

DENOUNCING THE MYTH OF PLACE-BASED SUBSIDIES AS THE SOLUTION FOR ECONOMICALLY DISTRESSED COMMUNITIES: AN ANALYSIS OF OPPORTUNITY ZONES AS A SUBSIDY FOR LOW-INCOME DISPLACEMENT

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In an attempt to remedy the uneven balance of investment in distressed, low-income communities, legislators enacted the Opportunity Zone legislation—a place-based tax subsidy included in the Tax Cuts and Jobs Act of 2017. Focusing primarily on capital investment, the Opportunity Zone legislation fails to incentivize community engagement, preserve affordable housing, or mitigate against displacement. The subsidy is likely to benefit wealthy investors and large corporations at the expense of low-income, minority residents who can no longer afford to live in areas they once called home. This Note provides a comparative critique of Opportunity Zones and similar efforts to revitalize urban areas. By examining how Opportunity Zones eliminate affordable housing and displace low-income communities, this Note offers alternative solutions aimed at helping the low-income communities the subsidy fails to protect.

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I. INTRODUCTION

In 2007, the Great Recession swept over the United States, resulting in widespread housing foreclosures and increased poverty.¹ Since then, the country's economic recovery has mostly been in affluent, predominantly white areas, and has bypassed the countries most distressed² census tracts.³ In an attempt to remedy the uneven

¹ Jim Tankersley, *Tucked into the Tax Bill, a Plan to Help Distressed America*, N.Y. TIMES (Jan. 29, 2018), <https://www.nytimes.com/2018/01/29/business/tax-bill-economic-recovery-opportunity-zones.html>

² "Distressed" is used throughout this note to describe low-income areas with high poverty rates as defined in the 26 IRC § 1392(a)(2). *See infra* note 39.

³ DC became predominantly Black in the 1950's; however, the percentage of Black residents has slowly declined since the 1970's. Beginning in 2000, a

balance of investment in distressed, low-income communities, legislators enacted the Opportunity Zone legislation—a place-based tax subsidy intended to incentivize investment in areas without significant access to capital.⁴ Unfortunately, wealthy investors are likely to be the predominant beneficiaries of this legislation, and at the expense of low-income, minority residents.⁵

Due to prior targeted economic recovery initiatives across the United States, some low-income communities have seen a drastic increase in investment.⁶ Although historically Black communities such as Downton Brooklyn, New York, and the Shaw neighborhood in Washington, D.C., have experienced some economic uplift, the beneficiaries of this recovery have not been long-term, minority residents. Instead, white, affluent, new residents have benefited from the stark changes in these formerly distressed areas.⁷ Washington, D.C. and Brooklyn, New York have become examples of the risk of gentrification⁸ and minority displacement when economic development lacks community-oriented approaches. Driving capital into low-income communities, alone, is not enough to encourage revitalization because it simply displaces economically disadvantaged residents in exchange for higher income residents.

large influx of about 50,000 white residents arrived in Washington, D.C., paired with a sharp decline in Black households. *See* Peter Tatian & Serena Lei, *Washington, DC: Our Changing City*, Urban Institute (Feb. 25, 2019, 10:00 AM), <http://apps.urban.org/features/OurChangingCity/demographics/#index>

⁴ Economic Innovation Group, *HQ2 and Opportunity Zones: The Big Picture* (Nov. 16, 2018) <https://eig.org/news/hq2-and-opportunity-zones-the-big-picture>.

⁵ Tankersley, *supra* note 1.

⁶ *See* Tatian & Lei, *supra* note 3.

⁷ *Id.*

⁸ This Note refers to gentrification to encompass the process through which high-income residents or developments displace low-income residents. This Note borrows the definition from Hannah Weinstein, *Fighting for A Place Called Home: Litigation Strategies for Challenging Gentrification*, 62 UCLA L. REV. 794, 796 (2015).

Similar to investment in Brooklyn and D.C., the Opportunity Zone legislation focuses on capital investment, but fails to incentivize community engagement, preserve affordable housing, and mitigate against displacement.⁹ Opportunity Zones may amount to little more than a tax cut for the wealthy that only furthers the economic burden on low-income residents who can no longer afford to live in areas they once called home.¹⁰ This Note illustrates the similarities between Opportunity Zones and other unsuccessful place-based tax incentives, the potential negative impacts of Opportunity Zone legislation on affordable housing, and solutions to preserve accessible affordable housing. The central thesis of this Note is that the Opportunity Zone legislation, on its own, is an ineffective solution to revitalize economically distressed communities. In order to spur development in a manner that minimizes displacement and preserves affordable housing, legislators should supplement the Opportunity Zone legislation with integrated community development approaches.

Part I provides background on the legislative history of Opportunity Zones, including an analysis of previous similar legislation. Part II outlines the intersection between Opportunity Zone legislation and affordable housing. In addition, Part II critiques the use of place-based tax incentives, focusing on their effectiveness and impact on affordable housing. Specifically, Part II analyzes the selection of Opportunity Zones in Washington D.C., Storey County, Nevada, and Long Island City, New York—where truly distressed communities were bypassed for higher-income areas previously targeted for investment. Part III offers both an offensive approach to protecting affordable housing, and a defensive approach that presents examples of successful litigation strategies used in gentrification lawsuits. The offensive strategies center around implementing community-oriented remedies, including 1) incentivizing diverse community development, 2) expanding access to transactional lawyering to increase urban entrepreneurship, and 3) developing

⁹ Tatiana Kimbo & Richard Phillips, *How Opportunity Zones Benefit Investors and Promote Displacement*, INSTITUTE ON TAXATION AND ECONOMIC POLICY: JUST TAXES BLOG (Feb. 25, 2019, 11:30 AM), <https://itep.org/how-opportunity-zones-benefit-investors-and-promote-displacement/>.

¹⁰ *Id.*

legal structures that support community land trusts to fight displacement. The defensive strategies focus on preventing the use of Opportunity Zone legislation to further displacement and diminish affordable housing availability, using the FHA, zoning laws, and state constitutions.

II. PART ONE: LEGISLATIVE HISTORY AND ANALYSIS OF OPPORTUNITY ZONES

The United States has previously tried to use different tax incentives to encourage investment in low-income, economically distressed areas with the goal of revitalizing those communities. Some of this legislation is still active, while other programs have been discontinued entirely. As this Note explains below, these programs have done little to improve low-income areas or protect affordable housing.

In 2017, Congress enacted the Tax Cuts and Jobs Act, which includes the Opportunity Zone legislation that purports to address the problem of distressed communities across the United States.¹¹ The Opportunity Zone legislation bears similarities to prior legislation in the United States that used tax incentives to encourage development in low-income, distressed communities.¹² Examples of previous place-based tax incentive legislation include: 1) Enterprise Zones in the 1980s; 2) Empowerment Zones/Enterprise Communities¹³ (“EZ/EC”) enacted in 1993; and 3) The New Markets Tax Credit Program¹⁴ (“NMTC”) enacted in

¹¹ See I.R.C. §1400Z-2 (2019).

¹² Timothy P. R. Weaver, *Elite Empowerment*, JACOBIN MAG (Apr. 21, 2016), <https://www.jacobinmag.com/2016/04/hillary-clinton-race-empowerment-zones-urban-policy/>; Kaitlyn Harger. & Amanda Ross. *Do Capital Tax Incentives Attract New Businesses? Evidence Across Industries from the New Markets Tax Credit*. 56 J. OF REG’L SCI., 733-53 (2016).

¹³ *Designation and Treatment of Empowerment Zones, Enterprise Communities, and Rural Development Investment Areas*, I.R.C. §§1391-1393 (1993).

¹⁴ New Markets Tax Credit, I.R.C. §45(D)(c) (2000).

2000. The Enterprise Zones program was one of the first of its kind to be introduced in the U.S.; however, it was never successfully implemented as a federal initiative.¹⁵ The Empowerment Zones/Enterprise Communities (“EZ/EC”) program and the NMTC were both implemented under former President Bill Clinton, but only the NMTC is still active today.¹⁶ This section will explain each of these prior legislative approaches, comparing them to the newly enacted Opportunity Zone legislation, and addressing their inability to revitalize distressed communities or have measurable positive impacts.

A. Enterprise Zones

In May of 1980, Congressmen Jack Kemp and Robert Garcia introduced the Enterprise Zone concept in the U.S. as an effort to revive “economically depressed” areas through promoting private investment.¹⁷ Peter Hall, a British geographer and urban planning professor is credited with introducing the Enterprise Zone theory to the United Kingdom, modeling it after the free market cities in Hong Kong and Singapore.¹⁸ These free market cities experienced successful economic revitalization through minimizing or eliminating government regulation, taxes, wage

¹⁵ Jennifer Forbes, Note, *Using Economic Development Programs as Tools for Urban Revitalization: A Comparison of Empowerment Zones and New Markets Tax Credits*, 2006 U. ILL. L. REV. 177, 180 (2006).

¹⁶ Tami Gurley-Calvez et al., *Do Tax Incentives Affect Investment? An Analysis of the New Markets Tax Credit*, 37 PUB. FIN. REV. 371, 371 (2009); see also Paul Anderson, *New Markets Tax Credit Progress Report*, NEW MARKETS TAX CREDIT COALITION (Jan. 8, 2019, 8:11 AM), <http://nmtccoalition.org/progress-report/>.

¹⁷ Gurley-Calvez et al., *supra* note 17 at 371; see also Wilton Hyman, *Empowerment Zones, Enterprise Communities, Black Business, and Unemployment*, WASH. U. J. URB. & CONTEMP. L. 143, 148 (1998).

¹⁸ Audrey G. McFarlane, *Race, Space, and Place: The Geography of Economic Development*, 36 SAN DIEGO L. REV. 295, 321 (1999). see also Hyman, *supra* note 17, at 147.

and labor regulation, factory safety regulations, and restrictions on imports and land use.¹⁹

The Enterprise Zone theory suggests that geographic areas, designated as “Enterprise Zones” may be improved through reduction in governmental regulation.²⁰ Hall theorized that reducing government oversight would create low-wage jobs as businesses sought inexpensive labor.²¹ Hall further concluded that these jobs would later evolve into higher wage jobs as demand for more sophisticated labor increased with business growth.²²

In 1980, the Enterprise Zone concept was adapted into the British Local Government Planning and Land Act along with the Finance Act.²³ Enterprise Zones were adopted as a proposed method for renovating and revitalizing industrial areas in Britain.²⁴ The program was aimed at attracting business to abandoned industrial areas through providing property tax exemptions, tax deductions for capital expenditures, and reduced administrative requirements.²⁵ Despite the promise of the Enterprise Zone theory in the United Kingdom, the program was widely deemed a failure, resulting in high expenses and limited “trickle down” effects.²⁶ In fact, few jobs were created and designated areas, such as the London Docklands, are still heavily income deprived.²⁷

¹⁹ See McFarlane, *supra* note 18, at 321; see also Hyman, *supra* note 17, at 147.

²⁰ See McFarlane, *supra* note 18, at 321.

²¹ See Hyman, *supra* note 17, at 146.

²² *Id.*

²³ See Forbes, *supra* note 15, at 180.

²⁴ See McFarlane, *supra* note 18, at 321.

²⁵ See Forbes, *supra* note 15, at 180.

