

6-24-2015

Sustaining Neighborhoods of Choice: From Land Bank(ing) to Land Trust(ing)

James J. Kelly Jr.

Notre Dame Law School, j.kelly@nd.edu

Follow this and additional works at: https://scholarship.law.nd.edu/law_faculty_scholarship



Part of the [Property Law and Real Estate Commons](#)

Recommended Citation

James J. Kelly Jr., *Sustaining Neighborhoods of Choice: From Land Bank(ing) to Land Trust(ing)*, 54 Washburn L. J. 3 (2015).

Available at: https://scholarship.law.nd.edu/law_faculty_scholarship/1207

This Article is brought to you for free and open access by the Publications at NDLScholarship. It has been accepted for inclusion in Journal Articles by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.



UNIVERSITY OF
NOTRE DAME
THE LAW SCHOOL

SUSTAINING NEIGHBORHOODS OF CHOICE: FROM LAND BANK(ING) TO LAND TRUST(ING)

James J. Kelly, Jr.
Clinical Professor of Law
Notre Dame Law School

54 WASHBURN L.J. 613 (2015)

Notre Dame Law School Legal Studies Research Paper No. 1520

A complete list of Research Papers in this Series can be found at: <http://www.ssrn.com/link/notre-dame-legal-studies.html>

This paper can be downloaded without charge from the Social Science Research Network electronic library at
<http://ssrn.com/abstract=2622654>

Sustaining Neighborhoods of Choice: From Land Bank(ing) to Land Trust(ing)

James J. Kelly, Jr.*

In looking back over the first decade of this new century, one cannot help but see that housing has been treated more like a consumption good than as a form of wealth. Until the bubble burst in 2007, “house lust” drove both consumer and lender behavior in homeownership finance. As we look to the future of housing within the framework of equity, stability, and sustainability, we would do well to return to community membership as a central aspect of housing. When we buy (or rent) a home, we are not only satisfying needs and wants related to shelter but also buying into an array of locally provided public goods. Because many of these goods, foremost among them primary education, are essential to personal development, one cannot think of a fair, stable, or sustainable future for housing without considering the neighborhood as the community in which the act of acquiring a home purchases membership.

In most places in the United States, a parent or couple’s choice of neighborhood determines where their children will attend public school. For low-income households, little or no choice exists. As shown by a study, increases in residential socioeconomic segregation negatively impact the educational attainment of lower-income children, even though expansions in overall inequality do not.¹ Fairness in basic education requires us to examine the need for and barriers to greater residential integration of different races and classes. Attention to stability and sustainability reminds us to focus on the role of real estate markets in creating or destroying, encouraging or hindering residential socioeconomic integration.

This essay will explore how land banks and land trusts promote social goods, including socioeconomic integration, by connecting with and shielding against, respectively, market forces. Both engage in stewardship of land. Land banks take temporary ownership of vacant, abandoned properties in order to make them available for productive use.² Land trusts hold land indefinitely to ensure a social purpose is met. Community land trusts hold land for a purpose

* Clinical Professor of Law, Notre Dame Law School. I would like to thank the organizers of and my fellow presenters at the 2015 *Washburn Law Journal* symposium on *The Future of Housing—Equity, Stability and Sustainability* for their inspiring contributions on this vitally important subject.

1. Susan Mayer, *How Economic Segregation Affects Children’s Educational Attainment*, 81 Soc. Forces 153 (2002).

2. Frank S. Alexander, *Land Banks and Land Banking*, CTR. FOR CMTY. PROGRESS (2nd ed. 2015).

that is responsive to the human environment, often permanently affordable housing in areas where affordable housing is rare to nonexistent.³ Land banks encourage people with choices to move into neighborhoods beset by abandonment and poverty. Community land trusts allow lower-income residents to become long-term members of neighborhoods otherwise inaccessible to them. Land banks reduce transaction costs to get the market moving. Land trusts increase transaction costs in order to protect affordable housing and other public goods against elimination by market-driven transfers.

