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An Opportunity Zone Falls in a Forest

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AN OPPORTUNITY ZONE FALLS IN A FOREST

*Anika Singh Lemar**

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INTRODUCTION

A recent press account summarizing research on the question of who benefits from economic development tax subsidies began:

At its best, the federal New Markets Tax Credit program has subsidized projects like a community-owned grocery store in West Oakland. Or a new permanent home for an immigrant rights organization in Queens, New York. Or the re-purposing of a 180-acre former steel production site on the far South Side of Chicago into spaces for retail, green manufacturing and food production, and the largest indoor recreational space in the region. At its worst, the same program has subsidized high-priced condominiums or even convention centers that spark or accelerate gentrification.¹

Unpacked, the paragraph contends that economic development subsidies, when well-spent, fund amenities that do not lead to gentrification. The paragraph, however, makes a number of

* Clinical Professor of Law, Yale Law School. Thank you to the *Fordham Urban Law Journal* for this symposium, particularly Cristina Lombardi for organizing the symposium and Shazell Archer and Stephen Rutman for their work on this Essay, and to Nathan Cummings for providing able research assistance.

1. Oscar Perry Abello, *Who Benefits from the New Markets Tax Credit? New Research Dives into 5,000 Projects to Find Out*, NEXT CITY (May 4, 2021), <https://nextcity.org/daily/entry/who-benefits-from-the-new-markets-tax-credit> [<https://perma.cc/RKZ3-H2FZ>].

assumptions about what sorts of subsidized transactions might yield gentrification: Community-owned retail does not lead to gentrification and high-priced condominiums do. Consider, however, the preferences of potential gentrifiers, well-paid, college-educated people living in or near low-income neighborhoods. Many readers of the quoted article, in fact, are probably potential gentrifiers. And, as they read this list of subsidized deals, it seems likely that many of them thought to themselves, “I would love to live in a neighborhood with a community-owned grocery store.” A community-owned grocery store — where presumably there had previously been no grocery store — would make many potential gentrifiers more likely to move to that former food desert. Similarly, an indoor recreational space sounds like an attractive amenity for families of all income bands.

But neighborhoods with convention centers are not generally considered particularly attractive. And the empirical research is quite clear that even “high-priced condominiums” do not raise nearby rents and they sometimes help to stabilize or decrease them.² That is not surprising: Developers like to build their “high-priced condominiums” where rents are already rising; they do not typically look to roll the dice in low-rent neighborhoods with no preexisting upward rent trajectory.³

In other words, the lede understood the conventionally accepted truth — high-end condominiums are a sign of gentrification — but misunderstood the causation. And perhaps it also misunderstood whether the tax credits that subsidized these transactions actually caused the transaction to occur, a question we need to take especially seriously in the context of Opportunity Zones, the cousin of the New Markets Tax Credit that was the subject of this symposium.

Whether Opportunity Zones cause or facilitate gentrification is a difficult question in part because it is far from clear that Opportunity Zones have a “but for” causal impact at all. Do Opportunity Zones drive investment decisions, or are they frosting on the top of an already-tasty cake? Some tax credit programs — for example, the more lucrative version of the Low-Income Housing Tax Credit — provide sufficiently deep subsidies to render an unprofitable

2. Xiaodi Li, *Do New Housing Units in Your Backyard Raise Your Rents?*, FANNIE MAE 1 (June 13, 2020), <https://www.fanniemae.com/media/35821/display> [<https://perma.cc/3VH2-3Z7U>].

3. *Id.* at 50.

transaction profitable.⁴ A rental housing complex with capped, below-market rents is not a profitable transaction. Add in 9% Low-Income Housing Tax Credits and, lo and behold, it is.

Other credits provide a shallower subsidy that nonetheless can be leveraged to draw private investment that might not otherwise have occurred. Consider, for example, the New Markets Tax Credit. It is shallower than the 9% Low-Income Housing Tax Credit, but the Internal Revenue Service has endorsed a leveraged loan model that makes it possible for a tax credit-motivated investor to pursue deals, the profitability of which turn on the tax credits.⁵ Opportunity Zones, however, are a shallow subsidy. The subsidy is insufficiently large to make unprofitable deals profitable, though it will make some profitable deals marginally more attractive to investors.⁶

Whether Opportunity Zones cause gentrification, then, is two inquiries, at least, baked into one. What, if anything, are the effects of Opportunity Zones? And do those effects cause gentrification? In other words, do Opportunity Zones cause the things that cause gentrification? This Essay unpacks these two questions in the reverse order. Part I explores the policies and conditions that lead to gentrification. Part II then examines the impact of the Opportunity

4. Roger M. Groves, *The De-Gentrification of New Markets Tax Credits*, 8 FLA. TAX REV. 214, 218 (2007).

5. The leveraged loan model effectively multiplies the effect of the credit by permitting the amount of credit to be calculated based, in part, on loan proceeds. The lender receives only interest and principal. The tax credits are paid to the equity investor, even though the amount of credit is based, in significant part, on the amount of the loan. “The [New Markets Tax Credit] is only equal to 39% of the equity investment made into the CDE — no investor would be satisfied with an investment of \$1 that results in a return of only \$0.39 The leverage model combines equity from a tax credit investor with the leverage loan proceeds The transaction is structured so that the leverage lender gets a return similar to its normal commercial lending activities — interest and principal and the tax credit investor gets what it is usually seeking — tax credits and some amount of cash return.” *New Markets Tax Credit Basics*, HOLLAND & KNIGHT LLP, http://services.housingonline.com/nhra_images/NMTC%20Basics.pdf [<https://perma.cc/6A9M-VGQX>] (last visited Aug. 25, 2021).

