

WAKE UP FANNIE, I THINK I GOT SOMETHING TO SAY TO YOU: FINANCING COMMUNITY LAND TRUST HOMEBUYERS WITHOUT STRIPPING AFFORDABILITY PROVISIONS[†]

ABSTRACT

Individual homeownership, the backdrop of the American Dream, is often cited as a panacea of economic and social stability. Investment in and control over one's "castle," the story goes, creates neighborhoods and communities of involved, committed residents. Besides providing a stable place to live, homeownership allegedly serves as an important element of wealth accumulation and its expansion, especially among marginalized populations, has been a major goal of economic and social policy for decades. However, the recent foreclosure crisis and related economic collapse exposed vulnerabilities in the developed system of homeownership and mortgage financing—vulnerabilities so deep that they have left whole neighborhoods abandoned, and shaken economic stability across every income bracket. As a result, some analysts have begun to seriously question the virtues of—and sometimes to blame—policies that incentivize homeownership for people who traditionally cannot afford it.

This Comment presents an existing model of affordable homeownership that has weathered the housing collapse with astounding resilience: the Community Land Trust (CLT). The CLT model aims to create community-based, affordable housing available in perpetuity. This Comment outlines the concepts and structures that underlie CLT affordability, exploring how the model operates within the context of American homeownership. In particular, it examines the tensions between the CLT model and the mortgage industry, focusing on the crucial but often difficult process of obtaining CLT homebuyer financing. Ultimately, the Comment suggests changes to the Fannie Mae CLT Uniform Mortgage Rider, an instrument originally developed to encourage lenders to loan money to CLT homebuyers, but which threatens the fabric of CLT resilience by stripping the model of its affordability provisions. The proposed changes suggest that these provisions survive foreclosure, lending

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stability to the CLT model and acknowledging the demonstrated resilience of CLT borrowers in the recent housing collapse.

INTRODUCTION	211
I. THE NATURE OF A COMMUNITY LAND TRUST	214
A. <i>Commitment to Affordability</i>	214
1. <i>Long-Term Affordability in the Land</i>	215
2. <i>Long-Term Affordability in the Community</i>	217
3. <i>Tensions in Long-Term Affordability</i>	219
B. <i>The CLT Establishes Its Commitment to Affordability in Its Formal Structure</i>	222
1. <i>Long-Term Affordability Established in CLT Organizational Structure</i>	223
2. <i>Structure of Legal Relationships</i>	227
a. <i>Split Ownership as a Basic Method of Affordability</i>	227
b. <i>Ground Lease as an Instrument of Affordability</i>	228
3. <i>Commitment to Affordability Established in Subsidy Retention</i>	233
II. FINANCING CLT HOMEBUYERS	235
A. <i>The Need for CLT Homebuyer Financing</i>	236
B. <i>The Difficulty of Finding a Lender</i>	237
C. <i>The Fannie Mae Uniform Rider and the Secondary Mortgage Market</i>	240
D. <i>Against the Sacrifice of Ground Lease Affordability</i>	243
E. <i>Eliminating Affordability-Stripping from the Fannie Mae Rider</i>	245
CONCLUSION	248

INTRODUCTION

There are two houses for sale on Pleasant Street in Williamstown, Vermont. They both have roughly the same square footage.¹ Both are painted white with red shutters, have two-car garages, and sit on grassy, tree-lined lots.² One house has a list price of \$243,000.³ The other will cost a buyer anywhere between \$110,000 and \$185,000, depending on her income and the number of people in her household.⁴ In a town where the average family could afford to pay approximately \$160,000 for a home (with an \$11,000 down payment),⁵ the price difference between the two Pleasant Street properties is significant. The price, however, is not the only difference. One of the homes—the less expensive one—rests in the stewardship of the Central Vermont Community Land Trust (CVCLT), “an affordable housing organization [based] on the community land trust model.”⁶ Whoever purchases this house on Pleasant Street will enter into a unique property relationship with CVCLT: she will purchase the structure, while CVCLT will retain title to the grassy, tree-lined lawn, which it will lease to her through a ninety-nine year, renewable ground lease. The house on Pleasant Street, along with over 6,000 other homes nationwide,⁷ rests under the wing of the Community Land Trust (CLT) model for affordable housing—a model that removes the cost of land from the price of homeownership, and aims to keep that price affordable in perpetuity.

CLTs have developed in the United States alongside a growing need for affordable housing.⁸ For years, the widening gap between stagnant incomes and the rising cost of homes excluded increasing numbers of people from the

¹ *Compare Condominiums*, CENT. VT. COMMUNITY LAND TRUST, http://www.cvclt.org/homes_for_sale.html (last visited Aug. 16, 2010) (on file with author), with *Williamstown Vermont Real Estate*, BERG, CARMOLLI & KENT REAL ESTATE, <http://www.bckrealestate.com/proddir/prod/12/5771> (last visited May 14, 2010) (on file with author).

² See sources cited *supra* note 1.

³ BERG, CARMOLLI & KENT REAL ESTATE, *supra* note 1.

⁴ CENT. VT. COMMUNITY LAND TRUST, *supra* note 1.

⁵ WILLIAMSTOWN TOWN PLAN DRAFT 36 (2010), available at http://www.williamstownvt.org/Docs/2010_TownPlan_Sec1-6.pdf.

⁶ *About CVCLT*, CENT. VT. COMMUNITY LAND TRUST, http://www.cvclt.org/about_cvclt.html (last visited Aug. 16, 2010).

⁷ Yesim Sungu-Eryilmaz & Rosalind Greenstein, *A National Study of Community Land Trusts* 16 (Lincoln Inst. of Land Pol’y, Working Paper No. WP07YS1, 2007).

⁸ David M. Abromowitz, *An Essay on Community Land Trusts: Toward Permanently Affordable Housing*, in *PROPERTY AND VALUES: ALTERNATIVES TO PUBLIC AND PRIVATE OWNERSHIP* 213, 214 (C. Geisler & G. Daneke eds., 2000).

residential real estate market.⁹ In response to this crisis, federal and state governments, as well as nonprofit organizations, established programs to assist low-income people in their struggle for stable shelter.¹⁰ These programs often focus on lowering the monthly cost of housing without affecting the price of the unit itself as it passes from owner to owner.¹¹ The CLT model assumes a different approach to affordable homeownership, crafting a strategy aimed at reducing the cost of the house, not just the monthly payment.¹² CLT homeownership incorporates a “shared equity” element, wherein the homebuyer agrees that upon reselling her home she will sell it to another low-income buyer and limit the price she will charge according to a preset formula. Ultimately, the CLT represents a method of structuring legal property relationships: “[T]o provide access to land and housing to people who are otherwise denied access; to increase long-term community control of neighborhood resources; to empower residents through involvement and participation in the organization; and to preserve the affordability of housing permanently.”¹³

In light of the recent housing crisis, analysts debate the value of homeownership as a goal for affordable housing programs.¹⁴ This Comment assumes that there is a place for homeownership in the spectrum of affordable housing and argues that CLTs present a viable model for sustainable, low-income homeownership. However, because ownership may not be for everyone, CLTs also incorporate affordable rental units into their portfolios.¹⁵ In 2007, 45% of CLTs surveyed offered rental housing.¹⁶ Many of these CLTs

⁹ Julie Farrell Curtin & Lance Bocarsly, *CLTs: A Growing Trend in Affordable Home Ownership*, 17 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 367, 368 (2008).

¹⁰ See RICK JACOBUS & JEFFREY LUBELL, CTR. FOR HOUS. POLICY, PRESERVATION OF AFFORDABLE HOMEOWNERSHIP: A CONTINUUM OF STRATEGIES 1–2 (2007), http://www.nhc.org/pdf/chp_se_strategies_0407.pdf (discussing various affordable housing programs, focusing on homeownership and subsidy retention).

¹¹ *Id.* at 3.

¹² See Tim McKenzie, *The Case for Plan B*, SHELTERFORCE, Fall 2007, at 36, 37–39, available at <http://www.shelterforce.org/article/637>.