²⁶ See Forbes, *supra* note 15, at 180.; see also Kimbo & Phillips, *supra* note 9 (arguing that the program simply moved existing jobs around and was extremely costly).

²⁷ Timothy Weaver, *The Problem with Opportunity Zones*, CITY LAB (May 16, 2018), <https://www.citylab.com/equity/2018/05/the-problem-with-opportunity-zones/560510/> [hereinafter *Weaver May 2018*].

The U.S. model differed from the U.K. model, targeting incentives toward small businesses and aiming to revitalize urban neighborhoods instead of industrial areas.²⁸ Despite gaining significant political traction on various forms of Enterprise Zone legislation, legislators failed to adopt and implement federal Enterprise Zone legislation in the 1980s.²⁹ Subsequently, the Enterprise Zone program was briefly implemented at the state level, with more than 75% of states adopting some form of the idea.³⁰ Each state's implementation and relative success with the program differed. Research varies on the impact of the state-based Enterprise Zone programs, with researchers expressing the difficulty in measuring the results of Enterprise Zones due to limited data.³¹ Some studies show an increase in the number of jobs but fail to provide a link between the program and job creation.³² The concept of Enterprise Zones did not begin to receive national attention again until the early 1990s.³³

B. Empowerment Zones/Enterprise Communities

In 1993, legislators attempted to address the disparity brought to light by the Los Angeles Riots, transitioning from the original Enterprise Zone approach to pairing tax incentives with

²⁸ See Forbes, *supra* note 15, at 181.

²⁹ See McFarlane, *supra* note 18, at 323; see also Forbes, *supra* note 15, at 180 (discussing legislation that Congress passed in 1987 that created federal zones without any tax incentives. However, the legislation was never implemented). See also, Hyman, *supra* note 17, at 148 (Title VII of the Housing and Community Development Act of 1987 incorporated Enterprise Zone legislation, but it was never utilized).

³⁰ See McFarlane, *supra* note 18, at 324.

³¹ See Hyman, *supra* note 17, at 153; see also McFarlane, *supra* note 18, at 325.

³² See McFarlane, *supra* note 18, at 325.

³³ See Forbes, *supra* note 15, at 182.

social legislation.³⁴ As a result of the Los Angeles Riots, attention was placed on low-income communities.³⁵ Systemic racial disparities were at the forefront of Congress' attention and a great concern of their constituents.³⁶ In August of 1993, President Clinton signed into law the Omnibus Budget Reconciliation Act of 1993, which featured the Empowerment Zone/Enterprise Community Program ("EZ/EC Program").³⁷ The Empowerment Zones Program was established as a ten-year program, providing tax incentives to businesses expanding their operations within designated geographic zones of select cities.³⁸ The program aimed to use tax incentives and social service funding to revitalize economically-distressed³⁹ areas through the creation of jobs and business opportunities.⁴⁰

Each state was able to nominate areas for designations as either Enterprise Communities or Empowerment Zones between 1993 and 1996.⁴¹ A nominated area was required to have a minimum poverty rate of at least 20% and at least 90% of the area had to have a poverty rate of at least 25%.⁴² Qualifying businesses

³⁴ See Forbes, *supra* note 15, at 183; see also Jill Zuckman, *Riots Resurrect Enterprise Zones*, 50 CONG. Q. WKLY. REP. 1253, 1253 (discussing that a strong proponent of the enterprise zone concepts "would not support zones without accompanying social legislation." Rep. Charles B. Rangel is quoted saying "No business person so blinded by tax breaks is going to go into an area with ex-cons, ex-addicts, high tensions and inadequate housing." Representative Rangel further stated that enterprise zones alone are "not going to do a bit of good.").

³⁵ See Forbes, *supra* note 15, at 182-83.

³⁶ *Id.*

³⁷ See Forbes, *supra* note 15, at 182; see I.R.C. §1391-§1393 (1993).

³⁸ See McFarlane, *supra* note 18, at 296; see also Forbes, *supra* note 15, at 183.

³⁹ I.R.C. §1392(a)(2) (defining "distress" as a nominated area with "pervasive poverty, unemployment and general distress.").

⁴⁰ See McFarlane, *supra* note 18, at 296.

⁴¹ I.R.C. §1391(b)-(c).

⁴² I.R.C. §1391(g)(3).

received larger grants for social services,⁴³ regulatory waivers,⁴⁴ and wage-tax credits for wages paid to “qualified zone employees.”⁴⁵ The U.S. Department of Housing and Development (“HUD”) and the United States Department of Agriculture (“USDA”) designated nine Empowerment Zones (“EZs”) and ninety-five Enterprise Communities (“ECs”).⁴⁶ Both EZs and ECs received federal assistance, although EZs were eligible for more federal assistance and employee wage tax credits.⁴⁷ The EZ/EC program established four principles to evaluate proposed zones or communities: 1) economic opportunity; 2) community-based partnership; 3) sustainable community development; and 4) strategic vision for change.⁴⁸

The perception of Empowerment Zones remains largely mixed, with some concluding that Empowerment Zones did little to alleviate poverty in urban areas.⁴⁹ Generally, as compared to the target small business population, larger firms were more likely

⁴³ Janet Thompson Jackson, *Can Free Enterprise Cure Urban Ills?: Lost Opportunities for Business Development in Urban, Low-Income Communities Through the New Markets Tax Credit Program*, 37 U. Mem. L. Rev. 659, 686 (2007).

⁴⁴ *Id.*

⁴⁵ See Forbes, *supra* note 15, at 183-84.

⁴⁶ See Forbes, *supra* note 15, at 183.

⁴⁷ See U.S. GOV'T ACCOUNTABILITY OFF., GAO/T-RCED-98-27, THE FEDERAL EMPOWERMENT ZONE AND ENTERPRISE COMMUNITY PROGRAM, 3 n.3 (1997) (The difference between EZs and ECs was not explicitly set out in the statute but designated under rules of the U.S. Department of Housing and Urban Development. Those rules are rearticulated in a 1997 United States General Accounting Office Report. At the time of this report, the designations and differences were described as follows: “The Secretaries designated a total of 104 EZs and ECs—6 urban EZs, 3 rural EZs, 65 urban ECs, and 30 rural ECs. Each urban EZ was allocated \$100 million, each rural EZ was allocated \$40 million, and each EC was allocated just under \$3 million in EZ/EC SSBG funds for use over the 10-year life of the program. In addition, businesses located in an EZ would be eligible for tax credits on wages paid to employees who live in the EZ and increased deductions for depreciation. Both EZs and ECs could use tax-exempt state and local bonds.”).

⁴⁸ See Forbes, *supra* note 15, at 183.

⁴⁹ Weaver, *supra* note 12.

to take advantage of the Empowerment Zone programs yet less likely to hire zone residents.⁵⁰ A 2010 Government Accountability Office (GAO) report noted limitations in evaluating tax benefits or the EZ/EC program and remaining unclear on how local businesses used the program.⁵¹ Although the study observed improvements in poverty, unemployment, and economic growth among some designated areas, due to data constraints these results could not be conclusively tied to the program.⁵² In fact, some of the benefits attributed to the program were also credited to external factors such as an improved national economy and changes in welfare policy.⁵³ Overall, the relative impact of EZ/EC remains largely unknown.

C. New Markets Tax Credit Program

The New Markets Tax Credit Program (NMTC), codified under 26 U.S.C. §45D, was also established during the Clinton Administration. The NMTC encourages capital investment in low-income communities by offering tax incentives to investors.⁵⁴ The program was first enacted in December 2000 and allowed investors to receive tax credits for investing through designated private entities into low-income areas.⁵⁵ Similar to other tax-incentive based programs, the NMTC aimed to use economic incentives to stimulate economic growth, create jobs, and revitalize low-income areas.⁵⁶ Congress established the NMTC to revitalize blighted communities, believing that driving private investment into neighborhoods in need

⁵⁰ See Forbes, *supra* note 15, at 185.

⁵¹ See U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-464R, REVITALIZATION PROGRAMS: EMPOWERMENT ZONES, ENTERPRISE COMMUNITIES, AND RENEWAL COMMUNITIES, 10 (2010) [hereinafter *GAO 2010*].

⁵² *Id.* at 11.

⁵³ *Id.* at 22.

⁵⁴ See Forbes, *supra* note 15, at 188; see also Anderson, *supra* note 16, at 12.

⁵⁵ See Jackson, *supra* note 43, at 663.

⁵⁶ See Jackson, *supra* note 43, at 680; see also Anderson, *supra* note 16, at 12.

of access to capital would uplift low-income communities.⁵⁷ The program was initially slated to run for seven years but was subsequently reauthorized, most recently in 2017.⁵⁸

The NMTC allows taxpayers to make “Qualified Equity Investments”⁵⁹ into Community Development Entities⁶⁰ (CDEs).⁶¹ CDEs use this investment to invest in low-income communities.⁶² CDEs, as established under the NMTC, are required to be a domestic corporation with a demonstrated mission of providing capital to low-income communities.⁶³ To apply for qualification, CDEs must design a business plan that outlines a plan to finance businesses or

⁵⁷ Matthew Freedman, *Teaching New Markets Old Tricks: The Effects of Subsidized Investments on Low-Income Neighborhoods*, J. PUB. ECON. 1000, 1007 (2012).

⁵⁸ A permanent authorization of the NMTC has been proposed, but as of March 2018 Congress has not moved on this decision. *See* Anderson, *supra* note 16, at 12.

⁵⁹ I.R.C. §45(D)(b)(1) (2000) (defining “qualified equity investment” as “any equity investment in a qualified community development entity if a) such investment is acquired by the taxpayer at its original issue (directly or through an underwriter) solely in exchange for cash, (b) substantially all of such cash issued by the qualified community development entity to make qualified low-income community investments, and (c) such investment is designated for purposes of this section by the qualified community development entity.” (b)(6) defines equity investment as “any stock (other than nonqualified preferred stock) ... in an entity which is a corporation, and any capital interest in an entity which is a partnership.”).

⁶⁰ I.R.C. §45(D)(c) (defining a community development entity as “any domestic corporation or partnership if a) the primary mission of the entity is serving, or providing investment capital for low-income communities or low-income persons, b) the entity maintains accountability to residents of low-income communities through their representation on any governing board of the entity or on any advisory board to the entity, and (c) the entity is certified for purposes of this section as being a qualified community development entity.”)

⁶¹ *See* Anderson, *supra* note 16, at 18.

⁶² *Id.*

⁶³ *Id.*

revitalization projects in low-income communities.⁶⁴ The Community Development Financial Institutions Fund (CDFI Fund) administers the NMTC, evaluating applications for tax credit allocations based on the following criteria 1) business strategy, 2) capitalization strategy, 3) management strategy, and 4) community impact.⁶⁵ The businesses that benefit from the CDE investment are labeled “Qualified Active Low Income Community Businesses”⁶⁶ (QALICBs).⁶⁷ An investor receives a tax credit of 39% taken over seven years.⁶⁸ An eligible low-income community must have a poverty rate of at least 20% or a median income at or below 60% of the state or metropolitan area’s median income.⁶⁹ Certain low population tracts that are adjacent to NMTC eligible tracts and that are in Empowerment Zones are also eligible.⁷⁰

⁶⁴ *Id.*

⁶⁵ See Jackson, *supra* note 43, at 693.

