

## Articles

# Common Ground: Community-Owned Land as a Platform for Equitable and Sustainable Development

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### Introduction

**L**AND, LABOR, AND CAPITAL are considered to be the primary factors of production, regardless of whether one is planning for the fabrication of durable goods in an industrial plant or the revitalization of dilapidated homes in a residential neighborhood.<sup>1</sup> Every analysis of a project's feasibility begins here. A great deal of creative thought is devoted, accordingly, to these essential inputs, figuring out how best to tweak their design, reduce their cost, and increase their effectiveness. Creativity is especially important in community development, where the production of goods and services for people of limited financial means must be heavily subsidized out of public coffers and private contributions. Every dollar must be inventively stretched and cleverly invested for maximum effect.

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1. Some schools of economic thought add entrepreneurship, knowledge, technology, energy, or time to the list of essential inputs, but land, labor, and capital remain the "big three."

Land has been the glaring exception to the predilection for innovation in community development. Experimentation abounds when it comes to finding new ways to improve infrastructure, to incubate enterprises, to finance homeownership, or to train low-skilled workers. Far less ingenuity has gone into designing new ways of owning, controlling, and utilizing land to make distressed places more livable or to make prosperous places more inclusive.

This pattern has persisted despite the presence of an innovative model of community-owned land that has gradually spread across the United States, Australia, Belgium, Canada, and England. Known as the community land trust (CLT), this unconventional approach to place-based development has three distinguishing features: (1) a non-profit organization, acting on behalf of a geographically defined community, acquires and retains scattered parcels of land that are put to a variety of socially desired uses through long-term ground leasing; (2) any residential or non-residential buildings located on these leaseholds are sold off to individual owners, either real persons or corporations, whose ownership interest is encumbered by long-lasting affordability controls over each building's use and resale; and (3) the nonprofit landowner is guided in the development of the lands under its care by the people who live on them and around them.

A shorthand description of this strategy, pursued by CLTs and by other nonprofit organizations operating in a similar fashion, would be *community-led development of individually owned buildings on community-owned land*. Or, shorter still, *common ground*.

Any sort of building can be raised on a foundation of community-owned land, although CLTs have devoted most of their resources to date to the production and preservation of affordable housing. On leased land, CLTs have developed many types of renter-occupied and owner-occupied housing, all priced within the financial reach of persons of limited means. But the forte of community land trusts is *stewardship*, taking care of this housing long after it is created. CLTs have been effective in preventing the disappearance of affordability when real estate markets are hot. They have been equally effective in preventing the erosion of owner equity, the neglect of necessary repairs, and the loss of homes to foreclosure when markets turn cold.

The documented success of CLTs in making such "counter-cyclical stewardship" a reality has not been enough to overcome the resistance of many practitioners in the field of community development, who have been slow to incorporate common ground into their own programs. The simplest explanation for their hesitancy is that doing

affordable housing and neighborhood revitalization on community-owned land is hard work, especially when a community's residents are given a say in deciding how land should be used. That can scare away the timid and give pause to even the boldest practitioner. Most choose an easier path. They sell off local lands. They shut out local voices. They roll out affordably priced housing that looks familiar to public funders and private lenders, while minimizing their own responsibility for preserving the affordability, quality, and security of these homes after they are built.

Choosing a path of least resistance is understandable, but short-sighted. It pays heed to the difficulties and demands of common ground, without looking closely into how it actually works and without weighing fully its larger and longer advantages vis-à-vis other place-based strategies. Community-led development of resale-restricted buildings on community-owned land is harder to do, but the extra effort is worth it.

This essay argues that common ground, as practiced by CLTs and by other nonprofits, is an especially effective strategy for promoting equitable and sustainable development in residential neighborhoods, be they urban, suburban, or rural. It is a platform for redistribution, putting property and power into the hands of people historically deprived of both. It is also a bulwark against loss, protecting hard-won gains that improve conditions, expand opportunities, and further fair housing for disadvantaged populations far into the future.

The case for common ground is presented here through a series of arguments that identify *what* practitioners strive to achieve with regard to equitable and sustainable development and *how* community-owned land can get them there. Some of these claims are closer to being working hypotheses or the kind of reasoning found in a lawyer's brief, than they are to being any sort of definitive proof. Community land trusts are simply too young, too small, and too few to render a final verdict on their performance.

Arguments for the superiority of community-led development on community-owned land are compelling nonetheless. They illustrate that land may be deployed as creatively as any other factor of production in doing place-based development. They suggest that community-owned land, in particular, may be transformative in ways that other strategies are not, creating places where justice is deepened and sustained. There are good reasons for giving common ground a try.

## I. Common Ground: Origins and Obstacles

Community-owned land as a platform for place-based development is an old idea. As far back as 1898, Ebenezer Howard proposed an innovative ownership scheme for the Garden Cities he hoped to establish on the outskirts of England's older, industrial cities.<sup>2</sup> Houses, stores, orchards, and factories would be privately owned by individuals, cooperatives, or for-profit businesses, but the underlying land would be permanently owned and managed by a nongovernmental organization created expressly for that purpose. The land would never be resold. However, it would be put into the hands of many individuals through long-term ground leases, executed between the nonprofit landowner and any number of owners and operators of the new town's buildings and enterprises.

At the heart of Howard's vision was a radical proposition: the equitable development of place depends on the common ownership of land. Or, as a latter-day manifesto has put it, updating Howard for the 21st Century, "the Garden City owns itself."<sup>3</sup> Land was to be held and managed on behalf of *all* residents, rich and poor, present and future, enabling a community to guide its own development, to determine its own fate, and to capture for the common good most of the gains in land value that society had helped to create.

This commitment to common ground was the foundation on which the first Garden Cities were raised, starting with Letchworth in 1903 and Welwyn in 1919. It was the foundation for other reformist schemes of decentralized development as well, some influenced by Howard and some not, including the *ejido* system in Mexico, the *Gramdan* villages of India, and the *kibbutzim* and *moshavim* of Israel.<sup>4</sup>

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2. EBENEZER HOWARD, GARDEN CITIES OF TO-MORROW 13 (Swan Sonnenschein & Co., 1902).

3. Philip Ross & Yves Cabannes, *21st Century Garden Cities of To-Morrow: A Manifesto* (Dec. 2014), [www.newgardencitymovement.org.uk](http://www.newgardencitymovement.org.uk) [<https://perma.cc/S6UA-UDNC>].

4. Each of these international precedents, where planned communities were established on a foundation of community-owned land, has an extensive literature all its own. Readers might begin with LYMAN TOWER SARGENT, UTOPIANISM: A VERY SHORT INTRODUCTION (Oxford University Press, 2010); DENNIS HARDY, UTOPIAN ENGLAND: COMMUNITY EXPERIMENTS 1900-1945 (Routledge, 2000); HENRIK F. INFELD & KOKA FREIER, PEOPLE IN EIJDOS: A VISIT TO THE COOPERATIVE FARMS OF MEXICO (Praeger, 1954); T.K. OOMMEN, CHARISMA, STABILITY AND CHANGE: AN ANALYSIS OF BHOODAN-GRAMDAN MOVEMENT IN INDIA (Thompson Press, 2001); D. WEINTRAUB, M. LISSAK, & Y. AZMON, MOSHAVA, KIBBUTZ, AND MOSHAV: PATTERNS OF JEWISH RURAL SETTLEMENT AND DEVELOPMENT IN PALESTINE (University Press, 1969); S. ILAN TROEN, IMAGINING ZION: DREAMS, DESIGNS, AND REALITIES IN A CENTURY OF JEWISH SETTLEMENT (Yale University Press, 2003); *see also* ROOTS & BRANCHES, <http://greenfordable.com/clt/> (last visited July 18, 2016) [<https://perma.cc/ZZ53->

The same idea of equitable development on community-owned land which had animated each of these international precedents was later incorporated into a homegrown model of community development in the United States: the community land trust (CLT). It, too, was founded on common ground, combining community ownership of land and individual ownership of buildings, while employing long-term ground leases to balance the interests of both parties.

American practitioners who pioneered and promoted the CLT may have inherited this mixed-ownership model from other countries, but they soon added organizational and operational features of their own, changing the model into something new. Organizationally, they structured community land trusts to ensure the continued accountability of the nonprofit landowner to the people and places it served.<sup>5</sup> Operationally, they designed the programs of community land trusts to ensure the continued affordability of any buildings on the nonprofit's lands, while protecting them against deferred maintenance or mortgage foreclosure if a building's owner were to hit hard times.<sup>6</sup>

Equally significant, the American model sidestepped what had always been the most daunting impediment to the real-world realization of Howard's grand vision. The promise of the CLT was that something resembling a Garden City could be launched right away. No one had to wait for the day when myriad acres of vacant land might be acquired on which to build a new town capable of accommodating thousands of families, homes, and enterprises. A CLT could start small and expand incrementally. It could grow through the construction of new buildings or it could concentrate on the rehabilitation of older

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HVCP] (tracing the origins and evolution of the model, and providing more information on international and domestic precursors to the modern-day CLT).

5. Organizationally, the "classic" CLT, as promoted by the Institute for Community Economics during the 1980s, had an open membership and a three-part board, representing the interests of the people who live on the CLT's land, people who live within the CLT's service area, and institutions that serve that geography, including local government, churches, banks, businesses, and other NGOs. INSTITUTE FOR COMMUNITY ECONOMICS, *THE COMMUNITY LAND TRUST HANDBOOK* (Rodale Press, 1982).

6. See *THE COMMUNITY LAND TRUST READER*, LINCOLN INST. OF LAND POLICY (2010) (discussing key features of the CLT); see also *THE CLT TECHNICAL MANUAL*, National Community Land Trust Network (Kirby White ed., 2011) available at <http://cltnetwork.org/2011-clt-technical-manual/> (last visited Aug. 30, 2016) [<https://perma.cc/N6AL-UJHY>]. (Operationally, all CLTs continue to exert considerable control over the leaseholder's property. Contained in the ground lease are guidelines and limits on how the land may be used and developed. Additional lease provisions regulate the occupancy, upkeep, improvement, financing, behest, and resale of the leaseholder's buildings. These controls endure for a very long time, with the typical CLT ground lease lasting for 99 years.)

buildings, gradually weaving the CLT into the frayed fabric of a built environment already in place.

The CLT was premised, moreover, on a bottom-up approach to community development that was missing in most mixed-ownership models of the past. It was not “gentlemen of responsible position and of undoubted probity,” as Howard had called them, who would be creating and governing a CLT, making all of the formative decisions about what land to buy and what infrastructure to build until some distant day when a “board of management” could be elected.<sup>7</sup> Participatory planning and direct democracy began on the day a CLT was organized, involving prospective leaseholders and proximate neighbors in the CLT’s affairs long before the organization started looking for land. This was not development on behalf of a needy population inhabiting a particular neighborhood, dictated from above by a governmental body or by a benevolent provider of social housing. It was development from below, initiated and guided by a locality’s own residents. Ownership and empowerment went hand in hand.<sup>8</sup>

Not all CLTs are alike. As the model spread, practitioners adapted features of the “classic” CLT to fit local conditions, priorities, and needs. Among the hundreds of CLTs in the United States, there can now be found many variations in how these organizations are structured, how their lands are utilized, and how development is done. There can also be found many variations in how the ground lease is crafted, with different CLTs setting different conditions for the occupancy, use, alteration, and resale of housing (and other buildings) located upon their land. Additional variations have arisen as CLTs have become better established outside the United States, each country adapting the model to fit its own laws and customs.

It is noteworthy, too, that many community development organizations in the United States that are *not* CLTs, either in corporate name or in organizational structure, are similarly committed to hanging onto the land beneath their projects and employing long-term ground leases to regulate both the land’s use and the future af-

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7. Howard, *supra* note 2, at 50–51.

8. These democratic, participatory features of the modern-day CLT were added to the mixed-ownership model that had originated abroad as a direct legacy of the Civil Rights Movement in the American South. Beginning with New Communities Inc. in 1969, prototype and inspiration for all the CLTs that followed, there was a clear link in the minds of early CLT organizers between the common ownership of land and the collective power of the people living on and around that land. JOHN EMMEUS DAVIS, *Origins and Evolution of the Community Land Trust in the United States*, in THE COMMUNITY LAND TRUST READER 3–47 (Rodale Press, 2010).

fordability and condition of any residential or non-residential buildings.<sup>9</sup> Ground leasing can now be found among community development corporations, community gardening associations, and resident-owned cooperatives in mobile home parks. Among the many affiliates of Habitat for Humanity, some three dozen have partnered with CLTs, building Habitat homes on leased land, or have created ground leasing programs of their own.<sup>10</sup> In Denver, the Urban Land Conservancy has made extensive use of ninety-nine-year ground leases in holding land under residential and commercial buildings in multiple neighborhoods, a strategy designed to preserve affordable housing, prevent displacement, provide jobs and critical services, and capture land gains resulting from public investment in transit-oriented development.<sup>11</sup> In New York City, the Cooper Square Mutual Housing Association created its own CLT in 1991 to hold the land beneath 21 cooperatively owned buildings, containing 328 affordably priced apartments and 24 storefronts, as a second line of defense in making sure this low-income housing would never be lost.<sup>12</sup>

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9. My focus is on land that is *community* owned and on development that is *community* led, which necessarily excludes many worthy initiatives where ground leasing has been used to hold land and to preserve the affordability of housing. For instance, the public housing authority in Atlanta retained ownership of the land beneath a mixed-income community of 700 homes at West Highlands, using long-term ground leasing in the redevelopment of Perry Homes, a dilapidated, crime-ridden rental complex. West Highlands is a successful example of ground leasing and permanently affordable housing, but not of community-led development on community-owned land. NORTHWEST ATLANTA REDEVELOPMENT PLAN AND PERRY/BOLTON TAX ALLOCATION DISTRICT, *Revitalizing Northwest Atlanta with Sustainable Redevelopment*, <http://investatlanta.com/wp-content/uploads/Northwest-Atlanta-Redevelopment-Plan.pdf> (Nov. 2002) [<https://perma.cc/7VM4-CC74>].

10. John Emmeus Davis, *Braided Lives*, ROOFLINES (March 28, 2013) [http://www.rooflines.org/3152/braided\\_lives\\_habitatland\\_trust\\_partnerships\\_bring\\_each\\_back\\_to\\_their\\_roots/](http://www.rooflines.org/3152/braided_lives_habitatland_trust_partnerships_bring_each_back_to_their_roots/) [<https://perma.cc/J9E7-YHAL>]; see also HABITAT FOR HUMANITY INTERNATIONAL, 2017 SHELTER REPORT, AFFORDABLE FOR GOOD: BUILDING INCLUSIVE COMMUNITIES THROUGH HOMES THAT LAST, (forthcoming 2017).

