

**Article**

**If It's Not Mixed-Income, It Won't Be Transit-Oriented: Ensuring Our Future Developments Are Equitable & Promote Transit**

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\* J.D. candidate, 2014, University of Denver, Sturm College of Law. I am profoundly indebted to Susan Daggett of the Rocky Mountain Land Use Institute for her supervision over this research and for inspiring my interest in TOD and automobile independence. I would also like to thank my parents and family for their love and support. Specifically, I would like to thank my uncle, Herbert V. Larson, Jr., in whose long jurisprudential shadow I am happy to tinker.

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I. INTRODUCTION

Transit-Oriented Development (TOD) represents a promising strategy for achieving sustainable development. It offers an opportunity to break the relatively young—but ultimately destructive—cycle of automobile dependence that grips American culture. Properly implemented, TOD encourages the efficient use of land and resources by promoting higher population densities, which as a corollary, helps to conserve open spaces. By encouraging transit use and multi-modal transportation, TOD reduces automobile dependence and, therefore, reduces greenhouse gas emissions and promotes healthier lifestyles. It also protects lower-income populations from marginalization by offering mixed-income housing in a connected and socially and economically diverse setting.

It is encouraging to note that demand for TOD is booming.<sup>2</sup> It is in such demand, in fact, that supply cannot keep up. The result is that the TODs that are being built are expensive to live in and cater to the higher end of the market.<sup>3</sup> For reasons this article will explore, a TOD that does not offer mixed-income housing is not a true TOD. A diverse economic cross-section is a crucial element of an effective TOD.

The current popularity of TODs is a recipe for exclusivity. This popularity, however, is troublesome when one considers the facility (and tendency) for TODs to be built in existing neighborhoods with proven transit ridership. When TODs are planned and built in existing, often historic, neighborhoods, gentrification is a common result. And while gentrifica-

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2. See *2007 Demand Estimate Update*, CENTER FOR TRANSIT-ORIENTED DEVELOPMENT, <http://www.ctod.org/portal/sites/default/files/2008demestctod.pdf>.

3. *Center for TOD Demand Estimate Update*, RECONNECTING AMERICA (Feb. 13, 2008), <http://www.reconnectingamerica.org/resource-center/books-and-reports/2008/center-for-tod-demand-estimate-update/>.

tion is a very real issue in its own right, it presents a formidable challenge to TOD's viability as a tool for sustainable development.

This article will develop, more fully, the threat that gentrification poses to the fulfillment of TOD principles starting with an overview of TOD and its rise to vogue. It will make clear the importance of mixed-income housing near transit and the connection that affordable housing has to sustainable development. It will then discuss some of the planning, regulatory, and strategic tools available to combat the current trends threatening to reduce a promising mechanism for sustainable urban development into a series of trendy, monied districts.

And because the problem of gentrification does not exist in a vacuum, this article will discuss these problems and potential solutions to them through the lens of a particularly susceptible neighborhood in Denver, Colorado: the historic Five Points neighborhood. Five Points lies just northeast of downtown Denver and is one of the fastest-gentrifying neighborhoods in the country. A historically African American neighborhood that struggled economically through the last portion of the 20th century, Five Points is (somewhat suddenly) the focus of renewed development and economic influx. Because of the light rail line running through it, Five Points is primed to become a premier TOD project for the city of Denver. This article will examine the tools available for burgeoning TODs with an eye toward their actual application within Denver's land-use climate.

## II. TRANSIT-ORIENTED DEVELOPMENT (TOD)

### A. TOD HISTORY & KEY PRINCIPLES

Transit-Oriented Development, as a development phenomenon, is not a new concept. Urban centers around the world have employed TOD principles, if unwittingly, for over a century.<sup>4</sup> Before the automobile was established as the dominant form of American transportation, TODs were the de facto shape of the suburban United States.<sup>5</sup> As populations moved away from the noise, filth, and congestion of urban inner cities, rail lines followed along as the primary means of connection to urban amenities and services.<sup>6</sup> Early suburban neighborhoods embodied the very principles that millions of automobile-weary renters and buyers are now seeking in their housing options<sup>7</sup>: "Typical features of these early

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4. Brett Hondorp, *Envisioning Neighborhoods With Transit-Oriented Development Potential, Appendix B: History of Transit-Oriented Development*, MINETA TRANSP. INST., 93 (2002), <http://transweb.sjsu.edu/MTIportal/research/publications/documents/01-15.pdf>.

5. *See id.*

6. *Id.* at 94.

7. *TOD 101: Why Transit-Oriented Development and Why Now?*, CENTER FOR TRANSIT-ORIENTED DEVELOPMENT and RECONNECTING AMERICA, 8 (Mar. 28, 2007), <http://www.recon>

transit neighborhoods included a transit depot and public space in the center of the neighborhood, small cottage-type houses, and a street pattern and scale that allowed convenient walking distances to transit.”<sup>8</sup>

TOD is a broad and nebulous concept. It is not a template for development but the realization of certain principles and attributes: “higher density, residential or mixed use development built within [walking distance] of a transportation corridor.”<sup>9</sup> There is no one shape for TOD because it is the “desired functional outcomes of TOD, not just the physical characteristics” that are beneficial or appealing.<sup>10</sup> When neighborhoods or communities are designed around transit or multi-modal transportation, rather than just around cars, certain benefits are inherent.<sup>11</sup> Communities designed on a human scale, rather than on an automobile scale, are healthier; people walk more; there is less pollution; and there are fewer automobile-related accidents.<sup>12</sup> There are economic benefits: foot traffic for local businesses increases; property values increase (in theory offering cities a chance to incorporate mixed-income housing); transit agencies experience increased ridership.<sup>13</sup> There are environmental benefits: greenhouse gas emissions decrease; consumption of fossil fuels and other non-renewable resources decreases; higher density cities help constrain urban sprawl and conserve surrounding open spaces.<sup>14</sup> And there are human benefits: decreased automobile dependency reduces isolation and encourages a healthier social environment.<sup>15</sup>

With so many advantages of transit-oriented urban spaces—and with its seeds apparently sewn into the fabric of modern urban design—it is easy to wonder how American culture became so separated from the principles TOD embodies, and how we became so mired in a cars-and-only-cars paradigm.

As early as the 1930s, the preference for automobile transit was be-

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nectingamerica.org/resource-center/browse-research/2007/tod-101-why-transit-oriented-development-and-why-now/.

8. Hondorp, *supra* note 3, at 94.

9. Scott LeFaver et al, *Construction of Transit-Based Development*, MINETA TRANSP. INST., 1 (Sept. 2001), <http://transweb.sjsu.edu/MTIportal/research/publications/documents/01-05.pdf>.

10. Dena Belzer & Gerald Autler, *Transit Oriented Development: Moving from Rhetoric to Reality*, 3 (June 2002), <http://ctod.org/pdfs/2002TODRhetoricReality.pdf>.

11. See CENTER FOR TRANSIT-ORIENTED DEVELOPMENT and RECONNECTING AMERICA, *supra* note 6, at 11.

12. See *id.*

13. *Id.*

14. *Id.*

15. See *id.* at 11; see also Todd Litman, *Evaluating Public Transportation Health Benefits*, VICTORIA TRANSP. POLICY INST., 3, 16 (June 14, 2010), [http://www.apta.com/resources/reportsandpublications/Documents/APTA\\_Health\\_Benefits\\_Litman.pdf](http://www.apta.com/resources/reportsandpublications/Documents/APTA_Health_Benefits_Litman.pdf).

ginning to manifest itself in American infrastructure.<sup>16</sup> The spread of the automobile, and the independence of travel it offered, chipped away at the transit-connected shape of early-1900s American cities.<sup>17</sup> After World War II, transit use plummeted and the shape of transit shifted markedly away from fixed-rail transit to buses.<sup>18</sup> Many of the fixed-rail systems that survived the shift to widespread automobile use were expected to work in conjunction with cars as regional commuter systems, rather than as the primary link from suburban areas to city centers.<sup>19</sup> This new automobile-centric shape of America did not spring forth uninvited from a sudden and unified font of middle-class demand, though. The federal government, through the Federal Housing Administration and Veterans Affairs, among others, practically invited the onset of widespread suburbanization: “For decades after [World War II], their loan programs provided millions of mortgages for less money per month than rental payments.”<sup>20</sup> Additionally, it was not existing housing stock in already-developed urban areas for which these programs were available but rather the new homes in suburban areas.<sup>21</sup> And as the interstate highway program grew and connected the nation, the burdens of long-distance commuting faded and the suburban, automobile-dependent planning model took root.<sup>22</sup> The extensive and ubiquitous implementation of this pattern of development is characterized, fittingly, as “sprawl.”<sup>23</sup>

#### B. THE ROLE OF GOVERNMENT IN SHAPING THE URBAN LANDSCAPE

As a result of the great demand for detached, single-family, suburban housing that gripped the nation, the government responded. The 1954 Housing Act “generated more than one billion inflation-adjusted dollars in federal spending for suburban planning.”<sup>24</sup> Since then, government policies and programs have continued to encourage the suburban shape in a number of ways.<sup>25</sup>

1. First, federal transportation policies obscure the true costs of au-

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16. Belzer & Autler, *supra* note 9, at 4-5.

17. *Id.*

18. *Id.* at 5.

19. *Id.*

20. Arthur C. Nelson, *The Mass Market for Suburban Low-Density Development Is Over*, 44 URB. LAW. 811, 811-12 (Fall 2012).

21. *Id.* at 812.

22. *Id.*

23. Dr. Wayne Batchis, *Suburbanization and Constitutional Interpretation: Exclusionary Zoning and the Supreme Court Legacy of Enabling Sprawl*, 8 STAN. J. CIV. RTS. & CIV. LIBERTIES 1, 2 (2012).