The use by these two publicly minded real estate market interventions of opposing tools in starkly different types of neighborhoods raises the following questions: First, do they meet somewhere in the middle? Second, does sustaining neighborhoods of choice hinge on the handoff of some critical mass of real property from land banks to land trusts? The answers to these both questions are negative, if we focus our attention solely on the work done directly by land banks and land trusts. The neighborhoods that warrant the housing stewardship activity of land trusts are just too different from those needing the help of land banks to talk of a continuum of care between the two poles of community land resource control. But, if land banking and its conceptual counterpart, “land trusting”, are thought of more broadly as the strategic adjustment of transaction costs for the promotion of social goods, such as residential socioeconomic integration, then an array of intermediate possibilities present themselves.

This essay will begin with a brief examination of the importance of residential socioeconomic integration and how it might be advanced appropriately. After looking at some misconceptions about the market’s role in segregating neighborhoods by class, I then explore how land banks and land trusts intervene to move neighborhoods toward a healthy diversity. The essay concludes with a discussion of land banking and, particularly, land trusting as alternatives to formal stewardship that nevertheless also foster the needed diversity of housing types, land tenure types, and ultimately, resident socioeconomic status to sustain neighborhoods of choice.

Although a full defense of a residential socioeconomic integration as a social goal is beyond the scope of this essay, a brief look at the justification for class diversity can help us understand what we are seeking as well as why. Calls for economic equality are frequently met with concerns about excessive taxation, moral hazard, and government interference with a range of civil liberties.⁴ These objections have some validity when the nature of equity being advocated requires strict equivalencies in a broad range of basic consumption goods. But, as the economist and social philosopher Amartya Sen frames it, everyone believes in some basic form of fairness among people, so the key

3. James J. Kelly, Jr., *Land Trusts that Conserve Communities*, 59 DEPAUL L. REV. 69, 79–83 (2009).

4. See, e.g., John H. Cochrane, *What the Inequality Warriors Really Want*, WALL ST. J., (Nov. 20, 2014) available at <http://www.wsj.com/articles/john-h-cochrane-what-the-inequality-warriors-really-want-1416442460>.

question is “Equality of what?”⁵ A libertarian’s idea of economic equality amounts to equal access to unfettered markets, a good that need not be rationed because it need not be limited. Sen’s own answer is also framed around equality of opportunity—but of substantive, meaningful opportunities, not merely theoretical ones made appealing by a rags-to-riches mythology. A true opportunity society is one that is rigorously inclusive when it comes to developmentally essential goods.

As important as primary education is to personal development and economic opportunity, it is not at all clear that equality in basic education requires neighborhoods to be integrated socioeconomically. Elementary school student populations need not be integrated across class to be equal in their resources. For decades, advocates of educational equality have fought for school funding reforms that would even out differences among local school district budgets.⁶ While parity in resources is absolutely essential for any intelligible claim of equality in educational opportunity, a “separate but equal” approach to the schooling of children from different socioeconomic groups fails for many of the same reasons that it did when used to justify racially segregated schools.⁷

Even once the need for residential socioeconomic integration is accepted, questions still remain about the extent of the integration or, better still, the potential for voluntary integration required to address the serious justice concerns raised by segregation. The fundamental problem is that poor households do not have the option of relocating in areas with good schools. Forced integration would replace one way of depriving them of housing autonomy with its opposite. The goal then should be to ensure that every household in a given metropolitan area has the opportunity to live in any school district in that metropolitan area. As housing costs make up such a large part of the typical household budget, it might seem, at first, that a call to equality in neighborhood choice would be tantamount to a demand for total economic equality. But, the decision to live in a more exclusive area need not be completely without cost.