11. The Urban Land Conservancy functions like a citywide community land trust. Although it lacks the community membership and community-controlled three-part board of a “classic” CLT, ULC utilizes an intensive community engagement process in planning its projects. See Robert Hickey, *The Role of Community Land Trusts in Fostering Equitable, Transit-Oriented Development: Case Studies from Atlanta, Denver, and the Twin Cities*, LINCOLN INST. OF LAND POLICY (June, 2013), available at [https://www.lincolnst.edu/pubs/2243\\_The-Role-of-Community-Land-Trusts-in-Fostering-Equitable—Transit-Oriented-Development](https://www.lincolnst.edu/pubs/2243_The-Role-of-Community-Land-Trusts-in-Fostering-Equitable—Transit-Oriented-Development) [<https://perma.cc/77LF-HQRE>].

12. More about Cooper Square and the intersection of co-ops and CLTs can be found in Tom Angotti, *Community Land Trusts and Low-Income Multifamily Rental Housing*, LINCOLN INST. OF LAND POLICY (2007) available at [https://www.lincolnst.edu/pubs/dl/1272\\_An\\_gotti%20Final.pdf](https://www.lincolnst.edu/pubs/dl/1272_An_gotti%20Final.pdf) [<https://perma.cc/Z77C-V2RN>]; see also Meagan Ehlenz, *Community Land Trusts and Limited Equity Cooperatives: A Marriage of Affordable Homeownership Models*, LINCOLN INST. OF LAND POLICY (2014) available at <https://www.lincolnst.edu/pubs/dl/>

Despite these successes, neither the acceptance of community land trusts nor the utilization of long-term ground leasing has been widespread. The organizations that call themselves a CLT or act like a CLT presently number fewer than 300 in the United States.<sup>13</sup> The total acreage of community-owned land remains relatively small. Clearly, common ground is not winning many popularity contests.

No wonder. In a country where so many cultural norms, financial prerogatives, and institutional practices are weighted so heavily in favor of land being treated as a commodity, a model of community ownership that removes land permanently from the stream of commerce, while preserving the affordability of housing forever, seems downright strange. Equally unusual, most CLTs are committed to giving residents of their chosen service area a voice in determining how their lands will be developed and a vote in governing the organization itself. Community-led development of permanently affordable housing on community-owned land is not an easy concept for most Americans to grasp or to accept.

As hard as it may be to imagine, it can be even harder to implement. Public officials who fund affordable housing must be persuaded to use the dollars and powers at their disposal to build a portfolio of debt-free lands and resale-restricted homes under the permanent control of a community-based organization.<sup>14</sup> Instead of recapturing subsidies when a home resells and reverts to market pricing, moreover, public officials must be willing to allow these subsidies to remain permanently in the home, lowering the price for successive buyers. Private lenders must be persuaded to mortgage homes on leased land, accepting the borrower's leasehold interest as partial security for the loan, relinquishing the right to seize the land should a mortgage go bad.<sup>15</sup> Municipal assessors must be taught how to value resale-re-

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2485\_1831\_Ehlenz%20WP14ME1.pdf [https://perma.cc/J66N-WC5M] (discussing Cooper Square and the intersection of co-ops and CLTs).

13. Materials posted on the website in the "Publications Library" of the National CLT Network, now named the Grounded Solutions Network, contain various estimates of the number of CLTs in the USA. The "Program Directory" on this website lists 270 CLTs in the USA as of 2016. *Program Directory*, COMMUNITY LAND TRUST NETWORK available at www.cltnetwork.org/directory/ (last visited Oct. 18, 2016) [https://perma.cc/K6EW-2SF6].

14. Historically the hardest "sell" in winning support from public officials has been to convince them to make their subsidies directly available to the CLT as an *equity* investment in order to bring land into a CLT's portfolio unencumbered by debt and to lower, thereby, the purchase price of any buildings located on the CLT's land.

15. See Sarah Ilene Stein, *Wake Up Fannie, I Think I Got Something to Say to You: Financing Community Land Trust Homebuyers without Stripping Affordability Provisions*, 60 EMORY L.J. 209 (2011) (discussing how community land trusts may be used to maintain affordability).



stricted buildings on leased land.<sup>16</sup> Prospective homebuyers must be helped to understand why they are not allowed to purchase the underlying land and why so many limits will continue to encumber their home's current use and future resale.<sup>17</sup> The CLT's leaders must carefully educate and actively engage a neighborhood's residents, winning their support for the nonprofit's plan to hang onto land instead of selling it, while soliciting the participation of these same residents in planning for the land's development.

Common ground can be a tough slog down a muddy road. It is not for the faint of heart, demanding of practitioners an extra measure of tenacity to stay the course in the face of so many obstacles.<sup>18</sup> Nor, it must be said, is long-term ground leasing always the right tool for the job. There are clearly circumstances where another model or mechanism is going to be the better strategy for providing affordable housing or for promoting neighborhood revitalization.<sup>19</sup> There are also times when PLACE itself is the wrong strategy; that is, occasions when the perennial debate over programs that rebuild the neighborhoods where low-income people live versus programs that expand op-

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16. See Alese Bagdol, *Property Taxes and Community Land Trusts: A Middle Ground*, 91 TEX. L. REV. 939, 946 (2013); see also John Emmeus Davis & Rick Jacobus, *The City-CLT Partnership: Municipal Support for Community Land Trusts*, Lincoln Inst. of Land Policy, 23–27 (2008) available at [http://www.lincolninst.edu/pubs/1395\\_The-City-CLT-Partnership](http://www.lincolninst.edu/pubs/1395_The-City-CLT-Partnership) [<https://perma.cc/YE7G-N2KR>].

17. Disclosing all of the conditions that encumber a CLT home is a moral and legal necessity, ensuring the *informed* consent of prospective buyers. It is also a sound marketing strategy to take extra time and care in explaining how the model works, since much of the skepticism that prospective homebuyers have about buying a resale-restricted home tends to melt away as they come to understand the reasons and rewards behind the deal. See Emily Thaden, Andrew Greer, & Susan Saegert, *Shared Equity Homeownership: A Welcomed Tenure Alternative Among Lower Income Households*, 28 HOUSING STUDIES 1175–1196 (2013) available at <http://www.tandfonline.com/doi/abs/10.1080/02673037.2013.818621> [<https://perma.cc/Q7JN-36VH>].

18. While I am willing to concede that it is often harder doing place-based development this way, I also believe that many practitioners exaggerate the difficulties and dismiss ground leasing out of hand without fairly weighing its advantages. See John Emmeus Davis, *Ground Leasing Without Tears*, SHELTERFORCE (Jan. 29, 2014) available at [http://shelterforce.org/article/ground\\_leasing\\_without\\_tears/.%C2%A0](http://shelterforce.org/article/ground_leasing_without_tears/.%C2%A0) [<https://perma.cc/AN4E-AUQY>].

19. In cases where an organization's program is focused on neither neighborhood revitalization nor community empowerment, where an organization's portfolio is small, where its capacity is weak, or where it controls only a small number of resale-restricted condominiums in a multi-unit project, it may be prudent to use a deed covenant or a mortgage instrument instead of a ground lease—at least at first. There is always the option of *transitioning* to community-owned land and long-term ground leasing down the road as an organization's circumstances change or, as many CLTs have done, *combining* ground leasing with other mechanisms.

portunities for low-income people to move out must be resolved in favor of the latter.<sup>20</sup>

When placemaking is called for, however, whether to improve conditions for the precarious residents of a damaged locale or to provide affordably priced housing for protected classes in a prosperous locale, common ground is a strategy that is particularly effective, balanced, and fair.<sup>21</sup> There is a case to be made, as Ebenezer Howard argued long ago, that a community should own itself, taking control of its destiny by collectively holding and managing the land beneath its feet. There is a case to be made, as I shall argue, that by leasing out its land instead of selling it off, a community has a better chance of ensuring that the use of its land will result in outcomes more equitable in the near term and more sustainable over time. That is how the game of community development ought to be played. Common ground is in a league of its own.

## II. Redistribution: The Pursuit of Equitable Development

Every investigation into whether place-based development is *equitable* should begin with the question that city planners ask less frequently than they should, a forensic question that is regularly asked by such street-level practitioners as police detectives or courtroom lawyers—*Cui bono*, who benefits? Equally relevant is the reverse—Who’s harmed?

When new investment is brought into a neighborhood, when new housing is built, when social conditions improve and land values rise, the lion’s share of the benefits may go either to people who are greatly in need or to people who already possess an abundance of property and power; conversely, the burdens of development may be

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20. Elwood M. Hopkins & James M. Ferris, *Place-based Initiatives in the Context of Public Policy: Moving To Higher Ground*, CENTER ON PHILANTHROPY AND PUBLIC POLICY (March 2015) available at <https://socialinnovation.usc.edu/2015/03/09/place-based-initiatives-in-the-context-of-public-policy-and-markets-moving-to-higher-ground/> [https://perma.cc/AZE9-2T6E] (providing a contemporary airing of the longstanding place-versus-people debate); see also Gregory Squires, *Place, Poverty and Politics: A Growing Divide*, ROOFLINES (May 20, 2015), Peter Dreier, *The Revitalization Trap*, ROOFLINES (Oct. 1, 2015) (both supplying an additional spirited conversation in blog format).

21. *Affirmatively Furthering Fair Housing*, 80 Fed. Reg. 42,272, 42,279 (July 16, 2015) (to be codified at 24 C.F.R. pts. 5, 91, 92, et al.). (The Final Rule endorses “a balanced approach [that] would include, as appropriate, the removal of barriers that prevent people from accessing housing in areas of opportunity, the development of affordable housing in such areas, effective housing mobility programs and/or concerted housing preservation and community revitalization efforts . . . .”) (This “balanced approach” is discussed in detail in *infra* note 46.).

apportioned fairly or fall disproportionately upon the shoulders of people who are least able to bear them. The plans, projects, and outcomes of place-based development are always found somewhere along the contested continuum between these poles. They tilt toward *redistribution*, challenging the existing landscape of inequality, or they tilt toward *reinforcement*, etching patterns of privilege more deeply into the social structure of residential neighborhoods.

Common ground is a mechanism for pursuing the former. It tips the scales in favor of people who have historically enjoyed few of the benefits of land-based wealth and exercised little power in shaping the trajectory of the neighborhoods in which they live. At the same time, common ground provides a mechanism for preserving this fairer distribution of property and power over time. In impoverished neighborhoods in need of revitalization, this allows investment to occur and development to proceed without the wholesale displacement of low-income households, low-profit enterprises, and beloved spaces that populated the area long before it began to improve. In prosperous neighborhoods in need of diversity and opportunity, this allows affordable housing to be created that has a better chance of lasting for many years. Common ground is the place where equitable development and sustainable development intersect.

#### **A. Street Level Land Reform: The Economic Case for Common Ground**

The community land trust is a hybrid form of land reform, combining three long-established strategies for redistributing landed resources from one class of owners to another to achieve a more equitable allocation of income and wealth. In its commitment to community-owned land, the CLT is part of a collectivist tradition of land reform in which large estates have been transferred intact to collectives, cooperatives, or village trusts.<sup>22</sup> In its commitment to the individual ownership of buildings, especially owner-occupied homes, the CLT is part of a distributionist tradition in which concentrated land-

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22. While this tradition inevitably invokes violent images of Stalinist confiscation of the estates of a purged aristocracy, there are less draconian examples. The Gramdan Movement in India relied on voluntary donations of land from wealthy landlords in the 1950s. The contemporary land reform movement in Scotland relies on state funds, raised largely through the national lottery, and a 2003 law enacted by the national assembly in Edinburgh giving communities a first option to purchase the feudal estates on which they sit. John Bryden & Charles Geisler, *Community-Based Land Reform: Lessons from Scotland and Reflections on Stewardship*, in *THE COMMUNITY LAND TRUST READER* 475-495 (Lincoln Institute of Land Policy, 2010).

holdings have been broken up into smaller homesteads and put into the hands of families, farmers, and entrepreneurs. In its commitment to fair allocation of the appreciating value of real estate, gains in equity that would otherwise be pocketed by landowners, the CLT is part of a long tradition of value recapture that can be traced from the “social increment” theory of John Stuart Mill, through the Single Tax crusade of Henry George, to the Garden Cities of Ebenezer Howard.<sup>23</sup>

What is noteworthy about the CLT’s approach to land reform is not only that it combines these three reformist traditions in a novel way; it also endeavors to redistribute land and land-based wealth at a different *level* than attempted in the past. Internationally, most land reform schemes have encompassed an entire country or, in Howard’s case, an entire city created from scratch. By contrast, the community land trust is tailored to fit the geography and circumstances of a neighborhood, group of neighborhoods, small town, or a similar place-based community of smaller scale.<sup>24</sup> Even when serving a wider territory, most of the economic benefits of common ground are realized at the micro-level of neighborhood and household.

### 1. Neighborhood Economics

Across the ages, the rhetoric and practice of land reform have swung back and forth between a “negative” focus on stopping the predations of a landed elite, stripping them of assets to blunt their power, and a “positive” focus on improving the lives of the landless, putting arable land and affordable housing into the hands of a population long excluded from the economic and political mainstream.<sup>25</sup> CLTs have concentrated on the latter. The positive reform practiced by most CLTs has been designed to make land more widely available

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23. An earlier attempt to situate the CLT within the context of different approaches to land reform can be found in John Emmeus Davis, *Reallocating Equity: A Land Trust Model of Land Reform*, LAND REFORM, AMERICAN STYLE 209–232 (Charles C. Geisler & Frank J. Popper eds., 1984).

24. Many CLTs that started out with a focus on a single inner-city neighborhood or single rural county have expanded their service areas in recent years. Even when serving a wider territory, however, most of the economic benefits of common ground are realized at the micro-level of household and neighborhood.

25. These are two sides of the same coin, of course. A prohibitionist agenda focused on stopping oppression, ending absentee ownership, and blocking real estate speculation is the flip side of a distributionist agenda aimed at moving land and land-based wealth into the hands of the have-nots. Two excellent introductions to the myriad forms that land reform can take are, PROMISED LAND: COMPETING VISIONS OF AGRARIAN REFORM (Peter Rosset et al. eds., 2006), and LAND REFORM, AMERICAN STYLE (Charles C. Geisler & Frank J. Popper, eds., 1984).

within their chosen service area for the kinds of uses that directly benefit low-income and moderate-income people. Most of this activity has been centered to date on expanding access to affordable housing. Homeownership, in particular, whether in single-family houses, townhouses, condominiums, or cooperatives, has been the priority of a majority of CLTs in the United States and elsewhere, although a number of CLTs are also heavily involved in developing multi-unit rental housing, SROs (single room occupancy), and homeless shelters.<sup>26</sup>

Beyond housing, lands owned by CLTs have been leased out for the development of community centers, day care centers, commercial buildings for neighborhood retail, and offices for other nonprofits. Agriculture has been an activity supported by CLTs as well. In rural areas, CLTs have been used to preserve access to productive lands for small farmers, with a CLT sometimes combined with a CSA (community-supported agriculture), linking those who grow food with those who consume it.<sup>27</sup> In urban areas, community-owned lands have been leased out for community gardens, greenhouses, and commercial farming.<sup>28</sup>

Common ground is a versatile foundation on which any type of building can be constructed and on which any use of land can be encouraged. Furthermore, any type of partner can be employed in developing, managing, or farming that land, including individuals or groups who want to build their own housing or start their own enterprises; cooperatives for producers or consumers; and even for-profit developers, builders, farmers, and entrepreneurs. Such versatility is essential whenever an organization's primary goal is not only to build as many residential units as possible, scattered across a wide geography,

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26. See generally Maxwell Ciardullo & Emily Thaden, *Community Land Trusts Have Renters Too*, ROOFLINES (October 15, 2013) (discussing the involvement of CLTs in the production and preservation of rental housing); Maxwell Ciardullo, *Community Land Trusts and Rental Housing: Assessing Obstacles to and Opportunities for Increasing Access* (Feb. 2014) unpublished Masters thesis, University of Massachusetts Amherst, 2012) (on file with ScholarWorks@UMass Amherst).

