Summer 2018

Sustainable Affordable Housing

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SUSTAINABLE AFFORDABLE HOUSING

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INTRODUCTION

Sustainable real estate development is an essential component of intergenerational justice,[1] in part because the real estate sector creates more than 20% of the world's carbon emissions.[2] Governments, recognizing that environmentally sustainable real estate development involves higher upfront costs, have encouraged green building by offering publicly funded incentives such as tax credits, grants, reduced approval fees, and streamlined permitting.[3] Using market measurement innovations such as the Dow Jones Sustainability Index, investors can promote environmentally sustainable development by prioritizing real estate developers that embrace environmentally conscious practices.[4] Even though real estate in general still underperforms in many other sectors in terms of its environmental sustainability, trends are encouraging.[5] Commercial real estate has embraced green building as a concept, and the World Economic Forum predicts that approximately 55% of all new commercial properties in 2020 will be "built green."[6]

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* Professor of Law, Washburn University School of Law. This project owes much to the team of housing law professors with whom I presented thoughts on sustainable housing and markets at Arizona State University School of Law's Sustainability Conference in 2017: David Reiss, Patricia McCoy, and Kristen Barnes. I am also indebted to my husband, Eric Boyack, who wrangled our four children while I wrote this piece.

1. *See generally* Richard B. Howarth, *Intergenerational Justice and the Chain of Obligation*, 1 ENVTL. VALUES 133 (1992).

2. Real estate use is responsible for broad economic impacts, including waste production, pollution, use of water and consumption of other natural resources. "Real estate is central to urban development, consumes physical resources and is a significant source of emissions. Equally, it is central to the goal of creating an environmentally sustainable future." WORLD ECON. FORUM, INDUS. AGENDA COUNCIL ON THE FUTURE OF REAL ESTATE & URBANIZATION, ENVIRONMENTAL SUSTAINABILITY PRINCIPLES FOR THE REAL ESTATE INDUSTRY 5 (2016) [hereinafter WORLD ECON. FORUM], http://www3.weforum.org/docs/GAC16/CRE_Sustainability.pdf.

3. Nicole C. Kibert & Charles J. Kibert, *Sustainable Development and the U.S. Green Building Movement: Profitable Development Projects Can Be Good for the Planet, Too*, PROB. & PROP., Mar.–Apr. 2008, at 21, 25.

4. *Sustainability Assessment*, ROBECOSAM, http://www.sustainability-indices.com/sustainability-assessment/index.jsp (last visited Mar. 14, 2018).

5. WORLD ECON. FORUM, *supra* note 2, at 5.

6. *Id.* at 7.

The affordable housing sector, however, needs more than marginal governmental carrots and sticks to be able to implement sustainability practices. Environmental sustainability will elude affordable housing as long as it remains in its current, financially unsustainable state.[7] Government housing assistance programs are unpredictable, underfunded, and may to some extent perpetuate rather than solve the problem of housing need.[8] The nation's supply of affordable housing is rapidly declining in quality as well as quantity,[9] and rising housing costs and stagnant incomes mean that an ever-increasing number of lower-income households must devote an unsustainably high percentage of their income toward housing costs.[10] Our affordable housing system cannot go green until the system stops operating in the red. Properly conceived, affordable sustainability of housing and sustainable affordability of housing are mutually enforcing concepts. Successful housing laws and policy must therefore find a way to achieve both.

This article addresses the specific issue of how housing affordability can be made more sustainable, both in terms of sustainable financial structures and sustainable tenure for residents. Sustainable affordability requires a flexible housing supply system that can be responsive to demands as well as a method to keep housing costs (purchase prices or rental rates) steady and reasonable. Environmental sustainability and housing affordability are overlapping issues in housing law, and similar policies and programs can be employed to promote both. Part I of this article discusses the unsustainable housing affordability gap and explains why effective solutions to housing unaffordability must be tailored to address particular market deficiencies in a given locality. Part II explains the impact that local laws can have on housing supply and highlights how supply-side initiatives can grow the number of affordable sustainable homes. Part III focuses on public policies and

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7. *See infra* notes 15–18 and accompanying text.

8. *See infra* notes 11–14 and accompanying text.

9. *See* MERYL FINKEL ET AL., ABT ASSOCS. INC., CAPITAL NEEDS IN THE PUBLIC HOUSING PROGRAM, at v–vi (2010), https://www.hud.gov/sites/documents/PH_CAPITAL_NEEDS.PDF.

10. HUD's most recent report to Congress on housing indicated that 8.3 million households have "worst-case housing needs," meaning they are very low-income renters who receive no government housing assistance and pay more than half of their income for rent, live in severely inadequate conditions, or both. The number of households with worst-case housing needs has increased from 7.72 million in 2013. OFFICE OF HOUS. POLICY DEV. & RESEARCH, U.S. DEP'T OF HOUS. & URBAN DEV., WORST CASE HOUSING NEEDS: 2017 REPORT TO CONGRESS, at ix–xi, 1–3 (2017), https://www.huduser.gov/portal/sites/default/files/pdf/Worst-Case-Housing-Needs.pdf; *see* JOINT CTR. FOR HOUS. STUDIES, HARVARD UNIV., THE STATE OF THE NATION'S HOUSING 1–6 (2016), http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/jchs_2016_state_of_the_nations_housing_lowres.pdf.

programs that provide financial support to households and concludes that current subsidies can be made more equitable and economically sustainable. The funding obstacles for environmentally sound and affordably priced housing are similar, and coordinated ownership, incentives, and financing approaches may be able to overcome both.

I. THE HOUSING AFFORDABILITY GAP

Our housing system is unsustainable at least in part because housing is so widely unaffordable. Although ostensibly private, a panoply of owner-occupancy-focused tax incentives and capital market supports provides financial benefits to market-rate and above-market-rate housing.[11] Government financial support of below-market housing is more apparent, but reliance on public funding makes housing costs precarious.[12] Only about one quarter of qualifying lower-income households receive public housing assistance, and it is likely the country lacks sufficient political will to continue to fund even this insufficient level of assistance indefinitely.[13] A

11. *See infra* notes 99, 133–135 and accompanying text.

12. The federal government's funding allocation for affordable rental housing includes the public housing, supply-side supports, such as the Low-Income Housing Tax Credit (LIHTC), various development grants, project based vouchers, and demand-side subsidies, primarily in the form of Housing Choice vouchers and programs providing financial assistance to low-income home-buyers. Andrea J. Boyack, *Side by Side: Revitalizing Urban Cores and Ensuring Residential Diversity*, 92 CHI.-KENT L. REV. 435, 439–43 (2017). President Trump's draft 2018 budget released in February 2018 proposed a drastic (18.3%) decrease in funding for affordable housing. OFFICE OF MGMT. AND BUDGET, AN AMERICAN BUDGET: BUDGET OF THE U.S. GOVERNMENT 63 (2018), https://www.whitehouse.gov/wp-content/uploads/2018/02/budget-fy2019.pdf. After several weeks of intense lobbying, however, the final Fiscal Year 2018 spending bill provided for a $4.7 billion increase for HUD programs (an increase of about 10%). H.R. 1625, 115th Cong. (2018), http://docs.house.gov/billsthisweek/20180319/BILLS-115SAHR1625-RCP115-66.pdf. The increased amount "includes a significant increase in funding for affordable housing and community development programs at HUD and USDA, along with an increase in Low Income Housing Tax Credits and an important reform to the tax program." *Advocates and Congressional Champions Secure Increased Funding for Affordable Housing in 2018*, NAT'L LOW INCOME HOUSING COALITION (March 22, 2018), http://nlihc.org/article/advocates-and-congressional-champions-secure-increased-funding-affordable-housing-2018.

13. Robert A. Collinson, Ingrid Gould Ellen & Jens Ludwig, *Low-Income Housing Policy* 1–2 (Kreisman Working Paper Series in Hous. Law & Policy, Working Paper No. 21071, 2015) (calculating that annual affordable housing programs cost the government approximately $46 billion annually, but noting that "[m]ost of the government's spending on housing . . . goes towards subsidizing homeowners through the tax code"); *see* Thomas B. Edsall, Opinion, *Who Will Pay the Political Price for Affordable Housing?*, N.Y. TIMES (July 15, 2015), https://www.nytimes.com/2015/07/15/opinion/edsall-who-will-pay-the-political-price-for-affordable-housing.html.

majority of lower-income households struggle to cover housing costs without public aid, and the gap between monthly income and such costs makes it impossible for many families to consistently afford both housing and basic non-housing needs.

As a nation, we both pay too much and pay too little toward housing. Because we have not invested enough upfront to establish a stable systemic foundation for housing, we individually and collectively bear unsustainable expenses over time. The high operating costs of dilapidated and antiquated homes create economic inefficiencies, as do the high public costs of homelessness and extreme, chronic poverty. Housing's systemic instability is not only unsustainable, it is worsening as the gap between housing costs and residents' ability to pay grows and the political willingness to make up the difference shrinks.[14]

A. Minding the Gap

Housing costs can be broken down into several components.[15] Initial housing development involves the cost to acquire land, regulatory and legal expenses to obtain permission for development, and the hard costs of construction labor and the associated "bricks and sticks."[16] Economists who measure housing affordability speak in terms of its costs (rather than residents' ability to pay) and typically focus on these upfront inputs.[17] The true cost of a home also includes its maintenance and operating costs, however, and green building advocates are quick to point out that greater initial expenses may be recouped by relatively lower operating costs over

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14. ERIC S. BELSKY ET AL., JOINT CTR. FOR HOUS. STUDIES, HARVARD UNIV., MEASURING THE NATION'S RENTAL HOUSING AFFORDABILITY PROBLEMS 9–12 (2005), http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/rd05-1_measuring_rental_affordability05.pdf.

15. In order to measure how well housing markets function in pricing homes, Ed Glaeser and Joe Gyourko measure "all-in cost of delivering housing units to the market"—a figure they term the "supply cost." Ed Glaeser & Joe Gyourko, *The Economic Implications of Housing Supply* 2 (Zell/Lurie Real Estate Ctr., Working Paper No. 802, 2017), http://realestate.wharton.upenn.edu/wp-content/uploads/2017/03/802.pdf.

16. Glaeser and Gyourko define the three components of housing supply cost as (1) the cost of the land (L) on which the housing unit sits, (2) construction costs (CC) associated with putting up the physical improvements, and (3) the entrepreneurial profit (EP) needed to compensate the home builder for taking on development risk. *Id.* at 6. They defined the "Minimum Profitable Production Cost (MPPC) of a unit of housing" as: MPPC = (L + CC)*EP. *Id.*

17. *See id.* at 9–11.

time.[18] Thus, although environmentally sustainable housing may be inherently less affordable from the get-go, it may be more sustainably affordable in the long run.

The government and the housing industry use a different approach to measure housing affordability.[19] The U.S. Department of Housing and Urban Development (HUD) judges housing to be affordable if total housing costs (rent, utilities, upkeep, etc.) are no more than 30% of a household's gross income.[20] HUD recognizes that unaffordability of housing exists on a spectrum: Households spending more than 30% of their income on housing are "cost burdened," and those spending more than 50% of income on housing are "severely cost burdened."[21] Although this metric is broadly accepted in the real estate industry, it is overly simplistic to conclude that spending more than 30% of household income on housing is inherently unaffordable.[22]

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18. GREG KATS ET AL., THE COSTS AND FINANCIAL BENEFITS OF GREEN BUILDINGS: A REPORT TO CALIFORNIA'S SUSTAINABLE BUILDING TASK FORCE, at v (2003) [hereinafter KATS ET AL., GREEN BUILDINGS], https://www.usgbc.org/Docs/News/News477.pdf. Green buildings provide financial benefits over time, including "lower energy, waste disposal, and water costs, lower environmental and emissions costs, lower operations and maintenance costs, and savings from increased productivity and health." *Id.*; *see also* INST. FOR MKT. TRANSFORMATION & APPRAISAL INST., GREEN BUILDINGS AND PROPERTY VALUE: A PRIMER FOR BUILDING OWNERS AND DEVELOPERS 4 (2013), http://www.imt.org/uploads/resources/files/GreenBuildingAndPropertyValue_Guide.pdf (calculating savings per square foot in commercial buildings). *See generally* GREG KATS ET AL., GREENING OUR BUILT WORLD: COSTS, BENEFITS, AND STRATEGIES (2009).

19. Although they note that this conventional approach to measuring housing affordability may have "social merits," Glaeser and Gyourko contend that this approach "is defective from an economic perspective because it conflates poverty and income inequality issues with a malfunctioning of the supply of housing units." Glaeser & Gyourko, *supra* note 15, at 6.

20. Office of Policy Dev. & Research, *CHAS: Background*, U.S. DEP'T HOUSING & URB. DEV., https://www.huduser.gov/portal/datasets/cp/CHAS/bg_chas.html (last visited Mar. 14, 2018) [hereinafter *CHAS: Background*]. The 30% figure evolved from an amendment to the 1934 Housing Act proposed in 1969 by Senator Edward Brooke, the first popularly elected African-American senator and co-author of the 1968 Fair Housing Act. The Brooke Amendment responded to complaints that rents in public housing were going up by capping the rent charged in public housing at 25% of a tenant's household income. Congress raised this cap to 30% in 1981, and that percentage has remained the industry standard for whether housing costs are considered "affordable." Housing and Urban Development Act of 1969 (Brooke Amendment), Pub. L. No. 91-152, § 213, 83 Stat. 379, 389 (codified as amended at 12 U.S.C. § 1715z-1 (2012)).

21. BELSKY ET AL., *supra* note 14, at ii.

22. *Id.* Different affordable housing advocacy groups use slightly different variations of the 30% affordability threshold. Some compare the number of households with incomes at or below a certain level (say 50% area median income) to the number of housing units with costs that are 30% or less of that income level and then express the affordability gap in terms of regional supply deficiencies (a lack of "affordable units") for given income categories. *Id.* The National Low Income Housing Coalition (NLIHC) takes a slightly different approach, calculating the income

Calculations of affordability usually measure market costs and area median incomes (AMI), both of which necessarily turn on the defined geographic scope. Although housing costs vary widely by state, region, and even within a given city, other non-housing expenses (food, clothing, medicine, and transportation), are much more geographically consistent.[23] This means that even if incomes and housing costs moved in lockstep, the impact of unaffordable housing would be significantly different for households in different income categories. For example, imagine *A*, who earns $178,000, lives in San Francisco and spends 30% of her income on housing ($4,450/month is San Francisco's median rent),[24] and *B*, who earns $31,000, lives in Topeka, Kansas, and spends 30% of his income on housing (the median rent in Topeka is only $775/month).[25] Each month, subtracting housing costs from pre-tax income leaves *A* with $10,266 and leaves *B* with only $1,867. According to HUD metrics, *A* and *B* are equally housing cost burdened, yet *B* is financially worse off than *A* and will have more difficulty affording food, clothing, and medicine. Percentage income allocated to housing is therefore not a perfect measure of the economic impact of housing costs.

