all the production of new affordable housing in the Twin Cities metro area that had occurred the preceding year. *Id.* The risk of losing so-called “naturally occurring affordable housing,” or NOAH, has motivated government and nonprofit entities to create preservation strategies specifically for unsubsidized properties. *Id.*

89. For existing subsidized housing units this happens at the point where all affordability restrictions on the property expire, whereas for unsubsidized property this can happen at the end of a lease in the case of increasing rent or at any point in the case of a property sale. *See* Reina & Begley, *supra* note 67, at 2.

90. In the case of existing subsidized housing, the Association of Neighborhood and Housing Development describes this choice as being between “the value of cashing out and going to market, versus the value the government will provide him or her to keep the property affordable.” *See* DULCHIN, *supra* note 5, at 8. Evidence

values that affect an owner's decision to exit a subsidy program, but also the anticipated growth in values.⁹¹ Public officials must either negotiate with owners seeking to exit an affordability program or risk losing subsidized affordable units. Indeed, there is an economic incentive for owners who are interested in maintaining the affordability of their properties to pretend otherwise in order to extract resources from a public entity. A permanent affordability restriction limits an owner's negotiating power. If a property has a permanent affordability restriction, then its owner must keep the unit affordable, and thus has less leverage when negotiating with a public entity for resources. Under the permanent affordability scenario, the owner is only able to negotiate subsidies based on the rehabilitation costs needed to maintain the property, as opposed to potential sales prices or rent potential. As a result, the public cost of preserving affordability falls.

Permanent affordability mandates also reduce the administrative costs of preserving affordable and subsidized housing. Research on preserving affordable housing highlights the need for coalitions of advocates, developers, residents, and government officials to work together and use data to proactively determine where rents are likely to increase, or subsidies will expire.⁹² Further, current research also emphasizes that these partnerships between stakeholders, advocates, tenants, and the government take time to develop and require considerable resources to be sustained.⁹³ Ultimately, a permanent affordability restriction reduces some of this complexity surrounding the preservation of low-cost housing. First, less advocacy and organizing is needed to pressure owners to keep properties affordable if they are required to do so.⁹⁴ Further, much of the cost of litigating preservation will be eliminated if there is a clear mandate tied to affordability.⁹⁵ While there will still be litigation from owners looking

shows that this calculation is likely different for nonprofit owners because of their social mission, but for all other owners that is not the case. *See* Reina & Begley, *supra* note 67, at 7.

91. *See* Reina & Begley, *supra* note 67, at 7. Properties located in neighborhoods with high property value growth and for-profit owners are more likely to opt out of the Mitchell-Lama program. *Id.*

92. Kathryn Howell et al., *One Size Fits None: Local Context and Planning for the Preservation of Affordable Housing*, 29 HOUSING POL'Y DEBATE 148, 162 (2019).

93. Kathryn Howell, *Neighborhoods, Local Networks and the Non-Linear Path of the Expiration and Preservation of Federal Rental Subsidies*, 55 URB. STUD. 3092, 3107 (2018).

94. *See* DULCHIN, *supra* note 5, at 8.

95. Currently, organizers and residents litigate to preserve affordable housing from owner opt-outs by intervening in federal foreclosure proceedings to promote

to exit affordability restrictions, a permanent affordability mandate reduces these instances and consequently reduces the current cost to the public of preservation.⁹⁶

A permanent affordability mandate could also increase housing stability and neighborhood access.⁹⁷ While it remains unclear whether neighborhood improvement leads to direct displacement, even households not displaced from an appreciating neighborhood can be forced into a sub-optimal living situation in order to maintain access to that neighborhood.⁹⁸ Preservation can be a bulwark against potential displacement. In addition, many existing affordable units, and particularly older subsidized housing units, are currently located in higher-opportunity neighborhoods.⁹⁹ These older subsidized housing units are more likely to have reached, or be on the verge of approaching, the end of their affordability restriction period.¹⁰⁰ Finally, households living in properties where a subsidy has expired have a higher propensity to move due to said subsidy expiration.¹⁰¹ In

preservation sales; enforcing the prepayment restrictions in federal mortgages; participating in bankruptcy proceedings to preserve project subsidies; using state law to preserve state-subsidized projects; and enforcing the city's right-to-purchase legislation. See Ellen Davidson & Ed Josephson, *Preserving New York's Subsidized Housing Through Litigation*, 18 J. AFFORDABLE HOUSING 437, 438 (2009).