⁶⁶ I.R.C. §45(D)(d)(2) (2000) (defining a “Qualified Active Low-Income Community Business” as any corporation within a taxable year that has “(i) at least 50% of the total gross income of such entity is derived from the active conduct of a qualified business within any low-income community, (ii) a substantial portion of the use of tangible property of such entity (whether owned or leased) is within any low-income community, (iii) a substantial portion of the services performed for such entity by its employees are performed in any low-income community, (iv) less than 5 percent% of the average of the aggregate unadjusted bases of the property of such entity is attributable to collectibles.. (v) less than 5 percent of the average of the aggregate unadjusted bases of the property of such entity is attributable to nonqualified financial property”).

⁶⁷ See Anderson, *supra* note 16, at 19.

⁶⁸ *Id.*

⁶⁹ See Anderson, *supra* note 16, at 21; see also I.R.C. §45(D)(e) (defining a “low-income community” as a community with a poverty rate of at least 20%, or either i) a tract in a non-metropolitan area with a median family income not exceeding 80% of the statewide median family income or ii) a tract in a metropolitan area with a median family income not exceeding 80% of the statewide median family income or the metropolitan area median family income.).

⁷⁰ See Anderson, *supra* note 16, at 21.

Similar to other place-based tax incentives, measuring the impact of the NMTC has proven difficult, specifically when considering the broad geographic scope of the NMTC.⁷¹ Implementation and eligibility criteria varied across areas, leading to mixed evaluations from researchers.⁷² Some researchers found that the NMTC had positive effects on economic activity and neighborhood conditions.⁷³ For example, over two-thirds of CDE investment has gone to commercial real-estate development.⁷⁴ The NMTC also shows a positive association between the program and an increase in jobs paying \$15,000 per year.⁷⁵ Since the implementation of the NMTC, designated areas have also seen a decline in poverty and unemployment rates.⁷⁶ Despite these results, the program may have had little to no effect on local employment.⁷⁷ Instead, the program seemed to show an insignificant impact on home value and an increased household turnover rate, potentially attributable to changes in neighborhood characteristics and not improved conditions for pre-existing residents.⁷⁸ In fact, there was no change in corporate investment levels in response to the NMTC but more likely the shifting of corporate funds from high-income communities to low-income communities to take advantage of the tax-break.⁷⁹ Overall, the benefits of the NMTC are modest and vary greatly across communities.⁸⁰ Despite minimal benefits to communities, investors participating in the NMTC program saw

⁷¹ See Gurley-Calvez et al., *supra* note 16, at 373.

⁷² See Freedman, *supra* note 57, at 1001.

⁷³ *Id.*

⁷⁴ *Id.* at 1002.

⁷⁵ *Id.* at 1012.

⁷⁶ *Id.* at 1000.

⁷⁷ *Id.* at 1001.

⁷⁸ *Id.* at 1000-01.

⁷⁹ See Gurley-Calvez et al., *supra* note 16, at 371.

⁸⁰ See Freedman, *supra* 57, at 1013.

a 58% increase in wealth, signaling a program that widely benefits investors but does little for distressed communities.⁸¹

As explained below, the structure of CDE investment is very similar to Opportunity Zones, where investment is driven through a fund for projects in low-income communities in exchange for a tax credit. Unlike Opportunity Zones, CDEs have more restrictions and only certain businesses are eligible under the CDFI fund. For example, golf courses, country clubs, gambling arenas, liquor stores, etc., are not eligible.⁸² Previous programs also suffered from ineffective evaluation parameters. A 2014 Government Accounting Office (GAO) study found that the NMTC subsidies, in some cases, were unnecessarily duplicative and had the potential to dilute the positive impacts on low-income communities.⁸³ In line with the solutions posed below, the study calls for adequate controls, more complete and accurate data collection, and improved evaluation of loan-performance. Unfortunately, the Opportunity Zone legislation does not currently incorporate any of the suggested monitoring tools and is at risk to suffer the same lackluster or adverse results as the previous programs. Given the overlap in structure and purpose between Empowerment Zones, the NMTC, and Opportunity Zones, it is unconvincing that Opportunity Zones are a new and novel idea that will have wide sweeping positive effects on low-income communities. It is more likely that Opportunity Zones will suffer a similar fate as previous initiatives.

D. Analysis of Opportunity Zone Legislation

Opportunity Zones were designed to address the development needs in low-income areas, including affordable housing and economic opportunity. However, Opportunity Zones have the potential to exacerbate displacement and the affordable housing crisis. Alternatively, the program might have little positive impact

⁸¹ See Gurley-Calvez et al., *supra* note 16, at 388.

⁸² See Anderson, *supra* note 16, at 19.

⁸³ See U.S. GOV'T ACCOUNTABILITY OFF., GAO-14-500, NEW MARKETS TAX CREDIT: BETTER CONTROLS AND DATA ARE NEEDED TO ENSURE EFFECTIVENESS (2014) [hereinafter *GAO 2014*].

on the affordable housing crisis it purports to address. This section provides a comprehensive overview of Opportunity Zones, as well as background on the Opportunity Zone program, its initiatives, and its current status. This section also provides illustrative examples of Opportunity Zone census tracts, analyzing their relative level of distress and ability to retain affordable housing. In fact, as the Brookings Institute notes, place-based subsidies have a null effect on investment in gentrifying areas.⁸⁴

1. What is an Opportunity Zone?

In 2017, Congress established the Opportunity Zone Program as a part of the Tax Cuts and Jobs Act.⁸⁵ The program is aimed at encouraging private investment in certain low-income areas designated as “Opportunity Zones.”⁸⁶ The Opportunity Zone Program provides investors with favorable capital gains treatment for investing in qualified opportunity funds.⁸⁷ Although similar to previous legislation, Opportunity Zones are on a larger scale and focus on capital gains tax subsidies to incentivize investor development with fewer restrictions and requirements than the Empowerment Zones program or the NMTC.⁸⁸

Opportunity Zone legislation was designed, in part, by the Economic Innovation Group (EIG), a research and advocacy group.⁸⁹

⁸⁴ See Hilary Gelfond & Adam Looney, *Learning from Opportunity Zones: How to Improve Place-Based Policies*, BROOKINGS INST, OCT. 2018, AT 1, 6 (ranking all Census tracts in each state by median home price appreciation between 2012 and 2016 and defining tracts in the top 25 percent as “gentrifying.”).

⁸⁵ See I.R.C. §1400Z-2 (2019).

⁸⁶ See Marc Shultz, *An In-Depth Guide to Opportunity Zone Guidance: Part I*, LAW 360 TAX AUTHORITY, Oct. 31, 2019, LEXIS.

⁸⁷ *Id.*

⁸⁸ See Benjamin W. Kennedy, *The Opportunity Zone Program*, NEV. LAW. SEPT., 2018 at 19, 21.

⁸⁹ See *The Promise of Opportunity Zones: Hearing Before the Jt. Econ. Comm.*, 115th Cong. 1 (2018) (statement of John W. Lettieri, Co-Founder

Senator Tim Scott, Senator Cory Booker, Representative Pat Tiberi and Representative Ron Kind co-authored and co-sponsored the bill. The program was implemented in a series of steps.⁹⁰ Each governor was able to designate up to 25% of eligible census tracts as Opportunity Zones subject to the approval of the U.S. Department of Treasury (DOT).⁹¹ An eligible low-income community must have a poverty rate of at least 20% or a median family income that is no greater than 80% of the statewide median.⁹² Up to 5% of the eligible tracts may be substituted for contiguous tracts. Contiguous tracts are areas that do not fall within the criteria for low-income communities but rather border a qualifying tract.⁹³ A contiguous tract must have a median family income that does not exceed 125% of the qualifying tract.⁹⁴ Eligibility for the Opportunity Zone program was vast, with 57 percent of all neighborhoods in America qualifying, despite not all being truly distressed.⁹⁵ Once zones were

and President, Economic Innovation Group) [hereinafter Lettieri]; EIG has political investment in the legislation. The idea was proposed in a 2015 White Paper written for EIG. Further, EIG helped “design and champion” the proposed act that was the basis for the Opportunity Zone legislation. EIG as a research and advocacy group, has released reports detailing the program and assessing its progress. However, EIG sources must be evaluated in light of their interest in the success and implementation of the program.

⁹⁰ *Id.*

⁹¹ Rebecca Lester et al., *Opportunity Zones: An Analysis of the Policy’s Implications*, 90 STATE TAX NOTES 221, 222 (2018).

⁹² In cases of low-income communities in metropolitan areas, the median family income must also not exceed 80% of the median family income in the surrounding metropolitan area. This definition of low-income communities, as cited to in I.R.C. §1400Z-2, comes from the statute codifying the NMTC, exhibiting the overlap between the two programs. *See* I.R.C. §45D(e) (2000).

⁹³ I.R.C. §1400Z-2.

⁹⁴ I.R.C. §1400Z-2.

⁹⁵ *See* Kennedy, *supra* note 88, at 19; *See also* Gelfond & Looney, *supra* note 84, at 1; Tankersley, *supra* note 1.

<https://www.nytimes.com/2018/01/29/business/tax-bill-economic-recovery-opportunity-zones.html> (defining “distressed communities” as communities with a median household income of no greater than 59,000 and a poverty rate above the national average).

identified, governors submitted nominations for approval by the U.S. DOT.⁹⁶

Investors planning to take advantage of the tax subsidy are able to take capital gains earned from another asset and invest it into a “qualified opportunity fund” within 180 days from the sale of the asset.⁹⁷ Capital gains include gains from the sale of stock or other forms of property.⁹⁸ The Act defines a qualified opportunity zone fund, in relevant part, as “any investment vehicle which is organized as a corporation or a partnership for the purpose of investing in qualified opportunity zone property (other than another qualified opportunity fund) that holds at least 90 percent of its assets in qualified opportunity zone property.”⁹⁹ Investors may defer and potentially avoid capital gains tax for investing in qualified opportunity zone funds.¹⁰⁰

Investors may then use a qualified opportunity fund to invest in an “opportunity zone property.”¹⁰¹ The Act defines a qualified opportunity zone property as one of the following: 1) qualified zone stock; 2) qualified zone partnership interest; or 3) qualified zone business property.¹⁰² Investors may not directly invest in property to receive the benefit but must do so through a qualified opportunity fund.¹⁰³ An investor is able to defer capital gains invested in a qualified opportunity fund from inclusion as taxable income until the earlier of either 1) the fund is sold or exchanged, or 2) December 2026.¹⁰⁴ Typically, the sale of assets is taxed at a maximum of 20% plus a 3.8% surtax, but under the Opportunity Zone legislation, asset sales may be rolled into an

⁹⁶ See Lettieri, *supra* note 89, at 3.

⁹⁷ See Kennedy, *supra* note 88, at 19.

⁹⁸ *Id.*

⁹⁹ I.R.C. §1400Z-2.

¹⁰⁰ See Shultz, *supra* note 86.

¹⁰¹ See Kennedy, *supra* note 88, at 19.

¹⁰² I.R.C. §1400Z-2.

¹⁰³ See Kennedy, *supra* note 88, at 19.