Furthermore, although median incomes do tend to be higher in places with higher housing costs, this is not universally true, nor does it indicate that the increased incomes are universally (or even on average) sufficient to cover increased housing costs.[26] In addition, regional variations among incomes are

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that a household would need in order to afford the federally defined "Fair Market Rent" for the region. This determines the "housing" wage (how much a household would have to earn in the region for reasonable rents to be affordable), and then the NLIHC expresses unaffordability as the difference between the wage needed and the wage earned. *Id.* Although one approach focuses on deficient supply and the other focuses on deficient income, "each derives from the same basic premise: when a household spends more than 30 percent of income on housing it is unaffordable and if it spends more than 50 percent it constitutes a serious cost burden." *Id.*

23. The IRS standards, used in consumer bankruptcy and in tax debt resolution, use national numbers for food, clothing, and health costs, broad regional standards for transportation costs, and very localized county-based standards for costs of housing. *See Collection Financial Standards*, INTERNAL REVENUE SERV., https://www.irs.gov/businesses/small-businesses-self-employed/collection-financial-standards (last updated Oct. 12, 2017); *Means Testing*, U.S. DEP'T JUST., https://www.justice.gov/ust/means-testing/20171101 (last updated Oct. 16, 2017).

24. *San Francisco Home Prices & Values*, ZILLOW, https://www.zillow.com/san-francisco-ca/home-values/ (last visited Mar. 14, 2018).

25. *Topeka Home Prices & Values*, ZILLOW, https://www.zillow.com/topeka-ks/home-values/ (last visited Mar. 14, 2018).

26. Area median incomes (AMI) vary widely based on location and these various measures are available through the Census Bureau. GLORIA G. GUZMAN, U.S. CENSUS BUREAU, HOUSEHOLD INCOME 2016: AMERICAN COMMUNITY SURVEY BRIEFS 2–3 (2017), https://www.census.gov/content/dam/Census/library/publications/2017/acs/acsbr16-02.pdf. For example, AMI in Mississippi in 2016 was $41,754, and in Maryland was $78,945. *Id.* at 2.

more extreme for some professions than for others.[27] AMI calculations are in themselves somewhat misleading because they state income medians

27. According to Glassdoor.com as of March 2018, the average annual wage for a sales associate in San Francisco, California, is $3,000 more than in New York, New York. *Compare Sales Associate Salaries in San Francisco, CA Area*, GLASSDOOR, https://www.glassdoor.com/Salaries/san-francisco-sales-associate-salary-SRCH_IL.0,13_IM759_KO14,29.htm (last updated Mar. 5, 2018), *with Sales Associate Salaries in New York City, NY Area*, GLASSDOOR, https://www.glassdoor.com/Salaries/new-york-city-sales-associate-salary-SRCH_IL.0,13_IM615_KO14,29.htm (last updated Mar. 8, 2018) [hereinafter *N.Y. Sales Associate*]. The average annual wage for a firefighter in San Francisco is $3,000 more than in New York. *Compare Firefighter Salaries in San Francisco, CA Area*, GLASSDOOR, https://www.glassdoor.com/Salaries/san-francisco-firefighter-salary-SRCH_IL.0,13_IM759_KO14,25.htm (last updated May 3, 2017), *with Firefighter Salaries in New York City, NY Area*, GLASSDOOR, https://www.glassdoor.com/Salaries/new-york-city-firefighter-salary-SRCH_IL.0,13_IM615_KO14,25.htm (last updated Oct. 31, 2017) [hereinafter *N.Y. Firefighter*]. The average annual wage for a paralegal in San Francisco is $12,000 more than in New York. *Compare Paralegal Salaries in San Francisco, CA Area*, GLASSDOOR, https://www.glassdoor.com/Salaries/san-francisco-paralegal-salary-SRCH_IL.0,13_IM759_KO14,23.htm (last updated Mar. 5, 2018), *with Paralegal Salaries in New York City, NY Area*, GLASSDOOR, https://www.glassdoor.com/Salaries/new-york-city-paralegal-salary-SRCH_IL.0,13_IM615_KO14,23.htm (last updated Mar. 8, 2018) [hereinafter *N.Y. Paralegal*]. The average annual wage for a police officer in San Francisco is $22,000 more than in New York. *Compare Police Officer Salaries in San Francisco, CA Area*, GLASSDOOR, https://www.glassdoor.com/Salaries/san-francisco-police-officer-salary-SRCH_IL.0,13_IM759_KO14,28.htm (last updated Jan. 16, 2018), *with Police Officer Salaries in New York City, NY Area*, GLASSDOOR, https://www.glassdoor.com/Salaries/new-york-city-police-officer-salary-SRCH_IL.0,13_IM615_KO14,28.htm (last updated Feb. 23, 2018) [hereinafter *N.Y. Police Officer*]. Interestingly, the average annual salary of elementary school teachers is $3,000 *more* in New York than in San Francisco. *Compare Teacher, Elementary School Salaries in San Francisco, CA Area*, GLASSDOOR, https://www.glassdoor.com/Salaries/san-francisco-elementary-school-teacher-salary-SRCH_IL.0,13_IM759_KO14,39.htm (last updated Feb. 8, 2018), *with Teacher, Elementary School Salaries in New York City, NY Area*, GLASSDOOR, https://www.glassdoor.com/Salaries/new-york-city-elementary-school-teacher-salary-SRCH_IL.0,13_IM615_KO14,39.htm (last updated Mar. 4, 2018) [hereinafter *N.Y. Teacher*]. The average annual wage in Little Rock, Arkansas, compared with in New York is $3,000 less for a sales associate, $10,000 less for a paralegal, $29,000 less for a police officer, and $19,000 less for an elementary school teacher. *Compare Paralegal Salaries in Little Rock, AR Area*, GLASSDOOR, https://www.glassdoor.com/Salaries/little-rock-paralegal-salary-SRCH_IL.0,11_IM500_KO12,21.htm (last updated Feb. 17, 2018), *and Police Officer Salaries in Little Rock, AR Area*, GLASSDOOR, https://www.glassdoor.com/Salaries/little-rock-police-officer-salary-SRCH_IL.0,11_IM500_KO12,26.htm (last updated Sept. 19, 2017), *and Sales Associate Salaries in Little Rock, AR Area*, GLASSDOOR, https://www.glassdoor.com/Salaries/little-rock-sales-associate-salary-SRCH_IL.0,11_IM500_KO12,27.htm (last updated Jan. 29, 2018), *and Teacher, Elementary School Salaries in Little Rock, AR Area*, GLASSDOOR, https://www.glassdoor.com/Salaries/little-rock-elementary-school-teacher-salary-SRCH_IL.0,11_IM500_KO12,37.htm (last updated Sept. 6, 2016), *with N.Y. Paralegal*, *supra*, *and N.Y. Police Officer*, *supra*, *and N.Y. Sales Associate*, *supra*, *and N.Y. Teacher*, *supra*. An associate attorney in New York earns on average $44,000 more than one in Little Rock and $14,000 less than one in San Francisco. *Compare Associate Attorney Salaries in New York City, NY Area*,

nationally or regionally, and incomes and housing costs are very localized. Neighborhood-level household income medians can vary by a factor of ten or more within a single metropolitan area.[28]

B. Unsustainable Social and Economic Volatility

"Having a decent, stable, affordable home" is "at the core of strong, vibrant, and healthy families and communities," but affordable housing today is socially and economically unstable in several ways.[29] First, the gap between housing costs and people's ability to pay for housing means that millions of people cannot afford the basic necessities of life. Second, housing unaffordability leads to instability of tenure and the harms caused by home loss and involuntary relocations. Third, housing unaffordability creates a barrier to entry for the country's booming centers of economic opportunity, necessarily constraining economic growth. Fourth, incomplete efforts to chip away at the affordability gap have concentrated poverty and created political volatility. Homes and housing costs are neither sustainable nor affordable, and they must be both.

GLASSDOOR, https://www.glassdoor.com/Salaries/new-york-city-associate-attorney-salary-SRCH_IL.0,13_IM615_KO14,32.htm (last updated Mar. 3, 2018), *with Associate Attorney Salaries in Little Rock, AR Area*, GLASSDOOR, https://www.glassdoor.com/Salaries/little-rock-associate-attorney-salary-SRCH_IL.0,11_IM500_KO12,30.htm (last updated Jan. 17, 2018), *and Associate Attorney Salaries in San Francisco, CA Area*, GLASSDOOR, https://www.glassdoor.com/Salaries/san-francisco-associate-attorney-salary-SRCH_IL.0,13_IM759_KO14,32.htm (last updated Mar. 5, 2018).

28. State medians fail to take into account huge local variations. For example, the median income in Census Tract 6056, San Mateo County, California is $233,125, and the median income in Census Tract 4088, Alameda County, California, just thirty-five miles away, is only $23,704. The median income in Census Tract 36.04, Shawnee County, Kansas was $103,836, but in Tract 40 of the same county (just seven miles away), the median income was a mere $13,750. The median income in Arlington, Virginia, (Tract 1004) was $206,058, and eight miles away in Anacostia, D.C., (Tract 75.04) the median income was only $17,372. *Census Explorer*, U.S. CENSUS BUREAU, https://www.census.gov/censusexplorer/censusexplorer.html (last visited June 10, 2018); *see* GUZMAN, *supra* note 26, at 1–3.

29. Press Release, MacArthur Found., How Hous. Matters, Pessimism About Prolonged Housing Affordability Crisis is On the Rise, 2016 How Housing Matters Survey Finds (June 16, 2016), https://www.macfound.org/press/press-releases/pessimism-about-prolonged-affordable-housing-crisis-rise-2016-how-housing-matters-survey-finds/ (quoting MacArthur President Julia Stasch).

Unaffordable housing undermines individual health, wealth, and economic progress.[30] Excessive housing costs limits consumer spending,[31] encourages excessive debt,[32] and leads to other social ills ranging from household economic fragility to homelessness. A community's economic health derives from the financial capacity of its members, so household-level financial distress can undermine neighborhood commercial prosperity. Financially precarious households are also more likely to incur debts they cannot repay, and discharged or uncollectible consumer debts (including medical and other local debts involuntarily incurred) impose costs on creditors and their paying customers.

Excessive housing costs relative to income increase tenure instability, which is not only a symptom of poverty, but is one of its causes.[33] Without stable housing, "everything else falls apart."[34] At its worst, tenure instability leads to homelessness and the myriad of social and public costs associated therewith, such as petty theft, vagrancy, drug use, and safety concerns in public spaces.[35] But even if cost burdened households remain housed, unaffordable housing costs likely lead to frequent relocations. People suffer

30. The breadth and intensity of harms caused by housing unaffordability are discussed at length in the excellent book, MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY (2016). *See generally* Ezra Rosser, *Laying the Foundation: The Private Rental Market and Affordable Housing*, 44 FORDHAM URB. L.J. 499 (2017); Emily Badger, *Why Losing a Home Means Losing Everything*, WASH. POST: WONKBLOG (Feb. 29, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/02/29/how-the-housing-market-exploits-the-poor-and-keeps-them-in-poverty/?utm_term=.34204c26a7bc.

31. "For lowest-income households, high housing costs mean skimping on other basic needs to the detriment of their health and well-being. Cost-burdened households with even modest incomes spend less on vital needs, although there are some notable differences in where they make cutbacks. At the same time, limited spending on non-housing items by these households has significant implications for large segments of the economy, including the transportation, apparel, and entertainment sectors." JOINT CTR. FOR HOUS. STUDIES, HARVARD UNIV., AMERICA'S RENTAL HOUSING: EVOLVING MARKETS AND NEEDS: RENTAL HOUSING AFFORDABILITY 32 (2013) [hereinafter AMERICA'S RENTAL HOUSING], http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/ahr2013_05-affordability.pdf.

32. John Eggum, Katherine Porter & Tara Twomey, *Saving Homes in Bankruptcy: Housing Affordability and Loan Modification*, 2008 UTAH L. REV. 1123, 1135–38 (calculating how household bankruptcy risk increases as housing costs become increasingly unaffordable).

33. *See generally* DESMOND, *supra* note 30.

34. Badger, *supra* note 30 (citing DESMOND, *supra* note 30).

35. *See* NAT'L ALL. TO END HOMELESSNESS, THE STATE OF HOMELESSNESS IN AMERICA 36 (2015), http://endhomelessness.org/wp-content/uploads/2015/04/2015-state-of-homelessness.pdf. Unaffordable housing is a huge factor contributing to homelessness, and homelessness itself is costly. In 2015 alone, the federal government spent $4.5 billion to address homelessness. *Id.* at 4; *see also* Julien P. Doucette-Préville, *The Challenge of Homelessness to Spatial Practices*, 8 ONT. INT'L DEV. AGENCY J. SUSTAINABLE DEV. 111, 114–15 (2015) (discussing urban redevelopment plans addressing homeless populations).

greatly from a lack of a stable home—a place they can reside, feel secure, raise a family, and enjoy rights of privacy. Housing instability for families and for children creates harms that last for years, even if affordability challenges are eventually solved. Time and money spent seeking shelter reduces the human capital and consumer spending inputs that house-poor members of society could be contributing to the economy. School changes are disruptive for children, and frequent moves drain household wealth and threaten income stability.

If housing costs are unpredictable or unmanageable, household wealth cannot grow.[36] Stable and affordable housing costs (particularly home ownership costs), on the other hand, increase household wealth, particularly in higher quality neighborhoods.[37] Local land use laws in higher opportunity neighborhoods, however, often exclude affordable housing,[38] and such exclusion not only means that low-income households cannot access the economic opportunities such communities afford,[39] but also prevents robust economies from realizing their full economic potential.[40] Excluding

36. *See* David Reiss, *Underwriting Sustainable Homeownership: The Federal Housing Administration and the Low Down Payment Loan*, 50 GA. L. REV. 1019, 1084 & n.338 (2016).

37. *See* Andrea J. Boyack, *A New American Dream for Detroit*, 93 U. DET. MERCY L. REV. 573, 584–90 (2016); Christopher E. Herbert, Daniel T. McCue & Rocio Sanchez-Moyano, *Is Homeownership Still an Effective Means of Building Wealth for Low-Income and Minority Households?*, *in* HOMEOWNERSHIP BUILT TO LAST: BALANCING ACCESS, AFFORDABILITY, AND RISK AFTER THE HOUSING CRISIS 50, 58 (Eric S. Belsky et al. eds., 2014); Dorothy Brown, *How Homeownership Keeps Blacks Poorer than Whites*, FORBES: LEADERSHIP (Dec. 10, 2012, 12:28 PM), https://www.forbes.com/sites/forbesleadershipforum/2012/12/10/how-home-ownership-keeps-blacks-poorer-than-whites/#4b0bc3d94cce.

38. WILLIAM A. FISCHEL, HOMEVOTER HYPOTHESIS 69 (2001); Andrea J. Boyack, *Limiting the Collective Right to Exclude*, 44 FORDHAM URB. L.J. 451, 472–74 (2017); Kristine Nelson Fuge, *Exclusionary Zoning: Keeping People in Their Wrongful Places or a Valid Exercise of Local Control?*, 18 HAMLINE J. PUB. L. & POL'Y 148, 159 (1996).

39. Investment in housing in low-opportunity areas is not a short-term endeavor; people stuck in impoverished communities often fail to become economically self-sufficient, and reliance on public housing assistance ends up creating a perpetual dependency that is, by its very nature, unsustainable. Boyack, *supra* note 12, at 436–37.

