

# ZONING AND PLANNING LAW REPORT



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## Community Land Trusts: Why Now Is the Time to Integrate This Housing Activists' Tool Into Local Government Affordable Housing Policies

*Stephen R. Miller*

*Stephen R. Miller is associate professor of law and director of the Economic Development Clinic at the University of Idaho, College of Law – Boise. He is also co-editor of the Land Use Prof Blog.*

### I. Overview

A recent study found that housing expenses in the period from 2006 to 2010 were 52 percent higher for the typical household living in each of the 25 largest U.S. metropolitan areas than they had been in 2000.<sup>1</sup> This rise in housing expenses, coupled with stagnant wages in those same locations over the same period,<sup>2</sup> is one of the major reasons that community land trusts (CLTs)<sup>3</sup> have risen from a fringe housing movement to the center of cities' efforts to provide affordable housing within the last decade. In addition, many cities see CLTs as a way to provide perpetually affordable units, a benefit not provided by inclusionary zoning ordinances that often only require affordability for a term of years.

This article explores how some cities have already added CLTs to their list of affordable housing policy tools, ultimately arguing that the current economic environment presents a strong case for more cities to start CLTs at this time. Even where cities are not ready to take such steps now, the dramatic rise in CLT formation nationally, as well as the massive city-wide CLTs planned for several major cities in the U.S., such as Chicago, Illinois and Irvine, California, are developments that land use and zoning lawyers will want to watch. If the massive CLTs ultimately work as planned, other cities are likely to follow suit in embracing CLTs, a move that in turn could alter how project proponents meet inclusionary housing requirements and revolutionize how affordable housing dollars are spent by local governments. This article proceeds as follows: Section II

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**Editorial Director**  
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**Publishing Specialist**  
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**Electronic Composition**  
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Editorial Offices: 50 Broad Street East, Rochester, NY 14694  
Tel.: 585-546-5530 Fax: 585-258-3774  
Customer Service: 610 Opperman Drive, Eagan, MN 55123  
Tel.: 800-328-4880 Fax: 800-340-9378

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reviews the history of CLTs; Section III reviews 10 characteristic features of the "classic" CLT structure; Section IV reviews the rise of cities' use of CLTs and presents, in detail, a review of two of the most ambitious city-backed CLTs started by Chicago and Irvine; Section V reviews several legal and policy issues unique to city CLTs; and Section VI makes the case for why cities should consider starting CLTs now.

## II. History of community land trusts

The intellectual roots of the CLT movement in the U.S. can be traced back to late-nineteenth century utopian thinkers, such as Henry George and Ebenezer Howard, who saw in land the cause, and potential solution, to the overcrowded tenements and poverty that was endemic in cities of the then-industrializing nations, such as New York and London.<sup>4</sup> George, for instance, was influenced by John Stuart Mill's notion of the "social increment," an economic theory that most of the appreciating value of land is created not by the investment or labor of individual landowners, but by the growth and development of the surrounding society.<sup>5</sup> In his 3 million copy-selling book, *Progress and Poverty*, George argued that rather than allowing individual landowners to reap the appreciation on land that resulted from public investment, the government should impose a "single tax" on land to tax away the social increment of lands accumulation through public investment, a tax he argued would be sufficient to pay for all public services, such as schools, without the need for other taxes.<sup>6</sup>

Howard sought to apply George's insights directly to city growth. In his 1902 classic, *Garden Cities of To-morrow*, Howard proposed to ease inner-city overcrowding by building planned communities for 32,000 persons, coined "garden cities," which would ring an urban center and provide elements of both the "town" and "country" for its residents.<sup>7</sup> Those of modest means would be assured they could live in these new towns without respect to land prices because the land would be owned by the local government and leased to residents without regard to speculative real estate

values.<sup>8</sup> The local government, through its land ownership, would capture the social increment and would reinvest it in the new town.<sup>9</sup> These nineteenth-century predecessors, as well as twentieth-century land movements, such as the collective ownership of the Israeli *kibbutzim* and the Indian Gramdan movement, provided early models from which CLT pioneers drew.<sup>10</sup>

The first CLT was established in 1968 by a group of civil rights activists seeking a way to assist African-Americans in rural Georgia.<sup>11</sup> Called New Communities, Inc., the CLT was located on over 5,000 acres of farmland and woodland near rural Leesburg, Georgia.<sup>12</sup> From the beginning, however, this first CLT was burdened by its purchase price of just over \$1 million and, as much of New Communities' revenue from farming went to pay its debt service, this debt eventually resulted in the sale of the land in the 1980s.<sup>13</sup> Despite the failure of New Communities, Inc., it proved a valuable learning experience for the movement. Those lessons were encapsulated in the 1972 publication of *The Community Land Trust*, which provided the first legal road map to implementing CLTs.<sup>14</sup> That was followed by the publication of the more detailed *The Community Land Trust Handbook* in 1982.<sup>15</sup> In the decades since, a number of very detailed, and freely available, legal treatises on CLTs have sought to make the concept approachable and eliminate, as much as possible, barriers to adoption imposed by legal transaction costs.<sup>16</sup>