6. BRETT THEODOS ET AL., URB. INST., AN EARLY ASSESSMENT OF OPPORTUNITY ZONES FOR EQUITABLE DEVELOPMENT PROJECTS 21 (2020), <https://www.urban.org/sites/default/files/publication/102348/early-assessment-of-opportunity-zones-for-equitable-development-projects.pdf> [<https://perma.cc/7LQL-QPC6>]. Urban Institute researchers spoke to investors who quantified the value of Opportunity Zone tax benefits as “adding somewhere between 150 to 300 basis points to the return for most deals.” *Id.* The interviewees concluded that “for a typical project, the incentive is not enough to provide the return that investors seek.” *Id.* One fund manager told the researchers, “you will hardly see the OZ incentive turning a project with a 5-to-8 percent return from a ‘no’ to a ‘yes,’ but it may happen with a project with a 10 percent return.” *Id.*

Zone program. Part III and the Conclusion argue that place-based economic development subsidies, like Opportunity Zones, are attractive to policymakers but unlikely to result in poverty alleviation. Advocates and scholars committed to addressing the problems facing low-income places will have to look elsewhere for solutions.

I. WHAT CAUSES GENTRIFICATION?

The vast majority of low-income census tracts in the United States are not at risk of gentrifying.⁷ Instead, in an era of escalating wealth inequality, segregation, and regional economic disparities, most low-income places are only likely to see ever-increasing rates of poverty.⁸ Nevertheless, considering this question — what causes gentrification — can be helpful to probing broader questions about place-based subsidies and the impacts of those subsidies on low-income people.

Researchers studying gentrification have endeavored to identify what kinds of investments trigger displacement and have distinguished between “amenity effects” of development and “supply effects.”⁹ Adding housing supply has “supply effects.”¹⁰ By absorbing a portion of demand, adding supply can decrease the rate at which rents rise.¹¹ If the effect is large enough or demand is relatively weak, it can even stabilize or decrease rents.¹² Developing housing, therefore, can mitigate escalating housing prices, a key component of gentrification.

7. By some accounts, as many as 20% of gentrification-eligible (i.e., low-income) census tracts gentrified in recent decades. See Miriam Zuk et al., *Gentrification, Displacement, and the Role of Public Investment*, 33 J. PLAN. LITERATURE 31, 33 (2018). Others, however, find even less impact across the nation. See ALAN MALLACH, *THE DIVIDED CITY: POVERTY AND PROSPERITY IN URBAN AMERICA* 123–44 (2018).

8. Zuk et al., *supra* note 7, at 33.

9. SHANE PHILLIPS, MICHAEL MANVILLE & MICHAEL LENS, UCLA LEWIS CTR. FOR REG'L POL'Y STUD., *THE EFFECT OF MARKET RATE DEVELOPMENT ON NEIGHBORHOOD RENTS* 7–14 (2021), <https://www.lewis.ucla.edu/research/market-rate-development-impacts/> [<https://perma.cc/EXU9-79TQ>] (citing and explaining several such studies).

10. See, e.g., Vicki Been, Ingrid Gould Ellen & Katherine O'Regan, *Supply Skepticism: Housing Supply and Affordability*, N.Y.U. FURMAN CTR. 4 (Aug 20, 2018), https://furmancenter.org/files/Supply_Skepticism_-_Final.pdf [<https://perma.cc/QV6X-RNSZ>] (describing how restricting the supply of houses increases housing prices).

11. See PHILLIPS ET AL., *supra* note 9, at 4.

12. Brian J. Asquith, Evan Mast & Davin Reed, *Supply Shock Versus Demand Shock: The Local Effects of New Housing in Low-Income Areas* 16 (Upjohn Inst. for Emp. Rsch., Working Paper No. 19-316, 2019).

Developments that add amenities are different. New amenities can make a neighborhood attractive to people who might not have otherwise considered living there. Joking about gentrification, people will often point to amenities like wine bars, beer gardens, and organic groceries as signs of gentrification. These amenities might be indicators that gentrification is taking place.¹³ It is unclear, however, that they drive gentrification. Other amenities are likely more important to an individual's decision on where to live. Indeed, the more basic amenities to which low-income people are entitled are the same amenities that might attract middle- and high-income people to low-income neighborhoods.

Returning to the earlier example, grocery stores are a fundamental need that all people share. Low-income neighborhoods are often food deserts.¹⁴ They lack adequate access to reasonably priced groceries. For that reason, community development corporations, nonprofit organizations, funders, and others seek to advance policy and transactions that can bring grocery stores to low-income neighborhoods.¹⁵ These grocery stores, then, also make a neighborhood more livable for wealthier households that would not have otherwise considered living in a neighborhood without a grocery store. Making a place more livable — nicer parks; more retail, full-service grocery stores; safer streets; transportation infrastructure; proximity to jobs — makes it more attractive to middle-class and wealthy people whose ability to pay for housing will outpace that of existing residents. Even when programs like New Markets Tax

13. See Neil Reid, *Do Craft Breweries Gentrify Neighborhoods? It's Complicated*, SALON (Jan. 13, 2020, 1:00 PM), <https://www.salon.com/2020/01/13/are-craft-breweries-a-harbinger-of-gentrification-its-complicated/> [https://perma.cc/UNC9-FMN6] (summarizing the author's own research to conclude that "in most cases, craft breweries are *not* the catalyst for neighborhood revitalization or gentrification. Rather, they typically follow other investments").

14. See Kelly M. Bower et al., *The Intersection of Neighborhood Racial Segregation, Poverty, and Urbanicity and Its Impact on Food Store Availability in the United States*, 58 PREVENTIVE MED. 33 (2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3970577/> [https://perma.cc/7GLX-JNGR] ("As neighborhood poverty increased, supermarket availability decreased and grocery and convenience stores increased, regardless of race/ethnicity. At equal levels of poverty, black census tracts had the fewest supermarkets, white tracts had the most, and integrated tracts were intermediate.").

15. WILLIAM H. SIMON, THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT: LAW, BUSINESS, AND THE NEW SOCIAL POLICY 105 (2001); see also *Food Deserts in the United States*, ANNIE E. CASEY FOUND. (Feb. 13, 2021), <https://www.aecf.org/blog/exploring-americas-food-deserts> [https://perma.cc/4G4U-BD43] (a blog post from a foundation that funds interventions intended to benefit low-income families).