40. Glaeser & Gyourko, *supra* note 15, at 7–9 (pointing out that many of the locations with the most localized economic growth have the strictest exclusionary laws and the most unaffordable housing); *see also* Chang-Tai Hsieh & Enrico Moretti, *Why Do Cities Matter? Local Growth and Aggregate Growth* 34–35 (Nat'l Bureau of Econ. Research, Working Paper No. 21154, 2015), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1045&context=housing_law_and_policy. A sustainable community is one that supports the inclusion of a range of housing options, including affordable housing, as it recognizes the value of providing opportunities for a diversity of people to live in, and contribute to, the local area. *See* GAVIN WOOD ET AL., AUSTL. HOUS. & URBAN RESEARCH INST., HOUSING AFFORDABILITY DYNAMICS: NEW INSIGHTS FROM THE LAST DECADE 39–40 (2014),

affordable housing from more economically vibrant neighborhoods also means that poverty is clustered, and concentrated poverty perpetuates costly social ills such as high-crime neighborhoods and low quality public schools.[41]

The Foreclosure Crisis showed how unpredictable and excessive housing costs can create systemic threats to local, national, and even international financial systems.[42] Disparate opportunities, segregated neighborhoods, and clustered economic harms undermine the fabric of society and can lead to political unrest.[43] The housing affordability gap perpetuates income, racial, and ethnic segregation and undermines the country's foundational premise of equality of opportunity.[44] The positive externalities that a stable housing system creates therefore justify public funding of sustainably affordable housing.

Examining both economic and socio-political approaches to and impacts of housing affordability is critical to designing the right level of public support in the affordable housing sector. Affordability solutions must be geographically tailored to match the particular locality's specific housing deficits.[45] Where the market price of housing is "too expensive" relative to its

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https://www.ahuri.edu.au/__data/assets/pdf_file/0013/2209/AHURI_Final_Report_No233_Housing-affordability-dynamics-new-insights-from-the-last-decade.pdf.

41. Boyack, *supra* note 12, at 462–63. Development of affordable housing in these low-income areas, however, has been shown to create a significant economic improvement in those neighborhoods from increased economic activity, increased property values, and lower crime rates. Rebecca Diamond & Tim McQuade, *Who Wants Affordable Housing in Their Backyard? An Equilibrium Analysis of Low Income Property Development* 2 (Nat'l Bureau of Econ. Research, Working Paper No. 22204, 2016), http://www.nber.org/papers/w22204.pdf.

42. Andrea J. Boyack, *Lessons in Price Stability from the U.S. Real Estate Market Collapse*, 2010 MICH. ST. L. REV. 925, 944–47.

43. As incomes stagnate and the wealth gap in this country grows, housing cost relative to income has steadily increased. AMERICA'S RENTAL HOUSING, *supra* note 31, at 28–29.

44. *See* BARBARA SARD & DOUGLAS RICE, CTR. ON BUDGET & POLICY PRIORITIES, CREATING OPPORTUNITY FOR CHILDREN 6 (2014), https://www.cbpp.org/sites/default/files/atoms/files/10-15-14hous.pdf.

45. The 30% affordable housing metric ignores multiple other complicated, important problems related to housing, and the measurement is conclusory with respect to other critical housing issues, such as substandard homes, unsafe neighborhoods, and transportation challenges. Many questions remain.

> Should households with moderate incomes who spend so much on housing that they have too little leftover to save and invest be viewed as having an affordability problem? Should a low- or moderate-income household that spends a large share of their income on housing to live in an affluent neighborhood be viewed as having an affordability problem or as having just made a choice to spend more on housing? Indeed, distinguishing between who is allocating large shares of income to housing or taking long commutes out of choice and who is doing so out of necessity is a bedeviling task.

production costs, laws and policies should encourage the natural market response: an increase of supply which will drive down the cost of housing.[46] If housing supply costs push prices above households' ability to pay, however, then reducing housing costs requires decreasing the costs of production, perhaps through streamlining regulatory approval or using government incentives and subsidies to lower land, regulatory, and construction costs.[47] If supply costs cannot be further reduced, then government rent subsidies may be necessary to make up the difference between minimum required rents and ability to pay.[48] Decreasing the costs of production and increasing the ability to pay will both positively impact housing affordability, but to discern what combination of efforts is preferable in a particular geographic area, potential policies, programs, and laws should be assessed according to how effective the solution will be at solving localized unaffordability problems.

II. SUPPLY: AFFORDABLE HOUSING CREATION

A. *Limitations on Supply and Density*

Local governments prop up home prices through zoning regulations that artificially limit the supply of homes.[49] Exclusive zoning schemes and anti-density provisions mandate both environmentally irresponsible and financially wasteful housing development.[50] Zoning law is under the control of local governments, and homeowners employ zoning laws (at least in part) to increase property values, thereby protecting their lopsided investment in their homes.[51] Much of exclusionary zoning has focused on limiting quantity and types of homes and curtailing residential density. For example, minimum

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BELSKY ET AL., *supra* note 14, at i.

46. Boyack, *supra* note 38, at 469 (describing how land use regulations impose costs on housing production that inhibit supply); Michael Lewyn, *Deny, Deny, Deny*, 44 REAL EST. L.J. 558, 558 (2016) (describing how limitations on supply in housing markets drive up prices).

47. Glaeser & Gyourko, *supra* note 15, at 8–9 (noting that land use restrictions and regulatory burdens increase the housing supply cost by making land more expensive).

48. James J. Hartnett, *Affordable Housing, Exclusionary Zoning, and American Apartheid: Using Title VIII to Foster Statewide Racial Integration*, 68 N.Y.U. L. REV. 89, 97 (1993) ("[O]verregulation directly increases housing development costs both through lengthy and expensive approval processes and the imposition of high permit fees—costs that are passed on to homebuyers and renters.").

49. FISCHEL, *supra* note 38, at 230; Boyack, *supra* note 38, at 469–70.

50. Boyack, *supra* note 12, at 472–73.

51. FISCHEL, *supra* note 38, at 230.

lot sizes and maximum home sizes keep developers and owners from choosing smaller, more ecologically friendly and less expensive homes.[52] Exclusive zoning separates property according to its "use," and courts have allowed single-family neighborhoods to bar multifamily developments in their neighborhoods.[53] Multifamily housing and smaller-sized homes create residential options that are both more affordable and more sustainable.[54] Local homevoter resistance to increased density may stymie efforts to increase neighborhood affordability and sustainability, however.[55]

Segregation by housing type means segregation by income and by race.[56] Persistently segregated housing patterns create social problems, including heightened racial tensions,[57] more concentrated poverty,[58] secession of the successful,[59] and lack of public funding in certain neighborhoods for public needs and amenities, such as parks, libraries, and even schools.[60] Unless regional or state oversight provides a fair and effective check, local exclusive zoning schemes are prone to create such negative externalities.[61]

B. Rental Supply; Rental Demand

The supply of affordable rental units has not kept pace with the sharp uptick in demand.[62] Simultaneously, stagnant income levels have severely limited many renters' ability to pay.[63] The affordability gap in rental housing

52. *See* Eliza Hall, *Divide and Sprawl, Decline and Fall: A Comparative Critique of Euclidean Zoning*, 68 U. PITT. L. REV. 915, 925–26 (2007).

53. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 397 (1926).

54. ALISON LINDBURG ET AL., DOVETAIL PARTNERS, WHAT'S NEW IN ECO-AFFORDABLE HOUSING? COMBINING GREEN BUILDING INNOVATIONS WITH AFFORDABLE HOUSING NEEDS 2 (2007), http://www.dovetailinc.org/report_pdfs/2007/dovetailecoafford0807ol.pdf; *see* WILLIAM BRADSHAW ET AL., NEW ECOLOGY, INC. & THE GREEN CDCS INITIATIVE, THE COSTS AND BENEFITS OF GREEN AFFORDABLE HOUSING 9–10 (2005), https://www.newecology.org/wp-content/uploads/2017/08/The-Costs-Benefits-of-Green-Affordable-Housing.pdf.

55. FISCHEL, *supra* note 38, at 230.

56. Boyack, *supra* note 12, at 462.

57. Jeannine Bell, *Can't We Be Your Neighbor? Trayvon Martin, George Zimmerman, and the Resistance to Blacks as Neighbors*, 95 B.U. L. REV. 851, 870–71 (2015).

58. Roderick M. Hills, Jr., *Saving* Mount Laurel?, 40 FORDHAM URB. L.J. 1611, 1615 (2013) (referring to *S. Burlington Cty. NAACP v. Township of Mount Laurel*, 456 A.2d 390 (N.J. 1983) and *S. Burlington Cty. NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J. 1975)).

59. Sheryll D. Cashin, *Privatized Communities and the "Secession of the Successful": Democracy and Fairness Beyond the Gate*, 28 FORDHAM URB. L.J. 1675, 1679–83 (2001).

60. Boyack, *supra* note 37, at 604; *see* Edsall, *supra* note 13.

61. Hills, *supra* note 58, at 15–18.

62. AMERICA'S RENTAL HOUSING, *supra* note 31, at 31–32.

63. *Id.* at 28–30.

has been at a "crisis" level for more than fifty years now.[64] Recently, the affordability gap has grown larger than ever, and while it persists, unaffordable housing imposes economic costs on communities and the country as a whole.[65] Public recognition of the affordable housing crisis, however, has so far failed to mobilize support for a comprehensive solution, and incomplete and incremental efforts to mitigate the harms of unaffordable housing have, in some cases, perversely fueled unaffordability. An effective, sustainable solution must focus primarily on the supply of affordable rentals and access to homeownership and only secondarily on owner and tenant subsidies.

Housing policy often centers on the question of homeownership and mortgage affordability, but rental affordability is an ever-increasing problem. According to the Pew Research Center, there were 43.3 million renter households in July 2017, meaning that there are more renters today than ever before, in both absolute and relative terms.[66] The increasing population of renters reflects demographic shifts in society and the economic realities of the early twenty-first century.[67] The population of the United States has grown by 7.6 million since 2006, but "over the same period, the number of households headed by owners remained relatively flat, in part because of the lingering effects of the housing crisis."[68] The percentage of the population renting rather than owning their home has increased among all age, race,

64. *See* JOHN I. GILDERBLOOM & RICHARD P. APPELBAUM, RETHINKING RENTAL HOUSING 3 (1987).

65. AMERICA'S RENTAL HOUSING, *supra* note 31, at 28–30.

66. At least 37% of households rent their homes, a higher percentage of renters than at any point in history (since the percentage first was tracked in 1965). Anthony Cilluffo, Abigail Geiger & Richard Fry, *More U.S. Households Are Renting Than at Any Point in 50 Years*, PEW RES. CTR. (July 19, 2017), http://www.pewresearch.org/fact-tank/2017/07/19/more-u-s-households-are-renting-than-at-any-point-in-50-years/; *see also Quick Facts: Resident Demographics*, NAT'L MULTIFAMILY HOUSING COUNCIL, https://www.nmhc.org/research-insight/quick-facts-figures/quick-facts-resident-demographics/ (last visited Mar. 14, 2018) (according to statistics updated as of September 2017 based on Census Bureau figures).

67. Andrea J. Boyack, *Equitably Housing (Almost) Half a Nation of Renters*, 65 BUFF. L. REV. 109, 113–16 (2017); *see* WEI LI & LAURIE GOODMAN, URBAN INST., COMPARING CREDIT PROFILES OF AMERICAN RENTERS AND OWNERS 16 (2016), http://www.urban.org/sites/default/files/alfresco/publication-pdfs/2000652-Comparing-Credit-Profiles-of-American-Renters-and-Owners.pdf.

68. Cilluffo, Geiger & Fry, *supra* note 66. Non-white households made up the largest increase in the number of renter households. JOINT CTR. FOR HOUS. STUDIES, HARVARD UNIV., AMERICA'S RENTAL HOUSING—MEETING CHALLENGES, BUILDING OPPORTUNITIES: RENTER DEMOGRAPHICS 16 (2011) [hereinafter MEETING CHALLENGES], http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/ahr2011-3-demographics.pdf. From 2001 to 2010 (a period which includes the home-buying boom), 81% of the increase in renter households were non-white households. *Id.*

education-level, and income groups.[69] Renters are an incredibly diverse group in terms of age, race, national origin, and income, but in the aggregate, renter households are smaller, younger, and more non-white than owner households.[70] The demographics of the country are trending more diverse along the lines of the demographic makeup of rental households.[71]

A large number of rental households are low-income, and a majority of all renter households cannot afford to pay for housing.[72] In many geographic areas, unaffordability is driven primarily by lack of supply. In nine of the nation's eleven largest cities, rental demand has grown by double-digits, and the production of new rental units has been much slower and concentrated at the high-end of the market.[73] Luxury rentals keep pace with demand, but the

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69. Cilluffo, Geiger & Fry, *supra* note 66.

70. MEETING CHALLENGES, *supra* note 68, at 16–17; Lewis M. Segal & Daniel G. Sullivan, *Trends in Homeownership: Race, Demographics, and Income*, 22 ECON. PERSP. 53, 53–57 (1998); William Apgar, *Rethinking Rental Housing: Expanding the Ability of Rental Housing to Serve as a Pathway to Economic and Social Opportunity* 3 (Joint Ctr. for Hous. Studies of Harvard Univ., Working Paper No. W04-11, 2004), http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/w04-11.pdf; *Housing Vacancies and Homeownership (CPS/HVS)*, U.S. CENSUS BUREAU, http://www.census.gov/housing/hvs/data/ann13ind.html (last visited Mar. 15, 2018) (follow "Homeownership Rates by Age of Householder and Family Status for the United States" hyperlink). Approximately 43% of owner households occupy single family homes, and 35% reside in multifamily buildings, and the precise opposite breakdown applies to renter households, 43% of whom occupy multifamily units and only 35% single-family homes. NAT'L MULTIFAMILY HOUSING COUNCIL, *supra* note 66 (according to statistics updated as of October 2017 based on Census Bureau figures).

71. Boyack, *supra* note 67, at 116; Joel Kotkin, *Ready, Set, Grow: The Changing Demographics of America*, SMITHSONIAN MAG. (Aug. 2010), http://www.smithsonianmag.com/40th-anniversary/the-changingdemographics-of-america-538284/?no-ist ("The U.S. minority population, currently 30 percent, is expected to exceed 50 percent before 2050. No other advanced, populous country will see such diversity.").

72. Average renter income levels have recently increased, but this statistic is misleading because income-level analysis shows that income increase has occurred only among the highest income levels. The average multifamily-dwelling renter household whose income was over $50,000 per year increased by more than 5% over the one-year period from 2015 to 2016; but over that same period, the average income for the average multifamily-dwelling household earning less than $50,000 decreased approximately by 1.5%. *See* NAT'L MULTIFAMILY HOUSING COUNCIL, *supra* note 66 (according to statistics updated as of October 2017 based on Census Bureau figures).

73. SEAN CAPPERIS ET AL., N.Y. UNIV. FURMAN CTR. & CAPITAL ONE, RENTING IN AMERICA'S LARGEST CITIES 5 (2015), http://furmancenter.org/files/CapOneNYUFurmanCenter__NationalRentalLandscape_MAY2015.pdf; JOINT CTR. FOR HOUS. STUDIES, HARVARD UNIV., THE STATE OF THE NATION'S HOUSING 27–28 (2017), http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/harvard_jchs_state_of_the_nations_housing_2017.pdf.

affordable unit shortfall is ever-increasing.[74] Demand for high-end units is robust, vacancy rates are at record lows, particularly in cities such as San Francisco, but demand for affordable units throughout the country is even more extreme.[75]

Lack of affordable rental options is exacerbated by the aging affordable housing stock.[76] When multifamily buildings are renovated, they are frequently converted to condominium ownership to allow construction costs to be quickly recouped. Since 2001, 12.8% of low-income housing supply has been lost due to conversion, demolition, or obsolescence.[77] In 2000, 62% of the country's rental units were affordable to lower-income households, but just twelve years later, only 41% of rental units in the housing supply were affordable.[78] The tight rental housing supply has predictably led to an increase in rental rates throughout the country.