24. Nelson, *supra* note 14, at 812.

25. See Jeremy R. Meredith, *Sprawl and the New Urbanist Solution*, 89 VA. L. REV. 447, 474-78 (2003).

tomobile dependence from the public by subsidizing automobile-based infrastructure, thereby indirectly encouraging automobile-dependent lifestyles.<sup>26</sup> This is contrasted with the government's approach to mass transit, which the government views "as a private investment that should not draw upon common taxpayer money."<sup>27</sup>

2. Second, in addition to federal transportation policies, federal housing policies have also facilitated sprawl by simply making low-density, auto-dependent housing cheaper for populations than higher-density, transit-connected housing.<sup>28</sup>

3. Third, exclusionary zoning policies—long ago deemed constitutional<sup>29</sup>—implemented at the municipal level encourage sprawl because they "[m]andate[ ] residential segregation from other land uses and the use of separate zones for various types of businesses, institutions, and community gathering places."<sup>30</sup> This is a practice which "clearly necessitates" further expansion into the urban periphery.<sup>31</sup>

This list is hardly exhaustive, and certainly there are innumerable other historical, social, and economic factors that have contributed to American sprawl.<sup>32</sup> But the point is clear: government policies—federal, state, and local—have directly and indirectly encouraged the sprawling patterns so familiar to our national landscape.<sup>33</sup>

It is important to note that TOD can—and does, occasionally—flourish in the current regulatory climate, which is not designed to advance the goals of the TOD movement. Looking to the three institutional regimes listed above, each presents a challenge to TOD implementation. However, each also represents a potential mechanism by which to encourage or enable TOD, as well.

1. There are signs that the federal government is awakening to the dire need for investment in non-automobile transit infrastructure. In 2012, the FTA allocated \$3.24 billion to the New/Small Starts programs,<sup>34</sup> compared with only \$1.82 billion in 2011.<sup>35</sup>

26. *Id.* at 475.

27. *Id.*

28. *See id.* at 476.

29. *See generally Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926).

30. Batchis, *supra* note 22, at 5.

31. *Id.*

32. *See Meredith, supra* note 24, at 466-74.

33. *See id.* at 474-78.

34. New Starts and Small Starts are the "FTA's primary grant program[s] for funding major transit capital investments, including rapid rail, light rail, bus rapid transit, commuter rail, and ferries." *Capital Investment Program: New Starts, Small Starts, and Core Capacity Improvements*, U.S. DEPT. OF TRANSP. FED. HIGHWAY ADMIN., [http://www.fta.dot.gov/12347\\_5221.html](http://www.fta.dot.gov/12347_5221.html) (last visited Feb. 26, 2014).

35. *Reconnecting America Analysis of FY 2012 New Starts Report*, RECONNECTING

In addition to an overall increase in federal funding for fixed-rail transit projects, the FTA's current transportation legislation, MAP-21, even gives a nod to TOD.<sup>36</sup> MAP-21 makes available \$10 million per year for 2013-14 for TOD pilot projects.<sup>37</sup> Although the available funds are relatively insignificant given the scale of most TOD projects, the federal recognition is symbolically important.

2. By now, the need for high-density urban housing near transit is fully acknowledged.<sup>38</sup> Transit authorities, because of their interest in maintaining and increasing ridership rates, have advocated for an adequate stock of housing near transit.<sup>39</sup> Likewise, departments of transportation, which often own or acquire substantial tracts of land along transit corridors for future transit projects<sup>40</sup> "have placed underutilized state-owned parcels out to bid for high-intensity, mixed-use development by the private sector or non-profit agencies."<sup>41</sup> The housing paradigm is shifting; there is now a recognition of the necessity of investment in TOD as well as in other, more traditional forms of housing.<sup>42</sup>

3. Although the constitutionality of exclusionary zoning practices was upheld in *Village of Euclid*,<sup>43</sup> zoning can be a flexible tool and is not limited to separating uses and facilitating sprawl. Within the ambit of "zoning" are multiple planning techniques well suited to sidestep the rigid patchwork classifications levied by Euclidean zoning that are so inhospitable to the TOD cause. Overlay zoning, for example, creates districts that "are placed 'over' the base zoning for that area and provide flexibility depending on the goals of the specific district."<sup>44</sup> Frequently, areas originally zoned for a single use are overlaid for mixed-use capabili-

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AMERICA (March 2, 2011), <http://reconnectingamerica.org/news-center/reconnecting-america-news/2011/reconnecting-america-analysis-of-fy-12-new-starts-report/>.

36. See Moving Ahead for Progress in the 21st Century Act, Pub. L. No. 112-141, § 20005(a), 126 Stat 405, 628 (2012).

37. *Fact Sheet: Transit-Oriented Development Planning Pilot*, FED. TRANSIT ADMIN (Oct. 22, 2012), [http://www.fta.dot.gov/documents/MAP-21\\_Fact\\_Sheet\\_-\\_Transit-Oriented\\_Development\\_Planning\\_Pilot.pdf](http://www.fta.dot.gov/documents/MAP-21_Fact_Sheet_-_Transit-Oriented_Development_Planning_Pilot.pdf).

38. See *Encouraging Transit Oriented Development: Case Studies that Work*, RECONNECTING AMERICA, 7 (Mar. 2009), <http://www.epa.gov/smartgrowth/pdf/phoenix-sgia-case-studies.pdf> (noting that "low-density uses make travel by car necessary"); see also Douglas Shinkle, *Transit-Oriented Development in the States*, NAT'L CONFERENCE FOR STATE LEGISLATURES, 6, 9 (Dec. 2012), [http://www.ncsl.org/Documents/transportation/TOD\\_Final.pdf](http://www.ncsl.org/Documents/transportation/TOD_Final.pdf).

39. Shinkle, *supra* note 37, at 6, 9.

40. *Id.* at 5.

41. *Id.*

42. See CENTER FOR TRANSIT-ORIENTED DEVELOPMENT and RECONNECTING AMERICA, *supra* note 6, at 3.

43. *Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926).

44. Alexander W. Judd, *Creating the "Green" Line: A Survey of the Transit-Oriented Development Planning Process*, in 35 NO. 6 ZONING & PLANNING LAW REPORT 1 (Patricia Salkin and Lora Lucero eds., June 2012).

ties. The parking requirements included in an original zoning district can also be scaled up or down in the overlay zoning (preferably down if the goal, as with TOD, is discouraging automobile use).<sup>45</sup>

In addition to overlay zoning, there are multiple other zoning techniques useful to foster TOD, including form-based zoning districts. Form-based zoning is an alternative to Euclidean zoning, which designates the use for which an area of land is permitted.<sup>46</sup> Form-based codes are particularly useful to achieve the mixture of uses that makes TODs so appealing and successful.<sup>47</sup>

Many states are beginning to employ these tactics with varying degrees of commitment, but 22 states have at least taken the crucial first step—acknowledging and defining TOD.<sup>48</sup> Wide-ranging state approaches to TOD reflect its burgeoning status. But as discussed, there is no one way to achieve TOD principles, and the fact that states are beginning to pay attention is its own victory. This budding recognition, though, has not been the result of states' own divine providence; rather, new TOD laws are the product of the undeniable demand for connectivity.<sup>49</sup>

### C. DEMAND FOR TOD IS BOOMING

With its ability to promote so many social, environmental, and economic benefits, it should be encouraging, then, to note that market demand for TOD is booming.<sup>50</sup> Americans “increasingly want to live and work in walkable communities that offer transportation choices.”<sup>51</sup> Demographics have shifted away from a preference for automobiles as the sole means of transportation.<sup>52</sup> With rising costs of automobile ownership, it is unsurprising that many Americans are finding other, cheaper modes of transportation.<sup>53</sup> For example, between 2001 and 2011, the number of vehicle miles traveled for people between the ages of 16 and 34 decreased by 23 percent.<sup>54</sup> Moreover, “[i]n the same time period, that age group—primarily approximately 50 million millennials—increased their transit miles by 40 percent and took 24 percent more trips by bicycle and 16 percent more trips on foot.”<sup>55</sup>

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45. *Id.*

46. *Id.*

47. John M. Barry, Note, *Form-Based Codes: Measured Success Through Both Mandatory and Optional Implementation*, 41 CONN. L. REV. 305, 308 (2008).

48. Shinkle, *supra* note 37, at 3.

49. See CENTER FOR TRANSIT-ORIENTED DEVELOPMENT, *supra* note 1.

50. *Id.*

51. Shinkle, *supra* note 37, at 2.

52. *Id.* at 1-2.

53. *Id.*

54. *Id.* at 1.

55. *Id.*



## D. SUPPLY OF TODS CANNOT MEET DEMANDS

Demand for TODs *is* a good thing, and will help shape the future of this country's built (and natural) environment. The problem is the supply of TODs has not matched the voracious demand for it.<sup>56</sup> Indeed, it does not seem that the market has even begun to respond to consumer demands.<sup>57</sup> By 2008 estimates, demands for transit-connected housing were near 15.2 million housing units.<sup>58</sup> For scale, that estimate would require the construction of "2,000 housing units near every [transit] station in the U.S."<sup>59</sup>

The result is a predictable one: "most new [transit-oriented] housing is being built for the high end of the market, and many of the low-income residents who already live in these locations are being forced out."<sup>60</sup> Thus, TODs are susceptible to gentrification. This, in a nutshell, is the problem.

## III. GENTRIFICATION

## A. GENTRIFICATION IN THE U.S.: HISTORY &amp; DEFINITION

Gentrification, as a social phenomenon in the U.S., is directly tied to the history and rise of automobile dependence being addressed in this article.<sup>61</sup> The beginnings of gentrification in the states can, like the rise of automobile dependence, be tied largely to the social, economic, and regulatory climates pervading the country in the post-World War II era.<sup>62</sup> Simple economics—the result of some favorable legislation—made it sensible for post-war veterans to move into the American suburbs and buy a home.<sup>63</sup> The suburban wave of this era emptied many urban centers of large parts of their former populations, eventually leading to what is now known as "urban blight."<sup>64</sup> But while suburban living was widely desired, and for better or worse led to the shape of the country we know today,

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56. See *TOD 201: Mixed-Income Housing near Transit*, CTR. FOR TRANSIT-ORIENTED DEV. at 3 (2009), <http://www.reconnectingamerica.org/assets/Uploads/091030ra201mixedhousefinal.pdf>; see also Nelson, *supra* note 19, at 818.