To have educational choice means that there is some possibility of gaining access to the desired school without having to live in a grossly overcrowded or substandard dwelling. But, a strict insistence of equal access to public goods does not entail no variation whatsoever in the quality of public goods, much less that every community must be as diverse as the metropolitan area as a whole.⁸ Two communities with very similar tax bases may value education

5. Amartya Sen, *Equality of What?*, in CHOICE, WELFARE AND MEASUREMENT 353 (MIT Press 1982).

6. See e.g., *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971).

7. See *Brown v. Bd. of Ed. of Topeka*, 387 U.S. 483 (1954).

8. Peter Byrne and Michael Diamond have rightly criticized as a “strawman” Robert Ellickson’s hypothetical “Waring Blender” model of neighborhood social composition in which every neighborhood would be engineered to be precisely reflective of the social composition of the general population as a whole. J. Peter Byrne & Michael Diamond, *Affordable Housing, Land Tenure, and Urban Policy: The Matrix Revealed*, 34 FORDHAM URB. L. J. 527, 564 (2007) (citing Robert C. Ellickson, *The Puzzle of the Optimal Social Composition of Neighborhoods*, in THE TIEBOUT MODEL AT FIFTY: ESSAYS IN PUBLIC ECONOMICS IN HONOR OF WALLACE OATES 199, 201 (William A. Fischel ed., 2006)).

differently. One group of citizens may tax themselves more to have better schools or sacrifice other less essential public goods or amenities.⁹ Lower-income households that want access to those goods may have to accept lesser housing. The key to making choice as much a reality for the poor as the wealthy is to ensure a range of housing options in each community.

If one were to estimate that a typical elementary school of five hundred students draws from a surrounding community of 5000 persons, it would seem sufficient that every geographic area containing 5000, roughly the population of the typical census tract, has enough diversity in its housing options to offer housing options to every low- and moderate-income households in the area. This very strict approach to integration would facilitate socioeconomic diversity not just in every school district but within every elementary school catchment area. The incorporation of education reforms already under consideration may allow for a less constrained geographic approach. True parity in resources among school districts would make it less essential that every school district have housing options that allow for a critical mass of the poorest families in the metropolitan area.¹⁰ With provisions allowing low-income children in a school district to attend an elementary school other than the one closest to them, one could easily imagine affordable housing “fair share” to mean the full range of housing affordability in each and every community of 15,000 or even of 25,000, instead of 5000.

Admittedly, the full ramifications of such integration cannot be known without an in-depth exploration of the means of achieving its costs and unintended consequences. The point of this brief sketch of the argument is twofold: to show that any notice of equality of true opportunity mandates the true sharing of developmentally essential goods such as primary education; and, to articulate what level of residential class integration is needed to allow true school choice. A full review is beyond the scope of this essay. Nevertheless, some unintended consequences of freeing lower-income households to seek better school districts should be considered here precisely because they impact the overall goal of enhancing the development potential of low-income families.

Even if the driving force of the moral argument is ensuring equal access to primary education as a developmentally essential local public good rather than total welfare maximization more generally, any advocate of mobility strategies to end residential socioeconomic segregation must be aware of unin-

9. Charles Tiebout saw this potential for sorting of metropolitan residents based on their public goods and taxation preferences as a fundamental efficiency of decentralized provision of public goods by local government. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

10. The NAACP strategy to overturn *Plessy v. Ferguson*, 16 S. Ct. 1138 (1896), in the context of public school education brought about belated efforts by segregationist systems to make the schools for African-American children as well-provided for as those for white children. Similarly, an attack on socioeconomic segregation of schools may well increase the political necessity for equalization of resources.

tended consequences that harm lower-income persons who do not move. Increasing the choice of ambitious, capable marginalized people will aggravate overconcentration of poverty. William Julius Wilson has documented that more attractive neighborhood options for both working class and professional class African-Americans aggravated the social isolation of very low-income African-Americans remaining behind.¹¹ Low-income residents loyal to their current neighborhoods should not themselves be forced to leave their communities by the loss of the little class diversity there was. Mobility strategies designed to open up the suburbs must be complemented by place-based community development that will stabilize impoverished neighborhoods.¹²

As discussed below, turning distressed areas into neighborhoods of choice involves reconnecting vacant and underused properties to the market. Once that economic improvement begins to take hold, another relevant unintended consequence may present problems for those who wish to remain. Gentrification can lead to displacement, especially for renters. Just as those who wish to remain should not see their streets and schools become even more intolerable because their neighbors with decently paying jobs and kids have more options, far less should they face eviction from their community after working so hard to rebuild it.