¹³ *Overview*, NAT’L COMMUNITY LAND TRUST NETWORK, <http://www.cltnetwork.org/index.php?fuseaction=Main.SectionHome§ionID=2> (last visited Aug. 16, 2010).

¹⁴ Joseph Williams, *President Shifts Focus to Renting, Not Owning*, BOS. GLOBE, Aug. 16, 2009, at 1.

¹⁵ Sungu-Eryilmaz & Greenstein, *supra* note 7, at 17.

¹⁶ *Id.* at 2.

use their access to government subsidies and nonprofit, tax-exempt status to develop inexpensive rental units, sometimes at 30% below local market rates.¹⁷

The CLT model has demonstrated exceptional resilience through the recent rash of nationwide foreclosures,¹⁸ and as a 2009 study reveals, efficiently retains and reuses the value of public subsidies over time.¹⁹ Despite the apparent success of the model, CLT homebuyers have faced difficulty securing mortgage financing. As a condition of loaning on a CLT property, lenders—backed by the Federal National Mortgage Association (“Fannie Mae”)—require CLTs to agree to amend their model in a manner that threatens the strength of their long-term affordability. Essentially, these amendments require that all affordability provisions terminate in the event of foreclosure, thrusting any and all risk associated with helping low-income individuals achieve homeownership onto the shoulders of the CLT.

This Comment argues that rather than force CLTs to bear the risk of homebuyer financing by placing their affordability provisions on the chopping block, Fannie Mae—a government-sponsored enterprise charged with an obligation to work affirmatively toward the increase of low-income homeownership—should revise the language of its Uniform Rider to allow CLT affordability provisions to survive foreclosure. Part I outlines CLT basics, describing how the model conceptually and structurally approaches its primary goal of long-term housing affordability. This Part focuses on the particularities of place and community in which the CLT grounds its commitment to affordability, noting that each CLT must negotiate its own way through a landscape of ethical and social tensions to accomplish its goal. Following this discussion of conceptual and foundational underpinnings, Part I outlines how CLTs establish and enforce their commitment to long-term affordability in their legal and organizational structures.

Having discussed the basics of CLT affordability in Part I, Part II focuses on the necessary and often difficult process of obtaining financing for a CLT homebuyer.²⁰ This discussion (1) explores financial risk as an obstacle to CLT

¹⁷ Daniel Fireside, *Community Land Trust Keeps Prices Affordable—For Now and Forever*, YES! MAGAZINE, Fall 2008, at 28, available at <http://www.yesmagazine.org/issues/purple-america/community-land-trust-keeps-prices-affordable-for-now-and-forever>.

¹⁸ See discussion of foreclosure statistics *infra* notes 263–65 and accompanying text.

¹⁹ See discussion of Champlain Housing Trust twenty-year affordability audit *infra* notes 188–93 and accompanying text.

²⁰ Although the development goals of the CLT itself, including land acquisition, construction, and organizational support, must also be financed, those issues are outside the scope of this paper.

homebuyer financing and (2) analyzes how the allocation of that risk threatens and thwarts CLT affordability. Focusing on the Fannie Mae CLT Uniform Rider, this portion of the Comment argues that current solutions to homebuyer financing, while they may encourage lenders to loan money, gravely threaten the fabric of CLT affordability by stripping the model of its affordability provisions. Finally, this Comment argues that in light of its affirmative duty to further affordable homeownership, and the demonstrated resilience of CLT borrowers against mortgage default, Fannie Mae should revise its Rider provisions to ensure that CLT affordability provisions survive foreclosure.

I. THE NATURE OF A COMMUNITY LAND TRUST

A recent nationwide study of existing CLTs revealed that 98% of the 105 CLTs surveyed considered the development of affordable housing a primary function of their organization.²¹ This Part explores how the goal of perpetual affordability has shaped the CLT model, and how the model continues to incorporate affordability into its structure and operations. Section A examines the historical development and contemporary status of the CLT commitment to affordability. Section B discusses the “nuts and bolts” of affordability, examining where and how the CLT incorporates affordability into its organizational structures and legal relationships.

A. *Commitment to Affordability*

The CLT commitment to affordability is found and founded in the lore and legend of the CLT model—from its international origins, to its first American manifestation in the civil rights movement, and its current affiliation with municipal, state, and national housing relief efforts.²² First, this section examines the importance of land to CLT affordability. Next, it investigates the many ways that the CLT conceives of and incorporates “community” into its role as a provider of perpetually affordable housing. Finally, this section discusses tensions inherent in the CLT model, and outlines ways that CLTs

²¹ Sungu-Eryilmaz & Greenstein, *supra* note 7, at 24. The survey included CLTs which provide open-space preservation and land conservation, which may explain the 2 of 105 respondents who did not claim the provision of affordable housing as a major component of their work. *Id.*

²² See, e.g., Julia Bartolf Milne, *Will Alternative Forms of Common-Interest Communities Succeed with Municipal Involvement? A Study of Community Land Trusts and Limited Equity Cooperatives*, 38 REAL EST. L.J. 273, 288–92 (2009) (discussing the interaction between CLTs and municipalities, especially the City of Chicago).

negotiate their community commitment within the larger political, social, and economic framework.

1. *Long-Term Affordability in the Land*

One of the most interesting and effective elements of the CLT's commitment to long-term housing affordability lies in the fact that the CLT has a physical location. The first American CLT emerged in Albany, Georgia, during the late 1960s.²³ Called "New Communities," the project held the concept of long-term, stable access to land at its core.²⁴ The New Communities project—led by Robert Swann, Slater King, and other activists—grew out of the civil rights movement. The project targeted the capture of over 5,000 acres of land in rural Georgia by an independent nonprofit organization, which would hold them "in trust" for the perpetual use of rural farmers.²⁵ The resident farmers would own their houses and other improvements to the land, but lease the land itself at low cost for a renewable period of ninety-nine years.²⁶ The New Communities CLT model sought to remedy the disparity in control of land between classes and racial groups and aimed to offer a stable source of farmland to primarily African-American farmers, regardless of the fluctuating market value of land or farm goods.²⁷ The model was designed to remove land from the speculative market and to protect farmer-residents from the instability of eviction or foreclosure suffered by poor tenants of more traditional rental- or mortgage-based models.²⁸

In 1972, Robert Swann and other members of the Institute for Community Economics (ICE)²⁹ outlined the CLT model in their book, *Community Land Trust: A Guide to a New Model of Land Tenure in America*.³⁰ The writers framed the CLT as a response to land maldistribution based on wealth and influence.³¹ The model drew inspiration and guidance from peaceful land reform movements across the globe, including the *Gramdan* movement in

²³ Curtin & Bocarsly, *supra* note 9, at 370–71.

²⁴ ROBERT S. SWANN ET AL., INT'L INDEPENDENCE INST., *THE COMMUNITY LAND TRUST: A GUIDE TO A NEW MODEL FOR LAND TENURE IN AMERICA*, at ix (DRA of Vt. 2007) (1972).

²⁵ Stewart E. Perry, *Preface* to SWANN ET AL., *supra* note 24, at vii.

²⁶ SWANN ET AL., *supra* note 24, at 62.

²⁷ *Id.* at 3.

²⁸ *Id.* at 18.

²⁹ At the time, the Institute for Community Economics (ICE) operated under the name International Independence Institute.

³⁰ JOHN EMMEUS DAVIS, NAT'L HOUS. INST., *SHARED EQUITY HOMEOWNERSHIP: THE CHANGING LANDSCAPE OF RESALE-RESTRICTED OWNER-OCCUPIED HOUSING 21* (2006).

³¹ SWANN ET AL., *supra* note 24, at 1; Perry, *supra* note 25, at xv.