C. Public Housing Supply: Past, Present, and Future

The United States Housing Act of 1937 created a program to construct and operate federally funded public housing.[79] The program was initially conceived as a jobs program to encourage employment in the construction sector as well as a way to provide housing for working class families rendered "temporarily destitute" during the Great Depression.[80] In the eight decades

74. NAT'L LOW INCOME HOUS. COAL., OUT OF REACH 5 (2017) [hereinafter OUT OF REACH 2017], http://nlihc.org/sites/default/files/oor/OOR_2017.pdf.

75. Glaeser & Gyourko, *supra* note 15, at 2.

76. JOINT CTR. FOR HOUS. STUDIES, HARVARD UNIV., AMERICA'S RENTAL HOUSING—MEETING CHALLENGES, BUILDING OPPORTUNITIES: RENTAL HOUSING STOCK 21 (2011), http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/ahr2011-4-stock.pdf.

77. ACTION CAMPAIGN & AFFORDABLE HOUS. TAX CREDIT COAL., THE CASE FOR EXPANDING THE LOW-INCOME HOUSING TAX CREDIT 2 (2015) [hereinafter EXPANDING LIHTC], http://www.taxcreditcoalition.org/wp-content/uploads/2015/12/Revised-Need-Document.pdf; *see* NAT'L LOW INCOME HOUS. COAL., OUT OF REACH 2011: RENTERS AWAIT THE RECOVERY 3 (2011), http://nlihc.org/sites/default/files/oor/2011-OOR.pdf; *What is Preservation?*, NAT'L HOUSING TR., http://www.nationalhousingtrust.org/what-preservation (last visited Mar. 17, 2018) ("[F]or every new affordable apartment created, two are lost due to deterioration, abandonment or conversion to more expensive housing.").

78. JOSH LEOPOLD ET AL., URBAN INST., THE HOUSING AFFORDABILITY GAP FOR EXTREMELY LOW-INCOME RENTERS IN 2013, at 5 (2015), https://www.urban.org/sites/default/files/publication/54106/2000260-The-Housing-Affordability-Gap-for-Extremely-Low-Income-Renters-2013.pdf; NAT'L LOW INCOME HOUS. COAL., THE GAP: THE AFFORDABLE HOUSING GAP ANALYSIS (2017), http://nlihc.org/sites/default/files/Gap-Report_2017.pdf.

79. United States Housing Act of 1937, Pub. L. No. 75-412, 50 Stat. 888 (codified as amended at 42 U.S.C. § 1437 (2012)).

80. Paul S. Grogan & Tony Proscio, *The Fall (and Rise) of Public Housing* 12 (Joint Ctr. for Hous. Studies, Harvard Univ., Working Paper No. W00-7, 2000),

since its creation, the public housing system has fundamentally changed in scope, application, and public perception.[81] What had originally been intended to be a financially self-sustaining program establishing a stop-gap measure for working-class families eventually became a permanently funded welfare program primarily serving extremely-low-income households, including a large percentage of elderly and disabled individuals.[82] In the 1990s, the federal government halted the construction of new public housing units and began underfunding the operation and maintenance costs of existing public housing.[83] Decades of neglect have led to a massive decline in both the number and the quality of public housing units.[84] An average of 10,000 public housing units are lost every year to disrepair and obsolescence.[85] Nearly 1.2 million affordable public housing units still remain in operation, owned and operated by some 3,300 local housing authorities.[86] It would take $26 billion to repair and rehabilitate these units (and the amount needed to preserve

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http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/grogan_w00-7.pdf; *see* Gordon Cavanaugh, *Public Housing: From Archaic to Dynamic to Endangered*, 14 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 228, 229 (2005). Although local housing authorities took title to and operated public housing developments, these projects were to be funded by the federal government. Alexander von Hoffman, *A Study in Contradictions: The Origins and Legacy of the Housing Act of 1949*, 11 HOUSING POL'Y DEBATE 299, 302 (2000).

81. *See* Anne Marie Smetak, *Private Funding, Public Housing: The Devil in the Details*, 21 VA. J. SOC. POL'Y & L. 1, 5–9 (2014).

82. Charles L. Edson, *Affordable Housing: An Intimate History*, *in* THE LEGAL GUIDE TO AFFORDABLE HOUSING DEVELOPMENT 3, 5 (Tim Iglesias & Rochelle E. Lento eds., 2d ed. 2011); Peter Marcuse, *Mainstreaming Public Housing: A Proposal for a Comprehensive Approach to Housing Policy*, *in* NEW DIRECTIONS IN URBAN PUBLIC HOUSING 23, 26–29 (David P. Varady et al. eds., 1998). Initially, public housing rents were uncapped, but in 1969, the Housing Act was amended to provide that rents in public housing could not exceed 25% of household income (later adjusted to 30%). Housing and Urban Development Act of 1969 (Brooke Amendment), Pub. L. No. 91-152, § 213, 83 Stat. 379, 389 (codified as amended at 12 U.S.C. § 1715z-1 (2012)).

83. With some limited exceptions, the Quality Housing and Work Responsibility Act of 1998 banned nearly all construction of net new public housing units after 1999. Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276, § 9, 112 Stat. 2461, 2256 (codified as amended in scattered sections of 42 U.S.C.).

84. DOUGLAS RICE & BARBARA SARD, CTR. ON BUDGET AND POLICY PRIORITIES, DECADE OF NEGLECT HAS WEAKENED FEDERAL LOW-INCOME HOUSING PROGRAMS: NEW RESOURCES REQUIRED TO MEET GROWING NEEDS 15 (2009), https://www.cbpp.org/sites/default/files/atoms/files/2-24-09hous.pdf; Smetak, *supra* note 81, at 9–12.

85. NAT'L LOW INCOME HOUS. COAL., ADVOCATES' GUIDE 2017: A PRIMER ON FEDERAL AFFORDABLE HOUSING & COMMUNITY DEVELOPMENT PROGRAMS 4-8 (2017) [hereinafter ADVOCATES' GUIDE], http://nlihc.org/sites/default/files/2017_Advocates-Guide.pdf; *see Rental Assistance Demonstration (RAD)*, NAT'L HOUSING L. PROJECT (Sept. 7, 2017), https://www.nhlp.org/resources/rental-assistance-demonstration-rad/.

86. *HUD's Public Housing Program*, U.S. DEP'T OF HOUSING & URB. DEV., https://www.hud.gov/topics/rental_assistance/phprog (last visited Mar. 14, 2018).

inhabitability of these units increases by $3 million each year).[87] That figure does not include funds for environmentally conscious improvements or rehabilitation.

The public housing model as currently constituted is economically unsustainable.[88] Because of income-based affordability limits, tenant rents only cover approximately 40% of the maintenance costs for public housing.[89] Desperate for a source of sufficient operating capital for public housing, in 2014, the Obama administration established the Rental Assistance Demonstration program (RAD).[90] The program was reauthorized in 2017 for at least another three years.[91] Under RAD, the federal government permits hundreds of thousands of public housing units to be transformed into privately held housing units, funded by a combination of public subsidies, tax credits, and private mortgage debt.[92] RAD establishes a way to privatize and therefore finally fund the operation of a significant number of the nation's public housing units, but the program has been criticized for allowing these units to be used as security for private debt and thereby render the affordable units vulnerable to default and foreclosure.[93] In spite of this potential risk, leveraging maintenance and operating costs through private/public financing structures does enable sustainability focused improvements to public housing units.

For decades, public housing has seemed on its way out; however, units owned and operated by a public or non-profit agency may be a necessary part

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87. FINKEL ET AL., *supra* note 9, at v–vi; Smetak, *supra* note 81, at 3.

88. Smetak, *supra* note 81, at 3 (stating that "the existing public housing funding structure is not sustainable").

89. Cavanaugh, *supra* note 80, at 231; Smetak, *supra* note 81, at 9.

90. RAD is only the latest in a series of initiatives that focused on rehabilitating and, to a large extent, destroying public housing units. One of the most infamous initiatives was the HOPE VI program (1993–2007), which allowed public housing developments to be destroyed or completely renovated into mixed-income developments, even though renovation projects invariably meant a net loss of public affordable housing units (some 45% of the units lost under HOPE VI are not being replaced). *See* Peter W. Salisch, Jr., *Does America Need Public Housing?*, 19 GEO. MASON L. REV. 689, 705–30 (2012); *see also* Alexis Stephens, *Risks vs. Rewards: Inside HUD's Favorite New Program*, NEXT CITY (Oct. 9, 2014), https://nextcity.org/daily/entry/public-housing-privatized-hud-rad-section-8.

91. The 2014 version of RAD established a 185,000-unit cap on the number of housing units that could be converted under RAD. *Rental Assistance Demonstration (RAD)*, *supra* note 85. In re-authorizing RAD in 2017, Congress increased the cap to 225,000 units. RAD must be continued or terminated by the end of 2020. *Id.*

92. The initial RAD program was both popular and perceived by HUD to be successful, leveraging $250 million of federal funds to obtain $2.5 billion in capital investment in public housing. *Id.*

93. Smetak, *supra* note 81, at 11–15.

of a sustainably affordable housing system. Private funding for affordable housing allows public funds to be leveraged to make capital improvements, but the long-term sustainability of this affordability model is unproven.[94] Recently, scholars and policy advisors have begun to look critically at what happens after the sunset of affordability mandates that have accompanied private affordable housing subsidies.[95] Private capital creates a broader source of funding for upfront costs, but this structure may prove unsustainable in the long term. Because of this, private funding incentives are likely a better solution to problems that arise from lack of housing supply rather than housing problems that are, essentially, symptoms of extreme poverty. The majority of public housing inhabitants today are elderly or disabled (or both).[96] These public housing residents lack the ability to compete in a more privatized housing market, even using vouchers, and their poverty is so extreme as to justify permanent public housing assistance. In addition, many such residents require housing that provides supportive services (like medical care and counseling), not just shelter and utilities.[97] Privatization of public housing is, to some extent, an answer to the problematic lack of public upkeep funds and the politicized concern about over-dependence on government handouts, but for some populations, housing in publicly held units may still make the most sense.

D. Tax Incentives for Private Ownership, Mortgage Borrowing, and Greening

The federal government's housing and tax policies impact the demand for home ownership, the costs of housing, the availability of mortgage credit, and the ability of lower-income people to access housing. Tax subsidies support sustainable real estate development and the creation and rehabilitation of affordable units.[98] But far greater tax subsidies support private (and semi-

94. *See* discussion *infra* Section II.D.

95. *See, e.g.*, OFFICE OF POLICY DEV. & RESEARCH, U.S. DEP'T OF HOUS. & URBAN DEV., WHAT HAPPENS TO LOW INCOME HOUSING TAX CREDIT PROPERTIES AT YEAR 15 AND BEYOND?, at xi–xix (2012), https://www.huduser.gov/portal//publications/pdf/what_happens_lihtc_v2.pdf.

96. Office of Policy Dev. & Research, *U.S. Housing Market Conditions*, U.S. DEP'T HOUSING & URB. DEV., https://www.huduser.gov/periodicals/ushmc/spring95/spring95.html (last visited Mar. 7, 2018).

97. Ehren Dohler et al., *Supportive Housing Helps Vulnerable People Live and Thrive in the Community*, CTR. ON BUDGET & POL'Y PRIORITIES (May 31, 2016), https://www.cbpp.org/research/housing/supportive-housing-helps-vulnerable-people-live-and-thrive-in-the-community.

98. For example, IRS § 179D provides a tax deduction for energy-efficient retrofits, the federal solar Investment Tax Credit (ITC) offers a 30% tax credit for solar systems on residential

private) mortgage borrowing and home-purchasing.[99] The home mortgage interest deduction is by far the largest housing subsidy,[100] and this deduction not only primarily benefits the highest-income households, but also has a minimal effect on growing the homeownership rate.[101] The only demonstrable effect of the mortgage interest deduction (beyond transferring public funds to the highest-income households) is to encourage anti-sustainable housing trends such as a demand for bigger mortgage loans and larger and more expensive homes.[102]

Tax provisions supporting the development of affordable rental housing are far more defensible. The most useful tax tool for growing affordable housing supply is the Low Income Housing Tax Credit program (LIHTC).[103]

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and commercial properties, and the U.S. Office of Energy Efficiency & Renewable Energy offers tax credits and abatements, bond financing, grants, and rebates for increasing energy efficiency in a development. Office of Energy Efficiency & Renewable Energy, *Tax Incentives for Energy Efficiency Upgrades in Commercial Buildings*, U.S. DEP'T ENERGY, https://energy.gov/eere/buildings/tax-incentives-energy-efficiency-upgrades-commercial-buildings (last visited Feb. 22, 2018). In addition to federal incentives, many states and cities offer their own tax-based incentives for green building. *See, e.g.*, CITY OF CINCINNATI, COMMUNITY REINVESTMENT AREA (CRA) RESIDENTIAL ABATEMENT 1 (n.d.), http://choosecincy.com/Cincinnati/media/Cincinnati/EconDev/CRA_one_pager_Residential.pdf?ext=.pdf.

99. Homeowners enjoy multiple tax benefits, ranging from being able to deduct mortgage interest and property taxes from ordinary income to not having to declare imputed rental value of one's owned home. Owners are also shielded from capital gains taxes. Edward L. Glaeser & Jesse M. Shapiro, *The Benefits of the Home Mortgage Interest Deduction*, 17 TAX POL'Y & ECON. 37, 47–50 (2003); Patric H. Hendershott & Michael White, *The Rise and Fall of Housing's Favored Status*, 11 J. HOUSING RES. 257, 257–61 (2000); Apgar, *supra* note 70, at 11–12.

100. The Millennial Housing Commission calculated that federal tax benefits for homeowners ($121.2 billion in 2001) far outweigh modest federal funding of affordable rental housing through HUD (a mere $33.6 billion during the same period). Apgar, *supra* note 70, at 12.

101. William G. Gale, Jonathan Gruber & Seth Stephens-Davidowitz, *Encouraging Homeownership Through the Tax Code*, 115 TAX NOTES 1171, 1178 (2007); Daniel Hemel & Kyle Rozema, *Inequality and the Mortgage Interest Deduction*, 70 TAX L. REV. 667, 667–70 (2017); Rebecca N. Morrow, *Billions of Tax Dollars Spent Inflating the Housing Bubble: How and Why the Mortgage Interest Deduction Failed*, 17 FORDHAM J. CORP. & FIN. L. 751, 761–62 (2012); Andrew Hanson, Ike Brannon & Zackary Hawley, *Rethinking Tax Benefits for Homeowners*, NAT'L AFF., Spring 2014, at 40–41 (criticizing the mortgage interest deduction as "regressive").