¹⁰⁴ I.R.C. §1400Z-2; *see also* Kennedy, *supra* note 88, at 19.

opportunity fund and deferred at least temporarily, and sometimes permanently.¹⁰⁵ If an investor holds the investment for ten years, then the investor may permanently exclude the gains on the initial investment.¹⁰⁶ Investments held for less than ten years are excluded on a step-up¹⁰⁷ basis.¹⁰⁸ As a result, an investor could defer capital gains tax and realize tax-free appreciation of the underlying real estate asset.¹⁰⁹

Proponents of Opportunity Zones contend that the program will reduce poverty, decrease unemployment and promote revitalization.¹¹⁰ If successful, the program could direct large investment to distressed areas, with more than \$2 trillion in untouched and unrealized capital gains.¹¹¹ However, state governments had broad discretion over the designation of Opportunity Zones; the program has few restrictions; and there is no cap on the amount of capital gains tax an investor may avoid.¹¹² Apart from some restrictions on “sin” businesses, the only significant restriction is that a real

¹⁰⁵ See Tankersley, *supra* note 1.

¹⁰⁶ See Kennedy, *supra* note 88, at 21.

¹⁰⁷ The step-up provision is outlined in the statute at I.R.C. §1400Z. For example, an investor may sell stock and use those gains to invest in a qualified opportunity fund. Those funds can be used to invest in a development project, such as a new shopping center. If the investor retains the investment for five years, the investor will pay 90% in capital gains tax on the original investment. If the investor retains the investment for seven years, the investor will pay only 85% of the capital gains tax. If the investor holds the investment for 10 years, the capital gains tax may be permanently avoided. For further discussion of the step-up provision, See Tankersley, *supra* note 1; Kennedy, *supra* note 88, at 21.

¹⁰⁸ See Kennedy, *supra* note 88, at 21.

¹⁰⁹ *Id.*

¹¹⁰ Weaver May 2018, *supra* note 27.

¹¹¹ See Tankersley, *supra* note 1.

¹¹² Ali Foyt, Comment, *Legal Obstacles to Affordable Housing Development*, 56 HOUS. L. REV. 506, 524 (2018); However, some states may have localized restrictions on projects despite the lack of a federal mandate. See Peter Murray, *Opportunity Zones in the Wake of Amazon HQ2*, CARTO (Nov. 28, 2018), <https://carto.com/blog/opportunity-zones-location-intelligence/>.

estate project must be “substantially improved.”¹¹³ Further, the Opportunity Zone program has few guardrails to ensure investment is directed to deeply impoverished areas, where investment could spur economic growth for long-term residents, instead of high gentrifying-tracts.¹¹⁴ Investment in high-gentrifying tracts overshadows the purpose of the program because investment in these tracts would likely occur without the tax-subsidy and long-term residents may be displaced due to rising home prices and lack of protections to maintain affordable housing.¹¹⁵

2. Opportunity Zones and Affordable Housing

Although the Opportunity Zone program aims to promote investment in distressed communities, the program neglects to outline any parameters for maintaining or creating affordable housing.¹¹⁶ Governors of every state faced a conflict between selecting deeply distressed areas that are in need of economic revitalization or alternatively selecting gentrifying areas where investment is likely but would only benefit investors.¹¹⁷ While either tract qualified under the Opportunity Zone legislation, directing investment to truly distressed communities better achieves the stated aims of the legislation. However, choosing a tract with

¹¹³ Brett Theodos et al., *Did States Maximize Their Opportunity Zone Selections?: Analysis of Opportunity Zone Designations*, URBAN INST. 2. (May 2018, rev. July 2018), <https://www.urban.org/research/publication/did-states-maximize-their-opportunity-zone-selections> [hereinafter *Theodos July 2018*]; See *I.R.C. §1400Z-2 (2019)* (“Property shall be treated as substantially improved by the qualified opportunity fund only if, during any 30-month period beginning after the date of acquisition of such property, additions to basis with respect to such property in the hands of the qualified opportunity fund exceed an amount equal to the adjusted basis of such property at the beginning of such 30-month period in the hands of the qualified opportunity fund”).

¹¹⁴ See Foyt, *supra* note 112, at 524.

¹¹⁵ *Id.* at 533.

¹¹⁶ *Id.* at 524.

¹¹⁷ See Gelfond & Looney, *supra* note 84, at 1.

appreciating economic values, a sign of gentrification, better benefits investors who hope to maximize their savings. For example, many areas in the Washington, D.C. area that are designated as Opportunity Zones are also receiving high level investments.¹¹⁸ Since the value of the tax subsidy is based on rising profits, lower-income individuals may be displaced for high-income residents who yield higher capital gains. While the majority of selections were indeed truly distressed areas, many designated zones were not actually low income and in need of access to capital.¹¹⁹ Therefore, Opportunity Zones may lack any positive effect on affordable housing or low-income economic uplift.¹²⁰ Instead, the legislation could fuel higher real estate prices and displacement.¹²¹ As a consequence, Opportunity Zones may become a vehicle to subsidize gentrification.¹²²

III. PART TWO: INTERSECTION BETWEEN OPPORTUNITY ZONES AND AFFORDABLE HOUSING

A. Opportunity Zone Critiques

Opportunity Zones focus on tax subsidies for capital gains and investments, which is not an effective strategy for revitalizing urban areas.¹²³ Previous legislation, including NMTC, Enterprise Zones, and Empowerment Zones, showed that tax incentives had

¹¹⁸ Brady Meixell & Brett Theodos, *Are Opportunity Zones in the Greater DC Area Targeted to Communities in Need of Investment*, URBAN INST. (June 20, 2018), <https://greaterdc.urban.org/blog/are-opportunity-zones-greater-dc-area-targeted-communities-need-investment>.

¹¹⁹ See Kimbo & Phillips, *supra* note 9.

¹²⁰ See Weaver May 2018, *supra* note 27.

¹²¹ See Kimbo & Phillips, *supra* note 9.

¹²² Adam Looney, *Will Opportunity Zones Help Distressed Residents or be a Tax Cut for Gentrification*, BROOKINGS INST. (Feb. 26, 2018), <https://www.brookings.edu/blog/up-front/2018/02/26/will-opportunity-zones-help-distressed-residents-or-be-a-tax-cut-for-gentrification/>.

¹²³ *Id.*

almost no impact on economic growth, were largely ineffective, or had limited scope.¹²⁴ The NMTC financed several projects, and while widely lauded, its lack of a defined targeted outcome impaired researchers' ability to analyze the net effect and benefit to local residents.¹²⁵ The few indications of economic improvement from the program were seemingly due to changes in the neighborhood composition.¹²⁶ Although the NMTC intended to devolve positive benefits onto long-term residents in distressed areas, reduced poverty and unemployment rates were, at least in part, a result of new residents moving into the area and not a reduction in these rates for long-term residents.¹²⁷

The notion that low-income area development is stunted because of excessive taxation on capital investment is misguided.¹²⁸ As the Empowerment Zones legislation showed, tax subsidies alone have no substantive impact on investment.¹²⁹ Comparatively, one of the most successful aspects of Empowerment Zones was its focus on people and local services, instead of focusing on capital gains and investments, which are featured in the Opportunity Zone legislation.¹³⁰ Opportunity Zone legislation may potentially reduce capital gains tax revenue by \$1.6 billion over 10 years without any substantive evidence that these investments will amount to anything more than tax-free gains for investors and developers.¹³¹

Opportunity Zone legislation is arguably a subsidy to wealthy investors based on capital appreciation, which created

¹²⁴ See Weaver May 2018, *supra* note 27; see also Tankersley, *supra* note 1.

¹²⁵ See Looney, *supra* note 122.

¹²⁶ See Freedman, *supra* note 57, at 1000.

¹²⁷ *Id.*

¹²⁸ See Weaver May 2018, *supra* note 27; see also Tankersley, *supra* note 1 (speculating that the provision could deliver a windfall to wealthy investors, namely corporations and financiers).

¹²⁹ See Forbes, *supra* note 15, at 183.

¹³⁰ See Looney, *supra* note 122.

¹³¹ See Tankersley, *supra* note 1.

perverse incentives for local legislators to select appreciating tracts. In some cases, instead of targeting areas with stagnant or diminishing housing prices, many states with Opportunity Zones chose “high appreciation” tracts.¹³² The larger the increase in value of the area, the more investors will accrue in capital gains tax and, thus, will save money as a result of the tax subsidy. Investing in high appreciating areas is incentivized by the Opportunity Zone legislation. The subsidy is not based on empowerment of local communities, local services, protections for retaining local residents, or affordable housing development.¹³³ In fact, the value of the subsidy is largely dependent on rising property values, appreciating rents, and increasing business profits.¹³⁴ Opportunity Zones are most beneficial to investors when property values rapidly increase.¹³⁵ Therefore, Opportunity Zones could serve as a tax subsidy for displacement, benefitting high income profits at the expense of local residents who are priced out of their neighborhoods.¹³⁶ Moreover, most individuals cannot take advantage of this subsidy; thus, the benefit of the tax subsidy primarily goes to high income investors.¹³⁷

Alarming, Opportunity Zone legislation relies on providing an indirect benefit, in the form of tax cuts, to wealthy investors in a longshot effort to encourage trickle-down benefits to low-income areas.¹³⁸ More likely, the program will result in lost tax revenue that would be better spent on programs that promote long-term community development and prevent displacement.¹³⁹

¹³² See Gelfond & Looney, *supra* note 84, at 3. Although high appreciation tracts may be defined in different ways, I use this term to indicate tracts with appreciating investment levels or tracts that were slated for investment prior to or concurrent with the legislation.

¹³³ See Looney, *supra* note 122.

¹³⁴ *Id.*

¹³⁵ See Gelfond & Looney, *supra* note 84, at 3.

¹³⁶ *Id.*

¹³⁷ See Gelfond & Looney, *supra* note 84, at 1.

¹³⁸ See Kimbo, *supra* note 9.

¹³⁹ *Id.*

Several states selected tracts in areas that are quickly gentrifying, instead of the most distressed areas in need of directed funding.¹⁴⁰ Offering tax incentives for investments projects that would have occurred without tax breaks will likely result in subsidized displacement of long-term residents.¹⁴¹ This fear is exacerbated in cities like the New York City metropolitan area, where numerous contiguous tracts were selected and housing affordability is rapidly declining.¹⁴² The Opportunity Zone legislation may further pressure an already weakened affordable housing industry.

B. Impact on Affordable Housing

The U.S. currently suffers from a severe housing shortage, especially in terms of affordable housing.¹⁴³ The U.S. is facing one of its worst housing crisis due to the combined impact of a sharp rise in rental prices and stagnant incomes.¹⁴⁴ In many markets, rental prices are soaring 10-15%.¹⁴⁵ Although in some of the most expensive U.S. cities, such as Washington, D.C. and New York, rental prices have seen a slight drop in median asking price, many of these cities are still well above the national median asking price of \$1209 for a one-bedroom.¹⁴⁶ All of this is despite an increase in production of housing units across the states, thus

¹⁴⁰ Although overall, designated census tracts were not high appreciating tracts, several designated at least some high gentrifying tracts. *See* Gelfond & Looney, *supra* note 84, at 13.

¹⁴¹ *See* Weaver May 2018, *supra* note 27.

¹⁴² Economic Innovation Group, *supra* note 4.

¹⁴³ *See* Foyt, *supra* note 112, at 507.