Credits are designed to provide those amenities, they are not designed to ensure that those amenities are enjoyed by low-income people. The solution, of course, is not to avoid building a grocery store but instead to build sufficient housing and sufficient affordable housing to ensure that the grocery store benefits low-income residents.

Gentrification, then, is not solely a function of *what* is built. It is, in addition and perhaps even more importantly, a function of *who* gets to enjoy whatever is built. Where a disinvested community is successfully revitalized, “[i]ncumbent residents stay and reap the benefits of neighborhood improvements, whereas in gentrification they can be displaced as the social and economic environment of neighborhoods shift, and the public sector does not take action to protect long-term residents.”¹⁶ As a result of such displacement, investments intended to benefit a neighborhood’s low-income residents may instead benefit wealthier people who are newly attracted to that community once those investments are made.

Even if the tax benefits of Opportunity Zones were limited to uses perceived to increase quality of life or create jobs in job-poor areas, there would be nothing in the program that would require that those uses or jobs be made available to low-income people. In the case of jobs tied to tax credit and other subsidy programs, studies have found these jobs are not created so much as they are redistributed around a region.¹⁷ Moreover, jobs are not necessarily made available to residents of adjacent low-income neighborhoods but instead hire applicants from around the commuting region, including higher-income areas.¹⁸

In fact, even when subsidies or public dollars are used to build public goods, there may be no good mechanisms to ensure that those goods are enjoyed by people who might need them most. As a result, some scholars and observers have worried that improvements to public transit, for example, can drive gentrification and

16. Zuk et al., *supra* note 7, at 3.

17. Timothy Bartik, *Targeting Jobs Toward People Who Need Them*, 39 J. POL’Y ANALYSIS & MGMT. 854, 855 (2020) (“Therefore, when we create jobs in a distressed neighborhood, we are mostly moving jobs around within the metro area.”).

18. *See id.* (“This doesn’t help neighborhood residents much, because there is sufficient commuting within a metro area that overall labor demand in the metro area matters more than where the jobs are located within the metro area.”). Bartik says, further that, “[i]f the job creation is accompanied by improved neighborhood amenities . . . then this might encourage gentrification.” *Id.*

displacement.¹⁹ Car ownership is expensive and universal car usage wreaks havoc on quality of life and the environment.²⁰ Public transit infrastructure is a key policy intervention to ensure economic vitality, access to opportunity, and quality of life. But there are few transit-rich neighborhoods in the United States, even in our most economically vital regions, and adding reasonably frequent, reliable transit to a neighborhood that lacks it will increase that neighborhood's attractiveness to everyone, including people with higher incomes than the people who already reside in that neighborhood. Most reasonable people can agree that transit is a sensible use of public dollars and that low-income people, for whom access to a car would require spending a greater portion of their wealth and income, might disproportionately benefit from transit expenditures. Again, this certainly does not mean that society should stop investing in amenities, whether grocery stores or public transit. And yet, it is not possible to ensure that the benefit of investment flows primarily to low-income residents of a neighborhood in which transit improvements are made. Investments in amenities must be accompanied by additions to housing supply, particularly affordable housing supply.

Meanwhile, the ability of people with money to look elsewhere — to move to a newly desirable neighborhood — dampens the efficacy of using place-based subsidies to improve the lives of poor people. Existing place-based subsidies, other than subsidized, income-restricted affordable housing, have not built in a model for ensuring that the amenities built with those subsidies are enjoyed by low-income people. The inability to solve that puzzle presents a strong argument for cash payments to poor people themselves rather than the indirect approach taken by programs like Opportunity Zones. In census tracts susceptible to displacement, it is not so simple, then, to say, well, the statute ought to define what uses are subsidized by an Opportunity Zones-eligible investment. The same amenities that are desirable to low-income people will attract higher-income people. The point here is not to stop investing in public goods but to encourage policymakers to permit housing construction alongside

19. See, e.g., Jeff Turrentine, *When Public Transportation Leads to Gentrification*, NAT'L RES. DEF. COUNCIL (June 1, 2018), <https://www.nrdc.org/onearth/when-public-transportation-leads-gentrification> [<https://perma.cc/V4YG-8D7D>] (describing “transit-induced gentrification”); see also JEREMY R. LEVINE, *CONSTRUCTING COMMUNITY: URBAN GOVERNANCE, DEVELOPMENT, AND INEQUALITY IN BOSTON* 134–36 (2021).

20. Gregory H. Shill, *Should Law Subsidize Driving?*, 95 N.Y.U. L. REV. 498, 500–02 (2020).

new amenities and to supplement public subsidies targeted at low-income places with subsidies intended to benefit low-income people.

II. WHAT DO OPPORTUNITY ZONES CAUSE?

Opportunity Zones will cause gentrification only insofar as they bring about gentrification-causing transactions that would not otherwise have occurred had it not been for the Opportunity Zone subsidy. The program famously does not require investments to fund developments that will be attractive to low-income people. There are essentially no limitations on what can be built.²¹ Not surprisingly then, some critical accounts suggest that Opportunity Zone-funded projects are precisely the disamenities, such as self-storage facilities and warehouses, one expects to see, without any public subsidy, in low-income neighborhoods.²² These uses do not provide substantial numbers of jobs, and the jobs that are created do not pay particularly well.²³ Nor do these uses otherwise increase local quality of life. There is some evidence, from press accounts and the like, that Opportunity Zone investments have been made in the types of developments one would have expected to occur with or without the investment: Self-storage facilities in slow or no-growth regions²⁴ and high rent mixed-use developments in growing regions.²⁵

21. The regulations prohibit the use of Opportunity Zone investment funds to develop golf courses, country clubs, massage parlors, racetracks, tanning facilities, and liquor stores. 26 C.F.R. § 1.1400Z2(d)-1 (2021).