27. KIRBY WHITE, *PRESERVING FARMS FOR FARMERS: A MANUAL FOR THOSE WORKING TO KEEP FARMS AFFORDABLE* (Equity Trust, 2009); see also, *LAND FOR GOOD, LEASING LAND TO FARMERS: A HANDBOOK FOR NEW ENGLAND LAND TRUSTS, MUNICIPALITIES, AND INSTITUTIONS* (2012).

28. Greg Rosenberg & Jeffrey Yuen, *Beyond Housing: Community Land Trusts and Urban Agriculture and Commercial Development*, LINCOLN INST. OF LAND POLICY (2012) (Lincoln Institute of Land Policy Working Paper, Lincoln) (on file with Lincoln Institute); Jeffrey Yuen, *City Farms on CLTs*, LINCOLN INST. OF LAND POLICY, 1 4–8 (2014).

but to restore and revitalize a marginalized territory that a stratified economy has left behind.<sup>29</sup>

## 2. Home Economics

Advocates for community land trusts and for other organizations using ground leases often speak of “removing land” from the purchase price of a home. What they mean is that subsidies granted by public agencies or private donors have been used to bring debt-free land into a CLT’s portfolio. Because of this equity investment, the CLT is able to sell homes for an “affordable” price that covers just the cost of constructing or rehabilitating them. Not only does this result in a lower purchase price, it also results in a lower loan-to-value ratio. The latter can increase the likelihood of lower-income households being able to qualify for a private mortgage; it can also eliminate the requirement for private mortgage insurance if they do qualify, further reducing their monthly costs.

It cannot honestly be said that “removing the land” is the only way to secure these economic benefits. Any subsidies that are structured as grants rather than loans will have the same effect. They will close the affordability gap and reduce a homebuyer’s costs, regardless of whether the subsidies are locked into the deal via a ground lease or via some other contractual mechanism. There are, however, three significant advantages that ground leasing has over other mechanisms when it comes to increasing and sustaining household wealth.<sup>30</sup>

First, common ground is an effective shield against financial shocks that can strip low-income homeowners of the prosperity they thought might finally be theirs, providing an operational and organizational umbrella that protects a homeowner’s equity against loss. As will be argued in more detail later on when considering sustainable development, ground leasing provides superior stewardship by committing a steward to closer vigilance and surer intervention in times of

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29. Common ground gives a nonprofit not only the ability to tailor the use of a neighborhood’s land to meet a variety of current needs, but also the flexibility to adjust the uses of its lands and buildings in the future, accommodating changing needs, a changing economy, or the changing priorities of its principal funders.

30. There is another, smaller economic advantage that might be mentioned. In some jurisdictions, a large parcel of land on which multiple dwellings are to be constructed is not required to go through a lengthy and costly subdivision process if the land underneath these buildings is leased rather than deeded. Assuming that the savings that result from *not* having to subdivide the land are passed along to the eventual buyers of the finished homes, rather than retained by the developer, ground leasing will bestow a financial benefit on each buyer in the form of a lower purchase price.

trouble. That protection necessarily extends to covering the precious investment that low-income families have made in their resale-restricted homes. Stewardship is not only about preserving affordability for the next generation of *homebuyers*; it is also about preserving the hard-earned equity of the present generation of *homeowners*.

A painful lesson of the Great Recession, starting in 2007, was that personal wealth, when embedded in residential real estate, is less secure than supposed. Indeed, homeownership itself was revealed to be less secure. You only earn wealth if you can hang onto your home, which many owners of market-rate homes could not when the recession hit and the housing market collapsed. Between 2007 and 2012, 12.5 million homes went into foreclosure. Communities of color bore the brunt of it, due in large measure to the higher incidence of homes owned by African Americans and Latinos that were mortgaged using high-priced, variable-rate subprime loans.<sup>31</sup>

Their counterparts in resale-restricted homes fared much better, experiencing rates of default and foreclosure during the worst of the Great Recession as low as a tenth of the rate reported by the Mortgage Bankers Association for the owners of market-rate homes.<sup>32</sup> What the former had that the latter did not was a third party that stood protectively between them and their lenders, at both the front end and back end of the lending process. There was someone by their side to review and to approve proposed mortgages, preventing burdensome payments on predatory terms. There was someone to intervene should the owners of resale-restricted homes get behind in their payments, thereby reducing the incidence of mortgage foreclosure and preventing the loss of household wealth.

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31. Jacob S. Rugh & Douglas S. Massey, *Racial Segregation and the American Foreclosure Crisis*, 75 *AMERICAN SOCIOLOGICAL REVIEW* 629, 633 (2016) (exposing evidence for the disparate impact of the mortgage crisis on communities of color); Debbie Gruenstein Bocian, Wei Li, Carolina Reid, & Roberto G. Quercia, *Lost Ground, 2011: Disparities in Mortgage Lending and Foreclosures*, CENTER FOR RESPONSIBLE LENDING (2011); see also Debbie Gruenstein Bocian, Peter Smith, & Wei Li, *Collateral Damage: The Spillover Costs of Foreclosures*, CENTER FOR RESPONSIBLE LENDING 1, 2 (2012); and Peter Dreier, Saqib Bhatti, Rob Call, Alex Schwartz, & Gregory Squires, *Underwater America: How the So-Called Housing Recovery Is Bypassing Many Communities*, HAAS INSTITUTE (2014).

32. Emily Thaden, *Stable Homeownership in a Turbulent Economy: Delinquencies and Foreclosures Remain Low in Community Land Trusts*, LINCOLN INST. OF LAND POLICY, (Lincoln Institute of Land Policy Working Paper, Lincoln) (on file with Lincoln Institute) (2011); see also John Emmeus Davis & Alice Stokes, *Lands in Trust, Homes That Last: A Performance Evaluation of the Champlain Housing Tract*, COMMUNITY WEALTH (2009) <http://communitywealth.org/content/lands-trust-homes-last-performance-evaluation-champlain-housing-trust> [<https://perma.cc/K346-KM8D>].

This safety net for low-income homeowners has proven to be an enormous economic advantage for people hoping to build wealth through homeownership, especially in communities of color. Structural racism in mortgage lending has fluctuated over several generations between starving these communities of needed capital and force-feeding them a diet of high-cost, variable-rate loans that make housing a risky investment. Community land trusts, in this regard, provide a tool not only for expanding homeownership, but also for sustaining it, along with the homeowner's investment. A recent report published by the Baltimore Housing Roundtable summarized this multi-faceted approach to wealth building:

Today, in a tight credit market, loans made to Black families have declined by 83% and in Baltimore Black households receive less than a quarter of new mortgages despite being the majority of the population. CLTs with lower transaction costs, affordability protections, and supportive services provide Black communities the much deserved opportunity to obtain financing, build equity, and sustain their investments in neighborhoods at a time when traditional lending avenues have been significantly restricted.<sup>33</sup>

A second economic advantage of community-owned land is the opportunity it creates for capitalizing a stewardship fund to help the owners of resale-restricted homes to bear the future cost of major repairs. A small charge is now being added to the monthly lease fee collected by many CLTs, which is either deposited into a separate reserve for each home or aggregated into a pooled reserve for the portfolio as a whole.<sup>34</sup> These escrowed increments, essentially forced savings, are a boon for low-income homeowners down the road, when predictably confronted by a major capital expense like replacing a roof or furnace, rebuilding a chimney, or rehabilitating some other big-ticket system.<sup>35</sup>

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33. Peter Sabonis & Matt Hill, *Community + Land + Trust: Tools for Development Without Displacement*, BALTIMORE HOUSING ROUNDTABLE 28 (2016) <http://www.baltimorehousingroundtable.org/publications> [<https://perma.cc/FCV6-C3BW>].

34. It should be noted that some homeownership programs using deed covenants have also begun collecting monthly "stewardship fees" from their homeowners. It is less obvious how defensible they would be, however, either legally or politically, were the owners of such resale-restricted homes to challenge this extra charge, unless collected as part of a condo association fee.

35. New banking laws in the United States have made it difficult for a mortgagee to escrow payments beyond those covering the mortgage, taxes, insurance, and association or lease fees. Nonprofit organizations like Habitat for Humanity that offer mortgages are similarly impeded from collecting extra fees that might be used in building up a maintenance and replacement reserve. When such a "stewardship fee" is part of a ground lease fee, however, it is more likely to be allowed, as long as a Habitat affiliate is not only the mortgagee but also the owner and lessor of the land underneath a Habitat home. This opportu-



Finally, community land trusts have shown themselves to be unusually effective at capturing and distributing land-based wealth inter-generationally. They do so by preventing the removal of public and private subsidies invested in the individually owned housing sited on their lands and by limiting the amount of appreciation the owners of such housing may pocket for themselves when reselling houses, townhouses, condominiums, or shares in a limited equity housing cooperative.<sup>36</sup> Subsidies and gains that are retained in a home reduce its price for subsequent buyers, in effect sharing land-based wealth between one generation of homeowners and another. This audacious feat of redistribution, achieved through a pricing formula and preemptive option embedded in the ground lease, puts the CLT squarely within the land reform tradition of value recapture that was pioneered by Henry George and Ebenezer Howard, with a street-level focus that was contemplated by neither.

### **B. Empowerment of Community: The Political Case for Common Ground**

A particular strength of community-owned land is not only the diversity it allows in *what* is developed and *how* development is done, but the opportunity it allows a place-based community to impose its will on both, making collective decisions about the common good. As Harry Smith has said about the CLT created in Boston by his own organization, the Dudley Street Neighborhood Initiative, “The land trust doesn’t exist just to acquire and manage land. It’s really about engaging community to decide together what they want on their land.”<sup>37</sup>

Land that is community-owned provides a foundation for development that is community-led. This is more than simply opening up a developer’s planning process to community participation, inviting residents to voice opinions about the kind of improvements needed to make their neighborhood nicer, safer, or more affordable. A non-

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nity has helped to persuade a number of Habitat affiliates in the U.S. to add ground leasing to their program mix.

36. Davis & Stokes, *supra* note 32; and see Kenneth Temkin, Brett Theodos, & David Price, *Shared Equity Homeownership Evaluation: Case Study of Northern Communities Land Trust*, THE URBAN INST. 1, 16 (2010) (providing evidence for the CLT’s effectiveness in preventing the wholesale removal of subsidies and gains, thereby keeping home prices within the reach of subsequent low-income homebuyers, can be found in).

37. Penn Loh, *How One Boston Neighborhood Stopped Gentrification in Its Tracks*, YES! MAGAZINE (Jan. 28, 2015) <http://www.yesmagazine.org/issues/cities-are-now/how-one-boston-neighborhood-stopped-gentrification-in-its-tracks> [<https://perma.cc/3LMF-A3ZJ>].

profit organization that owns and manages leaseholds has a head start on creating a place-based constituency that is capable of defending and advancing the interests of all who call a neighborhood their home. It also has a built-in incentive to heed the stated concerns of people who live on and around its holdings.

That is *not* to say that all nonprofits doing ground leasing are equally committed to sharing power with residents of their service area, nor that all of them are actively engaged in organizing residents for collective action.<sup>38</sup> It *is* to say that CLTs in their “classic” form *presume* a place-based constituency and an inclusive structure of governance, both regarded as best practices within the wider CLT world. Even when a nonprofit landowner lacks one or more of the democratic elements of the “classic” CLT, moreover, the long-term leasing of community-owned land sneaks empowerment through the backdoor, introducing a political dynamic that other mechanisms for keeping housing affordable often lack.

### 1. Sharing Power

Among many nonprofits doing community development, there has been a noticeable decline over the past few decades in the number that assiduously incorporate participatory strategies and structures into their organizations and operations. Too many have drifted away from what used to be an article of faith among nonprofit organizations helping to house low-income people or to revitalize low-income neighborhoods; namely, a core belief that the beneficiaries of an organization’s projects and services should have a voice in planning those activities and in guiding and governing the organization that carries them out.<sup>39</sup>

An organization’s philosophical commitment to democratic governance may help to arrest that slide, although that is hardly unique

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38. Even among community land trusts, not all are equally committed to keeping the “C” in CLT. For some, empowering community is a lesser concern than providing housing. See Jeffrey S. Lowe & Emily Thaden, *Deepening stewardship: resident engagement in community*, 37 URBAN GEOGRAPHY 611, 611–13 (2016); Emily Thaden & Jeffrey S. Lowe, *Resident and Community Engagement in Community Land Trusts*, LINCOLN INST. OF LAND POLICY (Lincoln Institute of Land Policy working paper) (on file with Lincoln Institute) (2014); see also Karen A. Gray & M. Galande, *Keeping “Community” in a Community Land Trust*, 35 SOCIAL WORK RESEARCH, 241, 241–42 (2011).

39. This is a personal observation, though I am hardly alone in noticing a decline in the number of community development organizations that give more than lip service to principles of participation and empowerment. See, e.g., RANDY STOEKER, *The CDC Model of Urban Development: A Critique and Alternative*, THE COMMUNITY DEVELOPMENT READER 361–368 (James DeFilippis et al. eds., 2d ed. 2012).

to organizations using ground leases. What *is* unique to ground leasing is the practical necessity of anticipating and managing the risk of leaseholder discontent. Landowner-leaseholder relations are not always smooth. Indeed, they can become downright bumpy, an ever-present possibility in the dual-ownership intricacies and intimacies of ground leasing. A desire to reduce the severity of these clashes and to protect its own reputation in the larger community can be strong incentives for a nonprofit landowner to create a structure and culture for leaseholder engagement.

Cost may be part of this calculation. The least expensive stewardship regime is one in which compliance is routine and enforcement is unnecessary, one in which the occupants of price-restricted buildings police themselves, voluntarily abiding by the contractual conditions that encumber their homes. Compliance with these restrictions is more likely when the people whose homes are encumbered are given a voice in directing the activities of the organization that is managing the land beneath their feet and overseeing the buildings in which they live.

It is much harder, in short, for a nonprofit landowner to ignore the wishes of those who, by virtue of occupying its land, have a personal stake in making sure the lessor is responsibly managed and responsibly attuned to the leaseholders' needs. The easiest way for a nonprofit organization to ensure that its beneficiaries are cheerleaders rather than critics is to make them partners in guiding and governing the organization itself.