¹⁴⁴ Patrick Sisson, *Community Land Trusts Take Aim at Rising Rents*, CURBED (Apr. 17, 2018), <https://www.curbed.com/2018/4/17/17244956/rent-affordable-housing-community-land-trust-collective>

¹⁴⁵ Wolf Richter, *Rental Prices are Soaring Around the US*, BUSINESS INSIDER (July 2, 2018), <https://www.businessinsider.com/rental-prices-are-soaring-around-the-us-2018-7>.

¹⁴⁶ *Id.*

leading to a crisis of housing affordability and not only housing availability.¹⁴⁷ The rise of home prices has resulted in the decrease of affordable housing production and availability.¹⁴⁸ As living in urban cities becomes increasingly more expensive across the United States, many long-term local residents are being forced to move outside of the city.¹⁴⁹

Opportunity Zone legislation is intended to address distressed cities across the United States, however, its legislation may further diminish the affordability of housing, forcing-out local residents in favor of investors and commercial developments. In general, place-based tax incentives similar to Opportunity Zones risk pricing out local or long-term residents.¹⁵⁰ Since Opportunity Zone legislation does not directly address affordable housing, it does not include any specific affordable housing protection or requirements.¹⁵¹ While not protecting affordable housing, the legislation also fails to adequately restrict investors. The legislation lacks a cap on the amount of capital gains taxes that investors are able to avoid under the act and the act has few limits on use of the subsidy.¹⁵² Additionally, the scope of the tax bill may have ultimately lowered the value of the Low Income Housing Tax Credit (LIHTC), which helps to promote affordable housing production.¹⁵³ Without adequate protections to minimize displacement, wealthy investors will gain at the expense of low-income residents. Some opponents, noting the lack of

¹⁴⁷ *Id.*

¹⁴⁸ See Sisson, *supra* note 144.

¹⁴⁹ See Sisson, *supra* note 144; Richter, *supra* note 145.

¹⁵⁰ See Gelfond & Looney, *supra* note 84, at 3.

¹⁵¹ Opportunity Zone legislation was enacted as a part of the 2017 Tax Cuts and Jobs Act. The entire bill reduced affordable housing productions and may have ultimately lowered the value of the Low-Income Housing Tax Credit (LIHTC), which helps to promote affordable housing production. The Act may reduce the supply of the LIHTC rental homes by 235,000 and jobs over the next 10 years by 262,000. See Foyt, *supra* note 112, at 523.

¹⁵² See Gelfond & Looney, *supra* note 84, at 1.

¹⁵³ See Foyt, *supra* note 112, at 507, 538

restrictions on investors and affordable housing reduction, characterized the Opportunity Zone legislation as simply “a limitless tax giveaway.”¹⁵⁴

Proponents of the policy suggest that it will improve the community and rarely results in displacement. If used to its maximum benefit, Opportunity Zone legislation could improve low-income neighborhoods drastically.¹⁵⁵ In fact, more than \$2 trillion of unrealized capital gains tax could be directed to truly low-income areas.¹⁵⁶ Opportunity Zone legislation has been lauded as flexible and scalable, serving to increase the ability for participation, variance across states, and scope of impact.¹⁵⁷

EIG, a key proponent of the legislation, argues that few tracts were designated in “gentrifying areas.”¹⁵⁸ Further, in his testimony before the Economic Committee of the United States Congress, EIG representative John W. Lettieri argues that the economic characteristics of selected tracts does not appear to indicate a probability of gentrification or displacement.¹⁵⁹ In aggregate, it is possible that most of the selected census tracts do not show a likelihood of gentrification. In a subsequent study published through *Median*, EIG notes that less than 4% of zones experienced high levels of socioeconomic change, an indicator of gentrifying pressures.¹⁶⁰ While this statistic seems encouraging, when evaluated at the state level, the potential for concentrated areas of displacement is apparent.¹⁶¹ As exhibited below, some census tracts and states were so zealous in their selections that

¹⁵⁴ See Foyt, *supra* note 112, at 523-524

¹⁵⁵ Michael Novogradac et al., *Tax Reform and Its Consequences for Affordable Rental Housing*, 27 J. Affordable Housing 107, 126 (2018).

¹⁵⁶ *Id.*

¹⁵⁷ See Lettieri, *supra* note 89, at 2.

¹⁵⁸ Economic Innovation Group, *supra* note 4.

¹⁵⁹ See Lettieri, *supra* note 89, at 5.

¹⁶⁰ Economic Innovation Group, *Opportunity Zones: The Map Comes into Focus*, MEDIUM (June 15, 2018), <https://eig.org/news/opportunity-zones-map-comes-focus>.

¹⁶¹ See Theodos July 2018, *supra* note 113, at 6.

their efforts seem to support and subsidize gentrification in historically minority populated areas across the U.S.¹⁶² Some communities experienced little targeting with regard to their relative need or ability to access capital.¹⁶³ Further, a measure of notable socioeconomic changes does not capture the future possibility of gentrification resulting from the legislation.¹⁶⁴ Seemingly, the joint testimony shifts the burden of success to local governments, and anchors any potential problems on the local governments' ability to work within the community.

Proponents admit that one of the biggest risks of Opportunity Zones is improper local management.¹⁶⁵ In order to ensure accessibility and empowerment of local communities, local legislators must mitigate the downsides of Opportunity Zones and properly influence its upsides.¹⁶⁶ Focusing specifically on raising and directing capital to distressed areas is “not a strategy,” instead it repeats the errors of unsuccessful place-based tax subsidies.¹⁶⁷ According to joint testimony before Congress, EIG worked closely with state and local policymakers, community organizations, and philanthropies.¹⁶⁸ Local governments should work with workforce development programs, ease restrictive land use regulations, and increase local entrepreneurship, in order to

¹⁶² See Theodos July 2018, *supra* note 113, at 8 (noting that the designated tracts had higher percentages of Hispanic and Black residents than non-designated tracts).

¹⁶³ Brady Meixell & Brett Theodos, *How Chicago and Cook County Can Leverage Opportunity Zones for Community Benefit*. URBAN INST. (Jan. 2018), <https://www.urban.org/research/publication/how-chicago-and-cook-county-can-leverage-opportunity-zones-community-benefit> [hereinafter *Meixell Jan. 2018*].

¹⁶⁴ Tanvi Misra, *How to make Opportunity Zones Work in Chicago*. CITY LAB. (Jan. 10, 2018), <https://www.citylab.com/solutions/2019/01/opportunity-zones-tax-benefits-economic-development/579868/>.

¹⁶⁵ Economic Innovation Group, *supra* note 4.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ See Lettieri, *supra* note 89, at 1.

maximize the success and benefit of Opportunity Zone legislation.¹⁶⁹

C. Illustrative Examples of Opportunity Zones

This section presents examples of Opportunity Zones across the United States. While states generally tended to select relatively disadvantaged areas, 24% of selections had low poverty rates.¹⁷⁰ Some legislators appeared to designate tracts with the lowest levels of pre-existing investment, such as Montana, Washington, D.C., Arkansas, and Georgia.¹⁷¹ However, some legislators designated large percentages of tracts with prevalent socioeconomic changes, i.e., New York State (13%) and, more specifically, New York City (21%), and Washington D.C. (32%).¹⁷² Despite some evidence that truly distressed areas were targeted, others were likely investment targets, as most significantly exemplified in Storey County, Nevada, which was originally unqualified to be an Opportunity Zone.¹⁷³ Given that areas such as New York City, Washington, D.C., and Storey County, NV, exhibit the potential for Opportunity Zones to subsidize gentrification, this section, will examine these areas as illustrative examples of the adverse impacts of Opportunity Zone legislation.¹⁷⁴ While most of this section focuses on areas ripe for gentrification and displacement, this Note also presents Cook County, Illinois as an example of an area with potential for economic uplift in truly distressed communities.

¹⁶⁹ See Lettieri, *supra* note 89, at 7.

¹⁷⁰ See Gelfond & Looney, *supra* note 84, at 7.

¹⁷¹ See Theodos July 2018, *supra* note 113, at 4.

¹⁷² See Theodos July 2018, *supra* note 113, at 6.

¹⁷³ See Gelfond & Looney, *supra* note 84, at 7.

¹⁷⁴ See Looney, *supra* note 122.

1. Washington, D.C.

Washington, D.C. legislators articulated four desired outcomes of Opportunity Zone investment in DC: 1) deliver new amenities, such as community-serving retail and fresh food grocers; 2) increase affordable and workforce housing; 3) capitalize DC small businesses; and 4) create jobs for DC residents and pathways to the middle class.¹⁷⁵

Many areas in Washington, D.C. that are designated as Opportunity Zones already have access to high level investments without the incentive of the legislation.¹⁷⁶ In Washington, D.C. qualified Opportunity Zones also include high appreciating areas such as Buzzard Point, near D.C. United's new stadium, NoMa, Shaw, Le Droit Park, and Brookland, all of which show great promise for rising home prices in previously distressed communities.¹⁷⁷ Affordable housing in Washington D.C., however, is rapidly declining and many low-income residents are being priced out of the Nation's capital.¹⁷⁸

Washington, D.C. has a population of 47.1% Black or African Americans and 11% Hispanic or Latinx.¹⁷⁹ Some of its most densely populated minority areas are facing the potential to become widely unaffordable. Not only does this impact low-income communities, but it also disproportionately targets communities of color to the direct benefit of wealthy investors. Washington, D.C. exhibits the potential for this legislation to have an adverse impact on communities of color that have been present in these communities for decades.

¹⁷⁵ *Opportunity Zones in Washington, D.C.*, OFFICE OF THE DEPUTY MAYOR FOR PLANNING AND ECONOMIC DEVELOPMENT <https://dmped.dc.gov/page/opportunity-zones-washington-dc> (last visited Nov. 4, 2019).

¹⁷⁶ See Meixell & Theodos, *supra* note 118.

¹⁷⁷ See Looney, *supra* note 122.

¹⁷⁸ See Foyt, *supra* note 112, at 518.

¹⁷⁹ U.S. CENSUS BUREAU, *Quick Facts: District of Columbia*, <https://www.census.gov/quickfacts/dc> (last visited Nov. 27, 2019).

2. Storey County, Nevada

Nevada originally elected not to nominate Storey County, Nevada because the county did not qualify under the legislation as detailed under the Tax Cuts and Jobs Act—the poverty rate was above 20% and the median income was above the statutory limit.¹⁸⁰ However, Nevada government and two Nevada representatives lobbied with the Treasury Department to get Storey County approved as an Opportunity Zone.¹⁸¹ In order to designate Storey County, the Governor had to withdraw the designation of Dayton as an Opportunity Zone even though Dayton has a higher poverty rate than Storey County.¹⁸² In Dayton, the median income is \$49,007 whereas in Storey County, the median income is \$65,508 and the poverty rate was only 2.6%.¹⁸³ Storey County is also home to the Tahoe-Reno Industrial Center, where Tesla, Google, Blockchains, Switch and Walmart have a large presence.¹⁸⁴ In fact, the Tesla Gigafactory is located in the Industrial Center.¹⁸⁵

While not necessarily an example of minority displacement, Storey County demonstrates the perverse incentives legislators had to designate zones that benefitted investors as opposed to zones that were truly in need. More distressed areas were not only passed over, but also dropped from designation to accommodate tracts with more profitable outlooks. In the case of Storey County, access to capital was previously prevalent, but investors now have the opportunity to receive tax benefits for their pre-planned projects.