22. See Jesse Drucker & Eric Lipton, *How a Trump Tax Break to Help Poor Communities Became a Windfall for the Rich*, N.Y. TIMES (Sept. 27, 2020), <https://www.nytimes.com/2019/08/31/business/tax-opportunity-zones.html> [<https://perma.cc/2P8X-SH84>].

23. Heather Long, *Amazon's \$15 Minimum Wage Doesn't End Debate over Whether It's Creating Good Jobs*, WASH. POST (Oct. 5, 2018), https://www.washingtonpost.com/business/economy/amazons-15-minimum-wage-doesnt-end-debate-over-whether-its-creating-good-jobs/2018/10/05/b1da23a0-c802-11e8-9b1c-a90f1daae309_story.html [<https://perma.cc/C44H-BDMJ>] (“Amazon’s pay is significantly above the \$10.28 an hour that the typical retail worker makes, but it’s less than the \$15.53 that a median warehouse employee is paid, according to Labor Department data.”).

24. See, e.g., Tom Condon, *Can Opportunity Zones Revive Struggling Neighborhoods?*, CONN. MIRROR (Dec. 14, 2020), <https://ctmirror.org/2020/12/14/can-opportunity-zones-revive-struggling-neighborhoods/> [<https://perma.cc/97VX-XKSH>]; Jennifer Nagorka, Opinion, *Opportunity Zone Tax Breaks Shouldn't Go to Another Self-Storage Facility in a Low-Income Neighborhood*, DALL. MORNING NEWS (Feb. 23, 2020, 2:00 AM), <https://www.dallasnews.com/opinion/commentary/2020/02/23/opportunity-zone-tax-breaks-shouldnt-go-to-another-self-storage-facility-in-a-low-income-neighborhood/> [<https://perma.cc/R6TS-XWDD>]. A Google search will lead would-be investors to a number of Opportunity Zone-augmented invitations to invest in self-storage

With that said, the inability to thoroughly track Opportunity Zone investments makes it quite difficult to understand their effect. There is no database of Opportunity Zone transactions. Notably, the original standalone Investing in Opportunity Act contained more robust reporting requirements, but these were removed prior to the passage of the Tax Cuts and Jobs Act.²⁶ Among other things, these reporting requirements would have eventually included annual reports that disclosed Opportunity Zone investments at the national and state level; the number and value of Opportunity Funds; the percentage of Opportunity Zones that received investments; and an assessment of Opportunity Zone investment outcomes including job creation, poverty alleviation, and business creation.²⁷ A bipartisan group of lawmakers subsequently introduced a bill to reintroduce the reporting requirements from the original bill and mandate that certain information about Opportunity Zone investments be made publicly available,²⁸ but this bill has never been voted out of committee. As a result, while some in Congress have sought to add reporting requirements that would allow policymakers and others to track Opportunity Zone transactions, to date these efforts have been unsuccessful.²⁹ Given the absence of an exhaustive repository of Opportunity Zone transactions,³⁰ we might instead look to experience from the New Markets Tax Credit for some sense of the impact Opportunity Zone investments might have. New Markets Tax Credits, it should be noted, differ programmatically from Opportunity

facilities. *See, e.g.*, Evelyn Josza, *Self Storage and Investing in Opportunity Zones During COVID-19*, COM. PROP. EXEC. (Oct. 6, 2020), <https://www.commercialsearch.com/news/self-storage-the-perks-of-investing-in-opportunity-zones-during-a-pandemic/> [<https://perma.cc/G9NC-R55X>].

25. Drucker & Lipton, *supra* note 22.

26. Susan W. Gates & Ann B. Schnare, *Can Opportunity Zones Live Up to Their Promise?*, WHARTON POL'Y GRP. 10 (2020), https://whartonpolicy.com/wp-content/uploads/2020/12/UPDATED-Report_Opportunity-Zones_12_2_20_FINAL.pdf [<https://perma.cc/FE7H-CJDS>].

27. S. 293, 115th Cong. § 1400Z-2(c) (2017); *see also* Press Release, U.S. Sen. Cory Booker, Booker, Scott, Hassan, Young Introduce Bipartisan Bill to Strengthen Reporting Requirements for Opportunity Zone Tax Incentive (May 8, 2019), <https://www.booker.senate.gov/news/press/booker-scott-hassan-young-introduce-bipartisan-bill-to-strengthen-reporting-requirements-for-opportunity-zone-tax-incentive> [<https://perma.cc/8V2G-KRTQ>].

28. S. 1344, 116th Cong. § 3 (2019).

29. *Id.* Consider, for example, the Opportunity Zone Reporting and Reform Act, S. 2787, 116th Cong. (2019), a bill introduced by Senator Ron Wyden on November 6, 2019, and the Opportunity Zone Transparency and Accountability Act, H.R. 5011, 116th Cong. (2019), a bill introduced by Representative Ron Kind on November 8, 2019.

30. S. 1344.

Zones in a number of ways. First, the subsidy is deeper and, therefore, has greater potential to render feasible an investment otherwise unlikely to occur. Second, investment funds seeking to use New Markets Tax Credits must apply for a limited pot of credits. The application process is selective and the historic rate of success is less than 25%.³¹ In order to be successful, applications must identify a realistic pipeline of actionable investments. Third, New Markets applicants must establish and consult with an advisory or governing board representative of the low-income communities in which the funds seek to invest.³² Importantly, the New Markets Tax Credit program includes some of the kinds of guardrails anti-gentrification advocates might seek to impose on the Opportunity Zone program.³³

While the New Markets Tax Credit program includes some of the guardrails that Opportunity Zones critics seek to incorporate in the Opportunity Zone program, the programmatic differences between New Markets Tax Credits and Opportunity Zones have not necessarily addressed the link between certain kinds of place-based investment subsidies and poverty alleviation. A 2008 review of the New Markets Tax Credit's early funding from 2002 to 2006 found that the credit had been used to subsidize nearly \$2 billion in investment in what the author deemed "Problematic Purposed Projects," including commercial office buildings, performing arts centers, and upscale retail outlets.³⁴

New Markets Tax Credits have been deployed to fund a wide variety of projects, ranging from community-focused initiatives like childcare programs and social service centers to market-rate ventures such as chain stores and hotels.³⁵ The plurality of transactions, however, have funded commercial real estate projects.³⁶ Just under

31. NEW MKTS. TAX CREDIT COAL., *NEW MARKETS TAX CREDIT PROGRESS REPORT 22* (2018), <https://nmtccoalition.org/wp-content/uploads/2018-NMTC-Progress-Report.pdf> [<https://perma.cc/VT3A-JVEZ>].