India, where land was given to villages as trustees with the purpose of granting land-use rights to individuals.³² The New Communities model also drew from the structure of the Jewish National Fund in Israel, an effort to bring security of land to small farmers and their families.³³ The Jewish National Fund's structure most directly parallels the CLT structure suggested in the guide.³⁴

The centrality of land access to housing availability seems almost too obvious to state, and yet many approaches to housing policy have not accounted for this necessity.³⁵ In an article exploring the ethics of housing, Tim Iglesias argues that American housing policy is informed by a plurality of five ethical models.³⁶ Iglesias acknowledges that courts and policymakers often approach housing as an economic good, and that this approach stands in "profound and persistent" tension with the goal of housing affordability.³⁷ Iglesias also notes that the CLT model of affordable housing conflicts with this "traditional expectation of housing as economic investment good."³⁸ He presents another ethic that approaches housing as "one land use in a functional system."³⁹ This ethic, which informs zoning ordinances and planning commissions, acknowledges the significance of land for housing but does not ensure that the land will be accessible to low-income individuals.⁴⁰ The CLT structure fuses an understanding of housing as a necessary land use with an understanding that a "functional system" is one in which low-income individuals can access the allocated land.

As demonstrated by the New Communities initiative, land hosts the community that can claim it, and the act of claiming land and determining its use stands at the core of CLT long-term affordability. For example, in the

³² DAVIS, *supra* note 30, at 20.

³³ SWANN ET AL., *supra* note 24, at 9–10.

³⁴ *Id.* at 16–17.

³⁵ Tim Iglesias, *Our Pluralist Housing Ethics and the Struggle for Affordability*, 42 WAKE FOREST L. REV. 511, 511 (2007).

³⁶ *Id.* These models include "(1) housing as an economic good, (2) housing as home, (3) housing as a human right, (4) housing as providing social order, and (5) housing as one land use in a functional system." *Id.*

³⁷ *Id.* at 530.

³⁸ *Id.* at 527.

³⁹ *Id.* at 569–76. Iglesias argues that this ethic is the most promising approach for the future of affordable housing because it leaves room for the mandatory inclusion of affordable housing without phrasing it in terms of redistribution. Examples of this approach include movements for "workforce housing," which argue for proximity of housing to employment for all income levels in a district. The CLT model is compatible with this approach to housing policy and can be an effective way of preserving space for the purpose of "workforce housing." *Id.* at 592–93.

⁴⁰ *Id.* at 585.

mid-1980s residents of Boston's Roxbury neighborhood found themselves victims of widespread urban divestment.⁴¹ Under the motto "Take a Stand on the Land," community members launched a campaign to revitalize their neighborhood called the Dudley Street Neighborhood Initiative (DSNI). After extensive grassroots planning, the community implemented a plan to redevelop the neighborhood.⁴² Community members, backed by the financial assistance from the City of Boston and foundational grants, spent thousands of volunteer hours cleaning up the neighborhood.⁴³

As the reality of urban recovery came into focus, DSNI planners realized that without somehow ensuring the land's future affordability, the very community members who invested so heavily in the neighborhood revitalization could be priced out of the neighborhood by gentrification.⁴⁴ It occurred to these leaders that the neighborhood's increasing value would not be created by the market but rather by the community's own efforts. If the land were merely resold to individuals, that increased value would be allocated to the private pockets of people who may or may not have contributed to the revitalization effort.⁴⁵ If, however, the land could somehow remain in community control, then the increased value could be preserved for community members, present and future, many of whom would not otherwise have the resources to access the value they helped create. DSNI chose to allocate the value of the revitalized neighborhood to the community itself and formed Dudley Neighbors Incorporated, a CLT.⁴⁶

2. *Long-Term Affordability in the Community*

As demonstrated by DSNI's use of the CLT model to channel the benefits of neighborhood redevelopment back into the community, the CLT commitment to long-term affordability arises out of a commitment to community. In addition to their primary function of fostering long-term affordable housing, many CLTs engage in other community-based activities, including homebuyer counseling, community gardening, and political

⁴¹ Abromowitz, *supra* note 8, at 222.

⁴² The City of Boston granted the Dudley Street Neighborhood Initiative the power of eminent domain so that it could acquire vacant properties that impeded the development process. *Id.*

⁴³ See PETER MEDOFF & HOLLY SKLAR, *STREETS OF HOPE: THE FALL AND RISE OF AN URBAN NEIGHBORHOOD* 72–73 (1994).

⁴⁴ Abromowitz, *supra* note 8, at 223.

⁴⁵ *Id.*

⁴⁶ *Id.*

advocacy.⁴⁷ By offering stable, affordable housing options⁴⁸ from within a community, CLTs become a center of gravity for other activities, weaving long-term affordable housing into the fabric of community development.

The CLT is a “trust,” with beneficiaries who must sit at the center of organizational and management decisions. The trustee–beneficiary relationship is at the heart of the CLT community concept and its method of providing long-term affordability. The traditional CLT ownership model, in which ownership of the land and structure is divided between CLT and homeowner, lowers the cost of homeownership for each individual buyer.⁴⁹ This aspect of CLT affordability is similar to that of condominium associations,⁵⁰ where the cost of common areas, amenities, and maintenance is shared among all owners, rendering the cost of housing lower than it would otherwise be if each owner separately owned equivalent property. The CLT model, however, incorporates a broader understanding of shared ownership. The CLT board operates as a trustee and is formed with the express duty of preserving the affordability of its units for *future* homebuyers.⁵¹ The Uniform Condominium Act articulates this difference in its definition of *person*: “‘Person’ means a natural person, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or other legal or commercial entity. [*In the case of a land trust, however, ‘person’ means the beneficiary of the trust rather than the trust or the trustee.*]”⁵²

This definition illuminates a difference between control and trusteeship.⁵³ Although both the CLT and the Condominium Association serve as organized entities that govern residential property relationships, in the CLT the role of

⁴⁷ *Id.*

⁴⁸ For most CLTs, long-term affordable housing goals are realized through the classic CLT homeownership model. However, other CLTs also host low-income rental options. *See, e.g.*, Sungu-Eryilmaz & Greenstein, *supra* note 7, at 2 (45% of responding CLTs reported to host rental units on their property).

⁴⁹ Merely removing the value of the land from the cost of the structure does not ensure long-term affordability; however, it is an element of the CLT model that enables long-term affordability to be established in the ground lease. *See infra* notes 124–78 and accompanying text.

⁵⁰ Some CLTs also incorporate condominium units into their portfolio of homes. JOHN EMMEUS DAVIS, BURLINGTON ASSOCS. IN CMTY. DEV., *STARTING A COMMUNITY LAND TRUST: ORGANIZATIONAL AND OPERATIONAL CHOICES* 61 (2007), available at http://www.richmondhabitatclt.yolasite.com/resources/Starting_a_CLT_Book_Format_Beneficiaries_Addition_0407.pdf.

⁵¹ *Id.* at 25–28.

⁵² UNIF. CONDOMINIUM ACT § 1-103(19) (1980) (emphasis added) (brackets in original).

⁵³ *See* discussion of New Communities *supra* notes 25–34 and accompanying text.

trusteeship⁵⁴ demands that the extent and substance of resident control remain in service of the larger circle of trust beneficiaries: the greater community—present and future.⁵⁵

In addition to extending into the future, the CLT community reaches well outside of its formal property lines. When forming a CLT, organizers work to incorporate fully the broader community into the goal of providing long-term housing.⁵⁶ CLTs envision homeownership as an investment in stable access to shelter and thus community security.⁵⁷ The model connects a web of stakeholders including CLT resident homeowners, other CLT residents (if any), all possible future CLT residents, the surrounding residential and business community, and the public at large.⁵⁸ It is in consideration of this network of interests that the CLT holds its land for the purpose of providing low-income housing.⁵⁹ In this way, the CLT model intertwines its members' ownership interest with those of the surrounding community.