¹⁸⁰ Damian Paletta, *After Nevada GOP Push, Treasury Changed Lucrative Policy Benefiting One County*, WASH. POST. (June 22, 2018), https://www.washingtonpost.com/business/economy/after-nevada-gop-push-treasury-quietly-changed-policy-benefiting-one-county/2018/06/22/d142acfc-74c5-11e8-b4b7-308400242c2e_story.html?utm_term=.c6404c2329ab.

¹⁸¹ *Id.*; See also Gelfond & Looney, *supra* note 84, at 7.

¹⁸² See Paletta, *supra* note 180.

¹⁸³ See Paletta, *supra* note 180; Gelfond & Looney, *supra* note 84, at 7.

¹⁸⁴ See Paletta, *supra* note 180.

¹⁸⁵ See Gelfond & Looney, *supra* note 84, at 7.

3. New York Metropolitan Area New York

New York City exemplifies the risks highlighted in Washington, D.C. and Storey County, illustrating both the potential for minority displacement and the subsidization of projects that were already in the pipeline. The following example focuses on Amazon's second headquarters (HQ2), which will no longer be placed in New York, but raises critical issues with Opportunity Zone legislation.

In November 2018, Amazon announced that it would build its HQ2 in both Long Island City, NY and Arlington, VA. However, in February of 2019, Amazon subsequently withdrew the deal in Long Island City, citing major public backlash.¹⁸⁶ Amazon, as of March 2019, plans to continue its development in Arlington, VA, a city just outside of Washington, D.C., in northern Virginia.¹⁸⁷ The Amazon deal in New York, featured approximately \$3 billion in tax subsidies for a company with \$232 billion in new sales, and 11.2 billion in U.S. profits.¹⁸⁸

At the time of the proposed deal, it appeared that only the Long Island City, New York location would fall within a designated Opportunity Zone. It is unclear whether the Arlington, VA tract will also receive benefits from being in the Opportunity Zone. While Amazon faced large public criticism for a variety of reasons, many critics cited the tax subsidies available to Amazon and the impact HQ2 would have on affordable housing in Long Island City.¹⁸⁹ Due to the Opportunity Zone legislation, Amazon would

¹⁸⁶ *Update on Plans for New York City Headquarters*, AMAZON: THE AMAZON BLOG (Feb. 14, 2019), <https://blog.aboutamazon.com/company-news/update-on-plans-for-new-york-city-headquarters>.

¹⁸⁷ *Id.*

¹⁸⁸ *Amazon.com Announces Fourth Quarter Sales up 20% to \$72.4 Billion*, AMAZON: PRESS CENTER (Jan. 31, 2019, 4:01 PM), <https://press.aboutamazon.com/news-releases/news-release-details/amazoncom-announces-fourth-quarter-sales-20-724-billion>.

¹⁸⁹ See Anthony Noto, *Here's What Amazon Stands to Gain in NYC Incentives*, N.Y. BUS. J. (June 22, 2018), <https://www.bizjournals.com/>

have been eligible for additional tax breaks because the proposed tract falls within an approved Opportunity Zone.¹⁹⁰ Although the public will not know the impact Amazon would have had on Long Island City, Amazon's selection of an Opportunity Zone census tract, embodies the critiques of the legislation's proponents—Opportunity Zone legislation could subsidize and accelerate both gentrification and displacement.¹⁹¹

Despite pulling out of the deal, Amazon's proposed headquarters provides a great example of a corporation's ability to exploit the Opportunity Zone program at the risk of widespread displacement and decreased affordable housing. Amazon's eligibility is even more alarming because the proposed tract fell within a zone whose poverty level is lower than the required minimum of 20% but was likely eligible because it was a "contiguous tract."¹⁹² Contiguous tracts are eligible because of their proximity to a census tract with a high eligible poverty rate.¹⁹³ Contiguous tract authority was used sparingly by other states, but in New York, which is already experiencing displacement of long-term residents, the governor used his contiguous tract authority more than any of its peer states.¹⁹⁴ Therefore, any funding that may have been redirected from the Amazon deal, would have been directed to an area that was not truly distressed.

Pairing the lack of distress and the potential for displacement, Amazon HQ2's location exhibits the ability for Opportunity Zone legislation to become a subsidy of displacement. According to a 2018 census estimate, Queens County has a median household income of approximately \$62,000 and a 20.5% Black/African-American population and 28% Hispanic or

[newyork/news/2018/11/13/heres-what-amazon-stands-to-gain-in-nyc-incentives.html](https://www.nyc.gov/news/2018/11/13/heres-what-amazon-stands-to-gain-in-nyc-incentives.html); Economic Innovation Group, *supra* note 4.

¹⁹⁰ Murray, *supra* note 112.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ Economic Innovation Group, *supra* note 4.

Latinx.¹⁹⁵ Between 2005 and 2017, Queens lost 22,700 Black homeowners.¹⁹⁶ The loss of Black homeowners is attributed to rapidly increasing housing prices and a “tight” lending market, exhibiting the disparities in homeownership and shifts in neighborhood composition occurring in the area.¹⁹⁷

One of the core issues with the Amazon HQ2 in New York is the particular census tract selection. EIG notes that one of the most extreme outliers is tract 36081000100 in Long Island City, the proposed home of Amazon HQ2.¹⁹⁸ Prior to Amazon’s selection of this tract, there was already ease in attracting private capital.¹⁹⁹ HQ2 may have caused property value to increase, along with the competition for New York homes from employees whose median incomes more than doubled the median income of \$62,000.²⁰⁰ As home prices increased, renters may have been unable to afford their units, or owners unable to afford their property taxes. Even if rising home prices did not directly displace Black homeowners, the rising cost of living—such as the price of food and gas— leads to indirect displacement of residents who can no longer afford day-to-day activities in the area that they call home.²⁰¹

Another concern in Long Island City is the disproportionate impact rising home prices have had on Black homeowners, who have seen the second lowest homeownership

¹⁹⁵ U.S. CENSUS BUREAU, *Quick Facts: Queens County (Queens Borough), New York*, <https://www.census.gov/quickfacts/queenscountyqueensboroughnewyork> (last visited Nov. 27, 2019).

¹⁹⁶ John Baker et al., *Aftermath: Affordable Homeownership in New York City 12* (2018), https://s28299.pcdn.co/wp-content/uploads/2018/10/CNY002-AH-Summit-Report_v7_FINAL_online.pdf.

¹⁹⁷ *Id.* at 12.

¹⁹⁸ Economic Innovation Group, *supra* note 4.

¹⁹⁹ *Id.*

²⁰⁰ See Kori Hale, *Housing Consequences for Amazon’s HQ2*, FORBES (Nov. 20, 2018) <https://www.forbes.com/sites/korihale/2018/11/20/housing-consequences-for-amazons-hq2/#5ebc95af3847>.

²⁰¹ *Id.*

rate in this area and a decline in homeownership.²⁰² These impacts include: high foreclosure rates, scarcity of home repair lending, and low rates of refinance lending for New York City Black homeowners.²⁰³ In fact, only 40% of Black applicants were approved for refinance loans in 2017.²⁰⁴ These factors combined often result in loss of homeownership.²⁰⁵

Another concerning aspect of the placement of Amazon HQ2 in this tract was the potential for Amazon to take advantage of the tax subsidy to increase its property ownership. Amazon could have deferred tax payments on capital gains for up-to-ten years by investing these gains into an "opportunity fund" that they could subsequently use to buy more property in the Opportunity Zone, which becomes eligible for the tax subsidy if it is invested in public infrastructure. Amazon would have been eligible if it invested in public infrastructure, which according to its HQ2 announcement, was a part of its plan.²⁰⁶ Per Amazon's statement (emphasis added):

The community will benefit from New York City providing funding through a Payment In Lieu Of Tax (PILOT) program based on Amazon's property taxes on a portion of the development site to fund community infrastructure improvements developed through input from residents during the planning process. Amazon has agreed to donate space on its campus for a tech startup incubator and for use by artists and industrial businesses, and **Amazon will donate a site for a new primary or intermediary public school.** The company will also invest in infrastructure improvements and new green spaces.²⁰⁷

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ Noto, *supra* note, 189.

²⁰⁷ *Id.*

As Long Island City, and previous legislation exhibit, local leadership and community engagement are imperative to the overall success and fulfillment of the program's articulated goals. Although Amazon withdrew its plans to build in New York, the same concerns remain for the Arlington, VA location, and other wealthy developers in census tract 36081000100 in Long Island City. Amazon exhibits the potential for the Opportunity Zone program to be used for the direct benefit of wealthy investors, corporations, or financiers at the expense of low-income, long-term, minority residents. Amazon may have been able to directly subsidize the displacement of people of color for its own corporate benefit. What remains to be seen, and a central concern of the legislation, is how other companies may also take advantage of this program to defer their tax obligations while negatively impacting affordable housing. Stakeholders should take these lessons and also monitor proposed corporate investments in Storey County, Nevada, and work to avoid re-segregative displacement that may be brewing in Washington, D.C.

4. Chicago, Illinois

Chicago, Illinois exemplifies the importance of legislators using the Opportunity Zone legislation as a remedy for race-based inequities in economic investment. In particular, the Chicago area exhibits the impact the legislation could have if used improperly because the area already “has particularly stark economic disparities by race.”²⁰⁸ In Cook County, Illinois,²⁰⁹ legislators typically designated Opportunity Zones that had a population with an African-American majority. Cook County designated tracts that averaged a high poverty rate of 41% and an

²⁰⁸ Jason Keller, et al., *Opportunity Zones: Understanding the Background and Potential Impact in Northeastern Illinois*, 1 PROFITWISE NEWS AND VIEWS 1, 13 (2019).

²⁰⁹ Cook County encompasses Chicago and surrounding areas.

unemployment rate of 27%.²¹⁰ The median home value is \$140,000, and the average percentage of Black residents is 85%.²¹¹

Chicago and state leaders not only accounted for the technical requirements of Opportunity Zone legislation (poverty and unemployment rates), leaders also conducted a general population analysis.²¹² Legislators also considered the existence of previous federal and state incentive programs in each area along with the economic development potential of each tract.²¹³ As a result, the designated zones were concentrated across areas with “low labor force participation rates,” high unemployment rates, high poverty rates, and a high concentration of minorities.²¹⁴ The designated tracts in Cook County are truly distressed with only five tracts out of 181 flagged as experiencing significant socioeconomic change since 2000.²¹⁵ These zones exhibit an opportunity to create economic growth and development for long-term, minority residents in Cook County, Illinois.²¹⁶

Legislators can help ensure that long-term minority residents realize the benefits of targeted Opportunity Zone investment through planning efforts that: improve accessibility to employment centers, increase the availability and access to living wage jobs, pair Opportunity Zones with workforce training programs, and foster collaboration between local stakeholders and public entities. Despite the fact that Illinois legislators targeted areas with greater need, the Chicago metropolitan area is still at risk for Opportunity Zone investments to disproportionately favor wealthy investors.²¹⁷ Investment may still flow to areas already attracting the interest of developers because the capital gains

²¹⁰ See Misra, *supra* note 164; Meixell Jan. 2018, *supra* note 163, at 6.