The first major statistical survey of CLTs conducted in 2006 resulted in the 2007 publication of the Lincoln Institute of Land Policy's report *A National Study of Community Land Trusts* (the "2006 Lincoln Institute Study").<sup>17</sup> In 2012, an update of the report was released as *Results of the 2011 Comprehensive CLT Survey* (the "2011 Lincoln Institute Study"). These two reports provide most of the statistical knowledge on the growth of the CLT movement. As the two studies did not always ask questions or present data in directly comparable ways, data from both of the studies will be described in this article where applicable.

At the time of 2006 Lincoln Institute Study, there were 186 CLTs in the U.S., of which 106 responded to the study's survey;<sup>18</sup> in the 2011 Lin-

coln Institute Study, there were 242 CLTs in the U.S., of which 96 responded in part to the survey.<sup>19</sup> Of those responding to the 2011 Lincoln Institute Study, only 4 CLTs were started in the 1970s; none were started between 1980 and 1985; 8 were started between 1985 and 1990; 5 were started between 1990 and 1995; 13 were started between 1995 and 2000; 17 were started between 2000 and 2005; and 38 were started between 2005 and 2010.<sup>20</sup> All 4 of the CLTs formed in the 1970s were formed by activists within local communities fed by goals of community organizing and funded with land donations from private parties.<sup>21</sup> In the 1980s, new CLTs were still largely organized by activists with community organizing intentions; however, the first local government CLTs emerged in this decade as did the first use of CLTs by housing developers and community development corporations.<sup>22</sup> Of those CLTs founded in the 1980s, the rapid rise in housing prices was the most common reason cited for organization.<sup>23</sup> Increasing housing prices have remained the dominant reason for CLT formation in the 1990s and 2000s.<sup>24</sup> While local community activists continued to play a large role in CLT formation in the last two decades, these decades also saw the rise of local government participation in the CLT movement.<sup>25</sup> Local governments played a role in formation of 36 percent of CLTs formed in the 1990s and 44 percent of CLTs formed in the 2000s.<sup>26</sup> Further, in the 2006 Lincoln Institute Study, CLTs reported that public funds were used in over half of new CLTs formed between 1990 and 2006, a dramatic departure from the purely private funding of CLTs at the movement's beginnings in the 1970s.<sup>27</sup> In the 2011 Lincoln Institute Study, CLTs reporting a median of three funding sources, of which 29 percent listed "other local government source" as a funding source; 11 percent listed a "Local Housing Trust Fund" as a funding source; and 9 percent listed inclusionary zoning as a funding source.<sup>28</sup>

The growth in the number of CLTs has been exponential: a 2008 study found that nearly 20 CLTs were started every year either as new nonprofits or as programs or subsidiaries of existing organizations.<sup>29</sup> There are currently at least 250 CLTs operating in the U.S., according to the National Community

Land Trust Network.<sup>30</sup> The 2011 Lincoln Institute Study found CLTs operating in 46 states and the District of Columbia.<sup>31</sup>

Despite the exponential growth in the number of CLTs, it is estimated that less than 2 percent of the nation's housing stock is in any type of shared-equity ownership with an even smaller portion in CLT-owned housing.<sup>32</sup> The 2006 Lincoln Institute Study found that most CLTs have less than 100 housing units, which indicates that most CLTs are still operating on a relatively small basis.<sup>33</sup> The 2011 Lincoln Institute Study found that the median number of units per CLT was 29.5, while 75 percent of CLTs had less than 57 units.<sup>34</sup> In 2006, properties in CLTs—nearly 7,000 units reported by survey respondents, and thus an undercount of the total number of units because of non-responding CLTs—were almost equally split between home-ownership and rental units.<sup>35</sup> Respondents to the 2011 Lincoln Institute Study indicated owning a total of 9,542 units, which included 3,669 home ownership units with resale-restrictions and 5,391 rental units.<sup>36</sup> While this is also an undercount because of non-responses to the survey from active CLTs, it does indicate that CLTs appear to be increasing the number of units nationally, although perhaps not at a rate commensurate with the tremendous growth of the number of CLTs that formed over the same five-year period.<sup>37</sup> Respondents to the 2011 Lincoln Institute Study also indicated that 13 CLTs also operated a total of 96 commercial spaces while 12 CLTs reported land conservation among their activities stewarding a total of 17,431 acres in rural and urban areas.<sup>38</sup> The Champlain Housing Trust is the largest CLT in the country managing over 1,500 rental apartments and over 500 single-family residential units.<sup>39</sup>