57. See generally Nelson, *supra* note 19.

58. RECONNECTING AMERICA, *supra* note 2.

59. *Id.*

60. CTR. FOR TRANSIT-ORIENTED DEV., *supra* note 55, at 3.

61. See Isis Fernandez, Note, *Let's Stop Cheering and Let's Get Practical: Reaching a Balanced Gentrification Agenda*, 12 GEO. J. ON POVERTY L. & POL'Y 409, 411-12 (Fall 2005); see also, Nelson *supra* note 19, at 811-12 (together, the histories laid out in these articles show how the mid-20th century exodus to automobile-dependent suburbs was a temporary phenomenon and that the current popularity for transit-connected urban housing is putting pressure on the populations that came to inhabit urban centers over the last 60-plus years).

62. Fernandez, *supra* note 60, at 411-12.

63. *Id.*

64. *Id.* at 411.

the nation's urban centers still had much to offer that suburbs could not.<sup>65</sup> For one thing, jobs were still mostly located in cities, which required suburbanites to commute daily.<sup>66</sup> Additionally, suburbs have traditionally failed to offer arts and cultural opportunities in any way comparable to the opportunities available in urban centers.<sup>67</sup> Finally, cities had existing and indispensable infrastructures that suburbs simply could not copy.<sup>68</sup>

In these ways, cities have remained relevant in the face of widespread suburban demand. And as a result of all the current social, economic, and environmental pressures listed above,<sup>69</sup> “[m]iddle-income earners are likely to come back to city cores.”<sup>70</sup> It is this process, and its associated effects, that we have come to identify as gentrification.

The term *gentrification* has no universally accepted definition (and as will be seen be low, no widely accepted connotation). Black's, however, offers a good working definition of the term: it is “the restoration and upgrading of a deteriorating or aging urban neighborhood by middle-class or affluent persons, resulting in increased property values and often in displacement of lower-income residents.”<sup>71</sup> Gentrification is caused, primarily, by a widespread and resurgent desire to live in an urban center.<sup>72</sup>

#### B. GENTRIFICATION'S GOOD & BAD: DISPLACEMENT & THE FREEMAN STUDY

There is wide debate about whether, and to what extent, gentrification is a good thing. Indeed, “some definitions [of gentrification] focus on the renovation and upgrading of the housing stock, while others concentrate on its socioeconomic effects.”<sup>73</sup> This focus, some argue, ignores certain inherent human detriments and discounts the history and persistence of racial concerns caused by gentrification.<sup>74</sup> Supporters of gentrification's virtues rely chiefly on three main benefits of the process: “1) an increase in the city's tax base; 2) an increase in both consumer and municipal services; and 3) structural/aesthetic improvements in the neighborhood.”<sup>75</sup> To be sure, these benefits are positive by most any measure.

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65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *See infra*, at pp. 11-12.

70. Fernandez, *supra* note 60, at 412.

71. BLACK'S LAW DICTIONARY (9th ed. 2009).

72. Fernandez, *supra* note 60, at 413.

73. *Id.* (internal quotation omitted).

74. *Id.*

75. *Id.*

In fact, the difference between critics and proponents of gentrification (to polarize the issue) seems to be one of perspective. Advocates for gentrification's benefits rely primarily on its utilitarian virtue: an influx of money to cash-strapped cities; a blending of political agendas between economic classes; and a mix of economic and social classes within the same community.<sup>76</sup> Its naysayers, however, focus mainly on its human costs when they espouse three key arguments: "1) there is a loss of 'sense of belonging' or community; 2) gentrification fosters racial tension and class segregation; and 3) people cannot afford to live in their homes anymore."<sup>77</sup>

Displacement of existing populations is a contentious subject.<sup>78</sup> Critics of gentrification are, in some literature, referred to as "liberals" where proponents of it are often referred to as "conservatives."<sup>79</sup> Liberals and conservatives spar over the extent to which displacement is a necessary corollary of gentrification.<sup>80</sup> Liberals contend, of course, that displacement *is* a necessary symptom of gentrification, while conservatives say it is not.<sup>81</sup> In an attempt to offer some empiricism to an often emotional and anecdotal debate, Columbia University professor Lance Freeman conducted a nationwide study, using a baseline control group (an element often missing from displacement data).<sup>82</sup> The study's findings were a mixed bag, with fodder for both groups. While displacement *does* occur in gentrifying neighborhoods, it is a relatively rare occurrence, and gentrification *can* take place *without* displacing existing populations.<sup>83</sup> These findings, the study notes, do not represent a victory for proponents of gentrification.<sup>84</sup> Moving forward, it will be important for the conservative guard to remember that, "although displacement may be relatively rare in gentrifying neighborhoods, it is perhaps such a *traumatic experience* to nonetheless engender widespread concern."<sup>85</sup>

The Freeman study does not seek to downplay the risks associated with new development and gentrification issues.<sup>86</sup> Rather, the takeaway from the new data seems to be that "[r]egardless of what a given study

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76. See J. Peter Byrne, *Two Cheers for Gentrification*, 46 How. L.J. 405, 419-24 (2003).

77. Fernandez, *supra* note 60, at 414-15.

78. See Geoff Wagner, *Virtue & Vice: A Reassessment of Gentrification*, 7 J.L. Soc'y 271, 286-88 (2005-2006).

79. See, e.g., *id.* at 271-75.

80. *Id.* at 286-87.

81. *Id.*

82. *Id.* at 287-88.

83. *Id.*

84. *Id.*

85. Lance Freeman, *Displacement or Succession? Residential Mobility in Gentrifying Neighborhoods*, 40 URB. AFFAIRS REV. 463, 488 (2005), available at <http://uar.sagepub.com/content/40/4/463.full.pdfhtml>.

86. Wagner, *supra* note 77, at 288.

has to say about displacement, there will always been a need for society to anticipate the effects of gentrification on a given area, and to plan accordingly.”<sup>87</sup>

This article proceeds by heeding this admonition. That displacement is a relatively infrequent occurrence does not diminish its threat, and this article will treat the problem as always imminent, and will propose solutions accordingly.

#### IV. THE PROBLEM OF GENTRIFICATION IN TODS

If gentrification carries with it inherent human risks (as mentioned above, (1) a loss of sense of community; (2) increased racial tensions and segregation; and (3) a risk of displacement of lower-income populations), what about TODs makes these risks especially acute? Why is the problem worth narrowing to specifically focus on gentrification within TODs?

##### A. EASING THE BURDEN OF TRANSPORTATION COSTS

It is important to locate low-income housing near transit for the simple reason that it makes life less expensive for families who struggle to make ends meet.<sup>88</sup> Often, low-income housing is “constructed at the ex-urban fringes” of a city.<sup>89</sup> This tendency is harmful because it requires residents of low-income housing to rely increasingly on automobiles to remain connected to urban centers and jobs.<sup>90</sup> The costs associated with automobile dependent housing have skyrocketed:

“According to a 2005 report by the Center for Housing Policy and the Center for Neighborhood Technology, average transportation costs for working families (defined as those households with an income of between \$20,000 and \$50,000) were as high or higher than housing costs in 17 of 28 metro areas in 2005 – before the steep climb in gasoline prices in 2008.”<sup>91</sup>

When one considers that a third of American households spends more than the target 30% of its income on housing, the heavy cost of transportation starts to set in.<sup>92</sup> The average automobile-dependent household is spending a quarter of its income on transportation and around a third of its income on housing.<sup>93</sup> For a shocking comparison, consider that “the combined cost of housing and transportation consumes

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87. *Id.*

88. *The Mixed-Income Housing TOD Action Guide*, CTR. FOR TRANSIT-ORIENTED DEV. FOR THE GREAT CMTYS. COLLABORATIVE, 5 (2009), <http://ctod.org/pdfs/2009MITODActionGuide.pdf>.

89. *Id.*

90. *See* CTR. FOR TRANSIT-ORIENTED DEV., *supra* note 55, at 5.

91. *Id.* at 4.

92. *Id.*

93. *Id.* at 5.

an average of 57 percent of household income, up from 3 percent of household income in the 1920s.”<sup>94</sup> For low-income families especially, the savings leveraged by moving away from high-demand, transit-connected neighborhoods are then compromised on substantially increased transportation costs.<sup>95</sup>

As in business, the mantra, “*location, location, location*” rings true here. The efficient location of housing is a way to make huge headway in one fell swoop.<sup>96</sup> When housing is sited in a “Location Efficient Environment”—that is, a walkable neighborhood with access to transit—families will spend around 9 percent of their income on transit.<sup>97</sup> This is compared to 19 percent of income for the average American family and 25 percent for automobile-dependent exurbs.<sup>98</sup>

This is all to say that transportation costs are not to be discounted. There is often a tendency to ignore the overall costs of transportation compared to housing because transportation costs are pieced out bit by bit, whereas housing costs are typically paid in a single monthly lump.<sup>99</sup>

## B. NON-TOD TODS

Another reason to incorporate mixed-income housing into TOD plans is to realize more fully the transit benefits of TOD. Because transit is the central element of TOD, it is crucial to recognize that low- and middle-income individuals utilize transit at a much higher rate than other economic classes.<sup>100</sup>

Low- and middle-income households utilize transit at a rate more than four times that of higher-income households.<sup>101</sup> According to a study conducted by the National Center for Transit Research at the University of South Florida, households making less than \$15,000 a year account for 28.9 percent of the transit market.<sup>102</sup> Middle low-income households (those making between \$15,000 and \$49,999 a year) account for 39.9 percent of the overall transit market.<sup>103</sup> “Together, these two

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94. *Id.* at 4.