96. Developers have challenged inclusionary housing mandates on the basis that they violate the Constitution's Fifth Amendment Takings Clause and could mount similar challenges against permanent affordability restrictions. See Richard A. Epstein, *The Unassailable Case Against Affordable Housing Mandates*, in EVIDENCE & INNOVATION IN HOUSING LAND AND POLICY 64, 66 (Lee Anne Fennell & Benjamin J. Keys eds., 2017).

97. There is a large body of literature addressing neighborhood change and its relationship with displacement. For a thorough review of this literature, see Ingrid Gould Ellen & Katherine M. O'Regan, *How Low-Income Neighborhoods Change: Entry, Exit, and Enhancement*, 41 REGIONAL SCI. & URB. ECON. 89, 90 (2011).

98. Kathe Newman and Elvin Wyly found that households in gentrifying neighborhoods who remained in that neighborhood were more likely to double up, pay a higher share of their income in rent, or live in sub-optimal housing. See Kathe Newman & Elvin K. Wyly, *The Right to Stay Put, Revisited: Gentrification and Resistance to Displacement in New York City*, 43 URB. STUD. 23, 48–49 (2006).

99. Lens & Reina, *supra* note 68, at 727.

100. LIHTC properties completed before 1989 were subject to a 15-year affordability restriction, while later-year buildings must maintain their affordability for 30 years. See SCHWARTZ, *supra* note 3, at 151. HUD-subsidized properties have varying affordability periods, typically 20 to 40 years. See *id.* at 203–11. Since many subsidy programs for privately-owned rental housing were created in the 1960s and 1970s, some older properties have already reached the ends of these periods. *Id.*

101. See Vincent Reina, *The Impact of Mobility and Government Rental Subsidies on the Welfare of Households and Affordability of Markets* 41–64 (Aug. 9, 2016) (Ph.D. dissertation, Univ. of S. Cal.), <http://digitallibrary.usc.edu/cdm/ref/collection/p15799coll40/id/281192> [<https://perma.cc/9JXB-4CZJ>].

some circumstances where an existing place-based subsidy expires, households are eligible for a voucher as a form of safety net to prevent a household from displacement.¹⁰² Those who can use the voucher tend to move to slightly lower-poverty neighborhoods.¹⁰³ However, less than 50% of those households eligible for the voucher succeed in using it, despite the high level of demand.¹⁰⁴ An affordability mandate on a property would likely reduce the odds of displacement from a housing unit. Such a mandate may also allow a household to remain in neighborhoods that have improved or are improving because it shields that household from rent increases (and the threat thereof). As a result, mandating permanent affordability could ensure low-income households are not displaced, regardless of whether the housing is subsidized, and ensure households can remain in a neighborhood as it improves.

Finally, an essential feature of a permanent affordability mandate is its ability to protect existing affordable housing from national policy shifts which reduce support for affordable housing. In 2018, the federal government suspended most of its operations due to an impasse on the federal debt limit extension, which affected the federal government's ability to honor some of its subsidy payments.¹⁰⁵ This occurred amid budget proposals that would reduce or eliminate funding for many subsidized housing programs.¹⁰⁶ Such events serve to reduce confidence in the government's commitment to providing housing subsidies, and could negatively affect an owner's desire to remain in a subsidized housing program.¹⁰⁷ As a result, it is likely that when allowed to opt out, a distrustful owner would rationally do so.

102. Vincent Reina & Ben Winter, *Safety Net? The Use of Vouchers When a Place-Based Rental Subsidy Ends*, 56 URB. STUD. 2092, 2093 (2019).

103. *Id.* at 2103.