Despite the still nascent size of the CLT movement, the rapid rise of municipal interest in CLTs in the last few years has the potential to bring CLTs into the mainstream and, overnight, dramatically increase the number of units in CLTs.<sup>40</sup>

### III. The "Classic" CLT structure

Over the decades of the CLT movement, a common formula has emerged for CLTs, which has

been reduced to 10 characteristic features covering the ownership, organization, and operation of CLTs by John Emmeus Davis and other prominent proponents of the CLT movement.<sup>41</sup> This "classic" CLT structure is briefly reviewed here as a benchmark against which to explore how CLTs have been theoretically conceived, how CLTs have shifted from that theory in practice, and how that theory may be further challenged as more cities adopt CLTs.

#### a. Ownership

The ownership structure of CLTs is arguably its most distinctive feature that separates it from other forms of affordable housing.

*Dual ownership.* In a classic CLT, parcels are purchased by the CLT, which is typically a non-profit corporation. The land portion of the parcel is severed from any improvement on the land, with the intention that the CLT will hold the land in perpetuity and in trust for the community. Any improvement on the land is sold as private property typically to individual homeowners, but potentially also to other nonprofit housing providers or governmental entities.<sup>42</sup>

*Leased land.* CLTs provide a ground lease to the owner of the improvement on a parcel, which permits the improvement owner to have exclusive use of the parcel. The ground lease typically runs for 99 years and is renewable and inheritable.<sup>43</sup> The 2011 Lincoln Institute Study indicates that the ground lease remains the most used restriction on resale price, as 82 percent of CLTs reported relying on this mechanism.<sup>44</sup> However, the same study also indicated that CLTs are increasingly using other legal mechanisms, including mortgage documents and promissory notes (19%), as well as deed covenants (on property (18%); on condominiums (19%)).<sup>45</sup>

#### b. Organization

The organizational structure of CLTs is based in nonprofit corporate governance but with a special emphasis on resident and community control of the CLT.

*Nonprofit, tax-exempt organization.* Most CLTs are independent, nonprofit organizations chartered in the state in which they operate and with a purpose of providing low-income housing, but may also have broader objectives such as community development or assisting governmental functions. Most CLTs operate as 501(c)(3) organizations.<sup>46</sup>

*Tripartite governance.* The most common governance structure for CLTs has a board of directors with equal representation from each of three interest groups: leaseholders, which are represented by directors who lease land from the CLT; the general community, which is represented by directors who live in the areas where the CLT operates but that do not lease land from the CLT; and the public, which is represented by directors that are public officials, those who provide funding to the CLT, or other community leaders. This unusual structure is intended to ensure that the underlying land assets are used to further community goals.<sup>47</sup> This structure, utilized by 30 percent of CLTs in the 2006 Lincoln Institute Study,<sup>48</sup> is also a likely reason why CLT boards typically have 9, 12, or 15 directors.<sup>49</sup> On the other hand, in the 2011 Lincoln Institute Study, the median percentage of resident board members was just 11 percent, and 41 percent of CLTs had no residents on the board, an indication that many of the newer CLTs are not using this traditional tripartite structure.<sup>50</sup>

*Place-based membership.* Most CLTs operate within a specific rural region or urban neighborhood, and typically voting membership in the CLT is limited to those that reside within the CLT service area. This traditional structure is increasingly challenged by municipal CLTs that service entire cities, and some CLTs that serve entire states.<sup>51</sup> In addition, other community-based organizations, such as neighborhood councils, are increasingly offering voting rights to those that reside outside of the community but that can illustrate a “vested interest” in the community,<sup>52</sup> which may influence how CLTs also address the question of place-based representation.

*Resident control.* In the tripartite governance structure, two-thirds of the CLT’s board of directors are nominated by, elected by, and composed of people who either live on the CLT’s land or live in the CLT’s target community.<sup>53</sup>

### c. Operation

The unique on-going administrative aspects of how CLTs operate directly results from the ownership and governance structures that form basis of the CLT.