## **2. Building Power**

A nonprofit doing ground leasing cannot confine its activities to being a developer; it must be an educator and organizer as well. That is not only because its leaseholders may sometimes insist on their "landlord" entering the fray on their behalf, but also because the difficulties that accompany this unfamiliar form of tenure make it *necessary* for a nonprofit lessor to build awareness and acceptance at the same time it is building housing. The very things that make ground leasing harder to implement and to manage tend to force a nonprofit doing ground leasing to behave (at times) like a community organizer and to use (on occasion) whatever power it has accumulated to defend the interests of its leaseholders, its community, and itself.

To be successful as both a steward and a developer requires a CLT also to be an effective organizer. These activities are complementary, an argument forcefully made by Nora Lichtash in describing the

CLT program operated by her own organization, the Women's Community Revitalization Project in Philadelphia:

Your funders think you should be doing one or the other, but it's not good for CLTs to be separated from organizing. . . . You're building your capacity, not just to do your present work, but for future work. . . . When you organize, you're respected because you have people power.<sup>40</sup>

Building power for a CLT begins with the "captive audience" of the organization's own leaseholders. As Jesse Myerson recently observed, "[l]and removed from the private market, de-commodified and placed under the ownership and management of the people who live there, is land that creates and renews its own political constituency."<sup>41</sup> This is a constituency that is helped to grow by the versatility of ground leasing, where anything can be developed or done on community-owned land. The political reality in most locales is that there tends to be only a small cadre of "housers" who vocally care about affordable housing. Common ground, however, can serve as a platform for many different kinds of development. When a nonprofit organization takes full advantage of this versatility, shopkeepers, service providers, and community gardeners are added to the ranks of leaseholders, broadening the base of a CLT's support.

### 3. Wielding Power

The model ground lease widely used by community land trusts gives the lessor the right to intervene on behalf of a building's owner to remove liens (Article 7.4), to contest unfair property taxes (Article 6.3), and "to prosecute or defend, in its own or the Homeowner's name, any actions or proceedings appropriate to the protection of its own or Homeowner's interest in the Leased Land" (Article 14.7). It also requires the use of mortgages that give the lessor the right to intervene in the event of default (Article 8.4).<sup>42</sup> While an affordability covenant may be crafted to grant similar rights to a covenantee, this is less commonly done. On occasions when it is done, however, when nonprofit organizations or public agencies retain rights like these as part of their oversight of homes they have developed or subsidized, a

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40. Miriam Axel-Lute & Dana Hawkins-Simons, *Organizing and the Community Land Trust Model*, SHELTERFORCE (Oct. 15, 2015) [http://www.shelterforce.org/article/4279/organizing\\_and\\_the\\_community\\_land\\_trust\\_model/](http://www.shelterforce.org/article/4279/organizing_and_the_community_land_trust_model/) [https://perma.cc/FY58-HXK4].

41. Jesse A. Myerson, *How To Get Rid of Your Landlord and Socialize American Housing, in 3 Easy Steps*, THE NATION (Dec. 8, 2015) <https://www.thenation.com/article/how-to-get-rid-of-your-landlord-and-socialize-american-housing-in-3-easy-steps/> [https://perma.cc/8FHM-5JWH].

42. White, *supra* note 27.

practical question must be asked: Will an organization holding a bushel of arms-length covenants be as likely to intervene on behalf of the people living in “its” homes as an organization holding parcels of land beneath a portfolio of houses, townhouses, condominiums, or cooperatives? The answer, I would argue, is “no.” The latter is committed in a way the former is not. A nonprofit lessor is more likely to wield whatever power it has in order to protect homes that are sited upon its own land—an argument that will be discussed in greater detail below, when considering the operational case for common ground.

There is also the matter of what “weapons” an organization has ready at hand should it choose to make that fight. Covenants, liens, and leases all give a nonprofit steward the power to control what happens to lands and buildings under its immediate control, but only ground leasing gives a steward the power to influence what happens to properties that *surround* its holdings. In nearly all jurisdictions, landowners are automatically notified by municipal agencies of proposed changes in municipal zoning, public investment, or private development slated for properties abutting their holdings. These landowners are formally invited to comment in public hearings about such proposals, and they are automatically granted legal standing in any regulatory or judicial disputes pertaining to abutting properties. By contrast, an organization that holds an affordability covenant or a mortgage lien is not likely to receive such notifications, nor to have legal standing in hearings or disputes before a planning commission, a zoning board, or civil court when deliberations involve properties beyond its own.

“All power comes from the land,” as Charles Sherrod has described his own motivation in helping to create New Communities, a CLT prototype that emerged out the civil rights struggle in Albany, Georgia during the 1960s.<sup>43</sup> That sentiment was widespread among the visionaries and activists who established the earliest CLTs, first in rural areas and then in cities. For them, ownership and empowerment were inseparable, each seen as being a condition for the realization of the other. They structured their organizations accordingly, believing

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43. This quote is contained in an interview with the Reverend Charles Sherrod in the filmed documentary *ARC OF JUSTICE: THE RISE, FALL AND REBIRTH OF A BELOVED COMMUNITY* (Open Studio Productions, 2016); see *ARC OF JUSTICE: THE RISE, FALL, AND REBIRTH OF A BELOVED COMMUNITY*, [www.arcofjusticefilm.com](http://www.arcofjusticefilm.com) (last visited Oct. 22, 2016) [<https://perma.cc/AAY8-FU3X>] (providing supplementary materials with additional context and background for events depicted in the film).

that a growing supply of community-owned land and an increasing number of homes on long-term leaseholds made it necessary, practically and politically, for a nonprofit landowner to have a place-based membership and a balanced board, to broadly represent the diverse interests of the community served.

This connection between ownership and empowerment has endured, even among CLTs that have relaxed or abandoned elements of the “classic” CLT in structuring their own organizations. That is due, in part, to the guiding principles subscribed to by most individuals who consider themselves members of the wider CLT community in the United States.<sup>44</sup> For these practitioners, expanding the power of disadvantaged communities to shape the trajectory of their own development is as important a purpose in doing their work as expanding the supply of community-owned land.

But there are also influences more practical than aspirational which explain the propensity of many CLTs to be as interested in redistributing power as in redistributing property. Community-owned land and long-term ground leasing, as I have suggested, create obligations that tug a nonprofit landowner toward sharing, building, and wielding power on behalf of the community it serves. There are certainly CLTs that resist that pull, but few CLTs completely ignore it.

### C. Development With Justice: The Preservationist Case for Common Ground

“Community development occurs,” according to James DeFilippis and Susan Saegert, “when the conditions of surviving and thriving in a place are not being supplied by capital.”<sup>45</sup> Most place-based development is aimed at aggressively rebuilding *impoverished* localities in which an absence of investment has caused conditions inimical to surviving and thriving for all residents. But place-based development may also be aimed at *prosperous* localities, affirmatively furthering fair housing in areas where an abundance of investment (combined, perhaps, with a pernicious dose of discriminatory zoning) has elevated land val-

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44. See, for example, the “guiding principles” put forward in February 2016 by the Grounded Solutions Network (<http://groundedsolutions.org/>) that are said, along with a common history and a distinctive set of best practices, to differentiate the “community of practice” of CLTs from other models and mechanisms promoted by the Network. *Concept Paper for a Community Land Trust: Community of Practice* (Feb. 8, 2016), available at <http://www.bacclt.org/wp-content/uploads/2016/05/CLT-Community-of-Practice-v2.pdf> [<https://perma.cc/YM76-WFGW>].

45. James DeFilippis & Susan Saegert, *Communities Develop: The Question is, How?*, THE COMMUNITY DEVELOPMENT READER 1, 5 (Routledge, 2012).

ues and left little room for housing that is affordable, effectively excluding the poor, people of color, and other protected classes. Equitable development is not only about lifting up the worst places; it is also about opening up the best places.<sup>46</sup>

In both situations, the special dilemma for practitioners committed to producing equitable outcomes is how to protect redistributive gains achieved in the present against their steady erosion and eventual elimination by market forces in the future; even more, how to avoid inadvertently accelerating that process by a practitioner's own success in turning a neighborhood around. The preservationist case for common ground addresses this dilemma head-on, arguing that common ground provides a foundation for equitable development *and* sustainable development, enabling the intersection and implementation of both.<sup>47</sup>

### 1. Do No Harm

Too rarely do public agencies, private foundations, and community developers of every stripe *plan for success* when endeavoring to improve distressed neighborhoods. Focused so desperately on doing something good for places and residents urgently in need, they provide only the flimsiest protection against the possibility of something bad happening down the road.<sup>48</sup> It is almost as if these well-meaning interventionists had become so accustomed to failure that they cannot imagine a day when their own efforts might cause property values to

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46. This is also what fair housing should be “about,” according to the Final Rule on *Affirmatively Furthering Fair Housing*. This directive recognized that a “balanced approach” might be needed to address fair housing issues in both kinds of places, including “the removal of barriers that prevent people from accessing housing in areas of opportunity, the development of affordable housing in such areas, effective housing mobility programs and/or concerted housing preservation and community revitalization efforts.” *Affirmatively Furthering Fair Housing, supra*, note 21, at 42, 279.

47. The broadest definition of a “preservationist” would be a person (or organization) concerned with the preservation of biological species, wildlife habitats, historic sites, or other endangered features of the natural or built environment. Common ground can be called a “preservationist” strategy by dint of its focus on perpetuating affordable housing, third spaces, and redistributive gains constantly endangered by market forces.

48. Many churches that minister to low-income renters in disadvantaged areas have been equally heedless, ignoring the rising tide of market forces that can hollow out their congregations when a neighborhood undergoes gentrification. As Bob Lupton has pointed out, these churches eventually face a difficult choice: “If they remain committed to the poor, they must decide to either follow the migration streams as they gravitate to the periphery of the city, or get involved in real estate to capture affordable property in their neighborhood to ensure that their low-income neighbors retain a permanent place.” Bob Lupton, *Gentrification with Justice*, BYFAITH, (June 1, 2006) <http://byfaithonline.com/gentrification-with-justice/> [<https://perma.cc/4ATU-F6K3>].

rise and market pressures to mount, threatening the security and well-being of the disadvantaged population they set out to help.

Planning for success when *equitable* development is the goal begins by honestly acknowledging the pain that place-based development can sometimes inflict on economically precarious people and accepting responsibility for doing something to prevent it.<sup>49</sup> By that light, any funder or practitioner who intervenes in a low-income neighborhood with the intention of bettering the lives of those who live there should approach such places with a caution and humility akin to that embodied in the Hippocratic Oath: “I will take care that they suffer no hurt or damage.”<sup>50</sup>

One of the surest ways of taking care is for a community to “Take a Stand, Own the Land,” as the organizing slogan of the Dudley Street Neighborhood Initiative (DSNI) once put it.<sup>51</sup> In the 1970s, residents of the Boston neighborhood of Roxbury welcomed the prospect that transit-oriented development might soon be attracting investment into an area that had experienced decades of redlining, abandonment, and arson for profit. But they also worried that rising rents and housing prices might follow in its wake, steadily displacing families with limited incomes and elders on fixed incomes. The solution championed by DSNI was to begin acquiring a significant percentage of the neighborhood’s land *before* it was bought up by private speculators and caught up in market forces that the government’s investment in infrastructure had helped to unleash. Equally important, DSNI had the foresight to realize that acquiring land was not enough. This land, and what was raised upon it, had to be permanently removed from the market. A community land trust subsidiary named Dudley Neighbors Inc. was established by DSNI in 1979 to own the land forever and to preserve the affordability of rental housing, cooperative housing, and

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49. Tony Pickett, *Stop Talking About Displacement*, ROOFLINES (Feb. 5, 2016) [http://www.rooflines.org/4384/stop\\_talking\\_about\\_displacement/](http://www.rooflines.org/4384/stop_talking_about_displacement/) [https://perma.cc/47JK-WE4V] (“Any veteran community development practitioner must acknowledge the dual responsibility of creating neighborhood improvements while also managing the potential of those same improvements to change market perceptions that attract new higher income “urban pioneers” who often precede displacement.”).

50. MEDICINET.COM, *Definition of Hippocratic Oath*, <http://www.medicinenet.com/script/main/art.asp?articlekey=20909> (last visited Oct. 23, 2016) [https://perma.cc/82JU-KLP2].

51. The story of DSNI is told by PETER MEDOFF & HOLLY SKLAR, *STREETS OF HOPE: THE FALL AND RISE OF AN URBAN NEIGHBORHOOD* (South End Press, 1994).



owner-occupied houses, duplexes, and triplexes being planned for construction on DNI's land.<sup>52</sup>

A similar strategy has been pursued in the Tenderloin neighborhood of San Francisco, where a long-standing partnership between municipal agencies and nonprofit providers of affordable housing has resulted in a steady stream of land being moved into social ownership over the span of many years:

Starting in the 1970s and continuing uninterrupted over the decades since, Tenderloin activists, working with city government and a set of strong nonprofit partners, bought or otherwise obtained control over a significant share of the area's real estate. . . . It's a "win-win" strategy that could be dismissed as wishful thinking in any other contested neighborhood. But in the Tenderloin, community control of land makes it possible for community leaders to risk improving the neighborhood without worrying that new investment will push out all the low income people. . . . In fact, this strategy of steady land acquisition and permanent affordability controls is probably the only approach to combating gentrification that can actually win.<sup>53</sup>

Community-owned land cannot keep market forces from buffet-ing a neighborhood, any more than an umbrella can stop the rain. It cannot prevent affluent people from moving into a low-income area that is newly attractive to homebuyers and entrepreneurs who, sensing a change in the area's fortunes, are now willing to settle their families or businesses there.<sup>54</sup> What community-owned land *can* do is to keep the poor from getting drowned in the deluge. It is a bulwark against displacement, protecting clusters of affordable housing that funders

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52. See generally Robert Hickey, *The Role of Community Land Trusts in Fostering Equitable, Transit-Oriented Development: Case Studies from Atlanta, Denver, and the Twin Cities*, LINCOLN INST. OF LAND POLICY, (Lincoln Institute of Land Policy working paper) (on file with Lincoln Institute) (2013) (examining other cities where CLTs have been promoted as a preservationist strategy vis-à-vis massive public investment in infrastructure).

53. Rick Jacobus, *The Gentrification Vaccine*, ROOFLINES, (Aug. 13, 2015) [http://www.rooflines.org/4211/the\\_gentrification\\_vaccine/](http://www.rooflines.org/4211/the_gentrification_vaccine/) [<https://perma.cc/D4Q9-J8TN>]; see also RANDY SHAW, *THE TENDERLOIN: SEX, CRIME, AND RESISTANCE IN THE HEART OF SAN FRANCISCO* (Urban Reality Press, 2015) (It is not only the tenure of land that has "saved" the Tenderloin, but the tenacity of grassroots organizing.).