The move towards ideal socioeconomic residential integration, then, involves three strategic elements. First, residential enclaves of the well-to-do must be diminished both in geographic extent and degree of exclusivity by the strategic siting of long-term affordable housing. Second, undercrowded, poverty-stricken neighborhoods must be reconnected to functioning real estate markets and developed as attractive options for households that already have the ability to choose among different stable neighborhoods. Third, as neighborhoods gentrify, renters and homeowners must not be forced out of their homes and certainly not out of their communities.

For each of these three strategies, financial subsidies to consumers and suppliers of housing are indispensable.¹³ But, to think that subsidies are the only mechanism involved in ending residential segregation by class is to buy into the myth that markets naturally segregate the various classes into separate

11. See generally WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* (1987).

12. Nestor M. Davidson, *Reconciling People and Place in Housing and Community Development*, 16 *GEO. J. ON POVERTY L. & POL'Y* 1, 6–9 (2009).

13. Neither should it be thought that a truly unfettered market will achieve anything like the diversity of housing opportunities to allow a low-income family to reside in any school district within commuting distance of their jobs. In the suburbs, we need fixed-location as well as portable housing subsidies. Fixed-location subsidy retention will require that subsidized homeowners be subjected to resale restrictions. James J. Kelly, Jr., *Homes Affordable for Good: Covenants and Ground Leases as Long-Term Resale-Restriction Devices*, 29 *ST. LOUIS U. PUB. L. REV.* 9, 19–23 (2009) [hereinafter *Homes Affordable for Good*]. In undercrowded inner-city neighborhoods, subsidies will be needed to help create units whose market values do not cover the construction/rehab costs. The need for large public financial investment in residential socioeconomic desegregation is just one of several reasons why no discussion of the policy arguments for it is complete without looking more broadly at its costs, unintended consequences, and importance to other social and political imperatives.

parts of the metropolitan area. Admittedly, the idea has intuitive appeal, at least superficially. When families eat out, wealthier households choose more expensive restaurants than lower-income families choose. Restaurants, to a significant extent, segregate us by class, the thinking might go, so we should not be surprised when neighborhoods do the same. The reality, however, is that neither the uniform affluence of many suburban subdivisions nor the entrenched physical degradation of distressed inner-city neighborhoods is a natural dictate of market forces. After describing how the market is prevented from increasing integration in neighborhoods, I will explain how land trusts and land banks respectively work to promote the socioeconomic integration described in the first two strategic objectives. An exploration of how “land trusting” can help further the third goal will follow a discussion of my reasons for being skeptical of the benefits of an institutional continuum that connects land banks to land trusts.

Local governments not only set local property tax rates but also establish zoning rules that dictate the basic types of houses that will be taxed. By zoning out small lots and multi-family housing, suburbs protect against overcrowding of their schools and establish a minimum buy-in price for community membership. Thus, local residents are able not only to choose the level of public goods they desire but also to ensure that their fellow local voters have roughly the same income as they do.¹⁴ This “fiscal zoning” is the primary method by which suburban governments prevent the market from fostering greater socioeconomic diversity and causing their locally funded public goods to be shared across a wider class spectrum. Even from the inception of zoning nearly a century ago, the power to segregate apartment buildings from single-family houses was justified as a way of making sure that residents of the former did not free ride on the amenities enjoyed by the latter.¹⁵ Together with racially discriminatory disbursement of subsidies for suburban development and the unavailability of inter-district school desegregation remedies,¹⁶ fiscal zoning has given middle- and upper-income urban residents the ability to set up tailor-made enclaves. At their core, inclusionary zoning and other state and regional responses to exclusionary local land use practices throttle back the ability of localities to interfere with the market’s natural propensity to create greater density in some parts of some suburban communities.

At the other end of the spectrum, neighborhoods that suffer from disinvestment and abandonment seem to already have their answer from the market:

14. WILLIAM A. FISCHER, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES 65–69 (2001) (citing Bruce W. Hamilton, *Zoning and Property Taxation in a System of Local Governments*, 12 URB. STUD. 205 (1975)).

15. See *Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 390 (1926) (referring to apartment buildings as parasites).