*Perpetual affordability.* Continued affordability of the improvement on CLT land, such as a single-family residential unit, is guaranteed through two provisions. First, the CLT retains the right to repurchase the improvement when it is sold; 80 percent of CLTs in the 2006 Lincoln Institute Study used this provision.<sup>54</sup> Second, the resale price is determined by a formula that ensures the unit is affordable to the new buyer while also permitting the seller to participate in the improvement’s equity.<sup>55</sup> The most common resale formula is the appraisal-based formula, which uses appraisals at the time of purchase and at the time of sale to determine the property’s appreciation, a percentage of which is then added to the original purchase price and claimed by the homeowner at resale.<sup>56</sup> The most common percentage used for homeowner participation in equity by CLTs is 25 percent.<sup>57</sup> This also means that the CLT housing unit, at resale, is increasing in price by 25 percent of the original purchase price, but also costing just one-fourth of the community’s market appreciation. This aspect of CLTs likely helps to explain why CLTs have become especially popular in cities that have seen marked housing price appreciation.

*Perpetual responsibility.* Because the goal of the CLT is to retain perpetual affordability of the unit, it also means the CLT retains perpetual responsibility for ensuring that the unit remains habitable and within its ownership. CLTs retain the right to improve properties that fall into disrepair and, should the owner of the unit fail to meet the terms of a mortgage, the CLT retains the right to intervene and prevent the unit from going into foreclosure.<sup>58</sup>

*Expansionist acquisition.* CLTs seek not only to retain existing units but to expand the number of CLT units in the community served. CLT units are not typically located in one concentrated block, but rather, are scattered across the community area served.<sup>59</sup>

*Flexible development.* Although CLTs have typically owned and operated primarily single-family residential units and residential rental properties, the development model is not limited to these types of properties. CLTs can also develop commercial properties, neighborhood parks, and provide locations for nonprofit organizations that might otherwise not be able to afford space within the community.<sup>60</sup>

While there are few CLTs operating strictly within these 10 characteristics of the “classic” CLT model, these characteristics provides a useful framework for understanding how CLTs have evolved, and how the municipal trend in CLT adoption is adapting this framework.

#### IV. The rise of city CLTs

Although the 2006 Lincoln Institute Study and the 2011 Lincoln Institute Study clearly demonstrate a dramatic rise in municipal involvement with CLTs, there is no definitive list of city-sponsored CLTs. Chicago, Illinois and Irvine, California are illustrative of the rise of major cities that are sponsoring city-wide CLTs, and are arguably two of the most ambitious of the new wave of city CLTs. In 2005, Chicago announced its intention to start a citywide CLT that would be staffed by the City of Chicago Housing Department.<sup>61</sup> In May, 2006 Irvine announced its commitment to fund the Irvine Community Land Trust.<sup>62</sup> This section investigates both of these CLTs as the vanguard of how CLTs, which in the hands of housing activists typically contained less than 100 units in a CLT’s serviced neighborhood, is being reimagined as a way to hold and manage thousands of units across large metropolitan areas.

##### a. Chicago Community Land Trust

*Background and scope.* The creation of the city-wide Chicago Community Land Trust (the “Chicago CLT”) was announced in December, 2005 by then-Mayor Richard Daley.<sup>63</sup> The Chicago CLT is just one part of the city’s broader affordable housing portfolio, which has produced 125,000 units of affordable housing since 1989,<sup>64</sup> and in which the Chicago Housing Authority provides housing

to over 50,000 families through 9,000 senior-living units, 8,600 family-housing units, and 37,000 vouchers that enable low-income residents to rent in the private market.<sup>65</sup> Despite this substantial effort, Chicago faced a dilemma: many of its for-sale affordable units were secured by soft-second mortgages, which had the net effect simply of ensuring that the city had an interest sufficient to retain the unit if it went into foreclosure and provide a subsidy to the next owner in the amount of the mortgage loan to the first owner. However, as owners that purchased such units could sell their units at market rate, they could repay the soft-second mortgage, but that repayment was insufficient for the city to use to aid the next homeowner purchase the unit then selling at market rate.<sup>66</sup> In addition, Chicago was also increasingly drawn to the CLT model by appreciation in its housing market, stagnant wages, and the decrease in federal housing subsidies.<sup>67</sup>

Chicago’s CLT planned to close on 150 units for its CLT in 2007 and 150 to 200 units each year thereafter.<sup>68</sup> However, because the Chicago CLT relies upon private development to generate units,<sup>69</sup> the slowdown in housing starts during the recession significantly impeded this goal. By November, 2007, the Chicago CLT had closed on just 10 units,<sup>70</sup> and by Spring, 2013, the Chicago CLT reportedly had 66 units of housing that are distributed through market-rate housing projects across the city.<sup>71</sup> Although the recession has substantially lessened the growth of the Chicago CLT, it would seemingly be poised to grow substantially with the return of market rate development in the current economic environment.<sup>72</sup> If the Chicago CLT grows at the rates previously predicted in an economic recovery, it could quickly become one of the largest, if not the largest, CLT in the country.