54. Putting aside the dubious question of whether it is really in the best interests of low-income residents to preserve geographic concentrations of poverty, even to the point of preventing all in-migration by more affluent households, there is probably no way realistically for a CLT to do it. There are few inner-city neighborhoods or rural villages where the *bulk* of the locality's land is ever going to be owned by a nonprofit organization acting to protect a community's more vulnerable residents. At a deeper level, Alan Mallach has expressed concern about "any racial, ethnic, social, or economic group" controlling most of a neighborhood and using "social ownership" to exclude other groups. See generally Allan Mallach, *Hung Up on Gentrification? Don't Be*, ROOFLINES (July 16, 2013) [http://www.rooflines.org/3320/hung\\_up\\_on\\_gentrification\\_dont\\_be/](http://www.rooflines.org/3320/hung_up_on_gentrification_dont_be/) [<https://perma.cc/6K7J-QUCC>].

and practitioners have worked so hard to create; preventing precious, precarious islands of security, mutuality, and opportunity from being washed away.<sup>55</sup>

This is different than viewing common ground as a so-called inoculant against gentrification. Protecting the security and affordability of “islands” set aside for low-income households should be a higher priority than preventing the in-flow of moderate-income or even upper-income people into neighborhoods with high concentrations of poverty. Gentrification as an *outcome* is worth stopping, since that usually entails the massive removal of all lower-income people who previously inhabited a neighborhood. But gentrification as a *process* may be worth allowing, *if* it is carefully managed (a) to regulate the type and pace of new development, (b) to protect vulnerable populations against displacement, and (c) to allow disadvantaged people to share in the benefits of living in a neighborhood that is attracting new investment and adding a mix of incomes. Few other strategies can match the efficacy of community-owned land in accomplishing all three, making the process of gentrification less painful and more equitable.

Affordable housing is not the only “lower” land use that is threatened when neighborhoods improve. The same is true for many non-residential land uses that serve or employ people of modest means. Common ground can be a bulwark here as well. A community-based organization that holds land under a variety of buildings and leases out land for a variety of purposes can prevent the loss of small manufacturers, retail establishments, artist spaces, community facilities, and open lands that are put under pressure whenever real estate

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55. The danger of being pushed aside as a community’s land grows more valuable is especially acute in informal settlements in the United States and elsewhere. In many of these squatter communities, people have become deeply rooted over several generations, even to the point of constructing permanent dwellings. But they have no legal right to occupy the land. They have no security of tenure. Community land trusts have been proposed as a possible strategy for securing the homes of squatters through long-term leaseholds. In San Juan, Puerto Rico, the first large-scale test of this strategy is underway. Over 25,000 people occupy 200 acres along the Martin Pena Canal, most of whom have neither a deed nor a lease for the land on which they live. The Cano Martin Pena Community Land Trust, an initiative sponsored by the Corporación del Proyecto ENLACE del Cano Martin Pena, has won title to much of this land and is working to establish security of tenure for the squatters. Recognized as being a replicable model with potential applicability to informal settlements across the globe, the Cano Martin Pena CLT won the 2015-2016 World Habitat Award from the Building and Social Housing Foundation in England. BUILDING AND SOCIAL HOUSING FOUNDATION, *Cano Martin Pena Community Land Trust*, <https://www.bshf.org/world-habitat-awards/winners-and-finalists/cano-martin-pena-community-land-trust/> (last visited Oct. 22, 2016) [<https://perma.cc/A6CX-TT6S>].

values rapidly rise. It can preserve cooperatively owned enterprises whose members may be tempted to “demutualize” if the enterprise thrives.<sup>56</sup>

Especially vulnerable in neighborhoods that are undergoing a rapid improvement in their fortunes are sites that Ray Oldenburg has called “third places.”<sup>57</sup> These are informal, celebratory spaces in which neighboring occurs and community happens. Yuen and Rosenberg argue that the most endangered of these spaces, within neighborhoods with large concentrations of lower-income people, are community gardens:

The third places of lower-income neighborhoods do not always get a lot of press, but serve important community functions such as establishing a sense of place, fostering broad and inclusive social interactions, and supporting civic engagement. They can take a variety of forms, such as bars, religious institutions, community centers, barbershops, and even simple building stoops. But few of these informal hangouts can activate a space and create an engaged constituency quite like the community garden.<sup>58</sup>

When a neighborhood is economically depressed, the supply of land for community gardens is often cheap and plentiful. When the neighborhood rebounds and land values rise, sometimes as a direct result of public investment or as an indirect result of residents cleaning up vacant lots and planting verdant gardens, third spaces devoted to urban agriculture are among the first to go. Public ownership can be flimsy protection, as community gardeners in New York City discovered in 1999 when Mayor Rudy Giuliani wanted to auction off 114 city lots beneath thriving community gardens. Community ownership offers greater security.<sup>59</sup>

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56. A rise in the value and profitability of a cooperatively owned enterprise can tempt the owners of the firm’s shares to sell out to an outside buyer, removing the cooperative structure and reaping personal gains, a process known as “demutualization.” Just as the leased land beneath a limited equity housing cooperative can prevent its conversion to a market-rate cooperative or condominiums, ground leasing underneath a worker cooperative or consumer cooperative can give a CLT (or other nonprofit landowner) the ability to prevent demutualization.

57. RAY OLDENBURG, *THE GREAT GOOD PLACE* 14 (Paragon House, 1st ed. 1989).

58. Jeffrey Yuen and Greg Rosenberg, *Hanging on to the Land*, SHELTERFORCE, NAT’L HOUSING INST. (Feb. 11 2013) [http://www.shelterforce.org/article/3068/hanging\\_on\\_to\\_the\\_land/](http://www.shelterforce.org/article/3068/hanging_on_to_the_land/) [<https://perma.cc/NE75-CACL>].

59. It cannot be assumed that the highest priority for a community’s residents—or for a nonprofit landowner representing their interests—will always be the preservation of open space. Darrin Nordahl offers the example of a neighborhood in Chicago where NeighborSpace was unsuccessful in developing an urban agriculture demonstration project because residents wanted housing to be developed on the vacant site. See DARRIN NORDAHL, *PUBLIC PRODUCE: THE NEW URBAN AGRICULTURE* 62–63 (Island Press, 2009).

In sum, common ground can serve as a durable protection for people, uses, and spaces that were tenaciously there long before a disadvantaged place began to improve. It can help to ensure that the *benefits* of development do not accrue primarily to those who had the foresight and fortune to buy up a neighborhood's real estate when prices were depressed. It can help to ensure that the *burdens* of development do not fall disproportionately on individuals who are the least able to bear them. In places where the economic tide has turned, often as a direct or indirect result of the intervention of public funders, private foundations, and nonprofit developers, common ground can bend the arc of prosperity toward justice.

## 2. Make it Last

"Conditions of surviving and thriving" for persons of limited means are not only lacking in most places of *poverty*, they are also lacking in many places of *prosperity*. The main culprit in the latter is the scarcity of affordable housing. Low-income and moderate-income people may work in affluent neighborhoods, suburbs, and towns. They may shop there. They cannot live there, excluded by rents and prices beyond their reach.<sup>60</sup>

Opening up the privileged enclaves from which low-income families, people of color, and other protected classes are regularly barred has been as much a focus of community land trusts as improving the distressed neighborhoods in which these underprivileged populations are frequently confined. At present, there are more CLTs in the United States that are working in areas where housing prices are robust than in places where housing prices are depressed.<sup>61</sup> As different as the conditions and challenges may be in strong-market versus weak-

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60. To focus on the cost of housing, as I am doing here, is not to ignore the presence of other barriers to geographic mobility, past and present, including discriminatory lending and exclusionary zoning.

61. This assessment is based on the experience of Burlington Associates in Community Development LLC, a consulting cooperative co-founded by the author that has directly assisted nearly half of all the CLTs in the United States. It should also be noted that many cities and neighborhoods occupy a wide economic expanse between localities where real estate prices are deeply depressed and those where prices are steeply rising beyond the reach of low-income and moderate-income households. These in-between places may still benefit from remedial treatments like health and safety inspections, vigorous code enforcement, and housing rehabilitation loans, but the more robust investments and interventions of community development are not as prevalent or as necessary here. Community land trusts have found a foothold in such places nonetheless by focusing less on the construction of new housing than on the restoration of existing housing or by doing little housing at all, focusing instead on commercial development or urban agriculture.

market cities, however, there is often a similar lack of attention being paid by policymakers to protecting whatever success they have had in improving conditions for people of limited means. Similar, too, is the preservationist role that CLTs have been asked to play.

Most affordably priced homes produced in affluent areas would simply not exist without the investment of public dollars from a federal, state, or city agency, without the imposition of municipal mandates like inclusionary zoning, or without the beneficence of density bonuses, parking waivers, tax abatements, land donations, infrastructure extensions, or other municipal incentives. Such governmental largess, lavishly bestowed on private developers, landlords, and homeowners alike, is what makes housing “affordable,” allowing homes to rent or to sell for below-market prices that are within the financial reach of people on the lower half of the income ladder.

In too many places, however, this heavily subsidized affordability is not designed to last very long. Restrictions imposed on rents and resales, if any, are allowed to lapse after five, fifteen, or thirty years. Prices then rapidly rise to meet the market, public subsidies get stuffed into private pockets and, in some instances, low-income people get displaced.

Despite being spectacularly wasteful, this programmed loss of publicly assisted, privately owned housing has been a standard feature of nearly all housing policy in the United States, at all levels of government, for decades.<sup>62</sup> Pre-planned “expiring use” has been so commonplace, so widely accepted that only a few prescient contrarians were once willing to stand up in the public square and sound the alarm about the attrition of subsidized homes *after* they are built or the risks faced by freshly minted, low-income homeowners *after* they moved in.<sup>63</sup> Their warnings fell mostly on deaf ears.

That began slowly to change under the sequential shocks of the nation’s affordability crisis of the 1980s and 1990s and the foreclosure

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62. Jake Blumgart, *Have We Been Wasting Affordable Housing Money?*, ROOFLINES (Dec. 3, 2015) [http://www.shelterforce.org/article/4322/have\\_we\\_been\\_wasting\\_affordable\\_housing\\_money/](http://www.shelterforce.org/article/4322/have_we_been_wasting_affordable_housing_money/) [<https://perma.cc/2SQR-QN2X>]; see generally John Emmeus Davis, *Plugging the Leaky Bucket: It’s About Time*, ROOFLINES, (Jan. 27, 2015) [http://www.rooflines.org/3995/plugging\\_the\\_leaky\\_bucket\\_its\\_about\\_time/](http://www.rooflines.org/3995/plugging_the_leaky_bucket_its_about_time/) [<https://perma.cc/KDM5-2PNF>].

63. Emily Achtenberg, Dean Baker, Rachel Bratt, Cushing Dolbeare, Peter Dreier, Chester Hartman, Peter Marcuse, and Michael Stone were among the first to lament the programmed loss of publicly subsidized housing, criticizing American policy for its shortsightedness. Many of my own writings have mined the same vein, but I came later to the cause, standing on the shoulders of scholar-activists who saw it sooner and said it louder than I.

crisis precipitated by the Great Recession of 2007–2009. These disruptive fluctuations in markets and mortgages caused a grudging shift in the tectonic plates of housing policy. At the municipal level in particular, increased attention began to be paid to preventing the loss of publicly subsidized housing, whether to market pricing, to deferred maintenance, or to foreclosure.<sup>64</sup> That was especially true in stronger markets where public powers were increasingly used rather than public dollars to bring this housing into being, either mandating or incentivizing the production of affordable housing. The disappointing performance of some of the earliest cities that adopted inclusionary housing programs, where thousands of units of affordably priced housing were summarily lost to the market because of short-term affordability controls, provided an object lesson for later adopters.<sup>65</sup> Municipal officials began paying closer attention to preserving the affordability of inclusionary housing for a much longer period of time.<sup>66</sup>

In many cities, this simply meant attaching a covenant to the deeds of residential properties that the municipality's dollars or powers had made affordable, a covenant presumed to be "self-enforcing." City officials blithely assumed that no monitoring or enforcement would be necessary because title companies, mortgage underwriters, or closing attorneys would catch any violations of a covenant's restrictions and block any resales involving an "unaffordable" price or an

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64. John Emmeus Davis & Rick Jacobus, *The City-CLT Partnership: Municipal Support for Community Land Trusts*, LINCOLN INST. OF LAND POLICY 10 (2008).

65. Some of the earliest adopters learned their lesson and changed their programs when thousands of inclusionary units were lost to the market. Montgomery County, Maryland, for example, initially imposed only a five-year affordability requirement for homes created under its 1973 Moderately Priced Dwelling Unit Ordinance. This period was increased to ten years in 1981 and increased again in 2005, mandating 30 years for owner-occupied housing and 99 years for rentals. Another example is Irvine, California. Having lost nearly a thousand inclusionary units, the city took the lead in establishing a CLT to protect assisted units in the future. See Karen Destorel Brown, *Expanding Affordable Housing through Inclusionary Zoning: Lessons from the Washington Metropolitan Area*, BROOKINGS INSTITUTION, CENTER ON Urban and Metropolitan Policy 1, 17 (Oct. 2001) <https://www.brookings.edu/~media/research/files/reports/2001/10/metropolitanpolicy%20brown/inclusionary.pdf>. [<https://perma.cc/X2E8-6Zaq>]; see, e.g., Rick Jacobus & Michael Brown, *City Hall Steps In*, NAT'L HOUSING INST. 335–341 (2010).

66. Rick Jacobus, *Inclusionary Housing: Creating and Maintaining Equitable Communities*, LINCOLN INST. OF LAND POLICY 1, 35 (2015) ("The overwhelming trend has been for inclusionary housing programs to adopt very long-term affordability periods."); see also Robert Hickey, Lisa Sturtevant, & Emily Thaden, *Achieving Lasting Affordability through Inclusionary Housing*, LINCOLN INST. OF LAND POLICY (Lincoln Institute of Land Policy working paper) (on file with Lincoln Institute) (2014) <https://www.lincolninst.edu/publications/working-papers/achieving-lasting-affordability-through-inclusionary-housing> [<https://perma.cc/9PMH-TRWN>].

“ineligible” buyer.<sup>67</sup> When this assumption was proven fatally flawed by the steady leakage of affordable units into the market, there was a dawning recognition that somebody had to stay watchfully in the picture if affordability was going to persist. Stewardship rose higher on the public agenda.

That created an opportunity for community land trusts to show that they could do what conventional tenures and programs do not, since stewardship is what CLTs do best. They are willing to stay in the picture long after affordably priced rental housing or homeownership housing has been created, making sure that it lasts. A CLT, in this way, is the ultimate preservationist: acting to ensure the lasting affordability and continuing upkeep of privately owned homes, while helping to ensure the ongoing success of the homeowners or renters who occupy them.<sup>68</sup> As Connie Chavez, former executive director of the Sawmill Community Land Trust in Albuquerque New Mexico was fond of saying, “We are the developer that doesn’t go away.”