104. *Id.* at 2094.

105. Suzy Khimm & Laura Strickler, *Because of the Shutdown, More Than 1,000 Affordable Housing Contracts Have Expired*, NBC NEWS (Jan. 8, 2019), <https://www.nbcnews.com/politics/white-house/because-shutdown-more-1-000-affordable-housing-contracts-have-expired-n955971> [<https://perma.cc/F6X7-AQGF>].

106. *President Trump Proposes Drastic Cuts to Affordable Housing Programs*, NAT'L LOW INCOME HOUSING COALITION (Mar. 11, 2019), <https://nlihc.org/resource/president-trump-proposes-drastic-cuts-affordable-housing-programs> [<https://perma.cc/M4EY-RMXZ>]. President Trump's proposed budget would have eliminated or greatly reduced funding to programs such as the Housing Trust Fund, the HOME Investment Partnership program, and public housing capital repair. *Id.*

107. See Amanda Abrams, *The Government Shutdown Put Thousands at Risk for Eviction: Officials Worried About Loss of Trust*, YES! MAG. (Feb. 12, 2019), <https://www.yesmagazine.org/peace-justice/trust-in-hud-public-housing-at-stake-overlooming-government-shutdown-20190212> [<https://perma.cc/5CWW-37DN>].

A permanent affordability restriction would limit an owner's ability to make this choice, preserving the unit's affordability amid such shifts in federal affordable housing subsidies.

B. Challenges and Unintended Consequences of Mandating Permanent Affordability

While many of these features of affordability mandates seem desirable, they do not come without costs. One main argument made against a permanent affordability mandate is that it could decrease the number of affordable housing units being developed, as well as the pool of owners willing to enter affordability agreements.¹⁰⁸ There is a constant tension between the desire to promote housing affordability with incentives and mandates, and ensuring that those incentives and mandates do not affect developers' and owners' willingness to engage in programs. This debate is reflected in the creation of inclusionary zoning policies. Inclusionary zoning uses a mixture of incentives and mandates to leverage existing market-rate development to increase the supply, and diversify the location, of affordable housing.¹⁰⁹ There are a myriad of inclusionary housing programs, and ultimately much uncertainty about the net impact of these policies on housing production and affordability.¹¹⁰

Like inclusionary zoning, a permanent affordability restriction could have two effects on an owner's decision-making. First, this restriction could reduce the likelihood of an owner engaging in an affordable housing program at all because it reduces an owner's long-term return on their investment.¹¹¹ A permanent mandate restricts

108. For arguments against perpetual affordability restrictions in inclusionary zoning programs, see generally NAT'L ASS'N HOME BUILDERS, *INCLUSIONARY ZONING PRIMER* (2015), <https://www.nahb.org/~media/Sites/NAHB/Research/Priorities/September-2015-Updated-NAHB-Inclusionary-Zoning-Primer.ashx> [https://perma.cc/3857-CF7X].

109. See generally Jenny Schuetz et al., *31 Flavors of Inclusionary Zoning: Comparing Policies from San Francisco, Washington, DC, and Suburban Boston*, 75 J. AM. PLAN. ASS'N 441 (2009) (providing an overview of the variation in types of inclusionary zoning programs).

110. See Emily Thaden & Ruoniu Wang, *Inclusionary Housing in the United States: Prevalence, Impact, and Practices* 14–31 (Lincoln Inst. of Land Pol'y, Working Paper No. WP17ET1, Sept. 2017). Thaden and Wang also review a broad set of inclusionary zoning programs. *Id.* While they point to the number of units developed, this estimate does not subtract the counterfactual, that is, the number of units that would have been developed had these programs not existed. *Id.* at 31. As a result, the large number of units developed are a sign of success, but it is not clear that a lower number of units would have been developed absent the policy. *Id.* at 58.