95. *Id.* at 5.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 6.

100. See, e.g., *Building and Preserving Affordable Homes Near Transit: Affordable TOD as a Greenhouse Gas Reduction and Equity Strategy*, CALIFORNIA HOUSING P'SHIP COALITION, 1, (Jan. 2013), [http://www.chpc.net/dnld/FullReport\\_CHPCAaffordableTOD013113.pdf](http://www.chpc.net/dnld/FullReport_CHPCAaffordableTOD013113.pdf).

101. *Id.*

102. Xuehao Chu, NAT'L CTR FOR TRANSIT RESEARCH, AN ASSESSMENT OF PUBLIC TRANSPORTATION MARKETS USING NHTS DATA, 31, (2012), available at, <http://www.nctr.usf.edu/wp-content/uploads/2013/01/77920.pdf>.

103. *Id.*

[groups] capture more than two-thirds of the overall transit market.”<sup>104</sup>

Additionally, 6.1 percent of households nationwide are without vehicles.<sup>105</sup> This small slice of the American population accounts for 48.5 percent of all transit travel.<sup>106</sup> It is hardly surprising that a household’s annual income relates directly to the likelihood of its owning a car.<sup>107</sup> Nearly 27 percent of all households making less than \$20,000 a year do not own a vehicle.<sup>108</sup> At a household income of between \$20,000 and \$39,000, that rate falls to 5 percent.<sup>109</sup> It is thus clear that the non-vehicle owning and lower-income segments of the American population (between which there is substantial overlap) represent the majority of the transit market.

On the other side of the coin, high-income and middle high-income segments (those making \$100,000+ a year, and those making between \$50,000 and \$99,999 a year, respectively) represent a combined total of 31.3 percent of the transit market.<sup>110</sup> Middle high-income households rely on privately owned vehicles (either as driver or passenger) 71.2 percent of the time.<sup>111</sup> The high-income segment relies on privately owned vehicles (either as driver or passenger) 48 percent of the time.<sup>112</sup> In sum, these groups have historically used cars far more and transit far less than low to moderate income people.

Transit agencies make the *transit* in TOD possible. It is important that their needs and goals are met if TOD is to be a viable development strategy in the future. And on paper, TOD *is* appealing to transit agencies. Under its “TOD Basics and Resources” page, Chicago’s Regional Transportation Authority (RTA) asks the question: “Why does the RTA support the use of Transit-Oriented Development?”<sup>113</sup> In its answer, it acknowledges its key interest: “TOD has been shown to help increase ridership.”<sup>114</sup> Continued investment and participation by transit agencies is crucial to TOD implementation. In exchange, however, transit agencies will need to see results in the form of ridership increases, which is among the top priorities of transit agencies around the country.<sup>115</sup>

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104. *Id.*

105. *Id.* at 33.

106. *Id.*

107. See CALIFORNIA HOUSING P’SHIP COALITION, *supra* note 99, at 4.

108. *Id.* at 4.

109. *Id.*

110. Chu, *supra* note 101, at 31.

111. *Id.*

112. *Id.*

113. *TOD Basics and Resources*, RE’L TRANSIT AUTH., <http://rtachicago.com/community-planning/tod-basics-and-resources.html> (last visited Mar. 5, 2014).

114. *Id.*

115. See Terence Plaskon, Stephanie Trainor, and Michael Grant, *Research Results Digest*

Considering the correlation between income and transit usage, one clear way to guarantee the gains in ridership necessary to make TOD appealing to one of its primary stakeholders is to incorporate lower-income housing into the TOD plan: “Nationwide, low income households use transit more than four times as much as those with higher incomes.”<sup>116</sup> It could be argued that middle high- and high-income households would utilize transit if it was readily accessible, say in the form of TOD. This is not always the case, though. In forty percent of areas studied by the Dukakis Center, transit ridership actually declined when a new station opened.<sup>117</sup> This, essentially, was a result of the neighborhoods experiencing increased property values from transit and an influx of higher-income, car-owning residents.<sup>118</sup> “When upper income households move into an area, they are more likely to own motor vehicles and to use them for their commute.”<sup>119</sup>

### C. EQUITABLE CONSIDERATIONS

Beyond the policy and strategic arguments made above, it is important to note, too, that cities should consider incorporating low-income housing into proposed TOD projects as a matter of equity. While much of this article focuses primarily on the threat of displacement to low-income populations as a result of rising costs of living, displacement of existing population can also occur “due to the construction of transit infrastructure or related buildings.”<sup>120</sup> Simply put, when transit and other redevelopment projects are being contemplated, their realization depends, *inter alia*, upon the acquisition of land for the transit corridor.<sup>121</sup> This often entails the acquisition of already-inhabited land.<sup>122</sup> And although the hard data indicates that gentrification-induced displacement is a rare occurrence (even while remaining a real threat),<sup>123</sup> there is other evidence

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358, NAT'L COOP. HIGHWAY RESEARCH PROGRAM 6 (July 2011), [http://onlinepubs.trb.org/onlinepubs/nchrp/nchrp\\_trd\\_358.pdf](http://onlinepubs.trb.org/onlinepubs/nchrp/nchrp_trd_358.pdf).

116. *Building and Preserving Affordable Homes Near Transit*, *supra* note 99, at 3.

117. Stephanie Pollack, Barry Bluestone, & Chase Billingham, *Maintaining Diversity in America's Transit-Rich Neighborhoods: Tools for Equitable Neighborhood Change*, DUKAKIS CENTER PUBL'NS, 24 (2010), [http://iris.lib.neu.edu/cgi/viewcontent.cgi?article=1003&context=dukakis\\_pubs](http://iris.lib.neu.edu/cgi/viewcontent.cgi?article=1003&context=dukakis_pubs).

118. *Id.*

119. *Id.*

120. *Development Without Displacement Development with Diversity*, ASSOC. OF BAY AREA GOV'TS 9 (Dec. 2009), <http://www.bayareavision.org/initiatives/dwd-final.pdf>.

121. *See, e.g., Property Acquisition*, RTD FASTRACKS, [http://www.rtd-fastracks.com/main\\_97](http://www.rtd-fastracks.com/main_97) (last visited Mar. 8, 2014).

122. *See, e.g., Jennifer Sorentrou, Riviera Beach Officials Say New Waterfront Revival Holds Most Promise Ever*, PALM BEACH POST (Feb. 6, 2013, 5:42 AM), <http://www.palmbeachpost.com/news/business/real-estate/after-plans-b-c-d-riviera-beach-officials-say-new-inWG39/>.

123. *See infra*, pp. 14–16.

to suggest that the introduction of TOD principles to a neighborhood increases the risk and likelihood of population migrations, if not full-bore displacement.<sup>124</sup>

Even if the transit agency implementing the TOD plan partners with private entities, “jurisdiction for regulating development in areas subject to a TOD typically resides with the local government.”<sup>125</sup> As such, it follows that local governments are—at least indirectly—responsible for the heightened threat of displacement to low-income populations.

As a matter of equity, then, cities should account for the populations under threat of direct displacement, as well as those at risk of being priced out of their home. The incorporation of low-income housing in TODs is one way of accounting for these populations.

## V. MIXED-INCOME TODS

### A. GENERALLY

Of TOD’s characteristic features—mixed-use; walkability and multi-modal transit; increased density—perhaps the least acknowledged feature of successful TOD is the need for mixed-income housing: “Indeed, a range of housing choices in TOD—‘mixed-income TOD’—is crucial to realizing the full potential of [a] region’s future transit investments.”<sup>126</sup> Mixed-income housing and transit-oriented communities each have their individual benefits.<sup>127</sup> When combined, though, the two achieve certain synergies that maximize the goals of each.<sup>128</sup>

Mixed-income is a rather vague term, and there is no strict set of criteria widely used to determine at what point a neighborhood is ‘mixed-income.’<sup>129</sup> The U.S. Department of Housing and Urban Development (HUD) lists criteria for mixed-income *properties*, but as applied to *neighborhoods* or *communities*, ‘mixed-income’ is more of a catchall for areas somehow embodying certain principles.<sup>130</sup> Specifically, those areas seem

124. See, e.g., *Development Without Displacement Development with Diversity*, *supra* note 119, at 9–30; see also *The Dimensions of Displacement: Baseline Data for Managing Neighborhood Change In Somerville’s Greenline Corridor*, METRO. AREA PLANNING COUNCIL 25–36 (2014), [http://www.mapc.org/sites/default/files/Dimensions\\_of\\_Displacement\\_Final\\_Draft\\_2\\_10\\_14.pdf](http://www.mapc.org/sites/default/files/Dimensions_of_Displacement_Final_Draft_2_10_14.pdf).

125. Robert H. Freilich, *The Land-Use Implications of Transit-Oriented Development: Controlling the Demand Side of Transportation Congestion and Urban Sprawl*, 30 *Urb. Law.* 547, 561 (1998).

126. *Transit-Oriented for All: The Case for Mixed-Income Transit-Oriented Communities in the Bay Area*, THE GREAT CMTY. COLLABORATIVE 16, (2007), [http://communityinnovation.berkeley.edu/publications/GCCFramingPaper\\_FINAL.pdf](http://communityinnovation.berkeley.edu/publications/GCCFramingPaper_FINAL.pdf).

127. *Id.*

128. *Id.*

129. *Id.* at 19.