32. I.R.C. § 45D(c)(1).

33. *See, e.g.*, Edward W. De Barbieri, *Opportunism Zones*, 39 *YALE L. & POL'Y REV.* 82, 96 (2020) (arguing in favor of additional use restrictions, reporting requirements, and participation opportunities in the Opportunity Zone program).

34. Groves, *supra* note 4, at 225–26.

35. *See* U.S. GOV'T ACCOUNTABILITY OFF., *GAO-10-334, NEW MARKETS TAX CREDIT: THE CREDIT HELPS FUND A VARIETY OF PROJECTS IN LOW-INCOME COMMUNITIES, BUT COULD BE SIMPLIFIED* 33–34 (2010), <https://www.gao.gov/assets/gao-10-334.pdf> [<https://perma.cc/J8UG-2MMQ>] (listing examples of different CDE project types).

36. MARTIN D. ABRAVANEL ET AL., *URB. INST., NEW MARKETS TAX CREDIT (NMTC) PROGRAM EVALUATION: FINAL REPORT* 126–27 (2013),

half of these projects have been office, retail, mixed-use, or hotel projects.³⁷

A report by the Federal Reserve Bank of San Francisco also found that most New Markets Tax Credit investments, approximately 66%, through 2006 were used to fund commercial real estate.³⁸ The report's author noted that real estate projects are viewed as less risky and more easily combinable with other tax subsidies, and suggested that the program be restructured to provide greater incentives for investments in business operations given their potentially greater benefit to residents of low-income communities.³⁹ A 2010 report by the Government Accountability Office, assessing New Markets Tax Credit-funded projects from 2003 to 2009, found that the minority of funds structured as nonprofit organizations, in contrast, were more likely to use the New Markets Tax Credit to fund business operations rather than commercial real estate developments.⁴⁰

It is not entirely clear if these commercial real estate projects are significantly owned by or informed by the needs of residents of low-income areas. In fact, the 2013 Urban Institute study found that “[c]ommunity involvement and emphasis on producing community benefits was uneven across early-year [New Markets Tax Credit] projects.”⁴¹ Based on an informal survey of project stakeholders, the study found that local public agencies were involved with fewer than half of the early-year projects before financing was arranged and that — notwithstanding the program's representative advisory board requirement, discussed above — only 55% of projects reported having any discussions with community stakeholders (for example, CDCs and public development agencies) during the development process.⁴²

<https://www.urban.org/sites/default/files/publication/24211/412958-New-Markets-Tax-Credit-NMTC-Program-Evaluation.PDF> [<https://perma.cc/G5CB-7FLU>].

37. *Id.* at vii. The study's analysis combined CDFI data collected from the universe of 2,031 projects funded in the program's first four rounds of allocations with randomly sampled survey and interview information from this group. *Id.* at 24.

38. Lauren Lambie-Hanson, *Addressing the Prevalence of Real Estate Investments in the New Markets Tax Credit Program* 6 (Fed. Rsrv. Bank of S.F., Working Paper No. 2008-04, 2008).

39. *Id.* at 29, 34.

40. U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-334, *supra* note 35, at 13.

41. ABRAVANEL ET AL., *supra* note 36, at x.

42. *Id.* at 67.

The program has also been criticized for failing to adequately support minority investors and minority-owned businesses.⁴³ The 2013 Urban Institute study found that 13% of businesses funded were minority-owned, and 10% were women-owned or controlled.⁴⁴ A 2009 Government Accountability Office report found that minority status is associated with a lower probability of receiving a New Markets Tax Credit allocation.⁴⁵

Not surprisingly, empirical findings on the New Market Tax Credit's effects more generally have been mixed. The credits have been associated with modest positive economic outcomes. For example, the credit has been found to have had small but positive impact rates on the entry of supermarkets in low-income communities.⁴⁶ One study found that New Markets Tax Credits were modestly successful in attracting new business to low-income communities but failed to drive capital to existing businesses.⁴⁷ The credit has also been linked to some indicators of gentrification, such as increased housing turnover rates, but not to others, such as increased housing prices.⁴⁸ The credit has also been found to changed local industry composition to favor more capital-intensive business types like manufacturing over more service-intensive ones.⁴⁹

43. See Janet Thompson Jackson, *Can Free Enterprise Cure Urban Ills?: Lost Opportunities for Business Development in Urban, Low-Income Communities Through the New Markets Tax Credit Program*, 37 U. MEM. L. REV. 659, 663 (2007).

44. ABRAVANEL ET AL., *supra* note 36, at 63.

45. U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-536, NEW MARKETS TAX CREDIT: MINORITY ENTITIES ARE LESS SUCCESSFUL IN OBTAINING AWARDS THAN NON-MINORITY ENTITIES 23 (2009), <https://www.gao.gov/assets/gao-09-536.pdf> [<https://perma.cc/68SQ-35PS>].

46. See, e.g., Matthew Freedman & Annemarie Kuhns, *Supply-Side Subsidies to Improve Food Access and Dietary Outcomes: Evidence from the New Markets Tax Credit*, 55 URB. STUD. 3234 (2018).

47. AMANDA ROSS & KAITLYN WOLF, DO MARKET-BASED TAX INCENTIVES ATTRACT NEW BUSINESSES? EVIDENCE FROM THE NEW MARKETS TAX CREDIT 20–21 (2014), https://www.econstor.eu/bitstream/10419/124360/1/ERSA2014_00653.pdf [<https://perma.cc/58RF-2LH2>]. This paper was presented at the 54th Congress of the European Regional Science Association in St. Petersburg.