3. *Tensions in Long-Term Affordability*

A CLT's commitment to ensuring long-term affordable housing, though firmly grounded in the land and community, floats amidst a series of tensions. First, the CLT faces a tension between the conventional concept of ownership as individual control over property and the concept of community trusteeship.⁶⁰ This tension arose even in the formation of New Communities, when its founders struggled to balance “the right of the individual user of land to control

⁵⁴ In recent years, CLT advocates have used the term *stewardship* to express the role of the CLT in respect to preservation of affordable housing. This Comment uses the term *trusteeship* here to set up the tension between trusteeship and control as discussed in *New Model of Land Tenure for America*. See *infra* note 60. The CLT movement's use of the term *trusteeship* probably originated from the *Gramdan* movement in India. See *History*, NAT'L COMMUNITY LAND TRUST NETWORK, <http://www.cltnetwork.org/index.php?fuseaction=Blog.dspBlogPost&postID=30> (last visited Aug. 16, 2010). The reasoning behind the shift in terminology is unclear, but it appears as though it may be an attempt by CLT advocates to avoid invoking the legal connotations of the word *trusteeship* in situations where those duties would complicate CLT formation.

⁵⁵ See John Emmeus Davis, *Homes That Last*, SHELTERFORCE, Winter 2008, at 18, 23, available at http://www.shelterforce.org/article/1237/homes_that_last.

⁵⁶ See, e.g., DAVIS, *supra* note 50, at 38–43.

⁵⁷ Abromowitz, *supra* note 8, at 214.

⁵⁸ DAVIS, *supra* note 50, at 25.

⁵⁹ DAVIS, *supra* note 30, at 18.

⁶⁰ See SWANN ET AL., *supra* note 24, at 26. In the guide, the authors propose a binary model of property management where *control* referred to the ability of the land's occupants to control the everyday operations while *trusteeship* described the separate duty of a group of people—some of whom may also live on the land trust—to ensure that the long-term goals of land access and affordability be implemented and maintained. *Id.* at 26–30.

his life; and the need for a body . . . that can perform the long-range allocation function and ensure . . . the goals of the trust.”⁶¹ The founders of New Communities imagined that their target community would look upon trusteeship with skepticism:

People who have never had a chance to own land . . . may very well reject the idea of a trusteeship over the land they expect to use. Members of minority groups who have been typically excluded from land ownership and often view it as the only way to gain control of both land and their own destinies, may see such a trusteeship as merely another exclusion.⁶²

Though perhaps smacking of paternalism, the New Communities concept of trusteeship promised the benefit of secured land tenure.⁶³ However, unchecked by some aspect of resident control, trusteeship does little to ensure that a community will be able to tailor the terms of affordable, accessible land tenure to local needs as they arise.

The principal question of resident control hinges on whether and to what extent the organizers of the CLT believe that CLT residents will be able to represent adequately the interests of future low-income residents as they make day-to-day decisions that could affect the affordability of CLT housing. After years of evolution, the CLT model still grapples with the balance between resident control and stewardship.⁶⁴ This tension challenges entrenched concepts of homeownership and property and stands at the heart of most policy debates over the CLT model.⁶⁵

Imbedded in the long-term goals of the CLT structure is a dialectic of value.⁶⁶ CLTs understand homeownership as a means of secure land tenure, as opposed to a speculative investment opportunity.⁶⁷ However, the relationship between the two is more complex than this dichotomy suggests. A CLT’s goal of maintaining durable affordability⁶⁸ pulls against the needs of a low-income

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ See DAVIS, *supra* note 50, at 71–72.

⁶⁵ See Abromowitz, *supra* note 8, at 234.

⁶⁶ See Iglesias, *supra* note 35, at 527–28 (discussing the conflict between the CLT model and an ethic of housing as an economic good).

⁶⁷ See Abromowitz, *supra* note 8, at 214.

⁶⁸ *Durable affordability* is a term used to describe the set of policies that restrain the price of a CLT unit from buyer to buyer. See RICK JACOBUS & RYAN SHERRIFF, CTR. FOR HOUS. POLICY, BALANCING DURABLE

resident who, in order to relocate in a rising market, would need to realize some degree of return in her investment.⁶⁹ These two goals are not mutually exclusive, and both inform the establishment of CLT resale restrictions.⁷⁰ The CLT's precise organizational structure will determine the process by which resale restrictions are calculated and can be amended.⁷¹ However, CLTs involve their membership (comprised of homeowners) in the amendment of resale restrictions.⁷² This ensures that homeowner concerns are considered in the formation of policies that govern investment return. Therefore, the manner in which the CLT balances resident control and CLT stewardship⁷³ will influence how the CLT balances durable affordability against an opportunity for wealth accumulation.

Another tension that CLTs face arises when they choose which sector of the population they will aim to serve.⁷⁴ For example, the Madison Area Community Land Trust describes itself as “a (501c) non profit organization seeking to promote affordable housing for first time home buyers at or below 80% of Median income in the Madison and Dane County area.”⁷⁵ This decision addresses the geographic and financial scope of the population for whom it would like to offer affordable housing.⁷⁶ Geographically, a CLT must devise a service area such that it is both manageable and effective.⁷⁷ Financially, the CLT should target a population that is not only in need, but also to which it is financially possible to offer homeownership.⁷⁸ Because the typical CLT model affords some level of voting rights to members,⁷⁹ the

AFFORDABILITY AND WEALTH CREATION: RESPONDING TO CONCERNS ABOUT SHARED EQUITY HOMEOWNERSHIP 4 (2009).

⁶⁹ *Id.* at 10. It is important to note that there are many reasons (beyond the need to relocate) why an element of wealth accumulation is not incompatible with the CLT model. *See id.* at 11–13.

⁷⁰ *See* discussion of resale formula *infra* notes 164–75 and accompanying text.

⁷¹ Resale restrictions are generally chosen by CLT organizers, but their amendment is provided for in the bylaws.

⁷² *See* discussion of resale formula amendment *infra* notes 103–08 and accompanying text.

⁷³ I have transitioned to using *stewardship* in place of *trusteeship* to reflect contemporary terminology. For a discussion of the relationship between the two words, see *supra* notes 54, 60.

⁷⁴ DAVIS, *supra* note 50, at 25–28.

⁷⁵ *About the Madison Area CLT*, MADISON AREA COMMUNITY LAND TRUST, <http://www.affordablehome.org/about/index.html> (last visited Aug. 16, 2010).

⁷⁶ CLTs might also determine eligibility for housing based on characteristics such as age, disability, and demonstrated need. DAVIS, *supra* note 50, at 28.

⁷⁷ *Id.* at 32–34.

⁷⁸ *Id.* at 25–27.

⁷⁹ Membership may include not only CLT residents, but also persons in the service area who choose to affiliate themselves with the CLT. *Id.* at 70.

characteristics of its service population can have a direct effect on the operation of the CLT.⁸⁰

When navigating any of these tensions, a CLT must take into account the social, political, and economic climate within which it will operate. In this way the CLT is often in tension with existing policies and institutions. Sometimes what seems like the best choice for the community conflicts with the qualifications for broader funding sources or greater political support.⁸¹ The weight of these tensions varies within communities, and their resolution sculpts CLTs into fundamentally local creatures. Any description of CLTs should acknowledge that the CLT model resembles a constellation of commitments and tendencies rather than a determined set of common, concrete features.⁸² This flexibility, while it allows a CLT to cater its policies to a community's needs, complicates efforts to advocate for broad CLT-friendly policy because the legislative and regulative process generally requires great specificity.⁸³

B. The CLT Establishes Its Commitment to Affordability in Its Formal Structure

When a CLT transforms from an idea born out of local need into a recognized organization, it establishes its commitment to long-term affordable housing in the rules and legal structures that define and regulate its operation. Through this process, each CLT negotiates the tensions that surround it, devising solutions that both respond to the particularities of its establishment and further the goal of long-term affordability. The following discussion attempts to navigate the landscape of CLT tendencies without sacrificing the complexity and diversity that underlie the model. This section discusses ways that CLTs have implemented and could implement goals of long-term housing affordability through the intentional use of organizational structure, legal relationships, and governing documents.

⁸⁰ *Id.* at 25.

⁸¹ *Id.* at 28.