### III. Resiliency: The Pursuit of Sustainable Development

Community land trusts are not the only community development organizations that are willing and able to play this stewardship role. Across the country, many other models, mechanisms, and organizations have joined CLTs in being assigned responsibility for the preservation of affordable housing that the largess of local government or a private charity has helped to create.<sup>69</sup> These preservationist tools are often viewed as being equally effective. Equivalency has, in fact, become an article of faith among some housing advocates. From their perspective, it doesn’t necessarily matter which model or mechanism is used, as long as subsidies are retained and affordability is sustained.<sup>70</sup>

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67. See generally John Emmeus Davis, *Design Contractual Controls Over Use and Resale*, in SHARED EQUITY HOMEOWNERSHIP: THE CHANGING LANDSCAPE OF RESALE-RESTRICTED, OWNER-OCCUPIED HOUSING, NATIONAL HOUSING INSTITUTE 1, 54 (2006) <http://www.nhi.org/pdf/SharedEquityHome.pdf> [<https://perma.cc/VX7M-J7A8>] (discussing a more detailed discussion of various options for imposing and enforcing affordability controls).

68. John Emmeus Davis, *Homes That Last: The Case for Counter-Cyclical Stewardship*, THE COMMUNITY LAND TRUST READER 562–570 (Lincoln Institute of Land Policy 2010) (explaining that these duties are sometimes called the three faces of stewardship).

69. Overviews of these models and mechanisms can be found in Davis (2006), *supra* note 67, at 13; and JEFF LUBELL, *Filling the Void between Homeownership and Rental Housing: A Case for Expanding the Use of Shared Equity Homeownership*, in HOMEOWNERSHIP BUILT TO LAST 203–227 (Eric S. Belsky, et al. eds., 2014).

70. See Emily Thaden, *Mission Above Method*, ROOFLINES, NATIONAL HOUSING INSTITUTE (March 6, 2014) [http://www.shelterforce.org/article/3627/Mission\\_Above\\_Method/?utm](http://www.shelterforce.org/article/3627/Mission_Above_Method/?utm)

That may actually be true when times are normal and nothing goes wrong. Other tools may be just as effective as community land trusts in ensuring that equitable gains are made to last, at least when it comes to preserving the affordability of subsidized housing. But the fortunes of low-income people, low-income communities, and the nonprofit organizations that serve them are constantly in flux and unavoidably precarious. Stability amidst a fluctuating economy and shifting politics can be hard to come by. Something inevitably goes wrong. Among the developers of subsidized housing, there may be shenanigans in trying to bypass affordability and eligibility restrictions that encumber their properties. Among the owners of resale-restricted homes, there may be delays in doing repairs or delinquencies in paying mortgages. Among the organizations charged with stewardship, there may be lapses in intervening when housing is at risk, and on occasion, flaws in the organizations themselves may lead to a failure to thrive.

If affordable housing is to be preserved, therefore, regardless of whether the local real estate market is hot or cold, the contractual and organizational system put in place to make it last must be able to withstand a changing environment and the changing circumstances of the people served. It must be able to cope with occasions when people do not behave as they should. It must not only plan for success, but also plan for failure and endure nonetheless. In a word, that system must be *resilient*.

Just as equitable development revolves around the question of “who benefits,” with redistribution being the aspirational goal, sustainable development hinges on the question of “how long,” with *forever* being the gold standard to which practitioners aspire and *resiliency* being the means for getting there. These are overlapping concerns. When it comes to place-based development, making it fair and making it last are two sides of the same coin. Development can be considered equitable only if it can be sustained, and it is *worth* sustaining only if it is equitable.

Sustainability in the context of common ground has a narrower meaning than is typical in most discussions of sustainable development.<sup>71</sup> For CLT practitioners, sustainability tends to be couched less

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\_source=March+11%2C+2014&utm\_campaign=March+11+Weekly&utm\_medium=email [https://perma.cc/QH4H-YKWT].

71. See, e.g., MARK ROSALIND, TOWARD SUSTAINABLE COMMUNITIES: SOLUTIONS FOR CITIZENS AND THEIR GOVERNMENTS 21 (New Society Publishers, 4th ed. 2012) (Roseland does something unusual in this admirable book. While embracing the broadest possible concep-



in terms of minimizing pollution or reducing the consumption of natural resources on a limited planet than in terms of preserving affordable housing and other place-based facilities, spaces, and activities that have been created for people of limited means. The more common meaning of sustainability is not overlooked. It might be argued, in fact, that the longer time horizon of community land trusts and other nonprofit community development organizations that “don’t go away” will necessarily make them more receptive to environmental concerns than developers that build and bolt. When a nonprofit owns the underlying land and has an abiding interest in what happens to buildings, occupants, and enterprises that are sited on its land, there is reason to believe that the nonprofit landowner/developer may be more appreciative of the need to construct greener buildings that are more durable and use energy more efficiently, while respecting the carrying capacity of land, water, and air.<sup>72</sup>

For purposes of the present discussion of common ground, however, sustainability will be considered mostly in terms of the longevity of the development that has been done on a CLT’s land and the deal that has been struck with the low-income and moderate-income people who inhabit a particular place. Our focus will be affordably priced housing in particular, and resale-restricted homeownership at that. The latter can be seen as a test case for exactly how sustainable this model of long-term ground leasing might be. If owner-occupied homes are more likely to be kept affordable, and if stewardship is more likely to be effective when homes are sited on community-owned land, then other types of development and other uses of land stewarded by a CLT should prove to be more sustainable as well.

Longevity is a function of resiliency, perpetuating what has been developed or achieved in the face of adversity. On this count, common ground is not merely the equal of other models and mechanisms. It is better, legally, operationally, and organizationally. The restraints on what a building’s owner may do with his/her property, including the price for which it may be resold, are more likely to be enforceable over a longer period of time. Intervention by the organization overseeing these restraints is more likely to happen, forcing

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tion of “sustainability,” he applies it narrowly to the neighborhoods and towns where people live. As he puts it: “To make sense of the sustainability imperative at the community level, we need a new focus on place.” *Id.*

72. While it is reasonable to believe that the longer time horizon of a “developer that doesn’t go away” will result in a heightened sensitivity to environmental concerns and a different set of cost-benefit calculations when planning a project and using land, this hypothesized effect of common ground has never been studied.

compliance and protecting the affordably priced housing that everyone has worked so hard to create. Failure, should it occur, is more likely to be graceful, rather than catastrophic. These are advantages inherent in the long-term leasing of community-owned land that allow a CLT to continue doing good even when things go bad.

#### A. Enforceable Restraints: The Legal Case for Common Ground

Covenants have been used far more frequently than ground leases to preserve the affordability of publicly assisted, privately owned housing. The former mechanism has been a particular favorite of various state and municipal agencies that either indirectly produce affordable housing through inclusionary mandates or regulatory incentives, or directly subsidize affordable housing through the investment of public funds.

Covenants have been preferred in part because they have been assumed to be simpler and easier than ground leases. Both assumptions were actually true, as far as they went. The affordability covenants used in the past *were* simple: a one-page or two-page addendum attached to the deed for a house or condominium. These older covenants had only two purposes: restricting the price for which homes could resell and limiting the pool of income-eligible households who could buy or rent these homes.

By comparison, most ground leases, especially those used by community land trusts, were lengthy and complex, containing myriad restrictions beyond the future determination of resale prices and income limits. The model ground lease used by most CLTs gave a nonprofit lessor the legal ability to regulate occupancy and subletting in the lessee's buildings; to review and approve the building's financing and re-financing; to require regular maintenance; to approve post-purchase capital improvements; to collect fees for the use of the lessor's land; and to undertake other activities designed to protect the subsidies invested, the structures purchased, and the low-income families who occupied these homes.<sup>73</sup>

Older deed covenants were also easier to administer, since the nonprofit and governmental entities that used this mechanism considered them to be "self-enforcing." Public officials believed no extra work would be needed on their part to ensure compliance with a covenant's requirements. They assumed that title companies, mortgage underwriters, or closing attorneys would catch violations of a cove-

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73. White, *supra* note 27, at 65.

nant's restrictions and block any resale involving an "unaffordable" price or an "ineligible" buyer. Furthermore, the term of most covenants was relatively short. Affordability covenants that lasted no longer than five to fifteen years were the norm. All restrictions then disappeared, allowing property owners to resell to anyone they wanted for any price they could get.<sup>74</sup>

By contrast, most ground leases lasted a very long time and presumed the ongoing involvement of the landowner in approving any changes in use or any plan by a lessee to sublet, improve, refinance, or resell his/her building. It was not a third-party title company, underwriter, or attorney who was responsible for monitoring and enforcing a leaseholder's compliance. It was the owner of the land on which a leaseholder's building was located. Stewardship was part of the deal, a nonprofit landowner's long-term responsibility.

When deed covenants were said in the past to be "easier," therefore, or when the same is said in the present, that claim is often true—up to a point. Covenants that impose fewer restrictions, covenants that presume no oversight, and covenants that disappear after a short period of time are clearly *not* as cumbersome or burdensome as ground leases that are longer-lived, more closely monitored, and more detailed and multifaceted in the activities they regulate.

Covenants have been steadily catching up, however, becoming more persnickety, comprehensive, and complex. No longer can comparisons between deed covenants and ground leases be based primarily on either the content of the contracts or the commitment to stewardship by the entity that developed or funded the housing. Increasingly, deed covenants are being crafted to contain many of the *same* terms and conditions as ground leases and, here and there, the *same* kind of stewardship regime is being instituted for covenants as was once the exclusive purview of community land trusts and limited equity cooperatives.<sup>75</sup>

Equivalency in the *content* of covenants and leases does not make them equivalent when it comes to their *enforceability*, however. Indeed, one of the strongest arguments for the superiority of residential ground leasing has always been that it is better able to withstand legal

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74. The affordability period for mortgage liens, when used as the mechanism of choice, would last only as long as the mortgage, typically 15-30 years. THE NEST, *The Typical Mortgage Term*, <http://budgeting.thenest.com/typical-mortgage-term-3487.html> (last visited Oct. 22, 2016) [<https://perma.cc/MMB3-R86D>].

75. This has been somewhat true for mortgage liens as well, when used to preserve the affordability of publicly assisted privately owned housing. Many conditions on the use and improvement of subsidized homes are being inserted into these liens.

challenge—over a longer period of time. Without delving too deeply into arcane legal doctrines like the rule against perpetuity, the rule against unreasonable restraint on alienation, touch and concern, and privity, suffice it to say that long-lasting restrictions on the use and resale of privately owned real estate are generally considered to be more legally defensible when the party imposing those restrictions has a proximate interest in the restricted property and when the restrictions themselves have an end date—even if the restrictions last for many years. Ground leasing receives a passing grade on these legal tests, while perpetual covenants that “run with the land” frequently do not.<sup>76</sup>

Recognizing the vulnerability of deed covenants in this regard, several states have enacted statutes that give specific sanction to long-lasting affordability covenants when they are used to preserve the public’s investment in housing. In Maine, Massachusetts, Oregon, and Vermont, for example, legislative action has put the enforceability of deed covenants on a strong footing.<sup>77</sup> It is arguable that in these states, but in these states alone, deed covenants may now be just as enforceable as ground leases, assuming there is someone standing reliably and vigilantly in the wings to do the enforcing.<sup>78</sup>

*How* they are to be enforced is an open question, however. The party that imposed a covenant’s restrictions on occupancy and use may conceivably pursue court action to compel compliance when there is a violation, but the judicial path to the enforcement of deed covenants is neither well-traveled nor clearly marked. By contrast, the means for enforcing the terms of a ground lease is, as David Abromowitz has pointed out, “[t]he relatively familiar process of declaring a default under the ground lease and, if the default remains

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76. See generally David Abromowitz, *An Essay on Community Land Trusts: Towards Permanently Affordable Housing*, 61 MISS L.J. 663 (1991); David Abromowitz & Kirby White, *Deed Restrictions and Community Land Trust Ground Leases: Two Methods of Establishing Affordable Homeownership Restrictions*, THE COMMUNITY LAND TRUST READER 327–334 (2010); JOHN EMEUS DAVIS, *Durable Affordability*, in SHARED EQUITY HOMEOWNERSHIP: THE CHANGING LANDSCAPE OF RESALE-RESTRICTED, OWNER-OCCUPIED HOUSING, 76–80 (National Housing Institute, 2006); James J. Kelly *Homes Affordable for Good: Covenants and Ground Leases as Long-term Resale-restriction Devices*, 29 ST. LOUIS U. PUB. L. REV. 9, 38 (2010).

77. Ryan Sherriff, *Shared Equity Homeownership State Policy Review*, 19 J. OF AFFORDABLE HOUS. & CMTY. DEV. L. 279, 283 (2010).

78. In North Carolina and Ohio, state law and court precedents have caused some lawyers to question the legality of separating the ownership of land and residential buildings, even though shopping centers, office buildings, and other commercial structures are regularly developed on leased land in both states.

uncured, obtaining judicial relief through the typical landlord-tenant summary process.”<sup>79</sup>

In sum, except for states where there is explicit legislative sanction for affordability covenants, the enforceability of ground leases is likely to be more durable and sure. Furthermore, the precedents and procedures for enforcing ground leases, as Abromowitz has noted, are better established than for covenants, especially when it comes to remedying violations by homeowners who are still occupying the property with no immediate plan to resell.

## **B. Dependable Intervention: The Operational Case for Common Ground**

A stewardship regime can be put in place that looks virtually the same for deed covenants and ground leases, regulating property to the same degree and assigning the same duties to some designated steward. That can be true for mortgage liens as well. That does not mean these contractual mechanisms will *perform* the same, however. Organizations that own the land beneath resale-restricted housing are more likely to know when their homes and homeowners are having problems. They are more likely to prevail in negotiations with private lenders to prevent these problems from leading to the loss of lands and buildings from the organization’s portfolio. They are more likely to intervene when problems arise. These advantages give community land trusts and other nonprofit organizations using ground leases an operational edge over programs that use covenants or liens instead.

### **1. Intelligence**

One of the keys to effective stewardship is learning about problems long before they become serious and too costly to fix. Every effective stewardship regime will adopt procedures for monitoring compliance and correcting violations, but ground leasing contains a formal and informal “early warning system” less frequently found in programs using deed covenants.

The *formal* components of this system are (1) the collection of ground lease fees from homeowners (and from the owners of other types of buildings on a lessor’s lands) and (2) notification from lenders of any mortgage delinquencies.<sup>80</sup> The revenues raised from lease

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79. Abromowitz (*An Essay*), *supra* note 76, at 667.

80. White, *supra* note 27 at 67–68 (The collection of lease fees is covered in Article 5 of the Model CLT Ground Lease. Notification of the lessor of a mortgage default by the lessee is covered in Article 8.4 and Exhibit: Permitted Mortgages).

fees are useful in covering a portion of the steward's operating costs, but they serve another function as well. They give the steward's staff a regular glimpse into how the organization's leaseholders are faring. The first thing the owners of buildings on leased land tend to stop paying, when experiencing financial distress, are the lease fees owed to their benevolent landlord. A pattern of late fee payments or an accumulating arrearage is usually an indication of more serious problems, alerting the steward of the need to intervene.