48. See Matthew Freedman, *Teaching New Markets Old Tricks: The Effects of Subsidized Investment on Low-Income Neighborhoods*, 96 J. PUB. ECON. 1000 (2012) (comparing census data from 2000 with community survey data from 2005 to 2009 and finding that the New Markets Tax Credit was associated with modest reductions in the poverty and unemployment rates in affected communities, but also with a slight increase in household turnover rates. The study found no association between the New Markets Tax Credit and changes in housing prices, and very little positive spillover of these investments from LICs to surrounding neighborhoods).

49. ROSS & WOLF, *supra* note 47, at 21–22; see also Kaitlyn Harger & Amanda Ross, *Do Capital Tax Incentives Attract New Businesses? Evidence Across Industries from the New Markets Tax Credit*, 56 J. REG. SCI. 733, 751 (2016) (finding

Notably, over half of the jobs created as a result of New Market Tax Credit investments are temporary construction jobs,⁵⁰ and only a third of total jobs go to neighborhood residents.⁵¹

In short, in connection with a deeper, more targeted subsidy with guardrails, scholars have found modest, temporary successes. There is little reason to think that a shallower, less targeted subsidy — Opportunity Zones — will have substantially different outcomes. The available empirical data suggests that place-based subsidies like the New Markets Tax Credit and Opportunity Zones have largely been used to drive commercial investment without a significant focus on the needs of low-income people. This kind of investment is unlikely to create the kinds of amenity effects that drive gentrification in a supply-constrained housing market, but it is also unlikely to produce robust, long-term positive impacts on either individual families or low-income neighborhoods.

III. LESSONS

Tax subsidies like Opportunity Zones are advertised as encouraging private investment in low-income places in a way that benefits low-income people. Our national experience with New Markets Tax Credits calls into question whether that advertising is truthful. And Opportunity Zones pose a variation on this question that occurred to very few people in the context of New Markets Tax Credits (or predecessor place-based subsidies like Enterprise and Empowerment Zones) a generation ago: Can investment subsidies do more harm than good by causing gentrification and involuntary displacement? The question is a difficult one in part because it is difficult to track the effects of these subsidies at all — as recounted in the literature review above, where there are impacts, they are generally on the margins and do not seem to lead to robust, long-term benefits to either individual families or neighborhoods.

Why, then, are place-based investment subsidies so attractive to policymakers? Despite scant evidence of impact on poor people's lives and substantial evidence of inefficiency, place-based economic development subsidies not only survive but multiply over time. Individual programs come and sometimes go, but the underlying drive to provide subsidies to investments geographically located in

positive effects on retail and manufacturing firms but negative effects on wholesale, FIRE, transportation, and services).

50. ABRAVANEL ET AL., *supra* note 36, at xiv.

51. *Id.*

low-income places remains. This Part explores the motivations driving place-based economic development subsidies.

For politicians and policymakers working on this issue, there is an acute understanding of the role of neighborhood institutions and local government as service providers. The local government is not often recognized as a service provider. But, of course, providing services — education, clean streets, clean water, parks, community programming, public safety — is its primary function. And in low-income communities, starved for tax dollars because, by definition, residents are poor and property is cheap, there is simply not enough money to pay for those services. Because poverty is concentrated, poorer localities are forced to provide services to a disproportionately resource-deprived population using a disproportionately small tax base. Programs like Opportunity Zones may provide a way of addressing this problem by attracting taxable real estate and transactions.

The notion that local and state actors use programs like Opportunity Zones to maximize property tax revenues is consistent with the finding that Opportunity Zone designations were largely technocratic.⁵² Importantly, then, the discourse surrounding place-based policy must recognize that the policies are sometimes intended to do just that: Benefit *the place*. In doing so, they ensure a political coalition consisting of legislators representing low-income places and legislators motivated to provide tax benefits to businesses and investors. These programs benefit the place by providing additional tax revenue to cash-starved cities and towns. In effect, these programs trade federal capital gains tax revenues for local property and sales tax revenues. The ultimate goal might be for the local government to have more money to spend on schools and trash pick-up. But the policy is directed at place for a reason, and people-based and place-based policies are not easily interchangeable for that reason. People are mobile — indeed, helping them helps the tax base, but only temporarily.

Unfortunately, low-income places' disproportionately small tax bases are massive structural problems, and simply subsidizing small amounts of private activity will not ameliorate the issue. Effectively addressing these issues requires action at higher levels of governance and intense focus on neighborhood-level activity risks missing the forest for the trees, missing the stranglehold placed on low-income

52. James Alm, Trey Dronyk-Trosper & Sean Larkin, *In the Land of OZ: Designating Opportunity Zones*, 188 PUB. CHOICE 503 (2020).

neighborhoods by wealthy suburbs, state capitols, and racial segregation.

But, partly because policymakers and politicians understand the fiscal constraints under which low-income places operate, place-based policies, particularly when structured as private market incentives, are, as many have noted, bipartisan. While bipartisanship does not necessarily result in good legislation, it may at least ensure that some legislation is passed, and place-based tax incentives, from Enterprise Zones to New Markets Tax Credits to Opportunity Zones, have been part of the community development conversation for at least 40 years now. They are not the most effective way to address local fiscal disparities. While there is, perhaps, no conceptual problem with trading federal capital gains tax revenues for local property tax revenues, there is no evidence that the government is getting a dollar-for-dollar trade.⁵³

But scholars and advocates worried about poverty must engage the question of whether that is a worthy objective. The key inquiry of that engagement ought to center on the connection between helping a place and helping low-income people. It is unassailably true that, for example, Newark's ability to provide local goods and services affects the lives of people who live in Newark, but the increased property tax revenue to low-income places as a result of Opportunity Zones will be relatively small, and it will be greatest in the places where investment would have come anyway. Federal help directed at Newark should be sufficiently tailored and sufficiently substantial such that it helps low-income people who live in Newark, whether now or in the future.