16. DOUGLAS S. MASSEY & SALLY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 50–51 (1993) (discussing Federal Home Administration’s use of redlining maps and imposition of racially restrictive covenants); *Milliken v. Bradley*, 418 U.S. 717, 752–53 (1974) (declining to enforce the school desegregation mandate against suburbs that had no history of *de jure* discrimination in education).

“No” to any significant capital investment. But, the assumption that no profitable deals can be done is only half-true. It is undeniable that subsidies are needed to help rehabilitate the many houses that could not be resold at a price that would cover the costs of renovation. But, the nature of public intervention must be in kind as well as in cash. Undercrowded neighborhoods need to confront the impediments to market activity as well as look to favorable financing of rehabilitation and new construction.

The market itself struggles to function in distressed neighborhoods, which have many properties with clouded titles and are impacted by other nearby vacant properties. A deal that involves two parties with appropriate information assuring each of them of a profit to be had is a deal that is likely to be made, all other things being equal. But, when a deal requires the coordination of many parties, some of whom may stand to gain little or nothing from giving their consent, the transaction costs involved may well thwart it even if it would produce an aggregate benefit. Transaction costs can prevent even clearly efficient deals from occurring. Even though the transaction costs hampering social beneficial market activity in distressed neighborhoods are not deliberately erected in the way the exclusionary zoning restrictions are, both types of market interference require interventions to free properties to be developed in a way that promotes neighborhood class diversity.

For more than thirty years, community land trusts (“CLT”) have built and sustained permanently affordable homes in areas where residential affordability was all too rare. By separating the investment and consumption aspects of homeownership, CLTs allow members of lower-income households to become fully fledged members of an otherwise exclusive community. CLT homeowners can stay in their homes indefinitely¹⁷ and, with CLT consent, improve their properties.¹⁸ They can, like owners of market-purchased homes, even build up equity that can be converted to cash.¹⁹ But, CLT homebuyers promise not to rent out their homes. They also covenant that, when it is time to move from the property, they will sell the home to another qualified household at an affordable price.²⁰ These two restrictions on transfer insure that the subsidy that is so important to creating diversity in the neighborhood stays with the property and the qualified household. Inclusionary zoning programs use similar restrictions

17. *The CLT Technical Manual*, NAT'L CMTY. LAND TRUST NETWORK (Kirby White, ed. 2011), available at <http://cltnetwork.org/wp-content/uploads/2014/01/master-clt-manual.pdf>.

18. *Id.* at 12-6 to 12-7.

19. John Emmeus Davis, *Shared Equity Homeownership: The Changing Landscape of Resale-Restricted, Owner-Occupied Housing*, at 102-06 (2006).

20. A community land trust (“CLT”) protects against full-price market sale of a CLT home principally through a preemptive option to purchase the property once the seller has declared the intent to transfer it. *The CLT Technical Manual*, *supra* note 17, at 2-1 to 2-3. The agreement between the CLT and the homebuyer includes a formula that determines what that resale price will be. *Id.* For a review of the possible enforceability relating to the property law doctrines of invalid restraints against alienability and perpetuities, see Michael F. Keeley & Peter B. Manzo, *Resale Restrictions and Leverage Controls*, A.B.A. J. AFFORDABLE HOUS. & CMTY. DEV. L. 9 (Spring 1992); Homes Affordable for Good, *supra* note 15.

on sublease, assignment, and resale to sustain the socioeconomic diversity that program subsidies make possible.²¹

Land trusts that focus on preserving affordable housing in unaffordable communities include not only CLTs but also agencies that monitor inclusionary housing, certain limited-equity cooperatives, some mutual housing associations, and nonprofit providers of affordable rental housing. All of them recognize that the in-kind benefit of decent, affordable housing they help provide to their beneficiary households can be converted to cash by the households through market transfers of possession. As land trusts, they establish sufficient legal protections to inhibit these market transactions from taking place.