Most organizations selling homes on leased land have a second tripwire built into their system. They become a party to the mortgage. The mortgage lender agrees to notify the landowner if any homeowners become seriously delinquent in their monthly mortgage payments.<sup>81</sup> A lender may do the same when receiving an application to refinance a home on leased land. As in the case of the late payment of lease fees, such notifications alert the steward to changes in the leaseholder's financial circumstances that may jeopardize the homeowner's ability to care for the home or to hang onto it.

The *informal* components of a lessor's early warning system are (1) the continuing relationship between lessor and lessee after a home is sold and (2) the continuing visibility of the landowner in the eyes of close neighbors and city officials. The very structure of ground leasing requires the landowner and homeowner to stay in touch and, to some degree, to get along. If this relationship is a good one, the homeowner is more likely to volunteer information about distress, giving the steward an opportunity to lend a hand. This marriage of convenience is forged early in the process of preparing a prospective homebuyer for a leaseholder's life on the steward's land. As described by Devika Goetschius, director of the Housing Land Trust of Sonoma County in Petaluma, California:

During every community land trust homebuyer education class, I've looked each person in the eye and told them, "When your financial circumstances change – good or bad – you call me."<sup>82</sup>

With admirable regularity, they do.

Any organization that serves as the long-term steward for a portfolio of resale-restricted, owner-occupied housing can establish a trust-

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81. *Id.* Banking law and privacy concerns have led CLTs in some states to execute a three-party agreement among the homeowner, the lender, and the steward, allowing the lender to share such information with the steward.

82. Emily Thaden & John Emmeus Davis, *Stewardship Works*, SHELTERFORCE (Dec. 24, 2010) [http://www.shelterforce.org/article/2080/stewardship\\_works/](http://www.shelterforce.org/article/2080/stewardship_works/) [<https://perma.cc/5CXM-XEXJ>] (quoting Devika Goetschius, Executive Director of the Housing Land Trust of Sonoma County).

ing and continuing relationship with the people who are buying their homes, regardless of the mechanism used to impose that restriction. My argument is not that such a bond is necessarily absent from programs that rely on covenants or liens, but that it is more essential and, therefore, more likely in programs where the steward actually owns the land under a homeowner's feet. That is partly the result of the landowner and homeowner being materially and psychologically tied together and partly a function of the landowner being constantly reminded of this relationship by parties looking on from the outside. The landowner can never be entirely invisible or forgotten, no matter how low a profile it may want to maintain. Local neighbors are likely to complain to the landowner when homes are not kept in good repair or when the grounds around them become cluttered with junk cars. City officials are likely to notify the landowner when there are violations of building or zoning codes, or when homeowners have failed to pay special assessments or property taxes. A steward using deed covenants will be pestered by fewer of these busy-body calls—for which an overworked, under-staffed steward may be thankful. But that also means that the steward's staff will be deprived of valuable on-the-ground intelligence of pending problems in the organization's portfolio of resale-restricted housing.

## 2. Leverage

A ground lease gives a nonprofit steward a wider range of options in dealing with a homeowner who is not occupying the home as her primary residence, not maintaining adequate insurance, not keeping the home in good repair, or not fulfilling any number of other responsibilities to which she agreed when purchasing the home. The landowner's ultimate leverage in compelling compliance is the threat of eviction from the leasehold, but ground leases also contain a graduated series of less-drastic warnings, penalties, arbitration, and opportunities for injunctive relief.<sup>83</sup> Nearly all violations are corrected long before reaching the dire straits of a CLT acting to remove a homeowner from its land.<sup>84</sup>

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83. White, *supra* note 27, at 76–77 (Article 12 (Default) and Article 13 (Arbitration)).

84. In serious situations, where leaseholders are clearly unable or unwilling to correct violations in the terms and conditions of the ground lease, most CLTs are more likely to repurchase the home, buying out the homeowner and enabling her to move elsewhere, instead of forcibly evicting her from the leasehold. Indeed, I know of no CLT to date that has actually evicted a homeowner/leaseholder, although the threat to do so has sometimes been used as leverage to persuade a homeowner who is not complying with the terms of her ground lease to move.

Equally important, by owning the land a community land trust (or other nonprofit lessor) has greater leverage in negotiating with private lenders or public funders who hold a mortgage on a troubled home or, for that matter, on any other building on its land. What is mortgaged in most ground leasing programs—and what a lender is allowed to seize if a loan goes bad—is the house and other structural improvements, *not* the underlying land.<sup>85</sup> This strengthens the steward's hand, while multiplying the possibilities for dealing with mortgage defaults and foreclosures. The lender may enlist the nonprofit landowner's cooperation in negotiating a workout with the homeowner, keeping the mortgage in place while putting the homeowner on a schedule to resolve the delinquency. The nonprofit may accept a deed in lieu of foreclosure from the homeowner. The nonprofit may decide to buy the house from the lender following foreclosure.<sup>86</sup> Alternatively, the nonprofit may decide to let the lender sell the foreclosed home for whatever price the lender can get from any buyer the lender can find. Whoever buys the building must then deal with the nonprofit owner of the underlying land.<sup>87</sup>

In short, even when a home (or other building) slides toward foreclosure, and even should a foreclosure actually occur, the nonprofit steward stays stubbornly in the picture. No matter how distant or distracted the lender, the presence and interests of the landowner cannot be entirely ignored.

### 3. Intervention

Any steward worth its salt will have reserved the right to intervene to preserve the homeownership opportunities it has worked so hard to create. Regardless of whether this authority is granted through a deed covenant or ground lease, therefore, every steward should be able to block resales in violation of affordability controls, to correct deferred maintenance, and to arrest the slide toward foreclosure. But having

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85. Technically, what is mortgaged is the home and the "leasehold estate." Some ground leasing programs have been forced to subordinate the steward's interest in the land, however. In these less-than-desirable arrangements, the lender is allowed to seize both the house and the land in foreclosure.

86. Under many financing arrangements for mortgaging homes on leased land, the landowner is given the first right to buy the house out of foreclosure. There is no reason, however, why the same right could not also be granted to a steward using deed covenants.

87. The landowner has leverage, too, in dealing with the building's new owner. The nonprofit will usually have the option of charging a market-rate ground rent in any situation where restrictions on the home's resale, occupancy, or subletting are suspended or invalidated. Charging a "fair market rental value" in these circumstances is the landowner's right under Section 5.6 of the Model CLT Ground Lease. *See* White, *supra* note 27.



the *right* to intervene is not the same as having the *will* to do so. In this regard, ground leasing comes out ahead.

It is not that the people who run programs using ground leases are more virtuous or energetic than those who run programs using deed covenants; rather, their incentive to intervene is greater should problems arise. When the homes for which a steward is responsible are located on land that the steward owns, it is much harder for the organization to ignore its stewardship responsibilities or to walk away from the deal. To put it bluntly, the steward is “stuck.” Those buildings that are not being maintained? They are on the steward’s land. Those homes with taxes or mortgages in arrears? They are on the steward’s land. And everybody knows it, especially those government agencies that have granted or loaned money to the landowner on the condition that homes will remain affordable forever.

Moreover, if a public funder has been smart in investing its homeownership subsidies, that investment will have been granted or loaned to the owner of the land, not to the owner of a resale-restricted home. The public agency will then have the ability to go after the nonprofit steward if affordability is compromised or if maintenance is deferred.<sup>88</sup> That gives the land a stickiness all its own, for there is no place for the nonprofit steward to hide and no easy way for the organization to divest itself of assets that public dollars have helped it to acquire.

In the face of the many *disincentives* to intervention, including the time required, the money involved, and the risk of antagonizing homeowners who would rather be left alone, stewards using mechanisms other than a ground lease are more likely to decide that the cost is simply too high (and, perhaps as suggested earlier, the judicial path to a corrective remedy too uncertain) to go to the extra trouble of rescuing a distressed property. Owning the land tends to nudge this calculation in the opposite direction, creating an incentive to act that outweighs the inclination to do nothing. Ground leasing, in this regard, is what behavioral economists would call a *commitment device*.<sup>89</sup> It locks the steward into living up to its own promises, raising the reputational cost of not intervening to protect the buildings upon its land.

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88. In some cases, municipalities have insisted that, as a condition of conveying their funds to the landowner/steward, the municipality itself will be able to take over the lessor’s stewardship responsibilities if the lessor is unable or unwilling to do so.

89. See, e.g., Gharad Bryan, Dean Karlan, & Scott Nelson, *Commitment Devices*, 2 ANNU. REV. OF ECON. 671, 673 (2010); see also Colin Camerer, Samuel Issacharoff, George Loewenstein, Ted O’Donoghue, & Matthew Rabin, *Regulation for Conservatives: Behavioral Economics and the Case for “Asymmetric Paternalism,”* 151 U. PA. L. REV. 1211, 1217 (2003).

Stewardship is more certain when the organization assigned responsibility for stewardship is not only vigilant but vested, ensnared in a web of its own making, compelled to do the right thing even when tempted to look the other way.<sup>90</sup>

### C. Graceful Failure: The Organizational Case for Common Ground

It might seem self-defeating to mention “failure” while extolling the virtues of community-owned land and long-term ground leasing. But the emphasis here is on GRACEFUL failure. This is a fault-tolerant principle lifted from the world of engineering and computer programming, where complex systems are intentionally designed to continue operating properly even when there is a flaw or failure in one of their components.<sup>91</sup> Engineers do not set themselves the impossible goal of building a transportation network, an electrical grid, or a computer program that will never fail. They strive, instead, to create systems that are robust and resilient. Such a system when subjected to extreme conditions may bend, but it does not break. It may flicker, but it does not crash. It may eventually collapse, but with enough warning and backup so as to protect its most valuable components.

Graceful failure is designed into a housing delivery system whenever stewardship is added as a backup for low-cost homes and low-income households that have been assisted with public or private dollars.<sup>92</sup> A stewardship regime makes failure less likely. It also helps to ensure that when failures do occur, which cannot be entirely avoided

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90. See Thaden, *supra* note 32 (A number of studies have documented the lower loss to foreclosure of resale-restricted homes versus market-rate homes during the Great Recession, but almost no research has been done comparing the performance of one model of resale-restricted housing to another.). See also THE DENVER OFFICE OF ECONOMIC DEVELOPMENT, INCLUSIONARY HOUSING ORDINANCE (2011) (The exception is a comparison that was published by the City of Denver’s Office of Economic Development (OED) in 2011. The OED examined 1056 resale-restricted, owner-occupied houses and condominiums created in large-scale projects by private developers, 2002 to 2010. The projects are in three different neighborhoods, located less than three miles apart. Affordability covenants were used in Stapleton/Forest City (222 units) and at Green Valley Ranch (648 units). These neighborhoods had a foreclosure rate of 6.31% and 24.54% respectively. In the Lowry neighborhood (186 units), however, where ground leases were used by the Colorado Community Land Trust to preserve the homes’ affordability, the foreclosure rate was 0%).

91. This principle has also been called “graceful degradation” or “graceful exit.” See John Emmeus Davis, *Shared Equity Homeownership: Designed to Last*, 20 COMMUNITIES & BANKING 29, (2009).

92. See, e.g., John Emmeus Davis, *Shared Equity Homeownership: Designed to Last*, 20 COMMUNITIES & BANKING 29, (2009). Mr. Rosenberg has argued that graceful failure is a virtue of deed covenants, not of ground leases, since covenants are easier to “unwind” if a non-profit houser no longer has the capacity or the will to perform its stewardship role. I am

when dealing with economically vulnerable people, structurally vulnerable assets, and a hopelessly convoluted system for regulating, financing, and subsidizing affordable housing, these failures will not be catastrophic. When stewardship accompanies the deal, homes are more likely to last.

I have argued already that the *operational* effectiveness of a stewardship regime is enhanced by a steward's ownership of the land underlying any residential buildings for which it has been assigned responsibility. But what of the *organizational* effectiveness of the steward itself? If it is true, as history has amply demonstrated, that there is no such thing as a "self-enforcing" covenant, lien, or lease and that some organization must stay watchfully in the picture for many years, stewardship must necessarily depend on the ongoing viability of that organization. It must have the capacity to do the job and the ability to survive. The steward, too, must be designed to last.

An under-appreciated function of common ground is that it tends to make organizational failure less likely and, should the organization begin to founder, to render its distress or demise less catastrophic. It builds greater resiliency into a stewardship regime.

One of the best ways to ensure that a CLT or any other nonprofit steward will be around for the long haul is to build a diverse portfolio of revenue-generating assets, reducing the organization's dependency on outside funders. Ground leasing, in this regard, can contribute significantly to a steward's bottom line, depending on the magnitude of the organization's holdings. Most or all of the ground lease fees collected from the owners of buildings on the steward's land can be used to cover the landowner's operating costs, especially those incurred in meeting its stewardship responsibilities. Furthermore, when that portfolio includes multi-unit rental housing on leased land, and perhaps commercial buildings as well, the operational revenue from lease fees can be quite substantial.<sup>93</sup>

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arguing the reverse, of course, that the virtue of ground leases is that they *are* harder to "unwind," discouraging a lessor from walking away when things get difficult.

93. These revenues will be meager when an organization's portfolio is small. It is only after a CLT (or other nonprofit landowner) is able to build a large and diverse portfolio that it will begin to generate a significant stream of revenue for its own operations. Even then, however, a CLT that is engaged in many different activities will never be able to cover *all* of its operating costs through lease fees, only those directly related to stewardship. The goal of organizational self-sufficiency, when it comes to the stewardship of affordable housing, must be minimalist: an organization should strive to generate enough revenues from its own portfolio to cover the cost of watching over that portfolio, even if the organization were to cease all other activities. I designed and taught the first stewardship courses offered by the National CLT Network. This "minimalist" goal was part of this course.

Ground leasing has a favorable effect not only on a nonprofit landowner's cash flow, but on its balance sheet as well. When public subsidies or private donations for affordable housing or for other community development projects are put into the underlying land, with the nonprofit serving as the long-term steward for the land and the buildings, the nonprofit gets to book the unencumbered value of that land as an asset. The same is not true, incidentally, when a steward merely holds the right to enforce the affordability provisions in a covenant or lien.

Should this landed asset appreciate in value, appreciation to which the organization's own neighborhood improvement efforts may have contributed, the original entry on its balance sheet does not increase; but the added value may be available for taking and using by the organization if needed down the road. The length of the typical CLT ground lease and the charitable mission of most nonprofit organizations that are doing ground leasing will necessarily and properly impede short-term profit taking on land gains, but there may be occasions when this appreciating asset can be legitimately accessed and used to support the organization and its mission. The nonprofit landowner may sometimes choose to convert some of its land to a "higher" use than affordable housing, for example, if conditions in the neighborhood have changed to the point where a different use of that land is warranted.<sup>94</sup>

There may also be times (rare so far) when a CLT homeowner defaults on a mortgage and intervention fails. The CLT could then find itself holding the land under a house a bank has seized through foreclosure and resold to a higher-income buyer. The CLT, as landowner and lessor, would have the ability under the terms of the ground lease to charge a higher lease fee to the new owner, if the house is no longer owned or occupied by a low-income household. In this situation, there would be an opportunity for the CLT to lease out a parcel of land at a monthly rate much higher than the heavily subsidized lease fee that is typically charged to a low-income homeowner, generating added revenue for the organization.