²¹¹ See Meixell Jan. 2018, *supra* note 163, at 6.

²¹² Keller, et. al, *supra* note 208, at 4.

²¹³ *Id.*

²¹⁴ *Id.* at 5.

²¹⁵ See Meixell Jan. 2018, *supra* note 163, at 6.

²¹⁶ Keller, et. al, *supra* note 208, at 9.

²¹⁷ Keller, et. al, *supra* note 208, at 13.

incentive is most beneficial to investors if the area rapidly increases in value.²¹⁸ Therefore, it is important for local leaders to pair Opportunity Zone incentives with other local programs that target inclusive growth in marginalized areas and stimulate local needs.²¹⁹ Local leaders must continue to work with community stakeholders to develop strategies to direct investment projects to areas in need and enhance community benefit.²²⁰

Although Opportunity Zones have already been selected and approved, local legislators, lawyers, and community stakeholders can work together to address potential displacement and protect affordable housing in the most vulnerable areas. Otherwise, investors may target communities where other investors are present because the risk of loss is lower.²²¹ This may increase gentrification and displacement, while other communities continue to struggle with access to capital.²²²

IV. PART THREE: RECONCILING OPPORTUNITY ZONES WITH MAINTAINING AFFORDABLE HOUSING

Since tax incentives do not seem to encourage investors to invest in distressed communities, Opportunity Zone legislation may provide a subsidy to projects that investors would likely have invested in anyway. Many of these investments may result in increased housing prices and displacement. To remedy these effects, legislators should reconcile the interests of residents that the legislation may displace with the articulated aims of the Opportunity Zone legislation.²²³ Legislators do not have to

²¹⁸ *Meixell* Jan. 2018, *supra* note 163, at 7.

²¹⁹ *Keller, et. al, supra* note 208, at 13.

²²⁰ *Meixell* Jan. 2018, *supra* note 163, at 9.

²²¹ *Id.* at 2-3.

²²² *Id.* at 3.

²²³ *Opportunity Zones Frequently Asked Questions*, INTERNAL REVENUE SERV. (Oct. 22, 2019) <https://www.irs.gov/newsroom/opportunity-zones-frequently-asked-questions>. The IRS articulated the purpose of Opportunity

abandon the program altogether but should instead pair the program with integrated, community-focused initiatives, nuanced approaches to each zone, and better reporting mechanisms.

Although place-based legislation may provide more economic opportunity to some individuals, legislators should consider mitigating harms with a more community-oriented approach. Legislatures should try to implement guardrails that provide for “smart gentrification.” Smart gentrification entails retaining local residents and increasing low- and middle-income housing, which is not currently a feature of Opportunity Zone legislation.²²⁴ A multi-layered, community-oriented solution would remedy the legislation and protect against community displacement.²²⁵ First, both Congress and local government agencies should implement legislation, programs and incentives to increase urban entrepreneurship. Second, local residents and community organizers should consider the utility of community land trusts in providing a long-term solution to affordable housing preservation. Third, local legislators and community leaders should adopt litigation strategies that are often used in gentrification lawsuits to stall the rapid decline in affordable housing.

A. Defining Desired Outcomes of Opportunity Zone Legislation and Encouraging Diversified Community Approaches

Opportunity Zone legislation lacks a clear policy evaluation metric to monitor the program’s success and avoid the permanent and costly effects of an unevaluated program, extended for a long-term.²²⁶ Currently, there is no statutory requirement for impact reporting, monitoring, or evaluation.²²⁷ Congress should properly

Zones as “an economic development tool—that is, they are designed to spur economic development and job creation in distressed communities.”

²²⁴ See Looney, *supra* note 122.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ See Meixell Jan. 2018, *supra* note 163, at 13.

define what constitutes “success” for the Opportunity Zone legislation and advance measuring requirements that embody the need to track capital flows, monitor the program, and assess its impact.²²⁸

EIG, in its joint testimony to Congress, calls on states to make available to investors, researchers, and the general public, data related to the progress and results of Opportunity Zones.²²⁹ EIG also argues that Congress should develop comprehensive strategies and work with entrepreneurs, fund managers, business owners, developers, and community stakeholders to create an Opportunity Zone investment ecosystem.²³⁰ Local governments have an important leverage to direct investment to areas in need.²³¹ Each zone requires a “tailored strategy.” For example, rapidly gentrifying areas may need efforts to preserve affordable housing: legislators and attorneys should leverage community benefit agreements, CLTs, and affordable housing requirements.²³² Alternatively, for areas that are not rapidly gentrifying, legislators may need to increase incentives to spark interest in “less attractive” neighborhoods.²³³

Legislators should amend Opportunity Zones to take a more inclusive approach to community development. An integrated community development plan could preserve affordable housing and allow for new commercial and residential development. Similar approaches exist across major metropolitan areas, including Washington, D.C., and New York, NY.²³⁴ For example, one research section of the Pratt Institute’s community development

²²⁸ See *Theodos* July 2018, *supra* note 113.

²²⁹ See Lettieri, *supra* note 89 at 8.

²³⁰ See Economic Innovation Group, *supra* note 160.

²³¹ See Misra, *supra* note 164.

²³² *Id.*

²³³ *Id.*

²³⁴ *Downtown Brooklyn’s Detour: The Unanticipated Impacts of Rezoning and Development on Residents and Businesses*. PRATT CTR. FOR COMMUNITY DEV. (July 2008), https://prattcenter.net/sites/default/files/prattcenter-downtown_brooklyns_detour.pdf.

group recommends legislators in New York to conduct a more accurate displacement risk analysis and develop an anti-displacement policy with the goal of no net loss of affordable housing.²³⁵ If not, Opportunity Zone appreciating tracts, such as the former Amazon Long Island City tract, may result in the displacement of many local residents and small businesses.²³⁶

EIG, in its joint testimony to Congress, acknowledged that the tax subsidy, alone, is insufficient to uplift distressed communities but instead encourages states to supplement the program with workforce development programs and less restrictive land use regulations.²³⁷ However, legislators should take a slightly different integrative approach that focuses on entrepreneurship, small business development, and localized gain across residents. A community-oriented approach mitigates the loss of affordable housing, while revitalizing neighborhoods. A community integrated approach should include supporting both local businesses and local residents to ensure their economic growth and independent sustainability. Further, legislators should support CLTs and affordable housing protections while investing in community development, instead of programs that reinforce burdens on land use that have a negative impact on low-income residents.

Similarly, Weaver argues for urban social citizenship, which empowers people to invest in their communities instead of simply providing tax breaks for high income investors.²³⁸ The government could integrate communities through improving entrepreneurial development in distressed communities. One approach to this is to encourage lawmakers to reduce regulatory hurdles, publish materials in languages spoken by immigrant

²³⁵ Jen Becker & Elena Conte, *Flawed Findings: How NYC's Approach to Measuring Displacement Risk Fails Communities*. PRATT CTR. FOR COMMUNITY DEV. (Sept. 18, 2019) <https://prattcenter.net/research/flawed-findings>.

²³⁶ Downtown Brooklyn's Detour, *supra* note 234.

²³⁷ See Lettieri, *supra* note 89, at 7.

²³⁸ See Weaver May 2018, *supra* note 27.

groups, and help facilitate entrepreneurial networks.²³⁹ Transactional lawyers may assist in community uplift through supporting urban entrepreneurship. Expanding access to urban enterprise, including transactional lawyering and counseling, may help improve the sustainability of urban entrepreneurship and affordable housing communities.²⁴⁰ As such, law firms have recently increased their transactional pro bono programs to support urban entrepreneurs and upcoming small businesses.²⁴¹ Integrative community planning avoids the risk of detached outside investors that benefit from the tax cut, while promoting displacement. Combining the resources of lawyers with small business development in urban communities, both sustains community development and encourages economic revitalization from within the community.

B. Increasing Access to Community Land Trust Protections

Community Land Trusts (“CLTs”) institute various legal structures in order to mitigate against displacement of community members, especially those with low incomes. CLTs provide a more offensive strategy, using property law concepts paired with transactional approaches to hold land in a trust for members of the community.

CLTs are a bifurcated ownership system, which often entails community ownership of the land, typically through a non-profit structure, paired with local residents that often hold the deed to the home and long-term leases.²⁴² Each CLT community is set up differently, however, one key aspect includes the CLTs

²³⁹ Susan R. Jones, Comment, *Supporting Urban Entrepreneurs, Law, Policy, and the Role of Lawyers in Small Business Development*, 30 W. NEW ENG. L. REV. 71, 79 (2007).

²⁴⁰ *Id.*

²⁴¹ *Id.* at 77.

²⁴² See Sisson, *supra* note 144.

ability to retain the right to purchase control of the property at an affordable price.²⁴³ Using the non-profit structure, many CLTs benefit are able to preserve their existence via various funding sources.²⁴⁴ Further, CLTs allow communities to maintain property at an affordable cost, even throughout the transfer of property across different parties.²⁴⁵

CLTs are cropping up across the United States and internationally, as a tool to address homelessness and displacement.²⁴⁶ To date, at least fifteen states have enacted at least a partial statutory provision regarding CLTs.²⁴⁷ One of the major benefits of incentivizing CLT formation and establishing initiatives that protect their efforts is the ability for CLTs to become a long-term solution to affordable housing.²⁴⁸ CLTs help curb speculation on housing prices and ensure permanent affordable housing.²⁴⁹ CLT homeowners significantly outperformed the market during the great recession.

In 2017, New York City took a major step in addressing its affordable housing problem by enacting CLT enabling

²⁴³ See Sisson, *supra* note 144.

²⁴⁴ Regional Plan Association for Manhattan Community Board 11, *East Harlem Affordable Housing Under Threat: Strategies for Preserving Rent Regulated Units*, 1, 3 (Aug. 2012) [hereinafter RPA].

²⁴⁵ This effort is specific to East Harlem but is widely applicable to areas where the availability of affordable housing is at risk, especially in New York City. *See Id.*

²⁴⁶ NYC COMMUNITY LAND INITIATIVE, <https://nyccli.org/the-problem/> (last visited Mar. 4, 2019).

²⁴⁷ These states include California, Connecticut, Florida, Georgia, Illinois, Iowa, Maryland, Minnesota, Nevada, North Carolina, South Carolina, South Dakota, Texas, Virginia, Wyoming. *See* Andrew Decker, *Community Land Trusts and State Legislation: A Model Act to Enable this Affordable Housing Tool*, 26 J. AFFORDABLE HOUSING 489, 491 (2018).

²⁴⁸ *See* RPA, *supra* note 244, at 3-4.

²⁴⁹ Deyanira Del Rio & Andy Morrison, *City Views: NYC Needs Equitable Economic Development, Not the Amazon Deal*. CITY VIEWS. (Nov. 28, 2018) <https://citylimits.org/2018/11/28/cityviews-nyc-needs-equitable-economic-development-not-the-amazon-deal/>.

legislation.²⁵⁰ Further, the New York State Attorney General's Office also helped direct settlement funds to CLT efforts across New York State.²⁵¹ Many of these efforts can and should be replicated across the country, especially in high density areas where affordable housing is sharply declining, such as New York and Washington, D.C. The availability of affordable housing can be protected on a long-term basis through redirecting the capital gains funds to initiatives such as CLTs, and providing legislation that protects, promotes, and endorses CLT formation. As the risk of the decline of affordable housing increases with the Opportunity Zone legislation, lawmakers should be vigilant in their efforts to protect some of the Nation's most vulnerable communities.