111. For a description of the financial considerations facing developers subject to affordable housing restrictions, see Rachel Bratt, *Affordable Rental Housing*

rents for a more extended period of time and raises the risk associated with the future sale of the property.¹¹² A future purchaser would be required to maintain the affordability of the property.¹¹³ Moreover, in some instances, a purchaser may even need to be approved by a public entity, thus reducing the sales price and potential pool of purchasers.¹¹⁴ In addition, an owner who knows they need to keep their property below market rate will likely face higher upfront capital costs in order to establish the reserves required to maintain the property over time.¹¹⁵ This capital requirement increases the initial development or preservation cost of a property with a permanent affordability mandate.¹¹⁶ Together, these two factors reduce the return on developing or preserving affordable housing, absent a subsidy accounting for that difference. The lower return could then reduce the number of actors engaging in affordable housing development and preservation, thus negatively impacting the actual number of units developed and preserved overall.

A second potential consequence of permanent affordability mandates is the potential effect on the location of affordable housing. Owners in high appreciation areas are less likely to commit to restricting rent levels absent a subsidy that matches or exceeds the

Development in the U.S. For-Profit Sector: Implications of a Case Study of McCormack Baron Salazar, 28 HOUSING POL'Y DEBATE 489 (2018).

112. See *id.* at 496–97. The developer in the case study sold 19% of its subsidized properties at year 15, sometimes because the combination of restricted rents and the lack of additional public resources made it impossible to reposition the assets for another 15 years such that they would remain financially viable. *Id.*

113. Affordability restrictions, until they expire, are passed onto subsequent purchasers. See KHADDURI ET AL., *supra* note 64, at 51–52.

114. The existing pool of affordable housing developers is already limited by rising development costs, limited returns, and cuts to government subsidy programs. See Gabriella Chiarenza, *Challenges for Affordable Housing in a New Era of Scarcity*, 25 COMMUNITY INV. 2, 3 (2013).

115. See CORP. FOR SUPPORTIVE HOUS., CAPITALIZED RENTAL SUBSIDY RESERVES: CONCEPT SUMMARY 1 (2006), <https://www.csh.org/wp-content/uploads/2012/07/CapitalizedReservepdf.pdf> [<https://perma.cc/43MV-XER2>]. Affordable housing developers create reserve funds to insure against unforeseen costs and to protect the project's long-term viability. STATE OF NEW JERSEY, A GUIDE TO AFFORDABLE HOUSING FUNDING SOURCES 11 (2008), <https://www.nj.gov/dca/affiliates/coah/resources/planresources/fundguide.pdf> [<https://perma.cc/W2BP-ZRXW>]. Such funds must be greater if the project operates at reduced rents for an extended period of time. *Id.* These funds are often capitalized into the project's development budget, thus raising the initial cost of development. *Id.*

116. *Id.*

expected return on the market.¹¹⁷ Consequently, a permanent affordability mandate could reduce the development and preservation of existing affordable and/or subsidized units in high-cost or high-appreciation markets. However, owners may be willing to accept a subsidy in exchange for a commitment to permanent affordability if their properties are located in areas where there is greater uncertainty about future appreciation. A permanent affordability mandate could push development and preservation away from higher-opportunity areas, or areas that are improving, to exclusively declining, stagnant, or uncertain markets.

A primary concern with a permanent affordability mandate is the likelihood that impacted properties will need subsidies at a later point in order to meet that mandate, thus creating an ongoing pipeline of properties needing public subsidies. Every property, even those capitalized with significant reserves during its initial financing, will eventually need to be rehabilitated, and the cost of those future repairs are difficult to predict. The reduced rent levels mandated by an affordability restriction reduce the amount of debt a property can carry. This reduction in debt effectively limits the amount of capital that can be used to rehabilitate a property.¹¹⁸ Consequently, this would mean that properties subject to a permanent affordability mandate will likely need additional financing in the future to maintain the quality of units and meet this mandate. This quandary creates a set pool of properties that will need reoccurring subsidies over time. Furthermore, some properties will need additional public resources to remain viable subsidized affordable housing options and will be competing for the same resources being used to develop new units.¹¹⁹

117. Mitchell-Lama property owners, for example, were much less likely to recommit to affordability restrictions in areas experiencing above-average property value appreciation. See Reina & Begley, *supra* note 67, at 6–7, 10.