130. *Id.*



to blend, in various ways, low-income and market-rate housing within the same space.<sup>131</sup> One common division of this blend is, as HUD has employed, an 80/20 split between market-rate and affordable housing.<sup>132</sup> This split is not ideal, and may fail to achieve the integration it seeks; however, it is one common measure of mixed-income attainment.<sup>133</sup>

The benefits of mixed-income neighborhoods, while sometimes difficult to quantify with precision, are evident. Low-income residents gain improved access to services, employment opportunities, and educational opportunities.<sup>134</sup> Diminishing class (and racial) segregation can broaden social and professional networks for individuals who may otherwise be confined to prospects within a particular neighborhood or societal division – which may cause neighborhood decline.<sup>135</sup> Middle- and high-income communities would also benefit from a mixing of incomes as crime rates, education, and social perspectives improve.<sup>136</sup>

#### B. MIXED-INCOME AS A SOLUTION TO GENTRIFICATION ISSUES?

By integrating mixed-income goals into transit-oriented designs, several mutually shared benefits are achieved.<sup>137</sup> Mixed-income TODs offer gains and opportunities for low-income populations, show dividends for TOD stakeholders, and represent a way to prevent the negative human impacts of gentrification, while preserving its economic enhancements.

First, mixed-income TODs create *genuinely* affordable housing.<sup>138</sup> As discussed above, current affordable housing methods marginalize low-income housing at urban peripheries.<sup>139</sup> While the actual housing may be affordable, this trend disregards the huge financial burdens of transportation.<sup>140</sup> Mixed-income TODs alleviate this burden, because transit is cheaper than personal automobile use.<sup>141</sup>

Second, as discussed,<sup>142</sup> mixed-income TODs can help guarantee—and even increase—a base of transit ridership.<sup>143</sup> Mixed-income is the key here, as “there is no guarantee that [higher income TOD] re-

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131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 20-22.

135. *Id.* at 20.

136. *Id.*

137. *See id.* at 21-24.

138. *Id.* at 21.

139. *See infra*, p. 16.

140. *Transit-Oriented for All*, *supra* note 125, at 21.

141. *Id.*

142. *See infra*, p. 20.

143. *Transit-Oriented for All*, *supra* note 125, at 22.

sidents. . . will give up their cars.”<sup>144</sup>

Third, the social benefits endemic to mixed-income neighborhoods—diminished racial and class segregation and increased educational and professional access—would then exist on a much larger scale.<sup>145</sup> Not only would low-income residents have increased opportunities within their neighborhood, but they would also be connected to other neighborhoods by an inexpensive and reliable means of transportation.<sup>146</sup>

Finally, the health and quality-of-life gains promoted by TOD would be extended to an economic cross-section of society.<sup>147</sup> TOD—as a high-density, mixed-use development plan—has been known to increase walking and bicycling as modes of transportation.<sup>148</sup> The undeniable health benefits of these activities would, in a mixed-income environment, be available to everyone equally.

These four areas represent significant social and economic opportunities, as well as the environmental opportunities bolstered by a development strategy that discourages frequent automobile use. The human costs commonly associated with gentrification<sup>149</sup>—sense of community loss; risk of displacement; increased class and racial tensions—are all mitigated by a mixed-income TOD strategy. The benefits associated with gentrification<sup>150</sup>—increased tax base, increased access to consumer/municipal services, and neighborhood structural and aesthetic improvements—are all maximized and made available to all economic societal levels.

In sum, mixed-income TOD *should* be a redundant term. TODs that fail to incorporate mixed-income principles are missing opportunities, and they may be self-defeating in their goals and the goals of the TOD movement:

A growing body of evidence demonstrates that investment in affordable housing that is transit accessible is an important greenhouse gas (GHG) reduction strategy. . . . Simply put, lower income people are more likely than other income groups to walk or take transit and less likely to own a car. Access to high quality transit lowers transportation costs compared to driving, yielding the greatest proportional savings to low income households and freeing up scarce financial resources for other important needs.<sup>151</sup>

Mixed-income TODs, then, offer opportunities that should appeal to both sides of the gentrification debate. However, implementing and en-

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144. *Id.*

145. *Id.* at 20, 22.

146. *Id.* at 22.

147. *See id.* at 23-24.

148. *Id.*

149. *See infra*, pp. 13-14.

150. *Id.*

151. *Building and Preserving Affordable Homes Near Transit*, *supra* note 99, at 2.

forcing the mechanisms necessary to achieve truly mixed-income TODs may be troublesome.

## VI. SELECTED TOOLS FOR ACHIEVING MIXED-INCOME TODS

There is a broad range of tools and strategies available for both encouraging and requiring mixed-income development in TODs. Some strategies are direct and some are indirect. These tools can be regulatory or planning devices; or they can be incentive-based. This section will focus on three particular methods of guaranteeing mixed-income in TODs: one regulatory method, one planning tool, and one social strategy.

### A. INCLUSIONARY HOUSING

One common way to ensure that independent developers do not ignore the needs of low-income populations is to promulgate inclusionary housing devices. Inclusionary housing requires that a specific percentage of a new development project be reserved for affordable housing units.<sup>152</sup> These requirements are built into the zoning typically by city ordinance.<sup>153</sup> Inclusionary housing ordinances will stipulate the particular requirements for developments of a certain size, but generally the individual ordinances mandate somewhere between 10 and 15 percent affordable units.<sup>154</sup>

At first glance, inclusionary zoning is a perfect solution: it is a regulatory tool compelling developers to account for low-income populations, and it appears to integrate economic classes among single developments. Given the high demand for TODs in today's real estate market, inclusionary zoning would also appear to guarantee minimum percentages of low-income housing connected to transit (in markets using inclusionary zoning). Of course, the solution is hardly so simple.

Developers are typically given multiple options within the ordinances to meet their requirements. Inclusionary zoning ordinances have, thus far, walked a fairly fine constitutional line – generally being upheld in state courts, though still unaddressed by the Supreme Court.<sup>155</sup> Inclusionary zoning ordinances have been shaped by a handful of cases and are generally upheld when three conditions are met:

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152. See CTR. FOR TRANSIT-ORIENTED DEV., *supra* note 55, at 17.

153. *Id.*

154. *Id.*

155. Jason McCann, *Pushing Growth Share: Can Inclusionary Zoning Fix What Is Broken With New Jersey's Mount Laurel Doctrine*, 59 RUTGERS L. REV. 191, 200 (2006). (For state law cases: see *Home Builders Ass'n v. City of Napa*, 108 Cal. Rptr. 2d 60 (Ct. App. 2001); *Holmdel Builders Ass'n v. Township of Holmdel*, 583 A.2d 277 (N.J. 1990); *S. Burlington Cnty. NAACP v. Township of Mount Laurel*, 456 A.2d 390 (N.J. 1983); *Bd. of Supervisors v. DeGross Enters., Inc.*, 198 S.E.2d 600 (Va. 1973)).

First, an inclusionary zoning ordinance that violates state compensatory laws and goes beyond the local municipality's zoning authority cannot be enacted. Second, affordable housing set-asides and development fees are valid inclusionary zoning techniques. Third, mandatory inclusionary zoning programs are valid without developer benefits, but alternatives to introducing affordable units in market-rate development must be in place.<sup>156</sup>

The options available to developers in the face of inclusionary zoning ordinances seem to land the ordinances in safe territory. Typically, such options include fees allowing developers to place the mandated affordable units at a separate site.<sup>157</sup> Such a bypass may be harmful to mixed-income TODs' goals, though (in addition to possible constitutional issues). It could, however, lead to the construction of more low-income housing than the ordinance requires.<sup>158</sup> If the development project is sited on expensive land in high demand with a moneyed demographic, and the proposed off-site low-income housing is on cheaper land, then—from a strictly mathematical standpoint—more low-income families could be housed for less money.<sup>159</sup> Again, though, this approach does little for the purposes of mixed-income TOD and would still likely require low-income families to bear greater transportation costs.

#### B. PARKING REQUIREMENTS

Scaling back parking requirements for a particular development has the potential to serve mixed-income and TOD interests simultaneously. Put simply, fewer parking spaces means fewer cars means increased transit use. Additionally, parking is extremely expensive to build and plays a substantial role in determining the cost of housing for a given area.<sup>160</sup> For example:

[I]f a 1-acre parcel zoned for up to 100 units of residential development requires 2 spaces/unit, parking will need to be provided in multilevel garage [sic] at a cost of \$20,000 to \$40,000 per space. If the same parcel is zoned at 1 space/unit, parking can be located in a groundfloor podium, saving the development as much as \$2 million. If the same parcel is zoned at 0.75 spaces/unit, there will be enough groundfloor space to include child care and 10,000 square feet of retail.<sup>161</sup>

Less parking infrastructure in a development translates to cheaper housing.

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156. Michael Floryan, *Cracking the Foundation: Highlighting and Criticizing the Shortcomings of Mandatory Inclusionary Zoning Practices*, 37 PEPP. L. REV. 1039, 1058 (2010).

157. See CTR. FOR TRANSIT-ORIENTED DEV., *supra* note 55, at 17.

158. *Id.*

159. *See id.*

160. *Id.* at 24.

161. *Id.*

Parking, however, cannot simply be scaled down, even if it does contribute to markedly lower development costs. Parking serves as a sort of guarantee for a number of different stakeholders that a development will show dividends. Ample parking can serve either as a revenue source for project creditors<sup>162</sup> or as insurance that the development will be profitable by making certain consumers can access it. Parking costs money, but it also helps ensure that money can be made.

This problem is not insurmountable, though, and there are ways around it. First, and most bluntly, show that TODs are profitable *without* two space/unit minimums. Second, and complementary to the first, implement “transportation demand management strategies.”<sup>163</sup> These strategies consist of creating transportation modes beyond the accepted one car/person paradigm. For example, in a TOD proposal with reduced parking requirements, a development should consider including a car-sharing program to lower the overall need for parking.<sup>164</sup>

Reduced parking requirements are a promising strategy for both discouraging society from its automobile dependence and for reducing development costs (and thereby decreasing the need to fill TODs with only market-rate units). Before these gains can be realized, though, financiers will likely need demonstrable evidence that money can be made *without* excessive parking – and that will take some creative thinking.