*Structure of Chicago CLT ownership.* Each Chicago CLT unit sale requires the recordation of a detailed restrictive covenant.<sup>73</sup> The restrictive covenant’s term is 99 years, which is renewed at the time of each sale, and this is intended to ensure that the unit is covered by the terms of the restrictive covenant in perpetuity.<sup>74</sup> The Chicago CLT thus never owns either the land or the improvement associated with the unit, and thus this

method does not sever the land from the improvement as the classic CLT model does.<sup>75</sup>

Several terms of the restrictive covenant are of particular note. First, the restrictive covenant limits resale of units to an income-qualified buyer at an affordable price.<sup>76</sup> In general, buyers are income-qualified if they do not earn more than 100 percent of the Area Median Income, as calculated annually by the U.S. Department of Housing and Urban Development (AMI), and would not spend more than 30 percent of their gross income on total housing-related costs, including taxes, assessments, and mortgage insurance, for a unit.<sup>77</sup> Second, the restrictive covenant establishes that the resale price of the unit is the lower of: the current fair market value, as established by an appraiser; an amount that is affordable to a household earning 120 percent of AMI; or an appraisal based formula similar to that used in classic CLT models.<sup>78</sup> The first step of this formula is to subtract the initial fair market value of the unit from the current fair market value to determine the market value appreciation during the time of ownership. The second step is to multiply the market value appreciation by the applicable homeowner equity participation percentage, which ranges between 12 to 25 percent, on the basis of the difference between the current fair market value and the reduced sale price as determined by the restrictive covenant's terms.<sup>79</sup> The third step adds the homeowner's share of appreciation to any debt on resale due to the Illinois Housing Development Association and the original subsidized purchase price, which becomes the base price. In the final, fourth step, the Chicago CLT can add 3 percent to the base price if it exercises an option to purchase the unit.<sup>80</sup> It is anticipated that this final, appraisal-based method will typically be the applicable provision determining the resale price.<sup>81</sup>

Other important terms of the restrictive covenant require that the unit must be used and occupied as principal residence for at least 9 consecutive months out of each year;<sup>82</sup> restrict the use of risky mortgage products;<sup>83</sup> require counseling for refinancing and taking out of homeowner's equity;<sup>84</sup> govern construction on the unit;<sup>85</sup> and provide for inheritance of the unit.<sup>86</sup>

*Structure of Chicago CLT governance.* The Chicago CLT is a nonprofit organization housed at the City Department of Housing and Economic Development.<sup>87</sup> It has its own board of directors made up of representatives from development companies, community-based organizations, banks, the legal community, funders, and others active in affordable housing, all of which are appointed by the Mayor with advice and consent of the City Council.<sup>88</sup> Once the Chicago CLT is administering 200 units, one-third of the board will be Chicago CLT homeowners.<sup>89</sup> The start-up administrative costs of the Chicago CLT were aided by a John D. and Catherine T. MacArthur Foundation three-year grant of \$396,000.<sup>90</sup> As the Chicago CLT evolves, the ongoing administrative fees are expected to be covered, in part, by a covenant fee of \$25 per month assessed on each CLT unit.<sup>91</sup>

*Methods of funding the Chicago CLT.* The Chicago CLT is financed through applicable federal and state subsidy programs that can be applied to homeownership.<sup>92</sup> However, the Chicago CLT anticipates that most of its units will ultimately be built by market-rate developers complying with the city's inclusionary zoning requirement that, in general, requires projects of 10 or more units that receive certain types of zoning changes must dedicate 10 percent of project units as affordable or donate \$100,000 to the city's Affording Housing Opportunity Fund.<sup>93</sup> Projects receiving financial assistance from the city to dedicate 20 percent of units as affordable.<sup>94</sup> Placing units in the Chicago CLT is one way that developers can satisfy these inclusionary requirements.<sup>95</sup>

*Property tax.* Another important issue arising with homeownership in areas with rapidly appreciating home values is controlling property taxes. The Chicago CLT worked with the Cook County Assessor's Office, which agreed to assess Chicago CLT homes based on the affordable price rather than on the market value.<sup>96</sup> This is an example of the kind of coordination and assistance that CLTs closely aligned with, or operated by, cities can provide.