118. Some developers use additional federal rental subsidy programs, such as Section 8 rental assistance, to ensure they can both meet their affordability goals and maintain higher rent levels to attract the capital required to maintain their property. Section 8 rental assistance, either through the project-based Section 8 or the voucher program, is a subsidy that covers the gap between the HUD approved rent for a unit and the tenant rent payment. The tenant rent payment is set at 30% of household income. As a result, the subsidy allows an owner to attract capital based on market rents, but ensures tenants are not rent burdened. The demand for Section 8 subsidies exceeds the supply, which means not all properties can benefit from this resource. For more details on the programs and subsidy layering, see Vincent Reina & Michael Williams, *The Importance of Using Layered Data to Analyze Housing: The Case of the Subsidized Housing Information Project*, 14 *CITYSCAPE* 215 (2012). For more details on the high demand for Section 8 subsidies, see Landis & Reina, *supra* note 12, at 12, 15–16.

119. Reina, *supra* note 33, at 4.

Ultimately, in many years going forward there will be more subsidized housing units in need of preservation than the annual average number of units developed through the LIHTC.¹²⁰ In New York City, for example, nearly 60% of the existing LIHTC units that needed reposition between 2008 and 2015 required additional forms of public investment.¹²¹ While the cost per unit was well below that of new construction, this still reflects an increasing commitment of public resources to the preservation of existing affordable housing, which could come at the cost of subsidizing new developments.¹²²

A final challenge with a permanent affordability mandate is the required additional monitoring of units. The monitoring of units comes in two primary forms: ensuring low-income households are renting them and ensuring housing quality standards are met.¹²³ Adequate monitoring is essential to the success of long-term affordability mandates, and necessitates a public investment in the capacity of public agencies to monitor the affordability of these properties.¹²⁴

Finally, one item that is both an opportunity and a challenge of permanent affordability is the mandated level of affordability. It is expensive to develop affordable housing for the lowest income households.¹²⁵ Accordingly, even some of the units developed

120. *Id.* at Figure 1 at 4.

121. DULCHIN, *supra* note 5, at 9.

122. The cost of preserving affordable units is well below that of constructing new ones. *See* Wilkins et al., *supra* note 78, at 707–08. But the costs of preservation can still be so high as to impede new construction. *See* SCHWARTZ, *supra* note 3, at 211. For example, the cost of renewing Section 8 contracts, even when renewed for very short periods, “escalated nearly to the point of absorbing HUD’s entire budget” in the 2000s. *Id.*

123. *See*, for example, the Washington D.C. Department of Housing and Community Development’s project monitoring functions. *Department of Housing and Community Development*, DC.GOV, <https://dhcd.dc.gov/service/project-monitoring> [<https://perma.cc/EW6J-WAQS>] (last visited Oct. 1, 2019). The department conducts two primary types of oversight of projects developed through federal and local subsidy programs: quality assurance and compliance monitoring. *Id.*

124. Alex Schwartz & Edwin Melendez, *After Year 15: Challenges to the Preservation of Housing Financed with Low-Income Housing Tax Credits*, 9 HOUSING POL’Y DEBATE 261, 262, 289 (2008). “[Many states] have yet to devise systems to monitor long-term compliance with [affordability] requirements or sanctions in the event of violation.” *Id.* at 262.

125. *See* ANDREW JAKABOVICS ET AL., URB. LAND INST., BENDING THE COST CURVE: SOLUTIONS TO EXPAND THE SUPPLY OF AFFORDABLE RENTALS 8–9 (2014). Housing development costs are driven by “site constraints, design elements, local land use and zoning restrictions, building codes, [and] delays in the development process.” *Id.* at 8. In the case of deeply affordable housing, costs are increased by

through the LIHTC program, the primary tool for developing new subsidized affordable housing units, are often only affordable at 50% or 60% of area median income.¹²⁶ As a result, many households earning less than that amount live in a subsidized unit but are still rent burdened.¹²⁷ On the other hand, because of HUD's ongoing rental support, households in project-based Section 8 developments are guaranteed that their rent will not exceed 30% of their income.¹²⁸ In both cases, a permanent affordability restriction would ensure the preservation of an affordable unit, but only in one of the cases would it ensure that households are not rent burdened.