Just as land trusts foster subsidy retention through increasing transaction costs, land banks reduce transaction costs to reconnect vacant properties with functioning real estate markets. As the owners of vacant properties struggle financially, their titles frequently become a patchwork of mortgages as well as public and private liens. A buyer wishing to acquire clear title to such a property must negotiate not only with the owner but each and every one of the lien claimants. There is rarely enough value in the property to induce every lien claimant and the record owner to release the property. Even the possibility of a negotiated transfer presumes that the parties in title can all be properly identified and contacted. The problem is multiplied when a buyer's investment plan requires acquiring not just one vacant property but all the nearby vacants that suppress neighborhood property values. The first task of a land bank, therefore, is to assemble clear title and repeat the process as often as necessary to allow for investment coordination.²²

Land banks typically overcome title clouds by acquiring properties through property tax sale foreclosures. Nearly every state provides a foreclosure remedy for collecting unpaid property taxes.²³ Property tax liens take priority over not only the ownership interests, but also any private lien interests in the subject property, even if they predate the unmet tax liability.²⁴ The super-priority nature of the property tax lien makes property tax sale foreclosure an extremely powerful tool for clearing out various mortgages and other liens. Instead of having to obtain the actual consent of all of the stakeholders, the foreclosing land bank need only notify them of their rights to redeem their interests in the property by seeing to it that the outstanding tax debt is paid in full.²⁵ By putting all the pieces of a fragmented title back together, the land bank as the property's new owner can make it available for sale.

21. Homes Affordable for Good, *supra* note 15, at 37–38.

22. James J. Kelly, Jr., *A Continuum In Remedies: Reconnecting Vacant Houses to the Market*, 23 ST. LOUIS U. PUB. L. REV. 109, 128–31 (2013).

23. See, e.g., KAN. STAT. ANN. § 79-2801 (2007); MD. CODE ANN., TAX-PROP. § 14-834 (West 2008); GA. CODE ANN. § 48-3-3 (West 2007).

24. Frank S. Alexander, *Tax Liens, Tax Sales, and Due Process*, 75 IND. L. J. 747, 760 (2000).

25. *Id.*; James J. Kelly, Jr., *Bringing Clarity to Title Clearing: Tax Foreclosure and Due Process in the Digital Age*, 77 U. CIN. L. REV. 63 (2008).

Acquiring all the tax-delinquent vacant properties within a block or two of one another allows land banks to market those properties in bundles. Frequently, dilapidated, tax-delinquent properties are located in neighborhoods where the land values are so low that even moderate repairs to the structure will exceed the resale price. Such neighborhoods cannot support one-at-a-time vacant house rehabilitation. If, however, a sufficiently capitalized renovator were to acquire all the vacant properties that affected one another, then the rehabilitation of all those houses might change the fundamental dynamic of that community. Thus, land banks' acquisition of tax-delinquent properties in key strategic neighborhoods can provide greatly needed investment coordination.

Land banks frequently focus on the goal of helping a distressed neighborhood compete for new residents, especially those in a position to choose from several different neighborhoods. Long-time residents of these neighborhoods sometimes see the efforts to revitalize the community as an attempt to improve it for these new residents rather than for them. As land banking efforts gain traction and the neighborhood gentrifies, these residents grow concerned that their rents or their property taxes will increase to the point that they will need to leave, even though they would prefer to stay. As the CLT movement has looked to addressing the problems faced by neighborhoods in economically struggling cities, it has explored the question of what, if anything, resale-restricted homeownership has to offer weak market communities.

Developers of permanently affordable homes often confront high acquisition costs for land. As one might expect, they and their advocates argue that it is never too early to start anticipating a lack of affordable housing.²⁶ Urban areas that were once written off as beyond saving can suddenly become exciting, attractive places for young people to live. The unpredictability of inner-city neighborhood markets, especially those receiving encouragement from land banking activities, supports the initiation of land trust activities before they appear needed. Two inner-city land trusts illustrate how such a preventive approach might work.