### C. LAND-BANKING

Land-banking is essentially prospecting: one purchases plots of still-cheap land near proposed transit stops or corridors and sits on it until the area is being developed.<sup>165</sup> Usually, land-banking entails establishing funds by non-profits or other public entities for the purposes of “acquir[ing] and assembl[ing] vacant, tax-foreclosed, and underutilized properties for short- or long-term strategic development. . .” goals.<sup>166</sup> Land-banking funds may “also be used to acquire existing housing in order to preserve affordability in neighborhoods where gentrification is a threat.”<sup>167</sup> This tool can address specific concerns of displacement and, as will be seen, is often preferable where governmental efforts are constrained by legal limitations.

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162. See EPA, INFRASTRUCTURE FINANCING OPTIONS FOR TRANSIT-ORIENTED DEVELOPMENT 8 (2013), available at <http://www.epa.gov/dced/pdf/2013-0122-TOD-infrastructure-financing-report.pdf>.

163. CTR. FOR TRANSIT-ORIENTED DEV., *supra* note 55, at 24.

164. *Id.*

165. URBAN LAND CONSERVANCY, *Strategies and Tools*, <http://www.urbanlandc.org/about/strategies-and-tools/> (last visited Mar. 23, 2014).

166. Diana A. Silva, *Land-Banking as a Tool for the Economic Redevelopment of Older Industrial Cities*, 3 DREXEL L. REV. 607, 608 (2011).

167. CTR. FOR TRANSIT-ORIENTED DEV., *supra* note 55, at 21.

VII. FIVE POINTS, DENVER: EXPERIENCES  
IN TOD & GENTRIFICATION

A. FIVE POINTS NEIGHBORHOOD, DENVER, COLORADO

The Five Points neighborhood, about one mile northeast of Denver's booming, cosmopolitan downtown, is among Denver's oldest neighborhoods.<sup>168</sup> Historically African-American—and still largely so—Five Points was a cultural center and jazz hotspot throughout much of the 20th century, leading many to call it the Harlem of the West.<sup>169</sup> The area was designated a cultural historic district in 2002 as a nod to its vibrant and important past.<sup>170</sup> By the 1970s, though, Five Points had begun a steady backslide, with its vibrant urban bustle giving way to neighborhood decay.<sup>171</sup> The urban exodus, so characteristic of cities nationwide, stung the Five Points neighborhood and left its predominantly African-American residents somewhat cut off from the surrounding city and in an economic stagnation that continued even as Denver as a whole began to rebound.<sup>172</sup>

Perhaps better late than never, the economic influx accompanying Denver's substantial growth from the 1990s until now<sup>173</sup> is beginning to trickle into Five Points.<sup>174</sup> The area is attracting attention from developers and small business owners and was listed as a pilot project site under the Colorado Sustainable Main Streets Initiative, which “brought a collective, integrated process to leverage technical and financial resources to help communities enhance the sustainability of their downtowns.”<sup>175</sup> In addition, Denver's Northeast Downtown Neighborhoods Plan, adopted in 2011, identifies substantial TOD possibilities in the Five Points area as a result of its “high degree of connectivity to the downtown core, as well as future connections to points east. . . .”<sup>176</sup>

A Five Points rebound was inevitable. Its proximity to downtown

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168. *Neighborhood Guides: Five Points*, DENVER.ORG, available at <http://www.denver.org/metro/neighborhoods/five-points>.

169. Alison Gregor, *In Denver, Beat Starts to Pick Up for Once in a Once-Thriving Hub for Jazz*, N.Y. TIMES Aug. 20, 2013, [http://www.nytimes.com/2013/08/21/realestate/commercial/ready-to-pick-up-the-beat-on-welton-street.html?\\_r=0](http://www.nytimes.com/2013/08/21/realestate/commercial/ready-to-pick-up-the-beat-on-welton-street.html?_r=0).

170. *Id.*

171. *Id.*

172. *Id.*

173. See DENVER REGIONAL INFORMATION SHARING AND INTEGRATION NETWORK, *Urban Growth*, <http://www.drcog.org/drisin/urbangrowth.htm> (last visited Mar. 23, 2014).

174. See Gregor, *supra* note 168.

175. COLO. DEPT. OF LOCAL AFFAIRS, SUSTAINABLE MAIN STREETS INITIATIVE (2010), available at <http://www.colorado.gov/cs/Satellite/DOLA-Main/CBON/1251594477725>.

176. NORTHEAST DOWNTOWN NEIGHBORHOODS PLAN 82 (2011), available at [http://www.denvergov.org/Portals/646/documents/planning/plans/plans\\_pre\\_2013/NE\\_Downtown\\_Plan\\_FINAL\\_Adopted\\_052311.pdf](http://www.denvergov.org/Portals/646/documents/planning/plans/plans_pre_2013/NE_Downtown_Plan_FINAL_Adopted_052311.pdf).

Denver, an existing light rail infrastructure, the “great bones of the neighborhood”<sup>177</sup> leftover from its jazz-era heyday, and a market demanding precisely these things all combine to create great opportunity—and great risk—for Five Points and its longtime residents. Economic opportunities are returning to Five Points, but with them come diminished racial and economic diversity.<sup>178</sup> In the span of five years (2001-06), “the average sales price of homes in Five Points jumped 36.6 percent” to place the neighborhood average only around \$9,500 behind the average home price for all of Denver.<sup>179</sup> Incidentally, this change corresponds with a marked ‘whitening’ of the neighborhood.<sup>180</sup> Between 2000 and 2010, the 80205 zip code (which includes Five Points as well as the Whittier, Cole, Clayton, Skyland, and City Park neighborhoods)<sup>181</sup> increased from a 29.2 percent white population to 56.2 percent.<sup>182,183</sup>

This stark demographic shift, along with the spike in real estate prices, is at least indicative of displacement. Longtime residents may not be seeing their homes bulldozed to make way for pricy condos, but costs are rising, and this traditionally low-income neighborhood is undoubtedly experiencing a dramatic shift in character.

#### VIII. APPLICABILITY OF THE TOOLS IN DENVER, COLORADO

In Denver, then, is there a way to use the tools described above<sup>184</sup> to encourage TOD and economic development in Five Points for its existing population and with less catastrophic changes to the neighborhood’s character? That is, can the tools listed above achieve the mixed-income housing quantity necessary to prevent widespread displacement and homogenization of this historic Denver neighborhood?

Denver’s own TOD Strategic Plan appears braced for defeat in this regard, acknowledging “that mixed-income housing will be difficult to achieve in TOD” as a result of “the strength of the Denver housing market and the limited number of development sites in the region. . .”<sup>185</sup>

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177. Gregor, *supra* note 168.

178. Jan Thomas, *Hip Find Five Points, at a Cost*, DENVER POST, June 10, 2007, [http://www.denverpost.com/headlines/ci\\_6098661](http://www.denverpost.com/headlines/ci_6098661).

179. *Id.*

180. See Michael J. Petrilli, *The Fastest-Gentrifying Neighborhoods in the United States*, FLY-PAPER (June 11, 2012), <http://www.edexcellence.net/commentary/education-gadfly-daily/flypaper/2012/the-fastest-gentrifying-neighborhoods-in-the-united-states.html>.

181. Sam Levin, *Denver’s 80205 makes National List of Areas Getting Rapidly Whiter*, DENVER WESTWORD, June 14, 2012, [http://blogs.westword.com/latestword/2012/06/denver\\_80205\\_whiter\\_gentrification.php](http://blogs.westword.com/latestword/2012/06/denver_80205_whiter_gentrification.php).

182. Petrilli, *supra* note 179.

183. The report’s characterization of “white” refers to non-Hispanic Caucasians.

184. See *infra*, Part IV.

185. Community Planning & Development, TRANSIT-ORIENTED DEVELOPMENT STRATEGIC

## A. REDUCED PARKING REQUIREMENTS

Throughout Denver, there are visible efforts to reduce the frequency and necessity of automobile ownership. Denver B-cycle, a public bicycle-sharing program with stations throughout the city, is one example of a growing push to make the city less automobile dependent.<sup>186</sup> Programs like Denver B-cycle help eliminate automobile use on short trips, which helps reduce the overall need for automobile ownership in a city—like Denver—with growing transit capability. In addition to bike-sharing programs, car-sharing programs are sprouting up throughout the city. The increased overall connectivity eliminates the need for *every* person to own his or her own automobile.

Despite their promise, programs like Denver B-cycle are still young and contain substantial gaps in their coverage. Among the areas still in need of greater coverage is Five Points. The neighborhood's namesake intersection of 26th Avenue, 27th Street, Welton Street, and Washington Street has a B-cycle station.<sup>187</sup> As one moves west (toward downtown Denver) or south, stations become more frequent. However, to date, only one station exists in Five Points, a neighborhood built on an automobile-dependent scale. This suggests, that the B-cycle station currently best serves those users visiting Five Points from an outside neighborhood or those users visiting an outside neighborhood from Five Points, and not those users traveling specifically within Five Points.

This is not a specific failing of Denver B-cycle or similar programs. On the contrary, Denver B-cycle is a major step forward to help realize the benefits of reducing automobile dependency. The problem, though, is that the B-cycle stations seem to follow established development, rather than precede it (or, at the very least, coincide with it). A somewhat anticipatory approach is necessary if TODs are going to be built with reduced parking requirements in mind. With that said, Five Points is in the midst of substantial development with more to come. *Now* is the time, if this discussion is going to result in the savings intended. Moreover, the fact that bike- and car-sharing programs have not made their way into Five Points on a large scale is not necessarily a hindrance. Rather, their broader availability in the city makes them a viable and valuable addition to any proposed TOD.