V. POLICY IMPLICATIONS

Ten years ago, nearly every economist argued that rent control was an inefficient policy because it reduced the supply of housing.¹²⁹ However, given today's affordability challenges, at least one well-regarded economist has argued that every tool needs to be on the table, and policies like rent control may be important for increasing the stock of affordable housing in some settings and for certain periods of time.¹³⁰ Like rent control, permanent affordability deserves reconsideration. For instance, when the Mitchell-Lama program was created, mandating longer affordability commitment periods was challenging.¹³¹ Today, however, developers are actively competing for subsidies with affordability restriction periods —

subsidy program regulations and by the services and amenities necessary to improve the lives of very low-income households. *Id.* at 18–20.

126. The Furman Center for Real Estate and Urban Policy found that of 12,228 LIHTC developments in 16 states, 21% of tenants had incomes at or above 50% of area median income. NYU FURMAN CTR. & MOELIS INST., *WHAT CAN WE LEARN ABOUT THE LOW INCOME HOUSING TAX CREDIT PROGRAM BY LOOKING AT TENANTS?* 3–4 (2012), https://furmancenter.org/files/publications/LIHTC_Final_Policy_Brief_v2.pdf [<https://perma.cc/C3W9-7R64>].

127. Anne R. Williamson, *Can They Afford the Rent? Resident Cost Burden in Low Income Housing Tax Credit Developments*, 47 *URB. AFF. REV.* 775, 791 (2011).

128. See SCHWARTZ, *supra* note 3, at 207, 222.

129. See generally Blair Jenkins, *Rent Control: Do Economists Agree?*, 6 *ECON. J. WATCH* 73 (2009). For a review of rent control literature, see LISA STURTEVANT, NAT'L MULTIFAMILY HOUS. COUNCIL RES. FOUND., *THE IMPACTS OF RENT CONTROL: A RESEARCH REVIEW AND SYNTHESIS* 10–12 (2018), <https://www.nmhc.org/globalassets/knowledge-library/rent-control-literature-review-final2.pdf> [<https://perma.cc/2QNM-L98M>].

130. See Gary Painter, *No, Rent Control Doesn't Always Reduce the Supply of Housing*, *L.A. TIMES* (Oct. 31, 2018), <https://www.latimes.com/opinion/op-ed/la-oe-painter-rent-control-economist-20181031-story.html> [<https://perma.cc/VZ48-QTDT>].

131. See MITCHELL-LAMA RESIDENTS COALITION, *supra* note 54.

sometimes more than 60 years.¹³² While 60 years is not perpetuity, a 60-year long restriction period may pose the same negative development incentives of a permanent affordability mandate. So, how can one determine when the clear long-term benefits of a permanent affordability mandate outweigh the potential challenges?

One solution is that municipalities can estimate the option value associated with a permanent affordability mandate. Essentially, how much is a government willing to pay now to preserve the affordability of a unit in the future? Or, how much is the government willing to pay in order to maintain the option to decide the best use of the land that the property is developed on, which could or could not be deemed to be for affordable housing? This payment can come in different forms. First, it can be a direct public subsidy which increases the rate of return, or one which increases the security of the return, for developers who agree to such a restriction. For example, the permanent affordability mandate might be accompanied by a subsidy which allows for a higher initial developer fee that is extracted at the time of financing, or it could subsidize deeper reserves to ensure the long-term viability of property, offering a moderate return.¹³³ Municipalities should acknowledge that zoning variances, tax abatements and land given to developers for free or at below market prices, are also significant subsidies. They should also acknowledge that when we consider these forms of public supports as “subsidies,” the public actually subsidizes a larger share of housing development than just those units with federal rental subsidies. Further, in instances where a city gives a developer land — land that will not be returned to the city — the future value of the land should be considered when evaluating the appropriateness of long-term affordability mandates.