In the late 1980s, decades of disinvestment and arson had taken their toll on Boston's Roxbury neighborhood.²⁷ The activist founders of the Dudley Street Neighborhood Initiative (DSNI) resolved to respond to a redevelopment plan proposed by the Boston Redevelopment Authority with one written by the neighborhood residents themselves.²⁸ Above all else, the leadership of DSNI wished to create a plan that did not involve resident displacement.²⁹ Even though much of the property they hoped to acquire consisted of vacant, tax-

26. *The Answer: What's The Point of Shared-Equity Homeownership in Weak Market Areas*, SHELTERFORCE (Apr. 18, 2015) available at <http://cltnetwork.org/wp-content/uploads/2014/04/CLTs-and-Land-Banks-Article1.pdf>.

27. Kelly, *supra* note 3, at 75–77.

28. PETER MEDOFF & HOLLY SKLAR, *STREETS OF HOPE: THE FALL AND RISE OF AN URBAN NEIGHBORHOOD* 50–52 (1994)

29. *Id.* at 89–91.

delinquent lots resulting from years of fires and demolitions, the resident-leaders of DSNI were resolute that any new housing produced pursuant to their plan should be part of Dudley Neighbors, Inc., the CLT they founded to protect permanent affordability.³⁰

To make sure the housing it supported was made permanently affordable whenever necessary, the City of Chicago formed its own CLT. Pursuant to a city ordinance adopted in 2009, any housing developed with subsidies disbursed by the City of Chicago will be dedicated to the Chicago Community Land Trust (CCLT) if the market value of such housing would exceed by \$25,000 a price that would be affordable to a moderate-income household.³¹ Many of the federal affordable home development subsidies that cities like Chicago handle already provide for some form of affordability protection. By forming the CCLT and adopting this policy, Chicago has declared that properties developed in areas with high land values will be permanently protected from the market.

DSNI represents an example of a community development effort in a neighborhood beset by abandonment that already anticipates displacement with the creation of a CLT. The CCLT offers a model for how cities can ensure the properties they control are made permanently affordable when appropriate. When faced with the creation of a new public land bank in Philadelphia, neighborhood activists concerned about gentrification demanded that any publicly controlled land be used to promote equitable development.³² At first, they insisted that any municipal effort to acquire and dispose of vacant inner-city property be used to build up the inventory of a CLT.³³ But, as they built their coalition to advocate for public accountability in land banking dispositions, they saw that the CLT approach did not reflect the broad range of neighborhood-based interests that needed to be reflected in the land banking legislation.³⁴ The coalition dropped its insistence on a land-bank-to-land-trust pipeline in favor of provisions for community accountability in land bank dispositions and a more inclusive understanding of beneficial land uses.³⁵

As neighborhoods emerge from severe distress, the specter of excessively high land values will seem, and may well be, remote as compared to other, more pressing concerns such as the need to encourage investment even as change is monitored for its impact on long-time residents. CLTs require complex legal structures and monitoring infrastructure.³⁶ Resale-restricted homes will have

30. *Id.* at 158–59.

31. *Chicago Community Land Trust for Developers*, CITY OF CHICAGO, http://www.cityofchicago.org/city/en/depts/dcd/supp_info/chicago_communitylandtrust.html (last visited Apr. 18, 2015).

32. Jill Feldstein, *Winning a Land Bank We Can Trust*, SHELTERFORCE (Oct. 2, 2014), available at http://www.shelterforce.org/article/3910/winning_a_land_bank_we_can_trust2/.

33. *Id.*

34. *Id.*

35. *Id.*

36. *See* Homes Affordable for Good, *supra* note 15.

difficulty competing for buyers with similarly priced unrestricted homes. The heavy hand that CLTs need to use in areas where affordability is scarce or non-existent will hamper efforts to reconnect emerging neighborhoods to a market activity that those neighborhoods still need. Efforts to reduce transaction costs through land banking will suffer if they are feeding directly into systems that deliberately impose transaction costs to isolate properties from the market. But, just as reducing transaction costs is not the exclusive province of land banks, strategically deploying transaction costs to nudge property use in a socially beneficial direction can be accomplished without the full set of resale restrictions associated with CLTs, inclusionary housing and limited-equity cooperatives.