⁸² *Id.* at 1.

⁸³ For example, in order for the Community Development Act of 1992 to make CLTs per se Community Development Housing Organizations (CDHOs), CLTs had to be defined. The definition outlines certain characteristics of a CLT that may not apply in some scenarios, such as governing board composition. 42 U.S.C. § 12773(f) (2006).

1. Long-Term Affordability Established in CLT Organizational Structure

A classic CLT⁸⁴ is set up as an independent, nonprofit corporation under the laws of the state in which it is formed.⁸⁵ As an entity that provides affordable housing and other community services, CLTs typically apply for federal 501(c)(3)⁸⁶ nonprofit, tax-exempt status early in their formation.⁸⁷ Nonprofit status qualifies CLTs for many forms of financial assistance beyond the benefit of tax exemption.⁸⁸

Because a CLT will need to attach copies of its articles of incorporation and bylaws to its application for 501(c)(3) status, CLT organizers need to prepare these documents early in the formalization process.⁸⁹ Articles and bylaws outline, among other things, the requirements of CLT membership and the method for establishing a governing board.⁹⁰ In the classic CLT model, members have considerable impact on the organization because they vote for and can serve on the CLT board.⁹¹ Thus, at an early point in formation, CLT organizers must address the tension between community control and the stewardship goals of the organization by specifying the parameters and powers of membership.

The National CLT Network (NCLTN)⁹² lists “representative governance” as one of its core principles, defining it as the integration of “key stakeholders

⁸⁴ I borrow the term *classic* from John Davis, a prominent and prolific CLT advocate, to discuss the most common forms of CLT legal and organizational structure. DAVIS, *supra* note 50, at 1 (“Although there is much variation among the 200 CLTs already in existence or under development in the United States, there are . . . key features that are found in most of them. These features . . . defin[e] and distinguish[] what may be called the ‘classic’ CLT . . .”).

⁸⁵ *Id.* at 1–2. Generally, in cases where a CLT is not an independent nonprofit, it exists as a project of another nonprofit organization. *Id.*

⁸⁶ 26 U.S.C. § 501(c)(3) (2006).

⁸⁷ For details on this process and general tips for CLTs as they fill out the 501(c)(3) application, see ICE, COMMUNITY LAND TRUST LEGAL MANUAL § 6, at 1 (3d ed. 2010) [hereinafter ICE (Third)], *available at* <http://www.clnetwork.org/index.php?fuseaction=Blog.dspBlogPost&postID=1614>.

⁸⁸ DAVIS, *supra* note 50, at 51 (“Any federal funds that are offered to nonprofit 501(c)(3) corporations for the construction of affordable housing . . . can be used—and have been used—by CLTs.”).

⁸⁹ ICE (Third), *supra* note 87, § 6, at 14.

⁹⁰ *Id.* § 4, at 1.

⁹¹ ICE, COMMUNITY LAND TRUST LEGAL MANUAL § 5C, at 1–3 (2d ed. 2002) [hereinafter ICE (Second)], *available at* <http://www.clnetwork.org/index.php?fuseaction=Blog.dspBlogPost&postID=1613>.

⁹² The National Community Land Trust Network (NCLTN) formed in 2006 out of the Institute for Community Economics (itself a descendent of Robert Swann’s International Independence Institute). NCLTN provides research and resources on the CLT model. *Who We Are*, NAT’L COMMUNITY LAND TRUST NETWORK, <http://www.clnetwork.org/index.php?fuseaction=Main.SectionHome§ionID=1> (last visited Aug. 16, 2010).

in the decision-making of the organization, particularly residents on community owned land.”⁹³ The classic CLT model extends membership to persons residing anywhere within the CLT service area.⁹⁴ For example, model language provided by ICE for classic CLT articles of incorporation outlines *membership* as:

- (a) The Initial Members . . . shall be those persons who have attended at least one “organizing meeting”
- (b) The Regular Members . . . shall be (1) the “Lessee Members,” who are all persons who lease land or housing from the Corporation or who lease or own housing located on land leased by another entity from the Corporation, and (2) the “Non-Lessee Members,” who are all other persons who qualify as Regular Members under the Bylaws.⁹⁵

Corresponding language from the ICE Model Bylaws further defines these categories:

- a. The Lessee Members . . . shall be all persons who lease land or housing from the Corporation or who lease or own housing that is located on land leased by another entity from the Corporation.
- b. The General Members . . . shall be all other persons, eighteen years of age or older, who have complied with the following requirements.
 - (1) Submission of a Membership application
 - (2) Payment of dues as established by the Membership⁹⁶

This language, although perhaps imprecise,⁹⁷ demonstrates the scope of membership of a classic CLT.

⁹³ *Id.*

⁹⁴ ICE (Third), *supra* note 87, § 5A, at 1.

⁹⁵ ICE (Second), *supra* note 91, § 4, at 10. This language leaves ambiguity as to how many and which members of a lessee household count as Lessee Members. More precise language appears in the bylaws of the Champlain Housing Trust (CHT):

Resident Members shall include all members of any household living in property owned, in whole or in part or otherwise in stewardship with the Corporation, as described in Article V, who are aged 16 years or older. This shall include single-family home-owners who lease land owned by the Corporation, owners of housing units who have granted BCLT or the Corporation a Housing Subsidy Covenant, tenants in rental units owned by the Corporation or by a limited partnership in which the Corporation, or any subsidiary of the Corporation has an ownership interest, and members of limited-equity housing cooperatives that have signed a Contract for Services with the Corporation or BCLT.

Champlain Housing Trust, Inc. Bylaws, art. II, § 2 (2009) (on file with Champlain Housing Trust and author).

⁹⁶ ICE (Third), § 5A, at 3.

⁹⁷ *See supra* note 95.

Once CLT organizers establish a membership body, they write the bylaws to outline general operations.⁹⁸ The bylaws govern the powers and duties of members; the composition, selection, and operation of the board of directors; and the establishment and amendment of fundamental pillars of the classic CLT, such as resale-restriction formulas and ground leases.⁹⁹ The bylaws also outline a process for amendment, the back door through which great changes can occur.

CLT bylaws serve as a procedural buffer to protect the stewardship goals of the CLT. For example, ICE recommends that CLTs require a minimum of two-thirds vote by directors and members for an amendment to pass.¹⁰⁰ The Champlain Housing Trust (CHT) Bylaws require a two-thirds vote by the board of directors, quorum established, and a three-fourths approval by the general membership.¹⁰¹ CHT also requires a procedure of notification before amendments can be presented to the membership.¹⁰²

In addition to general bylaw amendments, the process for amending the resale formula tends to include heightened procedural requirements.¹⁰³ CHT requires a separate procedure for the amendment of resale-restriction formulas.¹⁰⁴ First, any discussion pertaining to the amendment of the formula by the board of directors must be noted in advance with ten days notice to each director.¹⁰⁵ Second, a motion to amend the formula can only be made after two-thirds of the board (quorum required) find that the current formula “may be detrimental to the mutually-held purposes of the Corporation, Its Members, lessees, and Covenantors.”¹⁰⁶ Third, the board may propose and vote on a new formula, which must pass by two-thirds vote.¹⁰⁷ Finally, once adopted by the board, the new formula must be presented to a special meeting of the general

⁹⁸ See, e.g., Champlain Housing Trust, Inc. Bylaws, art. III–V.

⁹⁹ ICE (Third), *supra* note 87, § 5A, at 1–2.

¹⁰⁰ *Id.* at 15–16.

¹⁰¹ Champlain Housing Trust, Inc. Bylaws, art. VII.

¹⁰² *Id.* (“[P]rovided that written notice setting forth the nature of the proposed change(s) shall have been given to all Members no later than two weeks prior to the meeting. The notice must state that the purpose, or one of the purposes, of the meeting is to consider the proposed amendment and contain or be accompanied by a copy or summary of the amendment.”).

¹⁰³ ICE (Third), *supra* note 87, § 12, at 1.