Alternatives to car ownership are spreading, and Denver is becom-

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PLAN 31 (2006), available at <http://www.denvergov.org/Portals/193/documents/full%20tod%20st%20plan%20.pdf>.

186. See DENVER B-CYCLE, <https://denver.bcycle.com/About/FAQs.aspx> (last visited Mar. 10, 2014).

187. See B-STATION LOCATIONS, <https://denver.bcycle.com/default.aspx> (last visited Mar. 10, 2014).



ing increasingly multimodal.<sup>188</sup> Programs like Denver B-cycle and increased car-sharing operations are crucial steps in decreasing automobile dependence in a city built around automobile use. The programs' popularity is a good sign for the future of alternatives to car ownership, but the next big step is to expand these programs, and focus on their increased presence in traditionally low-income neighborhoods, like Five Points.

#### B. INCLUSIONARY HOUSING IN DENVER

Denver has an inclusionary housing ordinance (IHO).<sup>189</sup> Unfortunately, little else can be said in praise of Denver's affordable housing efforts as they relate to the ordinance. For a number of reasons, the ordinance is not working to create affordable housing options for Denverites. The law is somewhat hamstrung by a Colorado Supreme Court decision narrowing the ordinance's applicability.<sup>190</sup> Additionally, the ordinance contains a fee-based alternative provision for developers, the fees of which may fail to incentivize the inclusion of low-income units in the face of a strong housing market.<sup>191</sup> As a result, "[i]n the past four years, only 15 affordable units have been added to Denver's housing inventory under the ordinance. . . ."<sup>192</sup> Therefore, Five Points (or any other Denver neighborhood) should not hold out any sort of hope for increased affordable or mixed-income housing under Denver's IHO.

Denver's IHO requires that "[f]or new developments of thirty (30) or more for *sale* dwelling units, applicants shall create ten (10) percent of all the units as MPDUs [moderately priced dwelling units]. . . ."<sup>193</sup> The IHO applies only to sale units and not to rentals.<sup>194</sup> The IHO includes multiple incentives to build MPDUs, the most widely applicable of which is a \$5,500 rebate from the city for each MPDU, constituting up to half of the development.<sup>195</sup> Rather than accept the incentives for building MPDUs, many developers opt instead to take advantage of the MPDU alternatives built into the IHO.<sup>196</sup> The alternatives allow for developers to build MPDUs off-site within the same "statistical neighborhood" as the development, off-site near transit, or to pay a fee for each MPDU to

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188. See DENVER STRATEGIC TRANSPORTATION PLAN 14 (2008), available at [http://www.denvergov.org/Portals/688/documents/DenverSTP\\_8-5x11.pdf](http://www.denvergov.org/Portals/688/documents/DenverSTP_8-5x11.pdf).

189. See DENVER REV. MUN. CODE art. IV, ch. 27 (2010).

190. See *Town of Telluride v. Lot Thirty-Four Venture, L.L.C.*, 3 P.3d 30, 32 (Colo. 2000).

191. See art. IV, ch. 27, § 106(b).

192. Steve Raabe, *Denver to Address Failure of Affordable-Housing Effort*, DENVER POST, July 27, 2013, [http://www.denverpost.com/ci\\_23741935/denver-address-failure-affordable-housing-effort](http://www.denverpost.com/ci_23741935/denver-address-failure-affordable-housing-effort).

193. art. IV, ch. 27, § 105(a) (emphasis added).

194. See *id.* at § 102(e); see also *Town of Telluride*, 3 P.3d at 42 (Mullarkey, J., dissenting).

195. art. IV, ch. 27, § 107(a).

196. See *id.* at § 106(b).

the city.<sup>197</sup>

The IHO's limitation to only sale units is likely in response to the *Telluride* case.<sup>198</sup> In *Telluride*, the city passed an ordinance requiring "property owners to create affordable housing for forty percent of the employees generated by new development."<sup>199</sup> The Court found that, by "set[ting] a base rental rate per square foot and then strictly limit[ing] the growth of the rental rate, the ordinance constitute[d] rent control."<sup>200</sup> The Court ruled that the ordinance's effect was preempted by state statute, which declares that: "the imposition of rent control on private residential housing units is a matter of statewide concern; therefore, no county or municipality may enact any ordinance or resolution that would control rent on either private residential property or a private residential housing unit."<sup>201</sup>

Thus, if it is to harmonize with state law, Denver's IHO cannot extend to rental properties and must apply only to sale units. It does not take a census bureau to recognize that low-income families are more likely to rent than buy, and thus an IHO that applies only to sale units helps substantially fewer families than one that includes rental units.

The inherent difficulties of an IHO that applies only to for-sale units are further compounded when unintended consequences from a plaintiff-friendly construction defect law chip away at the stock of available affordable sale units. Colorado's Construction Defect Action Reform Act (CDARA) makes it relatively easy for parties to bring suit against developers responsible for construction flaws.<sup>202</sup> The problem is particularly acute regarding for-sale units, as potentially every condo owner within a building could bring a separate (or class action) suit; whereas, in rental apartments, only the building's owner can bring suit.<sup>203</sup> The result has been a dramatic slowdown in the construction of attached, for-sale housing.<sup>204</sup> The slowdown, in turn, "has had serious implications for development around new transit stations and for new housing options for lower-income homebuyers. . ."<sup>205</sup> The general shortage of attached, for-sale housing results in even less availability of affordable, for-sale housing. Moreover, attached, for-sale housing prices are even further skewed by

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197. *Id.*

198. *See Town of Telluride*, 3 P.3d at 40.

199. *Id.* at 32.

200. *Id.* at 35.

201. COLO. REV. STAT. § 38-12-301(1) (2013).

202. Ed Sealover & Dennis Huspeni, *Lawsuit Risk Slowing Condo Development; Defects Law a Target*, DENVER BUS. J. (Aug. 16, 2013, 4:00 AM), <http://www.bizjournals.com/denver/print-edition/2013/08/16/lawsuit-risk-slowng-condo.html?page=all>.

203. *Id.*

204. *Id.*

205. *Id.*

additional costs embedded by developers to account for existing and anticipated litigation.

The problems associated with construction defect litigation are ancillary to the primary concerns here. The issues highlighted here serve as a warning that for-sale housing under the IHO is hardly enough to salvage what is lost under *Telluride's* ban on affordable rental units under the IHO.

But Denver's IHO's failure to effectively provide adequate affordable housing cannot be pinned solely on *Telluride*. There are other ways to achieve mixed-income development and to make IHOs more effective.<sup>206</sup>

The city of Boulder, Colorado, subject to the same limitations under *Telluride* as Denver, leveraged particular language within the Colorado rent control ban disclaiming any effort "to impair the right of any state agency, county, or municipality to manage and control any property in which it has an interest through a housing authority or similar agency."<sup>207208</sup> This language—in response to *Telluride*—exempts from the general ban on rent control any developments in which the city is a stakeholder.<sup>209</sup> Boulder amended its IHO to reflect the *Telluride* decision to define "permanently affordable unit" as, among other things:

"Permanently affordable unit" means a dwelling unit that is pledged to remain affordable forever to households earning no more than the HUD low income limit for the Boulder Primary Metropolitan Statistical Area, or, for a development with two or more permanently affordable units, the average cost of such units to be at such low income limit, with no single unit exceeding ten percentage points more than the HUD low income limit, and

- (1) The unit is owner occupied;
- (2) Is owned or managed by the Housing Authority of the City of Boulder or its agents; or
- (3) Is a rental unit in which the city has an interest through the Housing Authority of the City of Boulder or a similar agency that is consistent with § 38-12-301, C.R.S.<sup>210</sup>

This updated definition fits Boulder's IHO nicely into the rent control ban exception. The language does not specify exactly what shape a city interest in the property does or should take, which leaves options open. Aspen, Colorado, for example, "requires that 1/10 of 1 percent of

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206. See Barbara Ehrlich Kautz, *In Defense of Inclusionary Zoning: Successfully Creating Affordable Housing*, 36 U.S.F. L. REV. 971, 1015-21 (2002).

207. COLO. REV. STAT. § 38-12-301(5) (2013).

208. BOULDER, COLO., REV. CODE tit. 9, ch. 13, § 7 (2013).

209. Kautz, *supra* note 205, at 1017.

210. tit. 9, ch. 16 (defining Permanently Affordable Unit).

the property be granted to the Aspen/Pitkin Housing Authority.”<sup>211</sup>

In the first ten years of Boulder’s current IHO (which changed from a voluntary to mandatory ordinance in 2000), Boulder added “over 350 affordable units in Boulder on-site as a result of inclusionary zoning and another fifty-five units have been built off-site or with cash-in-lieu payments.”<sup>212</sup> These numbers are impressive given the size of the metropolitan area subject to the IHO and the relative youth of the mandatory ordinance.<sup>213</sup> Still, it is unclear what percentage of these units are rentals and what percentage are for-sale. Boulder, though, because of the amended language in its IHO, is not constrained by the distinction. Denver, on the other hand, is. Between 2002 (the year Denver’s IHO took effect) and 2011, Denver added seventy-seven non-large-scale affordable units and 1,056 large-scale affordable units.<sup>214,215</sup> These numbers appear more impressive than Boulder’s but for two things: first, Denver is a substantially larger metropolitan area with a higher percentage of low-income residents than Boulder (in 2009, the poverty rate for Denver County was approximately 19%; in 2009, the poverty rate for Boulder was approximately 13%);<sup>216</sup> and second, Denver’s IHO applies only to for-sale units, with no option under the current IHO for rental units.<sup>217</sup>

Five Points has fared even worse than the city as a whole under the current IHO. Between 2002 and 2010, Five Points was the site of *only one* affordable housing project under the IHO.<sup>218</sup> This historic, historically low-income, historically black, downtown-adjacent neighborhood has been largely ignored under the IHO. Until Denver’s IHO gets any teeth at all, Five Points and the rest of Denver’s low-income neighborhoods will get little help from the city.