If “land trusting” is thought of broadly as the imposition of transaction costs to retard market actions that diminish social goods, a set of policy choices presents itself for preventing displacement without direct control over individual parcels. For homeowners, one such fix is readily apparent: targeted property tax relief. Many states, either generally or in specific local jurisdictions, provide protection against share increases in property tax rates.³⁷ Some states restrict relief to the elderly because many of them depend upon a fixed-income and therefore cannot “afford” to have their homes suddenly increase in value. Another form of property tax relief caps liability based on income. All of these measures go a long way toward ensuring that homeowners in a gentrifying neighborhood are not forced to move by rising property tax costs. But, they do not address the risk of voluntary transfer either by direct sale or by mortgage and default. While restrictions on truly voluntary sales are the domain of formal land trusts, low-income homeowners in appreciating markets need protection from predatory lenders to come from a wide range of public policy and community education initiatives.

Renters, on the other hand, face a double bind when land values rise sharply. Their landlords will see their property tax bills climb. Nearly all of the aforementioned property tax “circuit breakers” are restricted to owner-occupied properties. Moreover, increased demand for rental housing in the neighborhood will induce landlords not only to pass on the increased property tax costs but also to widen their profit margins at the same time. Sometimes, this will involve expensive upgrades to the building’s common areas or to the housing units themselves. Other times, the landlord just raises the rent because he or she feels the market will bear it.

A straightforward approach to the problem would be to award tenants security of tenure similar to homeowners through full-scale rent regulation. New York City’s Rent Stabilization Code requires landlords of regulated units to renew all leases indefinitely with rent increase percentages set by a municipal

37. The Lincoln Institute of Land Policy offers an online database of such programs. LINCOLN INST. OF LAND POL’Y, *Residential Property Tax Relief Programs*, available at https://www.lincolninst.edu/sub-centers/significant-features-property-tax/Report_Residential_Property_Tax_Relief_Programs.aspx (last visited June 2, 2015).

board.³⁸ New York City's law, however, receives its justification from a legislatively declared housing emergency now in its seventh decade.³⁹ For the past thirty years, the District of Columbia has had a comparable rent regulation system in which a tenant's rent increases are tied to overall inflation, but increases between tenancies are based on rents for comparable units.⁴⁰ The stability of tenure in the DC system is augmented by another local law that gives tenants a right of first refusal in any sale of the building.⁴¹ As attractive as these approaches are, advocates for tenants might find them difficult to enact especially in jurisdictions where land values are not uniformly high.

A more creative and politically palatable approach might be to offer landlords tax abatements in return for a lighter version of rent regulation. Absentee owners participating in such a program could have their property taxes capped in exchange for a commitment to evict their tenants only for a breach of the lease. For existing tenants of means and new tenants, rental increases could not exceed prevailing rates in the neighborhood for comparable units. For existing tenants on fixed or limited incomes, rents would increase pursuant to an index similar to the one in the New York City system. The property tax abatement would be greater for those landlords with a higher percentage of regulated rents. In this way, tenants in a changing neighborhood could take advantage of a security of tenure similar to the one enjoyed by homeowners. Elderly and low-income tenants could enjoy the same protection against rising land values enjoyed by their homeowner neighbors.

Properly understood, land trusting, rather than actual land trusts, might serve as a compass for navigating the challenges faced by low- and moderate-income residents in gentrifying neighborhoods. As tempting as it is to think that direct intervention through stewardship entities such as land banks and land trusts are required at all times, the market in an emerging inner-city neighborhood will not crush diversity. Absent outside influences, there should be a spectrum of housing options that need encouragement rather than management.

38. FERN FISHER & ANDREW SCHERER, *RESIDENTIAL LANDLORD-TENANT LAW IN NEW YORK* § 4.111 (2014).

39. *Id.* at § 4.5.

40. DEP'T. OF HOUS. & CMTY. DEV., *What You Should Know about Rent Control in the District of Columbia*, available at <http://dhcd.dc.gov/sites/default/files/dc/sites/dhcd/publication/attachments/RentControlFactSheet.pdf> (last visited June 2, 2015).

41. See Julie D. Lawton, *Tenant Purchase as a Means of Creating and Preserving Affordable Homeownership*, 20 GEO. J. POVERTY L. POL'Y 53 (2012).