¹⁰⁴ These formulas are referred to as “limited appreciation formulas” in the CHT Bylaws. Champlain Housing Trust, Inc. Bylaws, art. IX.

¹⁰⁵ *Id.* art. IX § 2(a).

¹⁰⁶ *Id.* § 2(b).

¹⁰⁷ *Id.* § 2(c).

membership, and two-thirds of the members present (quorum required) must approve the formula for it to take effect.¹⁰⁸

Bylaw provisions like Article IX of the CHT Bylaws, which provides for the amendment of a resale formula, demonstrate the power that the board of directors can wield over the CLT's affordability goals, and the detail of provision required to resist that possibility. The board's potential power pressures CLT organizers to carefully construct provisions outlining the composition and election of the board of directors.¹⁰⁹ Although CLTs vary widely based on local need, the classic CLT model suggests a tripartite composition for the board of directors consisting of (1) Resident Members, or persons who occupy CLT housing;¹¹⁰ (2) General Members, or CLT members residing within the service area but not in CLT housing; and (3) "Public Representatives" nominated by the serving board of directors and intended to represent the public interest that may not already be represented by the General Member representatives.¹¹¹ The composition of the board is intended to ensure representation of a wide variety of stakeholders in the CLT mission and to prevent a circumstance where a single "kind" of stakeholder dominates the decision-making process.¹¹²

The U.S. Congress codified the classic CLT board of directors structure in the Housing and Community Development Act of 1992 when it gave complying CLTs per se status as Community Housing Development Organizations (CHDOs).¹¹³ CHDO status renders CLTs eligible for federal Home Investment Partnerships Program (HOME) block grant funding, at least

¹⁰⁸ Once passed, the new formula does not affect existing leases or agreements based on the old formula.
Id.

¹⁰⁹ ICE (Third), *supra* note 87, § 5B, at 3–5.

¹¹⁰ Some CLTs that offer different varieties of residence, such as single-family residence, rental, or limited equity cooperative housing, allocate board seats in this section among the various types of CLT occupants. *Id.* § 5B, at 4; *see also, e.g.*, Champlain Housing Trust, Inc. Bylaws, art. III § 3.

¹¹¹ ICE (Second), *supra* note 91, § 5C, at 4.

¹¹² *Id.*

¹¹³ 42 U.S.C. § 12773(f) (2006). The statute sets out a definition of "community land trust":

For purposes of this section, the term "community land trust" means a community housing development organization

(5) whose board of directors—

(A) includes a majority of members who are elected by the corporate membership; and

(B) is composed of equal numbers of (i) lessees pursuant to paragraph (3)(B), (ii) corporate members who are not lessees, and (iii) any other category of persons described in the bylaws of the organization.

Id. (emphasis added).

15% of which must be given to CHDO organizations.¹¹⁴ The codification of the classic CLT board structure exemplifies a tension between local control and broader state regulation: now, if a CLT develops a different board structure that works better in its local context, the CLT sacrifices per se eligibility for CHDO status.

CLTs use their operating documents to establish a structure within which they can anticipate and address adverse interests and tensions to ensure long-term access to affordable housing. These documents also state the CLT's organizational purpose, which—although often tailored in anticipation of tax-exempt status and funding eligibility¹¹⁵—records the mission of the CLT for posterity—arguably, its most important beneficiary.

2. *Structure of Legal Relationships*

In addition to its organizational structure, a CLT establishes its commitment to long-term affordable housing through the legal relationships it forms. These relationships arise out of a series of documents and embody the classic CLT approaches to land, homeownership, property value, and community development.

a. *Split-Ownership as a Basic Method of Affordability*

The most basic element of the classic CLT model involves the splitting of ownership between the CLT and the homebuyer: the CLT holds title to land and sells structures located on the land.¹¹⁶ In the classic CLT model, the structure is a single-family home purchased by an income-qualified individual.¹¹⁷ However, CLTs apply the split-ownership model to multifamily residences, office buildings, and other scenarios where the party purchasing the structures is not an individual homebuyer.¹¹⁸ This ownership model appears in Congress's definition of a CLT as described in the Housing and Community

¹¹⁴ 24 C.F.R. § 92.300(a)(1) (2009).

¹¹⁵ See ICE (Third), *supra* note 87, §§ 3, 4, 6.

¹¹⁶ Abromowitz, *supra* note 8, at 214.

¹¹⁷ *Id.* at 214–15.

¹¹⁸ DAVIS, *supra* note 50, at 2. Unless otherwise specified, the reader may assume that this Comment treats CLT structures as units of housing.

Development Act of 1992.¹¹⁹ Thus, to qualify for the benefits of per se CHDO status, a CLT must offer this type of ownership structure.¹²⁰

The split-ownership structure relies on the transfer of a leasehold interest in the land from the CLT to the purchaser. The parameters of the purchaser's leasehold interest are governed by a ground lease.¹²¹ By splitting the ownership of the land and making the purchaser's rights contingent on a ground lease, the CLT model sets up two important aspects of long-term affordability: (1) price reduction,¹²² and (2) the power to recapture the unit after the purchaser moves on.¹²³ Combined, these two factors work to subsidize the cost of housing¹²⁴ and maintain the possibility that the unit will perpetually serve the broader goal of long-term housing affordability.

b. Ground Lease as an Instrument of Affordability

The split-ownership model requires a document for governing the relationship between CLT as landowner and the purchaser as owner of the improvements.¹²⁵ The CLT model uses a ground lease to define this relationship.¹²⁶ Ground leases have been used for centuries in agricultural and commercial real estate transactions.¹²⁷ CLT ground leases generally operate for a term of ninety-nine years and provide an option to renew.¹²⁸

The ground lease plays a central role in the functioning and long-term affordability of CLT housing.¹²⁹ NCLTN circulates the ICE Model Ground Lease, drafted in 2002, as “a central document in the CLT movement.”¹³⁰

¹¹⁹ 42 U.S.C. § 12773(f) (2006).

¹²⁰ This does not mean that CLTs cannot diversify their methods of housing stewardship by, for example, holding rights of repurchase in otherwise price-restricted units. DAVIS, *supra* note 50, at 2.

¹²¹ Abromowitz, *supra* note 8, at 214. The ground lease will be described in more detail in Part I.B.2.b.

¹²² Rosalind Greenstein & Yesim Sungu-Eryilmaz, *Community Land Trusts: Leasing Land for Affordable Housing*, LAND LINES: NEWSLETTER OF THE LINCOLN INST. LAND POL'Y, April 2005, at 8, available at http://www.lincolinst.edu/pubs/dl/1008_landlines_final_4.05.pdf.

¹²³ Abromowitz, *supra* note 8, at 214.

¹²⁴ The cost of housing is subsidized by removing the accruing value of the land from the equation. Greenstein & Sungu-Eryilmaz, *supra* note 122, at 9.

¹²⁵ Abromowitz, *supra* note 8, at 214.

¹²⁶ DAVIS, *supra* note 30, at 18.

¹²⁷ Abromowitz, *supra* note 8, at 214.

¹²⁸ ICE (Second), *supra* note 91, § 12, at 2.