A future value calculation of a permanent affordability mandate could also vary based on where units are being developed. For

132. For instance, New York City’s 9% LIHTC deals come with an affordability restriction of 60 years, yet it remains highly competitive. Press Release, N.Y.C. Housing Preservation & Dev., HPD Announces the Award of \$18.1 Million in Tax Credits to Create Nearly 1,000 Affordable Homes Across the Five Boroughs (Dec. 18, 2018), <https://www1.nyc.gov/site/hpd/about/press-releases/2018/12/hpd-announces-the-award-of-tax-credits.page> [<https://perma.cc/9LSV-GY2Z>].

133. “Moderate” meaning something along the lines of the return on a bond. Long-term government bonds have returned an average of 5.7% per year since 1926, compared with 10.1% per year for stocks. VISTA CAPITAL PARTNERS, THE OPTIMAL PORTFOLIO (2015), <https://vistacp.com/wp-content/uploads/2015/07/The-Optimal-Portfolio1.pdf> [<https://perma.cc/3UZQ-GKX3>].

example, a municipality may see a higher value associated with the option of preserving future affordability in a neighborhood showing early signs of price appreciation because the chances of preserving or developing affordable housing on land in those areas may be less financially feasible in the future, as opposed to one that is still declining. As a result, the municipality may be willing to offer a subsidy in exchange for a permanent affordability restriction in the former case, and offer a proportionately lower subsidy in exchange for a restriction in the latter case.

Alternatively, a municipality could elect not to provide any subsidy to incentivize owners to commit to permanent affordability, taking on the risk of fewer units being developed but that those developed are permanently affordable. In essence, municipalities may decide that future affordability expirations could offset current development levels, and that fewer units initially produced with longer restrictions will result in a larger supply of affordable housing in the long term. Regardless of the scenario, municipalities should consider the value of the future option of preservation and use that to guide their decisions around a permanent affordability mandate. A universal program requiring properties to receive any subsidy to be permanently affordable may not be as efficient as one that varies based on current, and perceived future, market dynamics.

CONCLUSION

Ensuring there is an adequate supply of affordable housing in good condition for the lowest-income households is an important housing policy goal. The need for such housing has become all the more important because most low-income households across the country face crippling housing cost burdens. Even if there was a large-scale supply response to current demand for housing, significant subsidies would still be needed to alleviate the severe rent burdens that the lowest-income households face. This lack of affordable housing places increased pressure on the limited resources the government has to supply affordable rental units. As a result, advocates have called for more aggressive affordability requirements to accompany public subsidies for housing, with some suggesting permanent affordability mandates. Permanent affordability mandates can be an important tool to ensure an adequate supply of affordable and suitable housing options, but this approach does not come without drawbacks.

This Article highlights the complexity of mandating permanent affordability. There are many potential benefits of placing

affordability restrictions on properties that are in perpetuity. A primary reason for permanent affordability restrictions is the possibility for a cheaper long-term solution to ensure there is an adequate supply of affordable housing. This approach could have the added benefit of ensuring that at least some of that supply is in improving or higher-opportunity neighborhoods. Conversely, permanent affordability mandates could increase development costs and therefore reduce the number of affordable units being produced. Such mandates could also result in affordable units only being produced in areas experiencing no growth. These conflicting potential outcomes suggest that permanent affordability mandates could improve housing affordability goals in some markets, and have the opposite effects in others.

One clear takeaway is that policymakers should account for the current and future value and benefits of affordability restrictions when making approvals in the development process. When there is public land, zoning variances, tax abatements, and actual dollars going into developments, the public sector has significantly more leverage in dictating the extent of such affordability mandates. However, government subsidies are competing with private market returns, which are based on investment risk and future values, and affordability mandates need to account for this. In the end, there is no hard and fast rule about when to apply permanent affordability mandates to developments, but it is clear these mandates are a viable tool that should be used to advance housing affordability goals.