102. The MID has been blamed for distorting home-buying and mortgage borrowing decisions, leading homeowners "to buy more expensive homes than they otherwise would (i.e., an inefficient allocation of resources)." Hemel & Rozema, *supra* note 101, at 672–73; *see* Glaeser & Shapiro, *supra* note 99, at 57–58. There are some other federal programs that provide down-payment funding, counseling, and other home-buying assistance for first-time low-income home buyers (the largest of which are discussed *infra* Section III.B).

103. Office of Policy Dev. & Research, *Low Income Housing Tax Credit*, U.S. DEP'T HOUSING & URB. DEV. (July 10, 2017), https://www.huduser.gov/portal/datasets/lihtc.html [hereinafter HUD LIHTC]. The LIHTC was established through the Tax Reform Act of 1986. *Id.*

The LIHTC, together with a variety of public grant and bond-financing programs, help defray the cost of production for low-income rental units.[104] By defraying development costs, these programs help channel private funds toward below-market rental units.[105] The LIHTC program has great potential to help grow the supply of affordable housing units and should therefore be expanded in markets where lack of supply drives the affordability gap.[106]

With the decline of public housing, affordable housing supply has come to depend more and more on private construction of affordable units. Without market intervention, private development of rental units tends to target the top of the market.[107] Focusing on higher-end rental units makes good business sense because the costs of production are similar for lower- and higher-rent units.[108] According to one estimate, development costs would have to be reduced by 28% in order to make it profitable for the private sector to create affordable housing without government intervention and incentives.[109] The government helps fund the profitability gap by subsidizing affordable housing projects through tax benefits and grants.

The LIHTC provides for a ten-year tax credit for an affordable housing development.[110] The LIHTC is a popular tool for affordable housing development, but LIHTCs are limited in supply. HUD allocates a certain amount of tax credits to each state annually based on population, and the

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104. The LIHTC has financed nearly three million affordable housing units and has provided homes for roughly 6.5 million low-income households. Emily Cadik, *The Low-Income Housing Tax Credit*, ENTERPRISE, https://www.enterprisecommunity.org/policy-and-advocacy/policy-priorities/low-income-housing-tax-credits (last visited Feb. 22, 2018).

105. The Tax Reform Act of 1986 established the LIHTC. HUD LIHTC, *supra* note 103.

106. Boyack, *supra* note 67, at 140–42.

107. JANET VIVEIROS ET AL., CTR. FOR HOUS. POLICY, PAYCHECK TO PAYCHECK: A SNAPSHOT OF HOUSING AFFORDABILITY FOR MILLENNIAL WORKERS 5 (2015), http://media.wix.com/ugd/19cfbe_e17dd74fd626472d8b2febba4caec37b.pdf; Laura Kusisto, *Rents Rise Faster for Midtier Apartments than Luxury Ones*, WALL STREET J. (Aug. 16, 2015), https://perma.cc/VX89-Z8UH.

108. Development costs for above- and below-market housing units are almost the same. BRADSHAW ET AL., *supra* note 54, at 24. Costs include the land costs, the expense of obtaining necessary approvals, and materials and labor to build and finish improvements. "[G]reen building in the commercial and institutional sectors show that green buildings often cost 2–3% more in total up-front development costs, but that the present value of operating savings over the life of the buildings more than offset the incremental capital costs." *Id.*

109. AFFORDABLE RENTAL HOUS. A.C.T.I.O.N., BUILDING AFFORDABLE HOUSING COMMUNITIES USING THE LOW-INCOME HOUSING TAX CREDIT 6 (2015) [hereinafter BUILDING AFFORDABLE HOUSING], www.taxcreditcoalition.org/wp-content/uploads/2015/03/Housing-Credit-Ed-Deck-March-2015-ver-14-3.pdf.

110. ADVOCATES' GUIDE, *supra* note 85, at 5-30; Cadik, *supra* note 104; HUD LIHTC, *supra* note 103.

credits are locally distributed by state entities.[111] State housing finance agencies award tax credits to certain projects, choosing among proposals for construction or rehabilitation of low-income rental housing.[112] To qualify for LIHTC allocation, a project must comply with income-based limits on tenant occupancy for fifteen years.[113]

Rental rates in LIHTC projects must be affordable to 60% AMI households, but because LIHTC projects use a uniform pricing scheme for rents, the 60% AMI affordability requirement does not necessarily mean that the rental rates are affordable to all tenants.[114] Some residents may be paying less than 30% of their income on housing costs, but other tenants with lower incomes end up paying much, much more. In fact, more than 40% of LIHTC housing residents pay more than 30% of their income in housing costs, and 16% pay more than 50%.[115] Some of these residents may make up the affordability gap with vouchers, but others may not have any additional housing assistance.[116]

LIHTC benefits fund only a portion of the affordable housing projects to which they apply, and developers fund the rest through debt (often low-interest loans, and bond-financing) or equity (including grants).[117] In addition to the tax credits, public funds incentivize production of affordable rental housing through tax-exempt bond financing,[118] HOME Investment

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111. *See* HUD LIHTC, *supra* note 103.

112. *Id.*

113. To be eligible, a project must ensure that 20% or more of its tenants earn less than half of the area median income (AMI) or, alternately, that 40% or more of its tenants earn below 60% AMI. Both these income levels are slightly above the poverty line, which is approximately 39% AMI. In reality, most LIHTC projects contain ONLY low-income units (with half of the tenants in LIHTC projects earning below 30% AMI). ADVOCATES' GUIDE, *supra* note 85, at 5-30 to -31.

114. *See id.* at 5-30 to -35.

115. *Id.*

116. Vouchers are discussed *infra* Section III.B.

117. ADVOCATES' GUIDE, *supra* note 85, at 5-30. The debt/equity split in affordable housing developments is typically much different than the debt/equity division in market-rate housing. Most real estate developments are 60–90% debt financed, but only 10–30% of affordable housing costs are financed by hard debt, the rest coming from equity investment and soft debt. BUILDING AFFORDABLE HOUSING, *supra* note 109, at 8–9.

118. Tax-exempt bonds help finance 40% of LIHTC developments. Boyack, *supra* note 67, at 143. They are particularly used in building affordable supportive housing (like senior housing). *Id.* Of course, the government caps availability. *Id.* The bonds are issued by the state housing finance agency or city housing agency. *Id.* at 144.

Partnership grants,[119] Community Development Block Grants,[120] and similar programs. Tax-exempt bond financing and grant programs are limited in amount and are subject to budgetary pressures (for example, available funding fell 44% after 2011).[121] One way to maximize the impact of such supply-side affordable housing supports is to streamline approvals and reduce regulatory costs for such projects.

> Raising capital for affordable housing projects is notoriously complex; it is common to see individual apartment buildings funded by a mix of any of the following: public grants, federal tax credits syndicated through private lenders, interest-free debt from community lenders and municipalities, mortgage debt from commercial lenders and private equity.[122]

Anything that can shorten and simplify the "long and convoluted process" of marshalling public financial support for affordable housing projects can lead to the production of additional affordable units and/or decreased need for public funding in this sector.[123]

Since its inception, the LIHTC program has leveraged approximately $100 billion in private investment capital and has helped create three million affordable rental units.[124] There is a robust demand for LIHTCs, and some legislators believe that if more tax credits were made available, even more

119. The HOME Investment Partnership provides grants to jurisdictions to create affordable housing. It is the largest federal block grant provided to state and local governments that is designated exclusively for affordable housing. *HOME Investment Partnerships Program*, U.S. DEP'T HOUSING & URB. DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/affordablehousing/programs/home (last visited Mar. 14, 2018).

120. The Community Development Block Grant (CDBG) program focuses on developing neighborhoods that were the hardest hit by the foreclosure crisis and other types of disasters. The CDBG program works with the Neighborhood Stabilization Program and focuses on metropolitan areas that contain more than 50,000 people. *Community Development Block Grant Program—CDBG*, U.S. DEP'T HOUSING & URB. DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/communitydevelopment/programs (last visited Mar. 14, 2018).

121. BUILDING AFFORDABLE HOUSING, *supra* note 109, at 13. For a discussion of federal funding gaps, insufficiencies, and the effects of insufficient housing assistance, see generally RICE & SARD, *supra* note 84; SARD & RICE, *supra* note 44.

122. Xiang Ying Estelle Chan, Real Estate Investment Trusts as an Alternative Source of Capital for Housing Development 2 (Sept. 2016) (unpublished S.M. thesis, Massachusetts Institute of Technology) (on file with Massachusetts Institute of Technology Libraries), http://hdl.handle.net/1721.1/107862.

123. *Id.*

124. OFFICE OF U.S. SENATOR MARIA CANTWELL, MEETING THE CHALLENGES OF THE GROWING AFFORDABLE HOUSING CRISIS: EXPANDING AND IMPROVING THE HOUSING TAX CREDIT 5 (2017), https://www.cantwell.senate.gov/imo/media/doc/03062017_Meeting%20the%20challenge%20of%20the%20growing%20affordable%20housing%20crisis%20REPORT.pdf

affordable rental units would be created, helping to meet the ever-increasing demand.[125] For the past several years, for example, Senator Maria Cantwell has annually proposed increasing the number of LIHTCs available by 50% as a way to grow the supply of affordable housing units, particularly in certain regions where affordable housing supply is the tightest.[126] The 2017 version of her proposal is co-sponsored by Senator Orrin Hatch and would provide for the creation of "at least 400,000 additional affordable units over the next decade."[127]

Because the demand for LIHTCs (and various grants) far outpace their supply, state agencies must pick and choose among various possible projects. Selection criteria for awarding LIHTC and grants, therefore, is key. The Tax Reform Act mandates preference of developments in lower-income tracts, but the Fair Housing Act arguably mandates that state housing agencies "affirmatively further fair housing" by selecting affordable housing projects that racially integrate populations rather than those that continue established patterns of residential segregation.[128] This makes selection and siting of LIHTC projects tricky, as housing authorities must walk the line between investment into impoverished neighborhoods and avoidance of poverty clustering.[129]

Another deficiency of governmental incentive programs is that they tend to favor large projects and developers over small ones.[130] Although allocations to large projects may be economically justified in terms of scale (and "bang for the buck"), this creates a disparate treatment of developers and property owners based on their size. Individuals and smaller companies that wish to invest in, develop, and rent out affordable units typically must do this

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125. Demand for LIHTCs is currently more than twice the credits available, and if credit availability was increased even just by 50%, approximately 400,000 more affordable units would become available over the next decade. *Id.*

126. *Id.* at 2 (pointing out that "we face a nationwide shortage of 7.4 million affordable rental homes available to the most vulnerable, extremely low-income citizens" and that this amount "is a 60 percent increase from 2000").

127. *Id.*; *see also Cantwell & Hatch Reintroduce Affordable Housing Credit Improvement Act with Support of Over 2,000 Businesses and Organizations*, AFFORDABLE RENTAL HOUSING A.C.T.I.O.N.: BLOG (Mar. 7, 2017), http://rentalhousingaction.org/blog/2017/3/7/sens-cantwell-hatch-reintroduce-affordable-housing-credit-improvement-act-with-support-of-over-2000-businesses-and-organizations. A similar bill, H.R. 1661, has been proposed in the House by Patrick Tiberi. Although these bills both enjoy broad, bipartisan and industry support, neither has moved out of committee for a vote. *See* H.R. 1661, 115th Cong. (2017).

128. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2525–26 (2015).

129. *See, e.g.*, *In re* Adoption of the 2003 Low Income Hous. Tax Credit Qualified Allocation Plan, 848 A.2d 1, 7–8 (N.J. Super. Ct. App. Div. 2004).

130. Boyack, *supra* note 67, at 146–47.

on their own, without government incentives, and this increases the costs and decreases the availability of financing for such developments. Smaller-sized projects, very many of which house low-income tenants, therefore bear relatively higher development costs, and these costs are then passed on to the lower-income tenants.[131] Lack of public support for smaller-scale developers and landlords puts them at a comparative disadvantage, creates anti-competitive effects in the rental housing market, and drives up rents for everyone.[132]

Fannie Mae and Freddie Mac (collectively, the "GSEs") also contribute to growing the supply of rental housing by enhancing mortgage market liquidity, but the GSEs focus on market-rate rather than below-market rate rental projects.[133] The GSEs provide a significant amount of mortgage capital for market-rate multifamily rental housing developments, and although such market liquidity does not directly impact housing affordable to lower-income renters, it does help grow rental supply which puts downward pressure on rental prices.[134] The GSEs' capital support lowers production costs for multifamily housing and therefore contributes to general housing affordability. Unlike the politically contentious involvement of the GSEs in encouraging residential home mortgage lending by owner occupants, GSE guaranties of multifamily loans have involved little taxpayer risk: less than 1% of the GSE-guaranteed multifamily loans have defaulted.[135]

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131. *See id.* at 147.

132. *See id.* at 146–47.

133. Liquidity in residential mortgage markets is provided by the Federal Housing Administration, Fannie Mae, Freddie Mac (collectively, the GSEs), and the Federal Home Loan Banks. Andrea J. Boyack, *Laudable Goals and Unintended Consequences: The Role and Control of Fannie Mae and Freddie Mac*, 60 AM. U. L. REV. 1489, 1495 (2011). The GSEs currently have a portfolio containing more than $286 billion of non-securitized loans on multifamily developments. For the most part, this amount does not represent a government subsidy, but rather is a government-structured channeling of private investment capital into multifamily development. Ninety percent of rental units financed through GSE structures have been tax and budget neutral. Boyack, *supra* note 67, at 150. The primary function of the GSEs involvement in the multifamily housing market is to increase the supply of capital or market liquidity (much like the role the GSEs play for market-rate home purchases). *Id.* at 127–28.

134. The GSEs' total market share in multifamily residential mortgage lending has fluctuated post-2008 from as high as 70% to as low as 30%. KARAN KAUL, URBAN INST., THE GSES' SHRINKING ROLE IN THE MULTIFAMILY MARKET 4 (2015), https://www.urban.org/sites/default/files/publication/48986/2000174-The-GSEs-Shrinking-Role-in-the-Multifamily-Market.pdf.

135. CTR. FOR AM. PROGRESS, A RESPONSIBLE MARKET FOR RENTAL HOUSING FINANCE: ENVISIONING THE FUTURE OF THE U.S. SECONDARY MARKET FOR MULTIFAMILY RESIDENTIAL RENTAL MORTGAGES 2–3 (2010), [hereinafter A RESPONSIBLE MARKET], https://cdn.americanprogress.org/wp-content/uploads/issues/2010/10/pdf/

GSE capital support is limited to "multifamily" (five-plus unit) rental projects, and the GSEs prefer to acquire mortgages on larger (fifty-plus unit) multifamily buildings because it is more cost-effective to resell or securitize larger loans.[136] Once again, preference for fewer, larger loans results in a comparative advantage for larger projects. In many communities, however, smaller multifamily buildings and duplexes, triplexes and quadplexes are the most affordable housing options for low- and moderate-income families.[137] These are the very sorts of developments that must compete in the market without GSE-channeled capital (and likely without the benefits of tax credit financing). It thus may be beneficial for the government to establish more targeted capital channeling with respect to smaller, more affordable rental housing.

Government involvement in subsidizing housing development allows the government to help shape housing's future. Tax incentives, grants, and public funding can mandate outcomes with positive externalities. For example, public financial support can require the creation of more affordable and more sustainable housing units. Allocation criteria or qualification requirements can explicitly require projects to accomplish such public purposes. Leveraging public and private funds for the upfront creation of sustainably located, integrated, affordable, and green housing options will ultimately reduce such housing's long-term operating costs, making it more likely that the projects can eventually become fairly self-sustaining (economically as well as environmentally). In terms of affordability, neighborhood quality, and environmental efficiency, the increased initial inputs (by the government and private developers) will create lower costs over time, making the entire system more sustainable.