Is it possible to design a program that is both politically attractive for all the reasons place-based subsidies have proliferated over the years and effective at addressing poverty? What kinds of changes might narrow the scope of Opportunity Zone investments to projects that will benefit low-income people?

One approach might be to impose on Opportunity Zones the types of governance required by the New Markets Tax Credit program. That program requires that low-income residents of eligible census tracts be part of the group making investment decisions. It also requires that tax credit recipients have a mission of service to low-income communities. Similarly, Community Housing Development Organizations (CHDOs) receive priority in certain funding

53. Certainly, the subsidies themselves are not designed to ensure a dollar-for-dollar trade, though they could easily be so reformed if the political will to do so existed.

allocations and, in order to be certified as a CHDO, an organization's governing board must include residents of low-income communities.⁵⁴ The accountability measures built into the New Markets and CHDO programs, which require that a subsidy-receiving entity reserve a certain number of board or advisory board seats for people residing in certain low-income census tracts,⁵⁵ can look like a form of tokenization. Tokenization blurs the possibility that low-income people and residents of low-income neighborhoods might disagree as to what sorts of amenities and businesses would benefit other low-income people.⁵⁶

Instead, one might consider reconfiguring subsidy eligibility to piggyback on certain local decisions, such as the decision to provide a local subsidy or other support, essentially subjecting Opportunity Zone eligibility to the local democratic process.⁵⁷ While local elections are hardly perfectly democratic,⁵⁸ if the concern is ensuring that subsidized developments represent the priorities of a neighborhood's residents, the democratic process is likely to be more indicative of those priorities than is the presence of a few token board members, representing, in any event, the minority of a board's make-up. Relying on the existing democratic process might seem clumsy, but there are efficient mechanisms that would not require additional processes to gauge democratic support for a project. For example, consider the more generous availability of 4% Low-Income Housing Tax Credits where at least 50% of an affordable housing development or rehabilitation is funded by tax-exempt private activity bonds

54. 24 C.F.R. § 92.2 (2021).

55. *See id.*

56. On the hazards of assuming that all members of low-income communities share the same vision and preferences for local economic development projects, see LEVINE, *supra* note 19. Levine, in an ethnography of community development corporations and their funders, notes frequent "farcical claims of 'community consensus.'" *Id.* at 203.

57. In the context of housing development, whether that housing is low-income or affordable, requiring projects to provide evidence of local support is a recipe for a fair housing disaster. *See* Rev. Rul. 2016-29, 2016-52 I.R.B. 875. While the effect might be less pronounced in the context of commercial developments, policymakers nevertheless need to worry about the possible problems with tying federal and state subsidies to local decision-making.

58. *See, e.g.*, Zoltan L. Hajnal, Opinion, *Why Does No One Vote in Local Elections?*, N.Y. TIMES (Oct. 22, 2018), <https://www.nytimes.com/2018/10/22/opinion/why-does-no-one-vote-in-local-elections.html> [<https://perma.cc/4GU4-WHTD>].

which, in turn, must be authorized by a unit of local or state government.⁵⁹

More importantly, however, this thought exercise — considering what kinds of development the democratic process might yield and how they compare to what Opportunity Zone investors are likely to provide — relates back to a core point missing from the design of a program like Opportunity Zones. Too many low-income people live in neighborhoods that are starved for capital. These neighborhoods are underinvested. But capital and investment are not ends unto themselves. The question the Tax Cuts and Jobs Act refuses to ask is, capital for what? If the investments missing in a low-income neighborhood are well-funded schools, public parks, clean air, and affordable transit, then the private market simply is not going to provide those things, no matter what the tax incentive is. You cannot design a program that can subsidize the production of what are, fundamentally, public goods that must be provided by the government. And as is relevant to inquiries about gentrification, in a world in which public parks and adequate transit are scarce, providing those amenities in neighborhoods where housing is scarce is likely to make those neighborhoods newly attractive to potential gentrifiers.

Community development practitioners are practical people and because there is no cap on Opportunity Zone subsidies, they have not, for the most part, focused on the program's deficiencies. Even if most of the program's money goes to projects that would have happened anyway — projects with little to no benefit for low-income people — some of the money could go to good projects. It is possible that Opportunity Zone money will provide one additional necessary layer of financing for some projects that will improve the lives of residents of low-income communities. But this is a far cry from the kind of fundamental change that the program is advertised to produce, and the kinds of capital that might benefit the low-income people who largely reside in low-income communities.

CONCLUSION: OPPORTUNITY RECONSIDERED

Given the name of the program, one might think Opportunity Zones are crafted to create opportunity. They are not, of course. But

59. See JOE BIBER, CORP. FOR SUPPORTIVE HOUS., FINANCING SUPPORTIVE HOUSING WITH TAX-EXEMPT BONDS AND 4% LOW-INCOME HOUSING TAX CREDITS 3 (2007), https://www.csh.org/wp-content/uploads/2012/01/Report_financing-withbondsand-litch_1012.pdf [<https://perma.cc/8A4B-CYVA>] (“To qualify for an allocation of 4% Low-income Housing Tax Credits, 50% or more of the project's development costs must be funded by bonds during construction.”).

it is worth noting that the word “opportunity” has independent meaning in community development and fair housing discourse and policy-making. From *Gautreaux v. Chicago Housing Authority*⁶⁰ to the Department of Housing and Urban Development’s Moving to Opportunity for Fair Housing program⁶¹ to contemporary work on identifying the factors that give rise to intergenerational economic mobility,⁶² the very word “opportunity” has long been a guiding star in conversations about anti-poverty policy and community development. Economist Raj Chetty and colleagues have used deep troves of census and other data to try to understand the place-based factors and conditions that create economic opportunity.⁶³ They have sought to understand what resources affect the likelihood that a child born into poverty will have upward mobility.⁶⁴ In a world of equal opportunity, low-income children would be just as likely as middle-class children to grow up to be middle-class adults. That is simply not the case in the United States today.⁶⁵ Among African American families, in particular, poverty is an intergenerational phenomenon, the result of accumulated disadvantage, not sporadic episodes of bad luck.⁶⁶ That accumulated disadvantage is, in part, the result of under-resourced, segregated communities.⁶⁷

Notably, the resources Chetty and his co-authors identify already exist — in well-off places. As a result, he argues in favor of policies and programs that enable low-income people to move to well-resourced neighborhoods, in addition to policies and programs that bring resources to concentrated neighborhoods of low-income

60. 304 F. Supp. 736 (N.D. Ill. 1969) (finding that the Chicago Housing Authority violated African Americans’ constitutional right under the Fourteenth Amendment to equal protection under the law for building public housing units only in predominately African-American communities).