¹²⁹ *Id.*

¹³⁰ *CLT Toolkit*, NAT'L COMMUNITY LAND TRUST NETWORK, <http://www.clnetwork.org/index.php?fuseaction=Blog.dspBlogPost&postID=111> (last visited Aug. 16, 2010). The Model Ground Lease is in a process of revision currently and is slated for release sometime in 2010, subject to approval by Fannie Mae. *Id.*

Many CLTs use this document as a template for their own ground lease, sometimes copying it to the word.¹³¹ Furthermore, Fannie Mae requires that CLT leases conform to the ICE Model Ground Lease to qualify for its mortgage products.¹³² For this reason, the bulk of this discussion draws from the ICE Model Ground Lease.¹³³

Like the bylaws, the ground lease establishes a lessee's status as a regular voting member in the CLT.¹³⁴ In providing that lessees are always voting members, the ground lease recognizes and protects a lessee's interest in the operation of the CLT.¹³⁵ While the bylaws can be amended by a sufficient vote of the membership,¹³⁶ the material terms of the ground lease have the potential to operate for nearly 200 years.¹³⁷ If a bylaw amendment were to conflict with terms in the ground lease, those terms would not apply unless the lessee specifically consented to their incorporation.¹³⁸

Through ground lease provisions, the classic CLT model establishes and enforces its most robust tactics to preserve affordability, including: resale restrictions,¹³⁹ affordability limitations upon transfer,¹⁴⁰ CLT options to repurchase,¹⁴¹ and limitations on use,¹⁴² assignment, and sublease.¹⁴³ The ground lease also includes provisions to protect the lessee as a low-income homebuyer, such as granting the CLT the right to refuse the terms of a lessee's mortgage.¹⁴⁴

¹³¹ See, e.g., CMTY. HOUS. TRUST OF SARASOTA, GROUND LEASE (2005), <http://www.burlingtonassociates.net/resources/archives/CHT%20Ground%20Lease.pdf>.

¹³² FANNIE MAE, FORM 2100: COMMUNITY LAND TRUST GROUND LEASE RIDER (2006), available at <https://www.efanniemae.com/sf/formsdocs/forms/2100.jsp>; see also discussion of Fannie Mae's role in CLT homebuyer financing *infra* Part II.C.

¹³³ The Model Ground Lease is set forth in section 12 of *Community Land Trust Legal Manual*. See ICE (Second), *supra* note 91, § 12.

¹³⁴ *Id.* § 12, at 16.

¹³⁵ Of course, this does not prevent a majority of members from amending the bylaws to limit membership control, but it does guarantee that lessees will have the right to vote on such a decision.

¹³⁶ See *supra* notes 100–02 and accompanying text.

¹³⁷ ICE (Second), *supra* note 91, § 12, at 2.

¹³⁸ *Id.* § 12, at 3.

¹³⁹ *Id.* § 12, at 13.

¹⁴⁰ *Id.* § 12, at 11.

¹⁴¹ *Id.* § 12, at 12.

¹⁴² *Id.* § 12, at 3.

¹⁴³ *Id.* § 12, at 14.

¹⁴⁴ *Id.* § 12, at 7. The implications of the ground lease on mortgage options and vice versa is discussed in further detail in Part II.

Some of the ground lease terms are common aspects of a lessee–lessor relationship, which the CLT applies in service to its greater affordability goals. For example, as tenants under the ground lease, homebuyers must comply with a ground lease provision that limits the property’s use as a primary residence.¹⁴⁵ The Model Ground Lease requires resident occupancy for a certain number of months, annually, as determined by the CLT.¹⁴⁶ The ground lease also prohibits assignment or sublease without the CLT’s written approval.¹⁴⁷ These provisions are intended to ensure that the lessee-homeowner is using the property for its intended purpose, as opposed to renting it out at market rates that would undermine the CLT’s affordability.¹⁴⁸

The ground lease also establishes a base rent for the land, payable monthly.¹⁴⁹ This rental amount covers the cost of CLT operations in maintaining the land and executing the ground lease, and may be influenced by state regulations.¹⁵⁰ CLTs take great caution to make sure that the ground rent does not render the home unaffordable.¹⁵¹

The ground lease also includes provisions that establish the CLT’s central role in the continuity of affordability from one homeowner to the next. The lease provides that a homeowner must (1) allow the CLT first option to purchase back the home at the resale-restricted price,¹⁵² or (2) sell the home at the resale restricted price to an “income-qualified” individual.¹⁵³ The ground lease further grants the CLT power of attorney to sell the property on behalf of the owner under certain circumstances.¹⁵⁴ With the knowledge that they will have first option to purchase units back from lessees, CLTs can seek out and

¹⁴⁵ *Id.* § 12, at 3.

¹⁴⁶ *Id.* For an example of this requirement in practice, see CMTY. HOUS. TRUST OF SARASOTA, *supra* note 131, art. 4.4 (requiring ten months’ annual occupancy).

¹⁴⁷ ICE (Second), *supra* note 91, § 12, at 14.

¹⁴⁸ Abromowitz, *supra* note 8, at 215.

¹⁴⁹ ICE (Second), *supra* note 91, § 12, at 4.

¹⁵⁰ See John Emmeus Davis et al., *Building Better City-CLT Partnerships: A Program Manual for Municipalities and Community Land Trusts* 77 (Lincoln Inst. of Land Pol’y, Working Paper No. WP08JD1, 2007) (describing a Michigan State Housing Development Authority policy that requires all CLTs that the Authority funds to contribute at least \$25 per month into a Capital Reserve Fund).

¹⁵¹ *Id.* § 13, at 5–6.

¹⁵² *Id.* § 12, at 12.

¹⁵³ Transfers to specific heirs, such as children, are also allowed even if they are not income-qualified, but all other heirs must demonstrate income qualification to possess the premises. *Id.* § 12, at 11–12.

¹⁵⁴ *Id.* § 12, at 13 (granting power of attorney to the CLT when “[l]essee (a) is not then residing in the Improvements and (b) continues to hold the Improvements out for sale but is unable to locate a buyer and execute a binding purchase and sale agreement within one (1) year of the giving of the Intent to Sell Notice . . .”).

prepare income-qualified buyers for placement on a waiting list.¹⁵⁵ A waiting list can prevent the CLT from tying up its limited resources in the repurchase and holding of units. The purchase option also allows the CLT to re-acquire the property and relegate it to other community needs, such as a common area or office space.

One of the key features of the ground lease, and the source of much contention,¹⁵⁶ is the resale formula.¹⁵⁷ As a lessee, a homeowner promises that, upon selling her unit, the sale price will be limited according to a given formula.¹⁵⁸ Resale formulas represent a “shared equity” aspect of the CLT arrangement.¹⁵⁹ Shared equity is the process by which a CLT allocates the value and risk of owning property between itself (and therefore its beneficiaries) as lessor and the selling owner as lessee.¹⁶⁰ The rationale behind resale formulas mirrors that described by the Dudley Street Neighborhood Initiative: increased property value arises out of both owner and community improvement, and should be allocated as such, especially when the unmitigated sale of the unit would price out existing community members.¹⁶¹ While the specific formula differs from one CLT to another,¹⁶² it always places some limitation on the amount of equity the homeowner may receive, preserving affordability for future purchasers.¹⁶³

The resale formula is the fulcrum of the tension between durable affordability and individual wealth creation and can be calculated in various ways.¹⁶⁴ Generally these formulas fall into four categories: appraisal-based formulas, indexed formulas, itemized formulas, and mortgage-based formulas.¹⁶⁵ Appraisal-based formulas are the most common¹⁶⁶ and are

¹⁵⁵ See Davis et al., *supra* note 150, at 4 (describing one of the tasks of a CLT as making a waiting list of interested buyers).

¹⁵⁶ See *infra* Part II.

¹⁵⁷ Resale formulas are also sometimes referred to as “limited equity formulas” or “appreciation limitation formulas.” ICE (Third), *supra* note 87, § 8, at 2.

¹⁵⁸ ICE (Second), *supra* note 91, § 12, at 13.

¹⁵⁹ Another shared equity aspect of CLT homeownership is the split ownership of structure and land because the increasing value of the land remains in the hands of the CLT as titleholder and lessor. See DAVIS, *supra* note 30, at 18–19.

¹⁶⁰ *Id.* at 5.

¹⁶¹ See discussion of Dudley Street Neighborhood Initiative *supra* notes 41–46 and accompanying text.

¹⁶² Sungu-Eryilmaz & Greenstein, *supra* note 7, at 29–32 (survey of resale formulas among CLTs nationwide revealed a wide variance in type and amount of resale formula).

¹⁶³ DAVIS, *supra* note 30, at 18–19.

¹⁶⁴ JACOBUS & LUBELL, *supra* note 10, at 10–11.