Affordable housing offers opportunities for public-private partnerships, community and mission lending, securitization, and other innovative financial structures.[138] Government support should encourage such financial innovations in order to maximize the flow of funds and create more

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multifamilyhousingreport.pdf; NAT'L MULTI HOUS. COUNCIL, HOUSING FINANCE REFORM: THE MULTIFAMILY PERSPECTIVE 1 (2011), http://content.aristotle.com/NAA/GSE_2011-07.pdf.

136. This preference for larger over smaller rental operations, however, does impact the market. Smaller multifamily (five- to forty-nine-unit range) have "particular challenges" because they are less likely to have predictable financing. Less than 45% of small multifamily projects have fixed rate loans (70% of fifty-plus unit property projects do). *See* CTR. FOR CMTY. LENDING, FINANCING SMALL MULTIFAMILY RENTAL HOUSING 20 (2015), http://centercommunitylending.org/wp-content/uploads/2015/06/Financing-Small-Multifamily-Rental-HousingCCL.pdf; A RESPONSIBLE MARKET, *supra* note 135, at 34–36.

137. Boyack, *supra* note 67, at 116–17.

138. Boyack, *supra* note 12, at 456; *see* Boyack, *supra* note 67, at 135.

affordable and environmentally sustainable housing units. Regulation should be constantly re-examined to ensure it rewards and promotes, rather than inhibits, financial innovation and experimentation.

In a similar vein, federal funding must work hand-in-hand with supportive local zoning that permits the creation of inclusive, sustainable neighborhoods containing a variety of housing types.[139] To the extent that local homevoters resist efforts to grow housing affordability, state or federal oversight should prevail to ensure a broader, more economically sustainable approach. Emphasizing community economic benefits and environmental sustainability gains resulting from affordability initiatives may increase community support.

III. DEMAND: HOUSING COST AFFORDABILITY

For the vast majority of renters, incomes have not kept pace with rapidly rising rents. Increasing the supply of housing units may not be sufficient to make housing affordable for all households, particularly in certain geographic areas where the affordability gap is the most extreme. In such cases, housing affordability must be addressed from the perspective of ability-to-pay, and not just with respect to cost-to-produce.

Today, 52% of all renters are cost burdened, paying over 30% of their gross income for housing, and half of these pay more than 50% of their gross income for housing.[140] Approximately eleven million renter households (27% of all renter households) spend more than half their monthly income on rent.[141] Rental unaffordability is a nationwide problem, even though the size of the gap and the degree of rent burdens vary by location.[142] In no state, however, does a minimum wage full-time worker earn enough to pay fair market rent on a one-bedroom apartment using no more than 30% of income.[143] To afford a two-bedroom rental unit at the national average rent of

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139. Boyack, *supra* note 38, at 477–78.

140. *See generally* BUILDING AFFORDABLE HOUSING, *supra* note 109, at 4.

141. OUT OF REACH 2017, *supra* note 74, at 1.

142. Generally, rents are more unaffordable in the west and the south. San Francisco, New York, and Honolulu have long struggled with rental unaffordability, but over the past few years, rental rate increases have actually been most dramatic in mid-sized metropolitan areas like Denver, Kansas City, Nashville, and Portland. *See generally, e.g.*, Olga Baranoff, Housing Affordability and Income Inequality: The Impact of Demographic Characteristics on Housing Prices in San Francisco (Apr. 10, 2016) (unpublished B.A. thesis, Johns Hopkins University) (on file with the John Hopkins University Economics Department).

143. OUT OF REACH 2017, *supra* note 74, at 14.

$892 per month,[144] an individual would need to earn $21.21 per hour for a forty-hour week.[145] In sixteen states and the District of Columbia, the housing wage (the hourly rate that would make a fair market rental unit affordable) is more than $20 per hour.[146]

The affordability gap is most acute for the nation's most impoverished households, and among the lowest-income quintiles, the gap is growing. Each year, more than 400,000 new renter households enter the housing market, the majority of which are low-income.[147] More than 75% of households earning less than $15,000 annually are severely rent burdened, an increase of 49% since 2003.[148] Rental increases have doubled over the past twenty years, but incomes over the same time have remained fairly stagnant.[149]

For decades, the federal government has subsidized tenants' and low-income owners' ability to pay for housing through a variety of programs. The biggest support for affordable homeownership is the FHA's mortgage insurance program. The largest and most well-known rental subsidy is the Section 8 tenant-based voucher program. Critics claim that public demand-side assistance of these sorts create unsustainable permanent entitlements (in terms of rental assistance) or unstable homeownership (in terms of FHA insured low-down-payment loans).[150] Rent and mortgage subsidies that foster

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144. Tracy Jan, *Here's How Much You Would Need to Afford Rent in Your State*, WASH. POST: WONKBLOG (June 8, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/06/08/heres-how-much-you-would-need-to-make-to-afford-housing-in-your-state/?utm_term=.18df58913402.

145. *Out of Reach 2017*, NAT'L LOW INCOME HOUSING COALITION, http://nlihc.org/oor (last visited Mar. 14, 2018) ("The Housing Wage for a two-bedroom apartment is $13.96 higher than the federal minimum wage of $7.25, and $4.83 higher than the average hourly wage of $16.38 earned by renters nationwide.").

146. OUT OF REACH 2017, *supra* note 74, at 16–17.

147. EXPANDING LIHTC, *supra* note 77, at 1.

148. *See* Jeff Larrimore & Jenny Schuetz, *Assessing the Severity of Rent Burden on Low-Income Families*, BOARD GOVERNORS FED. RES. SYS.: FEDS NOTES (Dec. 22, 2017), https://www.federalreserve.gov/econres/notes/feds-notes/assessing-the-severity-of-rent-burden-on-low-income-families-20171222.htm. S*ee generally* BUILDING AFFORDABLE HOUSING, *supra* note 109; OUT OF REACH 2017, *supra* note 74.

149. Rental rates are higher than ever before across the country. On average, during the five-year period from 2009 to 2014, rental rates went up 15.2%. Boyack, *supra* note 67, at 117. The median asking rate for rents has nearly doubled in the past twenty years. *See* OUT OF REACH 2017, *supra* note 74, at 2. Although the average income in the United States has increased, when incomes are broken into quintiles, it is apparent that this economic growth is clustered at the high end of the income spectrum. For low-income and extremely low-income households, rents have stayed the same or even decreased. LAWRENCE MISHEL ET AL., ECON. POLICY INST., WAGE STAGNATION IN NINE CHARTS 6 (2015), http://www.epi.org/files/2013/wage-stagnation-in-nine-charts.pdf.

150. Reiss, *supra* note 36, at 1022–23.

self-sufficiency are more economically sustainable, and economic sustainability may be further aided by incorporating green building initiatives into upfront supply-side funding assistance in order to reduce operating costs in the long term.

A. Purchase Prices and Mortgage Capital

The recent foreclosure crisis revealed that purchasing a home is a riskier investment than was previously recognized. Even though the crisis somewhat tainted the American Dream of homeownership, most economists still promote homeownership as a sound wealth-building strategy.[151] For many households, however, the purchase of a home is financially impossible, so stability and equity appreciation that may come with ownership are financially out of reach. Although homeownership is not always the most financially prudent choice for a given household, making home-buying accessible to a broader swath of the population is still a critical way to address the racial wealth gap and wealth inequality in our society.[152]

Homeownership can be economically difficult for one (or more) of three reasons: high home prices make monthly mortgage payments unaffordable, bad credit makes mortgage loans unattainable, and lack of cash on hand makes a substantial down payment virtually impossible. Prior to 2008, private lenders (i) lowered initial monthly payments, by offering interest-only and teaser-rate loans, (ii) made subprime loans to borrowers with unproven credit or bad credit, and (iii) reduced the need for cash down payment at closing by making loans at or near 100% loan-to-value.[153] These private market "solutions" ultimately destroyed the homeownership dream for many of these borrowers, and the collective failures of risky residential mortgage lending caused systemic financial collapse.[154]

Attempts by government and quasi-government entities to make housing more accessible have supported American homeownership for several

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151. *See* Herbert, McCue & Sanchez-Moyano, *supra* note 37, at 50; *see also* Kristen Adams, *Homeownership: American Dream or Illusion of Empowerment?*, 60 S.C. L. REV. 573, 574–75 (2009); David Reiss, *First Principles for an Effective Federal Housing Policy*, 35 BROOK. J. INT'L L. 795, 803–04 (2010). *See generally* Allison Freeman, *The Continuing Importance of Homeownership: Evidence from the Community Advantage Program*, 26 COMMUNITY INV. 7 (2014).

152. Patricia A. McCoy, *Has the Mortgage Pendulum Swung Too Far? Reviving Access to Mortgage Credit*, 37 B.C. J.L. & SOC. JUST. 213, 216 (2017).

153. Boyack, *supra* note 42, at 947–50.

154. *See* KATHLEEN C. ENGEL & PATRICIA A. MCCOY, THE SUBPRIME VIRUS: RECKLESS CREDIT, REGULATORY FAILURE, AND NEXT STEPS 10–11 (2011).

decades since the New Deal, but there have been costly and inequitable missteps along the way.[155] The FHA's mortgage insurance profoundly affected homeownership by making home acquisition more affordable. For one thing, the FHA introduced the thirty-year, self-amortizing, fixed-rate residential mortgage loan as the primary lending tool for prime mortgage loans.[156] This new type of mortgage loan was much more affordable for homebuyers, and access to cheap capital boosted homeownership. In addition, the FHA offered mortgage insurance to low-income, first-time homebuyers, including those with poorer credit scores, allowing these borrowers to obtain a mortgage with a relatively small amount of money down.[157] Such mortgage lending innovations grew the homeownership rate and forever changed the country's residential geography.[158] Although FHA support increased homeownership, support was initially channeled exclusively to white homebuyers. The FHA's redlining policies and practices continued for decades, but their socially harmful impacts have persisted even longer—for generations. By systemically denying mortgage insurance to borrowers and communities of color, the government prescribed, orchestrated, and enshrined the racially segregated residential housing system that plagues the country to this day.[159]

Overall, slow and steady growth in American homeownership soared to record levels in the first few years of the twenty-first century, but these homeownership gains turned out to be unsustainable. Approximately 4.5 million families lost their homes to foreclosure between September 2008 and August 2013.[160] In 2016, the homeownership rate fell to 62.9%, the lowest

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155. Fannie and Freddie increased liquidity in mortgage markets through establishing a secondary market for prime mortgage loans. For more information on the role of Fannie Mae and Freddie Mac in the context of increasing homeownership and in the context of systemic instability and bailout costs, see generally Boyack, *supra* note 133, and David Reiss, *Fannie Mae and Freddie Mac and the Future of Federal Housing Finance Policy: A Study of Regulatory Privilege*, 61 ALA. L. REV. 907 (2010).

156. Reiss, *supra* note 36, at 1023–24; *see also* PRESIDENT'S COMM'N ON HOUS., THE REPORT OF THE PRESIDENT'S COMMISSION ON HOUSING, at xvii–xix (1982), http://www.huduser.org/portal//Publications/pdf/HUD-2460.pdf.

157. Historically, this amount varied from less than 0% to 20% of the purchase price, and today is around 3.5%. Reiss, *supra* note 36, at 1073.

158. KENNETH JACKSON, CRABGRASS FRONTIER 190–91 (1985). See generally Reiss, *supra* note 36, at 1034–75, for an in-depth explanation of FHA mortgage insurance and its role in mortgage lending.

159. *See* RICHARD R.W. BROOKS & CAROL M. ROSE, SAVING THE NEIGHBORHOOD: RACIALLY RESTRICTIVE COVENANTS, LAW, AND SOCIAL NORMS 109 (2013).

160. CORELOGIC, CORELOGIC NATIONAL FORECLOSURE REPORT 2 (2013), https://www.corelogic.com/downloadable-docs/national-foreclosure-report-august-2013.pdf.

rate since the Census Bureau began tracking it in 1965.[161] Reacting to this foreclosure crisis and the broader financial distress that followed in its wake, private market players pulled out of the subprime mortgage business, and the government tightened its mortgage lending underwriting requirements. In the decade since the 2007 subprime crisis, obtaining a home mortgage loan has become much more difficult.[162] Recently, the housing market in many areas has rallied, and in 2017, average home prices in the United States reached an "all-time record high," exceeding prices at the peak of the Housing Boom.[163] Tight credit combined with record high home prices makes home-buying today more unaffordable than ever.

B. Gap Funding for Rental Costs

Purchasing a home is out of reach for most low-income households, and stable rental housing is elusive as well. In 1974, the federal government established voucher programs through HUD to fund the affordability gap for low-income rental households.[164] Under Section 8 of the Housing Act of 1937, Congress authorized HUD to provide gap funding in the form of portable vouchers issued to low-income tenants who could present the

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161. Prashant Gopal, *Homeownership Rate in the U.S. Drops to Lowest Since 1965*, BLOOMBERG (July 28, 2016, 10:04 AM), https://www.bloomberg.com/news/articles/2016-07-28/homeownership-rate-in-the-u-s-tumbles-to-the-lowest-since-1965. The homeownership rate fell from a high of 69.2% in 2005. Fed. Reserve Bank of St. Louis, *Homeownership Rate for the United States*, FED. RES. ECON. DATA, https://fred.stlouisfed.org/series/RHORUSQ156N (last visited Mar. 14, 2018). By third quarter 2017, homeownership rates have increased a bit to 63.9%. Press Release, U.S. Census Bureau, Quarterly Residential Vacancies and Homeownership, Fourth Quarter 2017, at 2 (Jan. 30, 2018), https://www.census.gov/housing/hvs/files/currenthvspress.pdf.

162. McCoy, *supra* note 152, at 2.

163. The average sale price for a new home in September 2017 was $385,200. Prior to the 2008 meltdown, the highest average home sale price of a new home was in March 2007 when average sale price was $329,400. U.S. CENSUS BUREAU, MEDIAN AND AVERAGE SALES PRICES OF NEW HOMES SOLD IN UNITED STATES 11, 14 (n.d.), https://www.census.gov/construction/nrs/pdf/uspricemon.pdf. The median sale price of a new home reached its highest point in December 2017, at $335,400. *Average & Median Sale Price for A New Home*, FEDPRIMERATE.COM, http://www.fedprimerate.com/new_home_sales_price_history.htm (last visited Mar. 6, 2018).

164. *See Housing Choice Vouchers Fact Sheet*, U.S. DEP'T HOUSING & URB. DEV., https://www.hud.gov/program_offices/public_indian_housing/programs/hcv/about/fact_sheet (last visited Mar. 16, 2018); *Section 8 Program Background Information*, U.S. DEP'T HOUSING & URB. DEV., https://www.hud.gov/program_offices/housing/mfh/rfp/s8bkinfo (last visited Mar. 16, 2018).

vouchers to landlords in partial payment of monthly rent.[165] Tenants using these Housing Choice Vouchers pay 30% of their income toward rent, and the government pays the rest up to a fair market rent cap.[166] Section 8 vouchers are an absolutely essential support for millions of renters who rely upon these subsidies.[167] But for two reasons, the subsidy program as currently constituted is unsustainable. First, the number of qualified low-income households far, far exceeds the number of rental subsidies provided by the government. This necessitates some sort of limited resource allocation

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165. *Section 8 Rental Certificate Program*, U.S. DEP'T HOUSING & URB. DEV., https://www.hud.gov/programdescription/cert8 (last visited Feb. 18, 2018); *see also* CTR. ON BUDGET & POLICY PRIORITIES, POLICY BASICS: HOUSING CHOICE VOUCHER PROGRAM 1 (2017) [hereinafter POLICY BASICS], https://www.cbpp.org/sites/default/files/atoms/files/PolicyBasics-housing-1-25-13vouch.pdf. The less common project-based vouchers are often grouped with the LIHTC as a supply-side subsidy.