61. See *Moving to Opportunity for Fair Housing*, U.S. DEP’T HOUS. & URB. DEV., <https://www.hud.gov/programdescription/mto> [<https://perma.cc/H62W-V7PM>] (last visited Aug. 27, 2021).

62. See, e.g., DANIEL P. McMURRER, MARK CONDON & ISABEL V. SAWHILL, URB. INST., INTERGENERATIONAL MOBILITY IN THE UNITED STATES (1997), <https://www.urban.org/sites/default/files/publication/70426/406796-intergenerational-mobility-in-the-united-states.pdf> [<https://perma.cc/G4U6-WLTN>].

63. See, e.g., Raj Chetty et al., *The Opportunity Atlas: Mapping the Childhood Roots of Social Mobility* (Nat’l Bureau of Econ. Rsch., Working Paper No. 25147, 2018), <https://opportunityinsights.org/paper/the-opportunity-atlas/> [<https://perma.cc/XK8S-THVD>].

64. See *id.*

65. See PATRICK SHARKEY, STUCK IN PLACE: URBAN NEIGHBORHOODS AND THE END OF PROGRESS TOWARD RACIAL EQUALITY 35–37 (2013).

66. *Id.* at 45–46.

67. *Id.* at 28.

people.⁶⁸ There are inherent benefits to an integrationist approach because integration is, according to Chetty and his co-authors, one of the defining characteristics of places that promote economic opportunity.⁶⁹ Integration creates a kind of interest alignment that ensures that when well-off people with political power advocate for public goods that benefit themselves, they are simultaneously advancing the interests of low-income people who live in their neighborhoods.⁷⁰ In segregated places, on the other hand, well-off, politically powerful parents, for example, can advocate for well-resourced schools that serve only the children of well-off, politically powerful parents.⁷¹

In addition to supporting policies and programs that decrease barriers to integration, opportunity data and research supports efforts to bring opportunity-enhancing infrastructure to under-resourced neighborhoods. In other words, research points to certain types of infrastructure that, in turn, set the stage for intergenerational economic mobility. For example, in Charlotte, North Carolina, Opportunity Insights is working with local actors to “[i]ncreas[e] access to high-quality preschool, ensur[e] students have skilled teachers and sufficient educational supports, and provid[e] adequate healthcare” in order to increase opportunity.⁷² Opportunity Insights began working with Charlotte in part because that city, despite enjoying a long-term regional economic boom, “had the lowest rate of upward mobility of the largest 50 metropolitan areas in the

68. See, e.g., Raj Chetty et al., *Race and Economic Opportunity in the United States: An Intergenerational Perspective*, 135 Q.J. ECON. 711, 718 (2020) (“[R]educing the black-white income gap will require policies whose effects cross neighborhood and class lines and increase intergenerational mobility specifically for black men.”).

69. Raj Chetty et al., *Where Is the Land of Opportunity? The Geography of Intergenerational Mobility in the United States*, 129 Q.J. ECON. 1553, 1557 (2014) (“We then identify five factors that are strongly correlated with the variation in upward mobility across areas. The first is segregation: Areas that are more residentially segregated by race and income have lower levels of mobility. Second, areas with more inequality as measured by Gini coefficients have less mobility . . .”).

70. See Anika Singh Lemar, *Building Bridges and Breaking Down Walls: Taking Integration Seriously in CED Practice*, 28 J. AFFORDABLE HOUS. & CMTY. DEV. L. 207, 211 (2019).

71. See generally RUCKER C. JOHNSON, *CHILDREN OF THE DREAM: WHY SCHOOL INTEGRATION WORKS* (2019).

72. *Supporting Local Community: Charlotte Opportunity Initiative Collaboration with Community Leaders to Identify and Support Data-Driven Systems Change*, OPPORTUNITY INSIGHTS, <https://opportunityinsights.org/charlotte/> [<https://perma.cc/R3FZ-YN9T>] (last visited Aug. 7, 2021).

country.”⁷³ In other words, the normal indicators of economic success in a place did not translate into increased opportunity and well-being for low-income residents of that place, a fact that calls into doubt so many of the assumptions that drive place-based subsidies.

One might imagine a place-based subsidy that prioritizes opportunity-enhancing infrastructure. Such a program, unlike Opportunity Zones or New Markets Tax Credits, would identify, based on research, the infrastructure necessary to create opportunity. The program would then subsidize the production of only that infrastructure. The difficulty, here, is that the sorts of infrastructure that create mobility and opportunity are not private goods — like apartment buildings, self-storage facilities, and even high-employment manufacturing facilities — but, instead, public goods.

But, generally, Opportunity Zones represent more of the same, a relatively small-scale effort to attract *private* capital to places where *public* capital is lacking. That private capital cannot and will not build public goods. And the complexity required to participate in the program will ensure well-compensated employment for accountants and lawyers, but not for residents of low-income communities. They may do no harm, but they are also unlikely to do much good.

Doing good will require us to look elsewhere. Doing good will require investing in the public goods that create opportunity. Doing good will require building enough housing to allow more people to live in opportunity-rich places. And doing good will require opening the doors for all people — regardless of income, race, or class — to enjoy the public resources that already exist.

73. *Id.*