*Other assistance.* The Chicago CLT also provides other types of support for those occupying its units, which includes pre- and post-purchase workshops; resources and referrals to assist with

common first-time homeowner questions and to help homeowners and condominium associations address larger issues where CLT properties are integrated into market-rate condominium projects; assistance in filing property tax incentives appeal forms for reduced property taxes; pre-purchase homebuyer counseling and educational materials specific to the Chicago CLT; a pool of lenders educated about the Chicago CLT and willing to provide mortgages to qualified homebuyers; a pool of attorneys trained on the Chicago CLT and the unique Chicago CLT's closing process; resale assistance; and default and foreclosure prevention assistance. The Chicago CLT also maintains a newsletter and holds meetings for its homeowners that address homeowner basics like planning for furniture buying and house maintenance.<sup>97</sup> Through these programs, the Chicago CLT seeks to ensure that its homebuyers are successful by maintaining a more connected relationship than would a typical lender.

#### b. Irvine Community Land Trust

*Background and scope.* The Irvine Community Land Trust (Irvine CLT) was borne of three factors. First, at the time of the Irvine CLT's creation in 2006, the City of Irvine had a median single-family home price of \$800,000, which was substantially higher than its surrounding county and California medians.<sup>98</sup> Further, while incomes in California generally had increased 150 percent between 1980 and 2002, the median price of housing in the state had increased 375 percent, an illustration of the widening wages and housing price gap.<sup>99</sup>

Second, Irvine wanted to find a way to maintain affordable housing options within its city, which it had been pursuing since 1971.<sup>100</sup> By 2006, the city had 4,400 affordable housing units, of which 3,155 had been generated through the city's inclusionary zoning program, and sought to have 9,700 units, or 10 percent of its housing stock, be affordable by 2025.<sup>101</sup> The city faced losing many of those units because existing affordability controls and subsidies on those units were expiring.<sup>102</sup> Irvine faces much the same dilemma under its existing inclusionary zoning requirements, which require projects over

50 units to dedicate 15 percent of all new units to be affordable;<sup>103</sup> however, developers are given a "menu" of options from which to choose to meet those requirements, including making the units affordable for 30 years; extending affordability on an existing unit for 40 years; payment of in-lieu fees; or land dedication; among other options.<sup>104</sup> The history of losing affordability units after expiration of the affordability term of years expired made the city increasingly turn towards options that favored land dedications that could promise longer-term affordability, such as a CLT.<sup>105</sup>

Finally, the city faced a historic opportunity with its then-pending annexation and redevelopment of the adjacent, decommissioned El Toro Marine Corps Air Station.<sup>106</sup> Among uses proposed for the site were 3,625 new residential units, which would be subject to the inclusionary zoning requirements. Further, California redevelopment law at the time required that 20 percent of tax increment funds generated from the project site to be used to improve affordable housing, which the city then valued at \$143 million.<sup>107</sup> The city sought a way to use this potential funding in a way that would result in permanent affordability.<sup>108</sup>

*Structure of Irvine CLT ownership.* The Irvine CLT follows the classic CLT model of dual ownership by selling the improvement to the new resident as well as a 99-year ground lease, which gives the new resident exclusive use of the land in which the Irvine CLT retains ownership.<sup>109</sup> The resale price of the unit is determined by adding the initial purchase price, the percentage change in the AMI for surrounding Orange County, California over the time of homeownership times the initial purchase price; and the value of any approved capital improvements.<sup>110</sup> The Irvine CLT has also established threshold and priority criteria to determine program eligibility. Threshold criteria include: applicants must be at least 18 years old; applicants must pre-qualify with a prime mortgage lender; applicants must attend an Irvine CLT orientation; applicants must sign a statement agreeing to the resale price restrictions; applicants must have at least 5 percent of the total purchase price to contribute at the time of purchase; and applicants must be below the maximum income limit expressed as a

percentage of AMI based on household size.<sup>111</sup> Priority is given to applicants who have been living in Orange County a minimum of one year prior to the application date; applicants who have been working in Orange County for a minimum of one year prior to the application date; and to applicants whose household size is appropriate for a given available unit.<sup>112</sup>

*Structure of Irvine CLT governance.* All seven members of the nonprofit Irvine CLT corporate board were appointed by the city.<sup>113</sup> Over time, the board intends to transition to a form of the tripartite governance structure of the classic CLT model, which at that time will include: two board members appointed by the city; two board members that are residents of Irvine CLT properties elected by residents of Irvine CLT properties; and three board members that are residents of the community filled by the board of directors.<sup>114</sup> This transition in representation has not yet occurred.<sup>115</sup>

*Methods of funding the Irvine CLT.* In March, 2006, Irvine approved the creation of the Irvine CLT with the vision that it would possess 5,000 affordable units by 2025, a size equal to nearly half of all other CLT units in the country.<sup>116</sup> However, because the Irvine CLT intended to receive a number of its units through developers' fulfillment of inclusionary zoning requirements, described previously, the growth of the CLT, as in Chicago, has been slower than anticipated because of the housing slowdown in the recession.<sup>117</sup> The Irvine CLT also anticipates developing properties where land is donated, either in satisfaction of inclusionary requirements, or for other reasons.<sup>118</sup>