166. Housing choice vouchers provide that tenants pay 30% of their income as rent and the federal government, working through local housing agencies and non-profit associations, pays the difference between the 30% amount and the rent up to a specified maximum payment standard for the geographic area. *See* POLICY BASICS, *supra* note 165, at 1. The specific maximum payment standard is calculated at 90–110% of the "fair market rent" in a metropolitan area or a non-metropolitan county, with "fair market rent" equaling the rental rate for units at the fortieth to fiftieth percentile of rents. FINKEL ET AL., U.S. DEP'T OF HOUS. & URBAN DEV., SMALL AREA FAIR MARKET RENT DEMONSTRATION EVALUATION, at v (2017), https://www.huduser.gov/portal/sites/default/files/pdf/SAFMR-Interim-Report.pdf; *see* 24 C.F.R. §§ 888.113, 982.503 (2018). Housing units rented must meet the quality and size standards set by HUD in order to qualify for the voucher-provided subsidy. *Housing Choice Vouchers Fact Sheet*, *supra* note 164. Federal law does not require landlords to accept Section 8 vouchers, but local law in thirteen states and several localities specifically prohibits landlords from discriminating against voucher holders. HUD uses larger areas (metropolitan areas or counties outside of metro areas) to define local market rents, but rental rates hugely vary within a single metropolitan area (often by a factor of five to ten). In Washington, D.C., a two-bedroom apartment in the 20003 zip code is listed at a monthly rate of $10,074. ZILLOW, http://zillow.com (search in search bar for "20003"; then select "For Rent" in dropdown tool; then select "2+ Beds" in dropdown tool) (last visited June 26, 2018). Just 1.5 miles away in the 20020 zip code, a two-bedroom apartment is listed at a monthly rate of $1,025, almost one-tenth of the price of the 20003 apartment. ZILLOW, http://zillow.com (search in search bar for "20020"; then select "For Rent" in dropdown tool; then select "2+ Beds" in dropdown tool) (last visited June 26, 2018). In Kansas City, Missouri, a three-bedroom home in the 64102 zip code is listed at a monthly rate of $5,218. ZILLOW, http://zillow.com (search in search bar for "64102"; then select "For Rent" in dropdown tool; then select "3+ Beds" in dropdown tool) (last visited June 26, 2018). Just two miles away in the 64109 zip code, a three-bedroom home is listed at a monthly rate of $600, 11% of the price of the more expensive home. ZILLOW, http://zillow.com (search in search bar for "64109"; then select "For Rent" in dropdown tool; then select "3+ Beds" in dropdown tool) (last visited June 26, 2018). *See also Collection Financial Standards*, *supra* note 23. This approach means that within a single metropolitan area, the only neighborhoods that are affordable even to recipients of Section 8 vouchers are typically concentrated in the lowest-income neighborhoods.

167. Vouchers currently help pay for the housing costs of more than five million people in approximately 2.2 million low-income households. POLICY BASICS, *supra* note 165, at 1.

scheme and means that the majority of qualified households do not receive public housing aid. Second, subsidy dollars feed and prop up rental rate increases, and, freed from income-based restraints on ability to pay, rental rates in high-demand areas can continue to climb, increasing the affordability gap.

Only one in four eligible households receive public housing assistance of any type.[168] This means that 75% of low-income households are at the mercy of the public market when it comes to finding money to pay the rent. For the lucky one-fourth, vouchers and other assistance provide a crucial source of relief and way to stay in a home. Because there are significantly fewer government subsidies available than the number of qualified tenant households seeking government aid, distributors of the subsidy must make difficult allocation decisions. Housing vouchers are allocated unevenly, to only a fraction of the eligible households, based on a first-in-time model using waiting lists or on a luck-of-the-draw model using lotteries, with an overlay of politically driven prioritization categories.[169]

Uneven allocation of public funds among the neediest households is destabilizing and unsustainable, but Congress has never shown the political will to fully fund the affordability gap in housing.[170] Unequal distribution of public housing assistance drives low-income households to desperately compete for a limited number of vouchers and affordable apartments. In Boston, for example, more than 10,000 people applied for just seventy-three additional vouchers that were issued in November 2014.[171] Even though extremely low-income households are prioritized in most local distribution

168. HOUS. COMM'N, BIPARTISAN POLICY CTR., HOUSING AMERICA'S FUTURE: NEW DIRECTIONS FOR NATIONAL POLICY 11 (2013), https://bipartisanpolicy.org/wp-content/uploads/sites/default/files/BPC_Housing%20Report_web_0.pdf; OUT OF REACH 2017, *supra* note 74, at 6.

169. *See* U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, PHA GUIDEBOOK TO ENDING HOMELESSNESS 8 (2013), https://www.usich.gov/resources/uploads/asset_library/PHA_Guidebook_Final.pdf.; Boyack, *supra* note 67, at 123.

170. *See, e.g.*, BRUCE KATZ & MARGERY AUSTIN TURNER, BROOKINGS INST., RETHINKING U.S. RENTAL HOUSING POLICY: BUILD ON STATE & LOCAL INNOVATION 4–5 (2008), https://www.brookings.edu/wp-content/uploads/2016/06/pb_housing_katz.pdf; Charles J. Orlebeke, *The Evolution of Low-Income Housing Policy, 1949–1999*, 11 HOUSING POL'Y DEBATE 489, 497–98 (2000).

171. NAT'L LOW INCOME HOUS. COAL., OUT OF REACH 2015, at 5 (2015), http://nlihc.org/sites/default/files/OOR_2015.pdf; *see also* Katie Johnston, *Demand Soars for Affordable Housing in Boston Area*, BOS. GLOBE (Nov. 28, 2014), https://www.bostonglobe.com/business/2014/11/28/demand-for-affordable-housing-soars/hCb4RSkLTbpqdMJR1eCYTI/story.html.

schemes, out of every 100 extremely low-income households, sixty-nine do not obtain rental assistance or placement in an affordable unit.[172]

Given limited taxpayer funding, every additional dollar spent for a given subsidy reduces the number of households served by the government subsidy program. This creates a built-in preference for locating subsidy recipients in the lowest-rental-rate housing possible in a given metropolitan area, leading to poverty concentration and racial segregation, which in itself runs counter to the mission of HUD and the purposes of the Fair Housing Act.[173] Recognizing the problems of poverty concentration left unsolved by current approaches to rental subsidization, HUD has begun experimenting with allowing local housing authorities to set market rents at the zip code level rather than regionally (although only a handful of housing authorities are currently doing this).[174] This approach, what HUD calls "Small Area Fair Market Rents" would increase the maximum voucher subsidy in high-rent neighborhoods and lower the maximum subsidy in low-rent neighborhoods, and this small area fair market rent pricing approach will theoretically allow subsidy recipients to locate in higher opportunity areas (supposedly with little net cost to the government). If recipients mostly prefer less impoverished neighborhoods, however, this method of calculating fair rents will make vouchers more expensive, necessarily reducing the number of households that can be served with the same number of public assistance dollars.

In 2016, Congress passed the Housing Opportunity Through Modernization Act (HOTMA), the most important affordable housing legislation in decades.[175] HOTMA was an effort to improve sustainability of federal housing assistance through reducing regulatory costs associated with the use of vouchers, delaying rent increases when household incomes rise, improving low-income households' access to low-poverty neighborhoods, and giving local housing agencies more flexibility to apply housing funds

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172. "Extremely low-income" refers to households that earn less than the poverty level or 30% of AMI. OUT OF REACH 2017, *supra* note 74, at 1.

173. Boyack, *supra* note 12, at 445–47.

174. FINKEL ET AL., *supra* note 166, at 2; OFFICE OF PUB. AND INDIAN HOUS., U.S. DEP'T OF HOUS. AND URBAN DEV., PIH-2018-01 (HA), GUIDANCE ON RECENT CHANGES IN FAIR MARKET RENT (FMR), PAYMENT STANDARD, AND RENT REASONABLENESS REQUIREMENTS IN THE HOUSING CHOICE VOUCHER PROGRAM (2018), https://www.hud.gov/sites/dfiles/PIH/documents/PIH-2018-01.pdf; *HUD Provides Guidance on Small Area FMRs*, NAT'L LOW INCOME HOUSING COALITION (Jan. 22, 2018), http://nlihc.org/article/hud-provides-guidance-small-area-fmrs; Todd Richardson, *Giving Public Housing Agencies More Time to Succeed*, U.S. DEP'T HOUSING & URB. DEV.: HUDDLE (Aug. 25, 2017), https://blog.hud.gov/index.php/2017/08/25/giving-public-housing-agencies-time-succeed/.

175. Housing Opportunity Through Modernization Act of 2016, Pub. L. No. 114-201, 130 Stat. 782 (to be codified at 42 U.S.C. § 1437).

toward necessary renovations for public housing units.[176] This legislation represents an encouraging first step toward more flexible and sustainable use of housing assistance, but is insufficient to address the gap in supply of affordable rental units and the gap between low-income renters' ability to pay and fair market rental prices.

Housing Choice vouchers are the government's go-to response to the increasingly inadequate supply of affordable housing units. When public housing units disappear, whether deliberately through project conversion (for example through HOPE VI or RAD) or through attrition or natural disaster, the government typically attempts to replace at least some of the lost supply with increased support for demand in the form of additional Section 8 vouchers.[177] Theoretically, if a one-to-one replacement is provided, former public housing tenants who receive Housing Choice Vouchers in lieu of placement in affordable units are financially unharmed because their rents remain basically the same as before.[178] In practice, however, vouchers are not always available for every public housing unit lost, and even when vouchers are provided, recipients still may find affordable housing elusive. One problem is the "rampant discrimination from private landlords" against voucher recipients.[179]

The Section 8 voucher program may also be problematic because it may, ironically, contribute to increasing rental rates. Subsidizing rental costs makes more money available for rental payments, and because tenant ability to pay has increased, landlords are able to charge higher rents. HUD's fair

176. *See generally id.*; *see also* Barbara Sard, *Congress Unanimously Approves Bill to Improve Housing Programs*, CTR. ON BUDGET & POL'Y PRIORITIES: OFF THE CHARTS (July 15, 2016, 1:15 PM), https://www.cbpp.org/blog/congress-unanimously-approves-bill-to-improve-housing-programs.

177. ADVOCATES' GUIDE, *supra* note 85, at 4-10, 4-17.

178. Failure to provide a voucher replacement for destroyed public housing has been legally problematic under past HUD initiatives, such as HOPE VI. *See, e.g.*, Cabrini-Green Local Advisory Council v. Chi. Hous. Auth., No. 96 C 6949, 1997 WL 31002, at *2 (N.D. Ill. Jan. 22, 1997).

179. Brentin Mock, *New Orleans' Leading Affordable-Housing Developer Explains Its Lack of Affordable Housing*, CITYLAB (Sept. 3, 2015), https://www.citylab.com/equity/2015/09/new-orleans-leading-affordable-housing-developer-explains-its-lack-of-affordable-housing/403351/. Only a handful of states explicitly prohibit private landlords from discriminating against voucher recipients in their tenant selection, and landlords frequently deny tenancy to voucher holders. In the aftermath of Hurricane Katrina, for example, Pres Kabacoff, CEO of one of the biggest multifamily developers in New Orleans, was asked about renting to very low-income former public housing tenants who had been provided with vouchers. Kabacoff infamously advised landlords: "You just don't take them, or you evict them. Just get them out of there." *Id.* Kabacoff claims that he was speaking only about "the criminal element" and indicated that more support for affordable housing unit construction is necessary. *Id.*

market rent caps on vouchers slows down this process, but vouchers still have a gradual market inflationary effect. Rental rates are economically justified if they reflect increasing tenant incomes and/or landlord expenses, but when subsidies increase the demand for market-rate rental units, the market will respond by creating more of these higher-priced units rather than creatively meeting unmet demands for lower-priced units. Basically, the availability of vouchers, while absolutely essential in the short term to provide impoverished households with basic shelter needs, may ultimately increase rental costs, unaffordability, and dependence on public gap funding. This cycle is inherently unsustainable, creating an ever-expanding need for public housing assistance.

C. Bridging the Owner—Renter Divide

One unsustainable aspect of our housing system is the clear divide between owners and renters and the inequitable support given to renters. Every homeowner household can deduct mortgage interest,[180] every homeowner can defer capital gains when selling her primary residence,[181] and every mortgage borrower benefits (directly or indirectly) from the GSEs' role in making mortgage capital more broadly available.[182] Many low-income homebuyers benefit from FHA mortgage insurance and the various home-buying assistance programs that HUD and local agencies have made available.[183] The vast majority of renters, on the other hand, receive no public support with respect to their housing costs. Only one-fourth of the neediest renters receive any rental subsidy,[184] and these subsidies in practice limit tenant choice with respect to where they can live.[185] Some tenants reside in

180. ADVOCATES' GUIDE, *supra* note 85, at 1–2; Robert Dietz, *Analyzing Claims Regarding the Mortgage Interest Deduction*, NAT'L ASS'N HOME BUILDERS (July 25, 2013), http://eyeonhousing.org/2013/07/analyzing-claims-regarding-the-mortgage-interest-deduction/. Acquisition mortgage debt is capped at $1 million and home equity debt is currently capped at $100,000. INTERNAL REVENUE SERV., DEP'T OF THE TREASURY, PUB. NO. 936, HOME MORTGAGE INTEREST DEDUCTION 10 (2015), https://www.irs.gov/pub/irs-prior/p936--2015.pdf.

181. INTERNAL REVENUE SERV., DEP'T OF THE TREASURY, PUB. NO. 523, SELLING YOUR HOME 2 (2015), https://www.irs.gov/pub/irs-prior/p523--2015.pdf; INTERNAL REVENUE SERV., DEP'T OF THE TREASURY, PUB. NO. 530, TAX INFORMATION FOR HOMEOWNERS 7 (2017), https://www.irs.gov/pub/irs-prior/p530--2016.pdf.

182. *See supra* note 155 and accompanying text.

183. *See* Reiss, *supra* note 36, at 1043–44.