Under direr circumstances, owning land may allow a wobbly organization to right the boat and to return to being an effective steward. Alternatively, owning land may entice another nonprofit into

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94. It should be noted that such a change in use could occur only at the *endpoint* in a ground lease or when lessees decide to resell their buildings to the landowner. The Model CLT Ground Lease used by CLTs and by a number of other community organizations do not allow the lessor to decide unilaterally to terminate the lease. *See* White, *supra* note 27.

taking over the steward's assets and responsibilities. "Where there is land, there is hope," says Brenda Torpy, executive director of the Champlain Housing Trust (CHT), a community land trust in Burlington, Vermont. It is an adage heard in the hallways of CHT whenever it looks like there is likely to be a distressed building on CHT's land, especially a house that is owner-occupied. Landownership gives the steward more options in solving the problems of a failing homeowner, a failing building, or a failing mortgage. The same may be said of a distressed organization. Landownership gives the board of a failing steward more options in trying to save what is most important—and a greater incentive to do so.

What matters most in these situations is saving the affordable housing into which a public agency or private foundation has invested its money and into which low-income people have poured their savings and dreams. In a time of crisis, a nonprofit landowner with a charitable mission must think first of the wellbeing of the homeowners and renters who live on its land. Its primary obligation is to them. The governing board of a shaky steward must do whatever is necessary to protect its leaseholders, including perhaps the prudent decision to lease out some of its land for a "higher" use than housing or the painful decision to sell off some of its land.<sup>95</sup>

The board may be led in more extreme cases of organizational distress to look for a suitor: another nonprofit that is willing to absorb the CLT through a corporate merger or that is willing to accept the CLT's assets upon the latter's dissolution. A steward with land on its books, along with a guaranteed stream of revenue from future lease fees, brings a lucrative dowry to the search for a partner or successor. This can increase the odds of attracting and negotiating an attractive organizational match that will protect the homes on the steward's land and perpetuate the stewardship regime surrounding them.

The key here is not only that ground leasing gives the board of a faltering organization more options, but also more motivation to pursue them. Similar to a CLT's commitment to oversight and intervention, a lessor and its lessees are married to one another in a mixed-ownership arrangement that is not easy to unwind. The difficulty of doing so can be a good thing in a time of crisis, forcing everyone to

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95. Even CLTs that are philosophically committed to *never* returning land to the speculative market have sometimes been forced to do so in service to mission and their own survival. The model bylaws adopted by most CLTs make land sales very difficult, requiring approval by both the board and the membership, but it can be done. See White, *supra* note 27 (*Model Classic CLT Bylaws*).

slow down, dig in, and work harder to solve the organization's problems.<sup>96</sup> When there is more at stake, as there is when low-income households live on the land that an organization owns, the governing board will do almost anything to make things right, even to the point of sacrificing the organization itself through merger or dissolution if that means saving its leaseholders' homes.<sup>97</sup>

#### IV. Just Places: The Transformative Potential of Common Ground

Fifty years ago Andre Gorz, a social philosopher living in France, drew a distinction between ameliorative measures that buttress existing relations of property and power versus those that open tiny cracks in the structure of inequality, slowly accumulating over time to offer an ideological and political challenge to the status quo. He called the first "reformist reform" and the second "non-reformist reform."<sup>98</sup>

Gorz's categories were recently revived and provocatively applied by James Meehan in his examination of community land trusts in the United States, using the Dudley Street Neighborhood Initiative in Boston as his principal case. He concluded:

It is clear that CLTs, in their diverse character and situations, walk the fine dividing line between the two tendencies of reformist and non-reformist. In many cases, the CLT legal model has been used as a gimmick to keep low-income housing costs low (thus taking pressure off the state and the private sector). In others, they play a role in raising consciousness to the realities of power in regard to land, questioning speculative ownership of land, and enabling some degree of community control over the local land base.<sup>99</sup>

Meehan captures well the tension between the pedestrian, day-to-day practice of CLTs and the loftier, transformative possibilities that

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96. At the same time, the difficulty of unwinding this deal should give pause to any nonprofit that is contemplating ground leasing for the very first time. A smaller nonprofit or a start-up nonprofit may not be ready for the added responsibilities and challenges that come with ground leasing. Such an organization may be better advised to use deed covenants instead, perhaps as an interim step, transitioning to ground leases when it has more administrative capacity and a broader political base to do ground leasing well.

97. There have, in fact, been several instances where a CLT board has deliberately and successfully sought out another nonprofit to take over its lands, leaseholds, and stewardship responsibilities. In those cases, the lessor-lessee arrangement has remained intact, even when the corporate identity of the lessor has changed and the CLT has been absorbed into another nonprofit organization.

98. ANDRÉ GORZ, *STRATEGY FOR LABOR: A RADICAL PROPOSAL* 7 (Beacon Press, 1964).

99. James Meehan, *Reinventing Real Estate: The Community Land Trust as a Social Invention in Affordable Housing*, 20 *JOURNAL OF APPLIED SOC. SCI.*, 113, 131 (2013).

may result from their work. CLTs are, in fact, an effective scheme for lowering housing costs, preserving affordability, promoting upkeep, and preventing foreclosures. Indeed, a CLT's full-cycle commitment to cost reduction at the front end and dependable stewardship at the back end is a marked improvement over the build-and-bolt mentality that characterizes most other programs for producing affordable housing or for boosting low-income people into homeownership.

At the same time, community land trusts, like every other non-profit organization working to improve conditions and to expand opportunities for disadvantaged people, do reinforce the hold of dominant institutions. When they expand access to mortgage capital for populations and places that have experienced redlining in the past, CLTs inadvertently contribute to the legitimization of a system of private finance that has been a source of woe for many low-income communities. When they expand access to homeownership for people who have been excluded from the private market, CLTs affirm and fuel the individualization of property that has been a flashpoint in the politics of place, where interests of property drive a frequently contentious wedge between owners and renters, haves and have-nots. Community land trusts, from this perspective, can be seen as a reformist tool for propping up the status quo, softening the edges of a harmful system that is left unchallenged and unchanged.

There is another way of looking at it, however, for the cumulative effect of community-led development on community-owned land may be to transform that system into something else. In the words of Peter Marcuse:

Community land trusts challenge the arrangements of a housing market used to the pleasures and pains of speculating on housing value . . . . They can move from seeing housing as a commodity, valued for its exchange value, the profit it can produce, and see it rather as a necessity of life, even perhaps up to a certain configuration as a public good.<sup>100</sup>

The arrangement under which land and housing are managed by a CLT holds the potential for fundamentally changing ideas, institutions, and relationships that have long governed the allocation of property and power in the place of residence. An ideology of possessive individualism, used by landlords and homeowners alike to justify their capture of all gains in value accruing to real property, is chal-

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100. Peter Marcuse, *Community Land Trusts as Transformative Housing Reforms*, PETER MARCUSE'S BLOG (July 23, 2014) <https://pmarcuse.wordpress.com/2014/07/23/blog-54-community-land-trusts-as-transformative-housing-reforms/> [https://perma.cc/9847-AH8V].

lenged by a CLT's dogged pursuit of a more equitable balance between the "legitimate" interests of individual residents and the community around them, secured though the collective ownership of land and the contractual imposition of durable controls over the uses and prices of housing.<sup>101</sup> The power of private lenders is moderated by the CLT's front-end right to approve any mortgages proposed for buildings sited on its land, screening against predatory lending, combined with the CLT's back-end right to intervene in cases of mortgage default, preventing most foreclosures. The politics of place are modified by a nonprofit landowner that is drawn into sharing and wielding power on behalf of residents living on and around its land.

Admittedly this happens within the geographic confines of a rather limited territory, encompassing a service area as small as a single neighborhood for some CLTs. It happens within the functional confines of a limited circle of institutions that determine how land-based wealth is distributed and how real estate is owned, regulated, and financed. Community-owned land may truly be a creative vehicle for non-reformist reform, but its territorial and institutional reach would not seem to extend very far.

It may be argued, on the other hand, that any institution that offers a counter-narrative to practices and meanings that buttress inequality carries a seed of possibility for influencing places and institutions that surround it. When one community prudently plans for success by improving conditions in a particular place without displacing its most vulnerable residents, it raises the question of why *equitable* development doesn't happen more widely. When community-led development on community-owned land creates a stock of housing that is permanently affordable in the face of market forces that pose a credible threat to all affordably priced housing, most of which would not exist without governmental funds or inclusionary mandates, it raises the question of why *sustainable* development is not a requisite of all housing policy.

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101. From the earliest days of the CLT, advocates for the model have wrestled with the philosophical question of exactly what these "legitimate" interests might be, accompanied by the practical problem of how to achieve an equitable balance between individuals and communities when allocating the benefits of real property. A seminal discussion of this issue can be found in the opening chapters of: MARIE CARILLO ET AL., *THE COMMUNITY LAND TRUST HANDBOOK 5* (Rodale Press, 1982). Many earlier theorists wrestled with the same issue. See, e.g., R.H. TAWNEY, *THE ACQUISITIVE SOCIETY* (Harcourt, Brace and Howe, Inc., 1920); see also REINHOLD NIEBUHR *THE CHILDREN OF LIGHT AND THE CHILDREN OF DARKNESS* (Charles Scribner and Sons, 1944).



A community land trust, from this perspective, represents what Ulrich Beck has called a “creative construction,” a social innovation that not only transforms relations within its particular sphere of influence but brings pressure to bear on the intellectual and political systems that surround it, “besieging what exists with a provocative alternative.”<sup>102</sup> In a similar vein, Eric Olin Wright has pointed to “community-controlled land trusts” as one of several strategies for achieving what he calls “interstitial transformations.” These are alternative institutions that “seek to build new forms of social empowerment in the niches and margins of capitalist society, often where they do not seem to pose any immediate threat to dominant classes and elites.”<sup>103</sup>

It cannot be said that most people drawn to a CLT, whether as practitioners or beneficiaries, are motivated by the prospect of mounting some sort of ideological, institutional, or political challenge to the status quo. Most have little interest in “besieging” anything. Many are blissfully unaware of the transformative potential of community-owned land beyond its immediate utility in helping low-income people to obtain and retain a home.<sup>104</sup> Even those who passionately embrace the CLT as a vehicle for moving toward a more just society may speak only in whispers about the radical proposition at the heart of the model they employ. As the sweet old lady confided to a colleague of mine several years ago, while talking proudly about the success of

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102. ULRICH BECK, *INDIVIDUALIZATION: INSTITUTIONALIZED INDIVIDUALISM AND ITS SOCIAL AND POLITICAL CONSEQUENCES* 190–91 (Mike Featherstone ed., 2005).

103. ERIC OLIN WRIGHT, *ENVISIONING REAL UTOPIAS* (Verso, 2010). Peter Maurin, who had inspired Dorothy Day to create the Catholic Worker, would have described this less grandly as creating a “society in which it is easier for people to be good,” invoking his favorite passage from the constitution of the I.W.W. which had talked about building a new society within the shell of the old. DOROTHY DAY, *Peasant of the Pavements*, in *BY LITTLE AND BY LITTLE: THE SELECTED WRITINGS OF DOROTHY DAY* 40–48 (Alfred A. Knopf, 1983). More recently, Gabriel Metcalf has argued that CLTs and alternative institutions like carsharing and cooperatives are instances of “piecemeal change” that can eventually lead to something bigger, one alternative building on another to open up further possibilities for a better society. GABRIEL METCALF, *DEMOCRATIC BY DESIGN: HOW CARSHARING, CO-OPS, AND COMMUNITY LAND TRUSTS ARE REINVENTING AMERICA* 4 (Martin’s Press, 2015).

104. That lack of political awareness is the reason that James DeFilippis, for one, has expressed doubts about CLTs producing social change. While conceding that CLTs and other community-based attempts to control work, housing, or money “provide a framework for ownership that is both equitable and viable,” he notes the lack of an oppositional politics. People who are drawn to these models recognize their practices are different than the norm, but they don’t see themselves or their organizations as doing anything politically significant. “Because of this,” concludes DeFilippis, “even if these collectives continue to grow in number and public recognition, they are not likely to challenge capital unless the politics of those involved are transformed.” JAMES DEFILIPPIS, *UNMAKING GOLIATH: COMMUNITY CONTROL IN THE FACE OF GLOBAL CAPITAL* 148–49 (Routledge, 2004).

her own CLT in doing both urban agriculture and affordable housing on community-owned land, “What we are really about, dear, is land reform, but we hide behind the tomatoes.”

Such reticence is understandable. Any community land trust or, for that matter, any nonprofit developer must think twice about calling too much attention to unconventional (and potentially controversial) elements in its own make-up when the organization’s leaders must continually beg for grants from public funders, apply for loans from private lenders, and anticipate attacks from reactionary neighbors opposed to anything being built near their own backyards.

Stealth has a price, however. When an innovation like community-owned land is cautiously kept out the limelight, it is simultaneously kept off the stage, waiting forever in the wings. To move from the periphery to the mainstream, however, and from pilot to policy, CLTs must be prepared to strut their stuff and prove their worth, proclaiming that *their* way of doing community development is preferable to the way it is normally done. Hiding behind the tomatoes may help a fledgling CLT to get established or enable a beleaguered CLT to survive, but it does little to demonstrate the comparative advantage of common ground. It does little to show that community-led development on community-owned land is not merely “just as good” as more conventional strategies of place-based development. It is often better.<sup>105</sup>

It is better because community land trusts are, at heart, more than simply another gimmick for lowering the cost of housing and cultivating a new crop of homeowners. What they are “really about” is equitably and sustainably replanting the contested ground at the intersection of property, power, and place. That may not be something to which all CLT practitioners aspire. That may not be something of which all CLT practitioners speak, at least not loudly. But the potential is inherently there whenever a community “owns itself” within the participatory framework of a community land trust to nudge the places where people reside toward greater security and opportunity for all. Common ground provides a versatile platform for promoting development with justice—and justice that lasts.

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105. That is what most CLT practitioners privately believe, else they wouldn’t put up with the extra toil and trouble. Many are reluctant to trumpet the superiority of the model they have adopted, however, a modesty that is prevalent among the practitioners of other models of shared equity homeownership as well. I believe such reticence to be a strategic mistake, as I’ve argued several times before. See John Emmeus Davis, *No Time for Timidity*, ROOFLINES (Aug. 27, 2012) [http://www.rooflines.org/2824/no\\_time\\_for\\_timidity/](http://www.rooflines.org/2824/no_time_for_timidity/) [<https://perma.cc/SY6N-DFXW>].