### c. Evaluating the Chicago CLT and Irvine CLT

Both the Chicago CLT and the Irvine CLT provide examples of how cities are redefining the classic CLT model in ways that fit their needs for a new affordable housing tool. First, the anticipated size of both the Chicago CLT and the Irvine CLT will dwarf all other existing CLTs, as each would contain almost as many units as all other CLTs in the nation taken together. While neither CLT has met its anticipated size, with the return of market

rate housing development, they are likely to see increased growth in the coming years.

Second, Chicago is utilizing a covenant restriction to guarantee long-term affordability, a novel approach for a CLT in which it actually holds no interest in the land of the unit. The Irvine CLT, on the other hand, is using a more traditional 99-year ground lease. The use of these different tools likely arises from the particular situations of the two cities: Chicago would likely have a difficult time assembling land for development within its borders, while Irvine has the unusual situation of annexing a former military site that will grant it an opportunity to find lots to purchase. Response to such local circumstances may ultimately determine the best approaches for local governments in choosing a property acquisition approach.

Third, the Chicago CLT and the Irvine CLT have taken different approaches to determining the resale price of the unit, with Chicago using an appraisal method while Irvine using an AMI-based method. Interestingly, both CLTs sought to respond to a similar underlying issue: the rising cost of housing in a community with stagnant wages. This indicates that there is no one universal formula shown to work in all cases; rather, different cities will likely choose differing approaches to structuring CLTs even where motivated by the same interests, especially in the early formative years of larger CLTs.

Fourth, both the Chicago CLT and the Irvine CLT redefined the classic CLT model to encompass not only a traditional neighborhood, but a whole city. This changes the dynamics of representation for a CLT, which in the classic CLT model was also an advocate for a specific community or neighborhood in the city.

Fifth, both the Chicago CLT and the Irvine CLT maintained city control of the CLT boards of directors in the opening years of the CLT with proposed transition to community and resident representation as the CLTs grow. While this makes sense given the scale of the CLTs proposed, it does represent a departure from the classic CLT model that prioritizes resident and community input as a way to ensure that the CLT's property is maintained in the community interest.

These illustrations of how large city CLTs are changing the classic CLT model also show how no one clear model for such city CLTs has emerged, but rather, how cities are changing the CLT model to respond to the specific circumstances faced by the local government's opportunities and challenges.

## V. Legal and policy issues with city CLTs

A number of excellent sources provide guidance on legal issues that may arise in CLTs.<sup>119</sup> This section will highlight some of the legal and policy issues that may arise as CLTs operated by cities continue to grow.

*Are restrictive covenants equivalent to ground leases?* According to the 2011 Lincoln Institute Study, nearly 20 percent of CLTs are utilizing covenant restrictions to preserve the CLT's affordable unit rather than a ground lease,<sup>120</sup> as illustrated in the Chicago CLT example.<sup>121</sup> Covenant restrictions have several important benefits: they avoid the challenge of land acquisition, one of the major problems that has limited the growth of the CLT movement; they avoid perceptions of "second-class" ownership that can accompany the ground lease model; and they offer a simplified legal structure that can facilitate lender comfort with the ownership structure.<sup>122</sup> On the other hand, some commentators have argued that covenant restrictions are relatively untested and may face unexpected legal challenges. For instance, because CLTs enforced with restrictive covenants do not own the land, the city would be in a position of having to seek enforcement of a restrictive covenant against a foreclosing lender. There is also a potential argument that restrictive covenants violate the rule against perpetuities or the rule against restraints on alienation.<sup>123</sup> While these arguments may present relatively weak challenges to CLTs that utilize restrictive covenants, they remain unsettled issues of which CLTs that proceed with restrictive covenants should be aware.

*Eligibility of CLTs for city's affordable housing funding sources.* The unusual ownership structures of CLTs do not always align easily with affordable housing subsidy programs. Cities will want to think through a number of funding issues before integrat-

ing CLTs into their affordable housing programs. For instance, the Low Income Housing Tax Credits (LIHTC) program is one of the largest sources of affordable housing development, but requires that a project operate as affordable rental housing for a fifteen year compliance period, which has been a barrier to using LIHTC to fund CLTs. At the same time, at least 10 CLTs have been able to use LIHTC to finance affordable rental housing controlled by CLTs.<sup>124</sup> LIHTC-funded projects may also be able to finance CLTs long-term. For instance, the owner of an LIHTC-funded project could sell the project to a CLT in year fifteen, at the end of the compliance period, at which time the CLT could re-sell the individual units to tenants while entering into a long-term ground lease preserving the affordable units in perpetuity.<sup>125</sup>

*Community board representation.* In a similar vein, representation on the CLT board by those living in CLT units, although a longstanding part of the CLT model, can cause some to question whether this invites self-dealing. For instance, HOME regulations have been read by some to prohibit participation on CLT boards of anyone living in a HOME-assisted housing unit.<sup>126</sup> For cities relying upon HOME funds to fund CLTs, careful review of these regulations may influence the board composition chosen by such cities.