The solution, then, is hardly revolutionary: amend the language of Denver’s IHO to leverage the exception left open by the Colorado legis-

211. GARFIELD CNTY. HOUS. ASSESSMENT 67 (2006), available at [http://garfieldhousing.com/wp-content/uploads/2013/04/garfield\\_county.pdf](http://garfieldhousing.com/wp-content/uploads/2013/04/garfield_county.pdf).

212. Nicholas Benson, *A Tale of Two Cities: Examining the Success of Inclusionary Zoning Ordinances in Montgomery County, Maryland and Boulder, Colorado*, 13 J. GENDER RACE & JUST. 753, 772 (2010).

213. *Id.*

214. JOHN R. LUCERO, OFFICE OF ECON. DEV., INCLUSIONARY HOUSING ORDINANCE STATUS REPORT 1 (2011), available at <http://www.denvergov.org/Portals/690/documents/Housing/IHO%20City%20Council%20Report%20-%208-11-11%20RTS.pdf>.

215. The construction of affordable units stagnate after 2007; the numbers listed here are consistent with the numbers listed above. *See id.* at 8; *see also* Raabe, *supra* note 191 (stating that Denver had added only 15 affordable units in the last four years).

216. Mark Harden, *In Colorado, 12.6% in Poverty in 2009; 18.8% in Denver*, DENVER BUS. J. (Dec. 8, 2010, 2:11 PM), <http://www.bizjournals.com/denver/news/2010/12/08/poverty.html?page=all>.

217. Raabe, *supra* note 191.

218. LUCERO, *supra* note 213, at 4-5.

lature when it enacted the rent control ban.<sup>219</sup> The language exists to make IHO's effective. *Telluride* was a setback for IHOs, but Colorado cities were not exactly left in the lurch. Section 38-12-301 of the Colorado Revised Statutes tells cities how to get around the rent control ban. Acquiring an interest in developments is easier said than done, but the tools are there. Denver's IHO recognizes the need for affordable housing: "Without a program requiring moderately priced housing to be built, it is unlikely based on current trends that developers will provide such housing on their own initiative, leaving Denver citizens without sufficient affordable housing."<sup>220</sup> The existing IHO, though, simply cannot provide the housing the city needs. The tools exist, but until they are used, the Denver IHO is an empty gesture.

### C. LAND-BANKING

Land-banks and other funds for the purposes of setting land aside for future development hold great potential for encouraging mixed-income development. Traditionally (and still largely) a tool used by municipalities to acquire vacant land for redevelopment, land banking can be a flexible way of jump-starting mixed-income development where city government is dragging its feet or hamstrung by legal restrictions.<sup>221</sup>

Fortunately, recognizing the need for affordable housing and the benefits of mixed-income development is not limited to TOD advocates. The understanding is there, even if city or government efforts are often stymied or glacial in pace. Using land-banking tools to achieve mixed-income goals by community non-profits or private entities offers an opportunity to bypass the strict limitations on Colorado IHOs by way of private property rights.

The traditional means of promoting affordable housing through land banks is for the local government to acquire the property in question—usually a "vacant, tax-foreclosed, or underutilized property"<sup>222</sup>—and then to "give public agencies and nonprofit community development programs first grab" at the property.<sup>223</sup> This approach, while beneficial for city goals, may not be as effective for low- and mixed-income development as another approach.

In Denver, the Urban Land Conservancy (ULC) is a nonprofit promoting community development ideals like TOD and mixed-income de-

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219. See COLO. REV. STAT. § 38-12-301(2) (2013).

220. DENVER REV. MUN. CODE art. IV, ch. 27, § 101(j) (2010).

221. See Silva, *supra* note 165, at 614-15.

222. *Id.* at 608.

223. *Id.* at 620.

velopment.<sup>224</sup> The ULC “uses real estate as a tool” to leverage these ideals, bypassing the ‘first grab’ principle offered by municipal land banks.<sup>225</sup> The ULC can select land parcels and use those parcels to expedite goals that may not be a priority for cities.

ULC’s TOD Fund, a loan program in collaboration with banks, other community groups, and the city and county of Denver, allows ULC to acquire land along proposed transit corridors ahead of their inevitable bump in cost.<sup>226</sup> This offers a way to guarantee that the group’s goal of preserving affordable housing survives the booming TOD demand in the Denver area.

Five Points is already benefiting directly from ULC’s land-banking approach. About two blocks from the 25th and Welton light rail stop, the ULC acquired a plot of land and has planned nine “healthy homes” for the site.<sup>227</sup> Frequently, “homes in low-income areas are. . . contaminated with lead paint and asbestos,” hence the need for *healthy* homes in the area.<sup>228</sup> Additionally, just a light rail stop away, ULC acquired a pair of large surface parking lots “with a vision for a mixed use redevelopment in the future.”<sup>229</sup>

The ULC and similar groups represent a promising avenue to guaranteeing at least minimal levels of connected, low-income housing. In order to further exploit the potential to guarantee that their properties continue offering low-income connectedness, land-banking groups like the ULC should consider seeking the establishment of vested rights through a development agreement (DA). For a land-banking entity, a DA is a way to “gain certainty about the permanency of entitlements and the related conditions of development approval.”<sup>230</sup> A DA is a joint agreement between local government and a private landowner, wherein the parties negotiate and determine the land use in question, the project impacts, and the regulatory conditions to which the project will be subject for the span of its life.<sup>231</sup> Changing land use conditions, then, will not upset the use for which the parties entered the DA. Colorado is among a

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224. See generally URBAN LAND CONSERVANCY, <http://www.urbanlandc.org> (last visited Mar. 23, 2014).

225. *Id.*

226. See *Denver Transit-Oriented Development Fund*, URBAN LAND CONSERVANCY, <http://www.urbanlandc.org/denver-transit-oriented-development-fund/> (last visited Mar. 23, 2014).

227. Christi Crane, *ULC Project in Colorado Health Foundation Journal*, URBAN LAND CONSERVANCY (Aug. 16, 2011), <http://www.urbanlandc.org/assets-investments/25th-stout-denver/ulc-in-colorado-health-foundation-journal/>.

228. *Id.*

229. *Community Assets & Investments*, URBAN LAND CONSERVANCY, <http://www.urbanlandc.org/assets-investments/> (last visited Mar. 23, 2014).

230. REDEVELOPMENT: PLANNING, LAW, AND PROJECT IMPLEMENTATION 226 (Brian W. Blaesser & Thomas P. Cody eds., 2008).

231. *Id.*

handful of states that have recognized the interest that redevelopers have in DAs and the likelihood that building them into the state land use regulatory scheme will spur redevelopment.<sup>232</sup>

Groups like the ULC should take advantage of DAs in Colorado in order to build additional long-term guarantees into the redevelopment plan. Guarantees about density minimums and low-income thresholds will survive future zoning changes, ensuring project goals are met in perpetuity.

## IX. CONCLUSION

Mixed-income housing is a necessary feature of true TOD. It begins to address the marginalization problem of low-income populations and makes affordable housing truly affordable. For cities and transit agencies, mixed-income TOD stabilizes ridership and legitimizes the need for transit in TODs. Despite all this, the TOD affordable housing aspect is one of the most overlooked. A strong housing market, huge TOD demand, and the sheer difficulty of blending incomes in today's economic and regulatory climates all tend to make affordable housing an easy trait to overlook when planning for TOD. The result is a recipe for gentrification and the attendant possibility for displacement of low-income families. Displacement perpetuates low-income populations' marginalization and forces a traditionally transit-reliant population to be more heavily car-dependent, which may or may not be financially feasible.

Facilitating mixed-income TOD may not eliminate entirely the displacement risk, but it at least allows existing populations to experience the economic uptick TOD can offer. It also helps preserve the character that made the neighborhood desirable for gentrification in the first place.

The Five Points neighborhood in Denver is on the cusp of a substantial change. The area has incredible richness of history and a beautiful urban character that make it an obvious target for redevelopment. The largely low-income population of Five Points would likely welcome aspects of gentrification: a city renewal and private investment; the revival of urban structures long ignored; and an overall boost in social and economic opportunities. However, if the interests of the existing population are not accounted for, the very people who are most connected to the area, who rely most heavily on the existing transit infrastructure, and who could benefit the most from a renaissance in Five Points would risk being forced out by costs too great to bear.

In Five Points, the base infrastructure exists to trim down the parking requirements, which are so characteristic of development in an automobile-dependent society. There are areas sufficient to accommodate non-

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232. See COLO. REV. STAT. § 24-68-101 (2013).

automobile transportation, and ventures like car-sharing programs and Denver B-cycle are finally challenging the one-car-per-person paradigm. The spread of these programs into low-income neighborhoods will mark a big step forward.

Additionally, land-banking tactics through community nonprofits like the Urban Land Conservancy are already active in protecting Five Points' residents from displacement threats. Land-banking may truly represent the best and most direct way of deflecting the negative gentrification impacts, especially in Colorado where inclusionary housing ordinances are ultimately powerless to guarantee inclusionary housing. Land-banking entities should explore options to ensure continued low-income housing and transit connectedness under development agreements with the city government.

The Denver IHO is not dead. It has been in a coma. Unfortunately, it will continue to be unless low-income housing proponents can recognize that the IHO's deadlock regarding rental properties is illusory. A change in the language and some creative deal structuring with developers could revitalize this potentially powerful asset for low-income housing.

The first step to implementing the available tools, though, is to bring about widespread understanding of the necessary role mixed-income plays in TOD projects. Stakeholders—whether developers, transit agencies, or local governments—need to understand that the immediate bottom line of “TODs” filled with high-end, market rate housing is not the ultimate bottom line. When parties can recognize their interest in accounting for low-income populations in TODs, then the tools available may be utilized to their potential.