C. Implementing Litigation Strategies from Gentrification Lawsuits

Another way to mitigate the potential for displacement and decreased affordable housing is through defensive strategies that involve commencing litigation against developers, city councils, and other government agencies. While I believe that the best way to protect affordable housing is through offensive strategies as detailed above, I also acknowledge that offensive strategies primarily require legislative buy-in and support. Therefore, while lawyers and community members work to ensure affordable housing protections are in place, lawyers may also implement some defensive strategies. These strategies, while promising, are less likely to prevail.

Numerous litigation strategies have been levied against gentrification, displacement, and affordable housing decline, including the use of zoning laws, the Federal Housing Act (FHA), and state constitutions. Lawyers should work closely with community organizations to develop theories that minimize the

²⁵⁰ *Id.*; New York City, Pub. L. No. 2018/067, (defining CLTs and allowing for the creation of regulatory agreements with CLTs.)

²⁵¹ Del Rio & Morrison, *supra* note 249.

decline of affordable housing as a result of the Opportunity Zone tax subsidy. For example, in December 2018, zoning laws were cited in a complaint against New York City to challenge the construction of luxury apartments in the Lower East Side area in Manhattan, which is home to many minority and immigrant families.²⁵² The lawsuit challenges the approval of the development as a “minor modification,” claiming that the project violates the zoning law.²⁵³ The use of zoning laws as a litigation tool helps preserve and create more affordable housing before displacement begins.²⁵⁴ Lawyers could also use inclusionary zoning litigation to challenge displacement of minority residents by white residents.²⁵⁵

Alternatively, another powerful tool available to lawyers is the use of the FHA. The FHA may be used to preserve affordable housing and challenge the building of luxury apartments to avoid displacing local residents.²⁵⁶ The FHA was passed in 1968 and bans discrimination in the rental and sale of housing, including in the lending process.²⁵⁷ Community leaders could challenge development projects as having a discriminatory impact under §3604²⁵⁸, advancing the claim that 1) the legislation results in an adverse impact on racial minorities or 2) the legislation is using

²⁵² Jake Offenhardt, *City Council files lawsuit Against ‘Irrational’ Approval of LES Skyscrapers*, GOTHAMIST (Dec. 7, 2018), http://gothamist.com/2018/12/07/two_bridges_towers_lawsuit.php.

²⁵³ Petition-Complaint, *The Council of New York v. The Department of City Planning of New York*, No. 452302, 2018.

²⁵⁴ See Hannah Weinstein, *Fighting for A Place Called Home: Litigation Strategies for Challenging Gentrification*, 62 UCLA L. Rev. 794, 794 (2015).

²⁵⁵ See *Id.* at 813; *Hallmark Developers, Inc. v. Fulton Cty.*, 466 F.3d 1276 (11th Cir. 2006).

²⁵⁶ See Weinstein, *supra* note 254, at 794.

²⁵⁷ *Id.* at 823; 42 U.S.C. §3601-31 (2019).

²⁵⁸ See 42 U.S.C. §3604(b), making it unlawful to “discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.”

the guise of development to re-segregates the area.²⁵⁹ Due to the racial impact of the Opportunity Zones on displacing low-income communities to benefit wealthy, predominantly white investors, challengers could bring an FHA challenge to halt new projects in minority-populated distressed areas under either theory.

One possible avenue to bring an FHA claim is through a re-segregation theory, showing the trend of white residents displacing long-term, minority residents; therefore, having a segregative effect on urban neighborhoods.²⁶⁰ Unfortunately, an argument that Opportunity Zones will have a segregative effect on an entire city will likely fail as an FHA claim. However, the segregative effect approach may be useful in cases specifically claiming that certain census tracts are prime for re-segregation, such as the census tract selected in the proposed HQ2 Long Island City deal, or historically Black census tracts targeted for redevelopment in Washington, D.C.²⁶¹ Litigators could show that in predominantly Black areas in Washington, D.C. the population of white residents increased by 10% over 10 years.²⁶² The current approach to affordable housing is unsustainable as the Opportunity Zone tax incentive encourages capital investments into low-income areas, which lead to redevelopment, but lack protections to secure access to affordable housing.²⁶³ The expiration of affordable housing provisions highlights this point. A large percentage of

²⁵⁹ See Weinstein, *supra* note 254, at 823; See also *Hallmark Developers, Inc. v. Fulton Cty.*, 466 F.3d at 1276 (finding that housing became “unavailable” within the meaning of FHA as a result of zoning. A showing of a significant discriminatory effect suffices to demonstrate a prima facie violation of the FHA). The Court in *Hallmark* also found that a plaintiff could demonstrate discriminatory effect through a showing of 1) segregative effect 2) housing more restrictive for members of a protected group than for persons outside of the group. *Id.* at 1286; See also 42 U.S.C. §3601.

²⁶⁰ See Weinstein, *supra* note 254, at 796.

²⁶¹ *Brown v. Artery*, 654 F. Supp. 1106, 1108-09 (D.D.C. 1987) (finding unlawful the conversion of low rent housing units to high rent units based on the consequent displacement of Black and Hispanic tenants).

²⁶² See Weinstein, *supra* note 254, at 807.

²⁶³ See Kennedy, *supra* note 88.

affordable housing units are located in urban areas and are also targets of redevelopment.²⁶⁴

Alternatively, litigators may rely on the adverse impact prohibition, which may be useful if an affordable housing building is subject to removal and likely has an adverse impact on racial groups, given the disproportionate number of minority residents in affordable housing communities.²⁶⁵ The joint testimony reports that the selected Opportunity Zone tracts are more densely populated with minority residents than the racial demographics reported as a national average. However, this may cut against the argument, since developers claim the need to provide resources to diverse and distressed communities.

Lawyers could work to permanently secure affordable housing as a U.S. or state Constitutional right. Although a far stretch at the moment, lawmakers providing large tax subsidiaries for developers in distressed urban areas, must recognize the direct impact this has on low-income, minority residents. Due to the disproportionate racial impact of decreased affordable housing, a Constitutional challenge may be brought under the Equal Protection Clause.²⁶⁶ However, a Supreme Court case found that there was no constitutional right to “dwellings of any particular quality.”²⁶⁷ While this does not preclude a finding that affordable housing is a right guaranteed under the U.S. Constitution, this holding seems to narrow the ability to make a compelling case under federal law. Therefore, lawyers aiming to make a particular case for affordable housing, should first look to state constitutions. For example, the New Jersey Mount Laurel cases clarified that municipalities have

²⁶⁴ See Weinstein, *supra* note 254, at 798.

²⁶⁵ See *Brown v. Artery*, 654 F. Supp. at 1106, (The Court defined “adverse impact” as a result of a “practice or policy that has a disproportionate effect upon the minorities within the group to which the policy is applied.” The court further discussed that there was support for a claim of discriminatory intent if the negative impact of the development would fall almost entirely on Black and Hispanic tenants) *Id.* at 1119.

²⁶⁶ See Weinstein, *supra* note 254, at 814.

²⁶⁷ *Lindsey v. Normet*, 405 U.S. 56, 74 (1972).

“an affirmative duty to ensure low- and moderate-income housing.”²⁶⁸ Further, New York state courts have found that their constitution requires zoning regulations that do not exclude low-income residents; however, an explicit protection of affordable housing was rejected.²⁶⁹

Litigation for protection of affordable housing under the state constitutions or inclusionary zoning laws enforcement are practical strategies for addressing a threat to affordable housing. Within the context of litigation under FHA and constitutional challenges, litigators should seek to have Opportunity Zone legislation include and acknowledge affordable housing as a necessary aspect of general welfare. However, this approach is subject to potential “backlash litigation,” which may question the validity of zoning laws under the Equal Protection Clause, Due

²⁶⁸ See Weinstein, *supra* note 254, at 814; The court in *S. Burlington Cty. NAACP v. Mount Laurel*, concluded that “every such municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing. More specifically, presumptively it cannot foreclose the opportunity of the classes of people mentioned for low and moderate income housing and in its regulations must affirmatively afford that opportunity, at least to the extent of the municipality’s fair share of the present and prospective regional need therefor.” 336 A.2d 713, 724 (1975), (*Mt. Laurel*). In a subsequent ruling, the court further clarified that “‘Affirmative’ in the *Mount Laurel* rule, suggests that the *municipality* is going to do something, and ‘realistic opportunity’ suggests that what it is going to do will make it *realistically* possible for lower income housing to be built. Satisfaction of the *Mount Laurel* doctrine cannot depend on the inclination of developers to help the poor. It has to depend on affirmative inducements to make the opportunity real.” *S. Burlington Cty. NAACP v. Mount Laurel*, 456 A.2D 390, 442 (1983) (*Mount Laurel II*).

²⁶⁹ See Weinstein, *supra* note 254, at 514 N.Y.2d 939, 949-50 (App. Div. 1987); *Suffolk Hous. Servs. v. Brookhaven*, 70 N.Y.2d 122(1987), finding a reduction in affordable housing has a negative impact on residents. However, the court also noted that *Mt. Laurel I* and *II* are the law of New Jersey and not New York, further citing New York’s history of producing low- and moderate-income housing. In *Suffolk Housing Services v. Brookhaven*, the court explicitly noted that “zoning is a legislative task,” declining to interfere in the alleged housing shortage. *Suffolk Hous. Servs. v. Brookhaven*, 70 N.Y.2d 122 (1987).

Process Clause, or Takings Clause, especially without a direct finding of affordable housing as a fundamental right.²⁷⁰ Therefore, litigators should be careful before bringing weak claims and risking the protections that currently exist. Overall, the best approach to Opportunity Zone legislation rests with community investment, local legislative oversight, and affordable housing protections. Opportunity Zones, while having the potential to promote investment, also may lead to a reverse urban sprawl of low-income residents.

V. CONCLUSION

Opportunity Zone legislation is a revamped approach to Enterprise Zones and Empowerment Zones. If history is any indication, the legislation will have little positive effect on affordable housing or low-income economic uplift.²⁷¹ Opportunity Zone legislation has the potential to achieve a “variety of positive outcomes,” including: revitalizing downtowns, boosting local entrepreneurship, addressing rural development, and commercializing tech around local knowledge centers.²⁷² While the articulated goals are positive, the structure of the legislation risks wide-spread displacement of minority local-residents. Congress and local legislators should implement zone-specific strategies, as detailed above, in order to ensure local community engagement and support of local residents.

Although place-based tax incentives have not achieved wide-spread success, shortcomings of previous legislation should encourage legislators to adopt more community-oriented approaches and specific parameters to measure success. Lawyers and community stakeholders are essential to ensuring the success of implementing social entrepreneurship focused legislation, or alternatively protecting existing residents from displacement and affordable housing decline. Careful consideration should be taken to

²⁷⁰ *Id* at 815.

²⁷¹ See Weaver May 2018, *supra* note 27.

²⁷² See Lettieri, *supra* note 89, at 8.

uplift low-income communities, instead of providing a windfall to wealthy investors at the expense of existing residents.