*City control over the CLT.* Because the CLT typically operates as a 501(c)(3) nonprofit corporation that is technically independent, the city will want to carefully structure its relationship to and oversight of the CLT. For instance, the city may require a CLT to meet certain standards before receiving city resources, and cities may want to retain control over how the CLT operates in key aspects of service delivery, such as how homes are marketed, as well as how eligibility, occupancy and affordability provisions of CLT homes are applied. The city may also want to include terms in its agreement with the CLT provisions for how the city may intervene in the CLT's affairs should the organization not perform as promised.<sup>127</sup>

*Loss of community organizing aspect of CLTs.* While affordable housing was always central to the CLT movement, its origins were also in broader efforts that included community organizing.

City CLTs are unlikely to possess these characteristics, especially since much community organizing is often aimed at the policies of city hall. Cities will have to decide how much of the broader community organizing component they want their CLTs to pursue, or whether cities ultimately want to reduce the CLT to being just one more component of the city's affordable housing strategy.

*The problem of perpetuity.* Cities change over time; a hip and fashionable neighborhood of one generation can fall into disrepair the next, while blighted neighborhoods are reinvigorated. While most cities grow, some cities shrink as their populations chase opportunity elsewhere. While perpetual affordability is a benefit of CLTs, the long-term implications of maintaining affordable housing stock in the same location over generations is one that has no real precedent. Cities will want to think through the implications of maintain perpetual ownership of specific properties in the CLT, and whether additional terms to the CLTs organizing documents might be warranted to provide flexibility to generations to come.<sup>128</sup>

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## VI. Why cities should consider starting CLTs now

There are a number of good reasons why cities should consider starting city-based CLTs in the present economy. After years of recession in which housing starts stagnated, many parts of the country are seeing housing starts rise, tightening housing stocks, and with them, housing price appreciation. For those cities that fund affordable programs through inclusionary zoning ordinances, the rise in market-rate unit production also means new production of affordable units or, at a minimum, the influx of in-lieu fees or land dedications. Having a CLT structure in place to accept those new inclusionary units, fees and dedications would be preferable to establishing a CLT mid-way through the next boom cycle. Further, a CLT established now would ensure that inclusionary units built in the next boom cycle are affordable in perpetuity, as opposed to just 30 or 40 years, as many inclusionary zoning requirements now dictate.

At the same time, land and housing prices still remain low in many parts of the country relative to prices in the mid-2000s.<sup>129</sup> For CLTs seeking to purchase land, now may represent one of the best foreseeable opportunities to purchase land at reasonable prices.

The reduction in federal and state affordable housing subsidies is another reason why now is a good time to start a CLT that can ensure affordability in perpetuity. Given the existing climate in the federal and many state capitols, affordable housing subsidies are unlikely to dramatically increase any time soon, and face an uncertain future even at existing funding levels.<sup>130</sup> At the same time, inclusionary zoning ordinances are also facing an increasing number of legal challenges, and losing some of those battles.<sup>131</sup> Diversifying approaches to affordable housing, such as through adding a CLT, provides one more path to affordable housing production.

The continually growing disparity between housing costs and household income is also likely to be exacerbated as the economy recovers. As a matter of policy, major cities that recognize high housing appreciation in their communities, as Chicago and Irvine did in the mid-2000s, should consider CLTs as part of the solution to that gap. The equity participation of homeowners in the CLT model is one additional way that CLTs provide additional assistance in overcoming the housing – wages gap.

Finally, given how foreclosures ravaged many low-income communities during the recession, it is worth noting that, nationally, CLT homes were 10 times less likely to go into foreclosure than market rate homes during the recent recession.<sup>132</sup> This is an indication that an investment in CLTs could help low-income communities better weather future recessions to come.

These are but some of the reasons why a number of cities are already incorporating CLTs into their affordable housing programs. Although CLTs presently remain a nascent movement, municipal use of CLTs is likely to bring it to the fore of affordable housing policy in the decade ahead, a trend that cities are well advised to get ahead of now.

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