184. OUT OF REACH 2017, *supra* note 74, at 6.

185. Jenna Bernstein, *Section 8, Source of Income Discrimination, and Federal Preemption: Setting the Record Straight*, 31 CARDOZO L. REV. 1407, 1412 (2010). Landlord resistance to having Section 8 tenants may be racially motivated, and at the least likely causes a disparate

public housing, but Congress is increasingly underfunding the maintenance of these units. Other tenants compete for access to designated privately owned affordable units, but there are not enough of these to go around. Only a quarter of qualifying low-income rental households obtain voucher-based assistance. A majority of renters are unable to avail themselves of any government rental subsidy, leaving such households in an unsustainably fragile financial state.[186] Unlike homeowners, renters typically lack the opportunity to capture any tax or wealth gains through their monthly housing payments. In addition, unless specifically protected in their tenure, renters face the constant risk of having to move out upon termination of the lease.[187]

An economically sustainable approach to affordable housing will engage with and address the inequity between renter and owner housing supports and, ideally, provide more viable ways for renters to move gradually into the status of homeowner, both in terms of equity investment and in terms of tenure protection. Recent hybrid homeownership proposals have started the conversation about structural changes that could protect renter tenure and pave an alternate path to property-based wealth-building.[188] Although historically private rent-to-own models have often been predatory, victimizing rather than empowering participating tenants, a publicly run or closely overseen rent-to-own model might offer financial and tenure stability rather than serve as a tool for oppression.[189]

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impact based on race. Laura Bacon, Godinez v. Sullivan-Lackey*: Creating a Meaningful Choice for Housing Choice Voucher Holders*, 55 DEPAUL L. REV. 1273, 1280 (2006); Emily Badger, *How Section 8 Became a 'Racial Slur': A History of Public Housing in America*, WASH. POST (June 15, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/06/15/how-section-8-became-a-racial-slur/?utm_term=.da1f4c3bcc54. Many states and localities have prohibited discrimination based on source of income. LOCAL PROGRESS, BANNING HOUSING DISCRIMINATION BASED ON SOURCE OF INCOME 60 (2017), http://localprogress.org/wp-content/uploads/2013/09/Banning-Source-of-Income-Housing-Discrimination.pdf.

186. *See* discussion *supra* Section I.B.

187. A landlord has no duty under common law to renew a lease at the end of its term, but rent control and rent stabilization laws in many cities limit the right of landlords to evict tenants or refuse to re-let premises except on specific grounds. *See* CAROL NECOLE BROWN, EXPERIENCING HOUSING LAW 1268 (2016).

188. *See, e.g.*, Apgar, *supra* note 70, at 6–7, 12–14 (discussing socially motivated forms of rental housing and programs that provide residents with an equity stake in a cooperative multifamily; conceptions of community governance as a hybrid form of ownership; and "no cash rental units" (like tenant farmers/groundskeepers/caretakers) where services are exchanged for occupancy, and mentioning that two million households do this already).

189. BERYL SATTER, FAMILY PROPERTIES: RACE, REAL ESTATE, AND THE EXPLOITATION OF BLACK URBAN AMERICA 3–6 (2009); Calvin Bradford, *Financing Home Ownership: The Federal Role in Neighborhood Decline*, 14 URB. AFF. Q. 313, 319 (1979); Audrey G. McFarlane, *The Properties of Instability: Markets, Predation, Racialized Geography, and Property Law*, 2011 WIS. L. REV. 855, 891–98. For an example of a lawsuit dealing with predatory rent-to-own

Some federal voucher programs run by housing agencies attempt to bridge the renter-owner divide as well. The Family Self-Sufficiency Voucher Program does this by allocating all rent paid by the tenant above a certain base amount to an escrow fund that can potentially be used by the tenant for a down payment.[190] Federal funds also support non-profits that assist low-income families in building their own homes on land they acquire at below-market rates.[191]

A non-traditional path to homeownership could involve the more than three million households who live on leased land in manufactured/mobile homes that they own.[192] Transforming the ground lease arrangement in this sort of situation into a rent-to-own model would pave the way to eventual homeownership. Condominium units are another more affordable housing options for low-income, first-time home-buyers.[193] Government programs should prioritize support given to such lower-priced home-buying options. The HOTMA, for example, increases access to ownership with respect to condominium units and lots on which tenant-purchased manufactured homes sit.[194] The FHA will insure mortgages on condominium units in qualifying

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transactions, see generally *Contract Buyers League v. F & F Investment*, 300 F. Supp. 210 (N.D. Ill. 1969), *aff'd on other grounds*, 420 F.2d 1192 (7th Cir. 1970).

190. *Family Self-Sufficiency Program*, U.S. DEP'T HOUSING & URB. DEV., https://www.hud.gov/program_offices/public_indian_housing/programs/hcv/fss (last visited Mar. 16, 2018).

191. For example, the Self-Help Homeownership Opportunity Program provides competitive grants to fund land acquisition and pre-construction development in order to make it easier for low-income renters to become homeowners by building their own homes. ADVOCATES' GUIDE, *supra* note 85, at 5-42 to -43.

192. *See* WILLIAM APGAR ET AL., JOINT CTR. FOR HOUS. STUDIES & NEIGHBORHOOD REINVESTMENT CORP., AN EXAMINATION OF MANUFACTURED HOUSING AS A COMMUNITY—AND ASSET—BUILDING STRATEGY 9 (2002), http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/w02-11_apgar_et_al.pdf; Apgar, *supra* note 70, at 14. Congress has passed legislation mandating state "dispute regulation" to "clarify the rights and responsibilities of the interested parties in potential conflicts that may arise from this blended tenure form." *Id.*; *see* Manufactured Hous. Inst., *106th Congress Approves Manufactured Housing Improvement Act* (Dec. 7, 2000).

193. John Boughtin, *Realtors Applaud House Passage of "Housing Opportunity Through Modernization Act,"* NAT'L ASS'N REALTORS (Feb. 2, 2016), http://www.realtor.org/news-releases/2016/02/realtors-applaud-house-passage-of-housing-opportunity-through-modernization-act.

194. Previously, housing assistance voucher recipients could use vouchers to rent manufactured homes, but they could only apply the full value of vouchers toward the purchase of a manufactured home if they also bought the land on which it was situated. WILL FISCHER, CTR. ON BUDGET & POL'Y PRIORITIES, HOUSING BILL UNANIMOUSLY PASSED BY HOUSE WOULD BUILD ON EFFECTIVENESS OF RENTAL ASSISTANCE 10 (2016), https://www.cbpp.org/sites/default/files/atoms/files/2-1-16hous.pdf. Under HOTMA, however, the voucher subsidy can

projects, and the HOTMA endeavors to broaden the availability of such insurance by reducing the costs for condominium projects to qualify for FHA-insured financing.[195]

Equity appreciation rental models may involve payment in kind rather than additional tenant cash outlays. Shifting operating and maintenance responsibilities onto tenants in exchange for tenant equity building could simultaneously channel resident investment toward eventual homeownership and relieve overburdened landlords from unforeseeable operating costs. Allocating operating cost responsibility with the party who resides in a home is attractive from an efficiency perspective and likely encourages sustainable stewardship of the real property. This sort of self-service rental model would work better in the context of single-family (one to four unit) rentals than in the context of larger multifamily projects, but a large number of the lowest-income tenants already reside in these types of housing units.

Incorporation of environmentally sustainable practices would enhance these affordable homeownership and equity building rental models, particularly if initial input costs were paid by the government. Public funding of greening costs would increase long-term affordability of housing units through reduced maintenance costs. Tenants may be able to afford higher rents and mortgage payments if utility and other home operating costs are reduced. More affordable operating costs of green housing would thus increase tenure stability and reduce the financial burden of homeownership in addition to creating an environmental benefit.

In addition to creating new pathways to homeownership, legal and policy changes could promote better financial outcomes for tenants, primarily through supporting an adequate supply of affordable housing options. One's residential space is the key to establishing a sphere of personal independence and civic engagement, it is the place in which one connects with community amenities and public goods such as education, transportation, and

be fully applied toward purchase of the manufactured home even if the land on which it is situated is to be rented, not purchased. *Id.*

195. *See* Boughtin, *supra* note 193. HOTMA would streamline the FHA's recertification process, lowering compliance costs, and lower the FHA's current owner-occupancy requirement for a project from 50% to 35%, enabling more diverse condominium projects to take advantage of FHA qualification. *See FHA to Lower Owner-Occupancy Requirement for Certain Condominium Developments*, U.S. DEP'T HOUSING & URB. DEV. (Oct. 26, 2016), https://archives.hud.gov/news/2016/pr16-162.cfm. It also streamlines the process of getting an exemption to FHA's basic requirement that qualifying projects have no more than 25% of space dedicating to commercial use, allowing a qualifying condominium to be more mixed use. Boughtin, *supra* note 193.

employment, and it is a way to grow wealth over time.[196] A resident need not be a homeowner to achieve these benefits.[197] Changes in our legal tenure system (perhaps incorporating shared equity models), landlord-tenant law, and expansions in the range in housing options available in communities could enable the renting population to take advantage of some of the benefits that a homeownership traditionally offers.[198]

D. More Sustainable Approaches to Assisting Demand

Vouchers and public housing have been essential to providing shelter to lowest-income households, but such housing assistance programs are costly and have downsides. Public housing and subsidized affordable housing creation have historically led to ghettoization, inequitable aid distributions, neighborhood decline, and a perception (and perhaps reality) of ever-growing fiscal drain.[199] Increasing tenants' ability to pay removes an anchor on housing prices and possibly allows greater rental inflation.[200] Even putting aside the woeful inadequacy of the aid provided (in terms of assisting only a quarter of eligible households), tenant subsidies alone do little to solve the underlying affordability challenges: They treat the symptom, not the disease.

Tenant subsidies and/or publicly provided housing must be preserved with respect to the neediest segments of the population: the most extremely low-income households and, in particular, disabled and elderly residents.[201] With respect to households whose income is unlikely to ever improve, the public assistance model is a humane and socially responsible solution. But for other households, tenant subsidies should be tailored to encourage gradual self-sufficiency. Some of this can occur through employing vouchers as a method

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196. Boyack, *supra* note 67, at 126.

197. NAT'L HOUS. TASK FORCE, A DECENT PLACE TO LIVE 3 (1988), https://www.huduser.gov/portal/Publications/pdf/HUD-5830.pdf; Rachel G. Bratt, *Housing and Family Well-Being*, 17 HOUSING STUD. 13, 13–14 (2002); Lee Rainwater, *Fear and House-as-Haven in the Lower Class*, *in* HOUSING URBAN AMERICA 187, 187–88 (Jon Pynoos et al. eds., 2d ed. 2013); *see also* Apgar, *supra* note 70, at 50 ("There is, however, nothing magical about homeownership. Good quality rental housing located in a resource rich community can also serve as a pathway to opportunity.").

198. *See* Apgar, *supra* note 70, at 1–2; *see also* Rick Jacobus & David M. Abromowitz, *A Path to Homeownership: Building a More Sustainable Strategy for Expanding Homeownership*, 19 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 313, 315 (2010).

199. *See* Ingrid Gould Ellen & Jessica Yager, *Race, Poverty, and Federal Rental Housing Policy*, *in* HUD AT 50: CREATING PATHWAYS TO OPPORTUNITY 103, 107–11 (2015), https://www.huduser.gov/hud50th/HUDat50Book.pdf.

200. *See supra* note 179.

201. *See supra* notes 96–97 and accompanying text.

to create more accessible paths to homeownership.[202] Additionally, efforts to reduce operating costs through publicly funded environmental improvements, for example, may help reduce rents to a more economically sustainable level.[203] Public funds spent today should, to the extent possible, be allocated strategically as an investment in long-term housing affordability rather than as a recurring payment into an economic black hole.

Finally, in crafting tailored community responses to affordable housing needs, communities may wish to re-assess the HUD affordability standards and their adequacy and application in the local housing market.[204] Although the 30% of gross income threshold has been long and widely accepted as the measure of housing affordability, to some extent this number is just a random guesstimate.[205] Perhaps public housing aid in certain contexts would have a more economically sustainable benefit if allocated differently. For example, instead of fully funding all housing costs over 30% of gross income for a mere 25% of eligible tenants, a community might create better outcomes for more households by funding housing costs over 50% for 45 or 50% of eligible tenants.[206]

Ideally, housing aid should be available to all qualified tenants and be focused on creating a path to self-sufficiency. This likely will mean a larger public investment in affordable housing, at least in the short term. There is a simple way to free up funds necessary to achieve that effort. The home mortgage interest deduction (MID) should be capped, and 100% of the savings from capping the MID should be invested into sustainable affordable housing. The Trump administration's current tax proposal embraces the idea of capping the mortgage interest deduction, setting the maximum eligible mortgage loan amount at $500,000 rather than $1 million, but fails to mandate reinvestment of the recaptured public funds into affordable housing.[207] Tax analysts claim that capping the mortgage interest deduction in this way will

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202. *See* discussion *supra* Section III.C.

203. KATS ET AL., GREEN BUILDINGS, *supra* note 18, at 55, 107.

204. *See* discussion *supra* Section I.A.

205. *See* 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 1–2 (2008), https://www.census.gov/housing/census/publications/who-can-afford.pdf.

206. *See* Boyack, *supra* note 12, at 444–45 (exploring whether housing assistance would be more equitably allocated if all renters in a given priority category were treated equitably and shared the available public funding according to a system of correlative rights).

207. John Patrick Pullen, *How the Republican Tax Plan Could Change Mortgage Interest and Property Tax Deductions*, FORTUNE (Nov. 2, 2017), http://fortune.com/2017/11/02/how-the-republican-tax-plan-could-change-mortgage-interest-and-property-tax-deductions/.

free up $241 billion in federal funds, and that would be enough to create a significantly more sustainable affordable housing system.[208]

CONCLUSION

Just as environmentally unsustainable housing misallocates energy resources, financially unsustainable housing misallocates monetary resources. In both cases, failure to establish a stable allocation model today foreordains an eventual systemic fiasco. Intergenerational fairness justifies government funding of some of the initial costs of green building so that real estate consumes energy resources more evenly as measured over time.[209] Similarly, funding outlays that invest in establishing a sustainably affordable housing system will pay economic and social dividends far into the future. Sustainable affordable housing will meet "the needs of the present without compromising the ability of future generations to meet their needs."[210]

Regressive, sporadic, and incomplete government housing aid allocation is wasteful. Providing grossly insufficient funding for affordable housing is a bit like trying to extinguish a house on fire with a half-hearted trickle from a hose. If we flood the problem with well-aimed financial support, however, we may be able to snuff out the conflagration of financial distress or at least establish a way to perpetually contain it. It is worth a significant upfront investment today to create a sustainable affordable housing system in the future.

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208. ADVOCATES' GUIDE, *supra* note 85, at 3-19 to -20 (arguing that capping the mortgage eligible for the MID at $500,000 would generate $241 billion in savings that could be more equitably allocated in housing support, relative to the MID which currently benefits only one-fourth of taxpayers). Another way to reform the tax code to make housing subsidies more equitable as between renters and owners would be to add a renters' tax credit. *See* ADVOCATES' GUIDE, *supra* note 85, at 4-54 to -56; *see also* CAROL GALANTE, CAROLINA REID & NATHANIEL DECKER, UNIV. OF CAL. BERKELEY, TERNER CTR. FOR HOUS. INNOVATION, THE FAIR TAX CREDIT: A PROPOSAL FOR A FEDERAL ASSISTANCE IN RENTAL CREDIT TO SUPPORT LOW-INCOME RENTERS 11 (2016), http://ternercenter.berkeley.edu/uploads/FAIR_Credit.pdf.

209. Howarth, *supra* note 1, at 136–38.

210. Kibert & Kibert, *supra* note 3, at 22 (quoting World Comm'n on Env't & Dev., Our Common Future, U.N. Doc. A/42/427 (1987), http://www.un-documents.net/our-common-future.pdf).