¹⁶⁵ *Id.*

featured in the Model Ground Lease provided by the Institute for Community Economics. These formulas compare the owner's purchase price to an appraised fair market value of the property. The positive margin between the two numbers, if there is one, is then divided between the selling homeowner and the unit itself.¹⁶⁷ For example, if the formula allows for a 25% equity retention by the homeowner the following would apply:

25% Appraisal-Based Resale Formula

Year 1: Homeowner purchases CLT unit—\$100,000

Year 3: Homeowner seeks to sell unit—appraised at \$140,000

Increase in value: \$40,000

Resale Formula: $.25(\text{Increased Value}) + \text{Year 1 Price} = \text{Resale Price}$
 $.25(\$40,000) + \$100,000 = \mathbf{\$110,000 \text{ Resale Price}}$

Homeowner's positive value margin: \$10,000

Amount "retained" in property: \$30,000

Indexed formulas fix the rate of increase in the sale price to the rate of increase of a specified indexed value, such as the area median income (AMI) or the Consumer Price Index.¹⁶⁸ Mortgage-based formulas derive the maximum sales price by choosing a target level of income, expressed as a percentage of AMI, and then working backwards from that income level to derive the maximum affordable price.¹⁶⁹ Finally, itemized formulas determine the sales price by adding or subtracting specific amounts from the original price, such as the cost of improvements made to the property or an inflation factor.¹⁷⁰ Each CLT must establish its resale formula balanced against the tension between the affordability goals of the CLT and the needs and limitations of its community, resulting in the wide spectrum of shared equity formulas that appear across the country.¹⁷¹ The formula is initially determined

¹⁶⁶ In a recently conducted survey by the Lincoln Institute of Land Policy, fifty-one of ninety-four responding CLTs indicated that they use an appraisal-based formula. Sungu-Eryilmaz & Greenstein, *supra* note 7, at 31–32. Twenty-one responding CLTs use an indexed formula. *Id.*

¹⁶⁷ *Id.* at 31.

¹⁶⁸ *Id.* at 32.

¹⁶⁹ This price is based on an affordability factor of 33% of monthly income including taxes, interest, and insurance. JACOBUS & SHERRIFF, *supra* note 68, at 24. Only four CLTs responding to the Lincoln Institute survey reported that they used mortgage-based formulas. Sungu-Eryilmaz & Greenstein, *supra* note 7, at 32.

¹⁷⁰ Only three CLTs responded to the Lincoln Institute survey indicating that they use this method of calculation. Sungu-Eryilmaz & Greenstein, *supra* note 7, at 32.

¹⁷¹ *Id.* at 30–32 (reporting appraisal-based resale formulas ranging 2%–60% of the equity allocated to the owner, with a median value of 25%).

by CLT organizers and members,¹⁷² and in the case of revision—which is an intentionally difficult process¹⁷³—guided by the board of directors and approved by the voting membership.¹⁷⁴ In the event that a CLT amends the resale formula, it only applies to existing ground leases if the lessee specifically agrees to the change.¹⁷⁵

3. *Commitment to Affordability Established in Subsidy Retention*

The CLT model facilitates housing affordability and community development by getting the most mileage out of housing subsidies. Typically, when a low-income individual seeks to purchase a home she has two options: traditional homebuyer assistance provided by state and federal programs like the Federal Housing Administration, or other subprime loan options available from private lenders.¹⁷⁶ In recent years, lenders have offered “creative” mortgages and low-to-zero down payments to borrowers whose financial status and credit scores did not qualify them for traditional mortgage products.¹⁷⁷ However, the subprime crisis has underscored the risk—individual and systemic—involved in the unregulated promotion of these products.¹⁷⁸

On the other hand, traditional public homebuyer assistance aims to lower the cost of home purchases by offering grants or low-interest loans to individual homebuyers.¹⁷⁹ These homebuyer assistance programs focus on affordable *payment* for the individual but fail to consider the affordability of the housing unit itself.¹⁸⁰ To develop this distinction more fully: a plan that only aims to reduce a person’s monthly housing burden¹⁸¹ by providing subsidies that merely reduce that individual’s payment—such as a down payment grant or “soft second” mortgage—may not consider whether that subsidy is actually increasing the supply of affordable housing in the long

¹⁷² ICE (Third), *supra* note 87, § 12, at 23–24.

¹⁷³ *Id.* at 25–26.

¹⁷⁴ See discussion of amended resale formulas, *supra* notes 104–08 and accompanying text.

¹⁷⁵ ICE (Third), *supra* note 87, § 12, at 26.

¹⁷⁶ See Alan Mallach, *Preface* to DAVIS, *supra* note 30 (describing common strategies for low-income people to access homeownership). See generally Sean Zielenbach, *A Critical Analysis of Low-Income Homeownership Strategies*, 13 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 446 (2004) (discussing various low-income options for financing the purchase of a home).

¹⁷⁷ DAN IMMERSLUCK, FORECLOSED 69 (2009).

¹⁷⁸ See *id.* at 3.

¹⁷⁹ See JACOBUS & LUBELL, *supra* note 10, at 8.

¹⁸⁰ *Id.* at 9–10.

¹⁸¹ Here, the discussion focuses primarily on homeownership programs to maintain a comparison between CLT durable affordability and other homebuyer assistance methods.

run.¹⁸² The subsidy merely makes an unaffordable property manageable—or even profitable—for one individual or family.¹⁸³ Even when these programs involve some level of subsidy recapture,¹⁸⁴ they do not necessarily pace the rising cost of homes, and end up requiring a greater investment after one low-income homebuyer cycles through and a new one comes along.¹⁸⁵ By focusing almost entirely on the cost of a home for each individual buyer, traditional homeownership assistance programs approach affordability as a problem that is income-generated—the homebuyers do not make enough money to play in the regular market. The CLT model, however, adds nuance to the inquiry. While CLT homebuyers qualify based on their income, the model views “affordability” in terms of whether the price of the house is accessible—not whether the individual can be hoisted into affordability.¹⁸⁶

“Locking in” a subsidy involves keeping the price low and the unit perpetually available to future income-qualified persons.¹⁸⁷ Funds devoted to the creation of CLT units are retained in the property itself, sustaining their value through multiple sales.¹⁸⁸ For example, the Champlain Housing Trust (CHT) in Burlington, Vermont, completed a study of all government subsidy invested in CHT houses that had resold between the years of 1988 and 2008.¹⁸⁹ The results of the study showed that CHT was able to use subsidies of 152 homes to help 357 families obtain CLT homeownership.¹⁹⁰ The amount that this cost public coffers was five times less than it would have been if each subsidized homeowner had pocketed the subsidy upon sale.¹⁹¹ Interestingly,

¹⁸² See JACOBUS & LUBELL, *supra* note 10, at 9–10.

¹⁸³ See Mallach, *supra* note 176 (“[W]here house prices are rapidly appreciating, publicly subsidized homeownership can lead to windfalls for a few, while other less fortunate lower income households are being pushed out of their own communities.”).

¹⁸⁴ In a subsidy recapture program, the public subsidy must be paid back when the homebuyer resells the property. JACOBUS & SHERRIFF, *supra* note 68, at 5–6.

¹⁸⁵ *Id.* at 11–13.

¹⁸⁶ See JOHN EMMEUS DAVIS & ALICE STOKES, CHAMPLAIN HOUS. TRUST, LANDS IN TRUST HOMES THAT LAST: A PERFORMANCE EVALUATION OF THE CHAMPLAIN HOUSING TRUST 21–27 (2009), available at http://www.champlainhousingtrust.org/assets/files/Lands-In-Trust_Homes-That-Last.pdf (measuring the preservation of affordability of Champlain Housing Trust homes by assessing the average resale price of the home against a household income of 50%–80% area median household income as compared to market rate Burlington housing).

¹⁸⁷ RYAN SHERRIFF & JEFFREY LUBELL, CTR. FOR HOUS. POLICY, WHAT’S IN A NAME? CLARIFYING THE DIFFERENT FORMS AND POLICY OBJECTIVES OF “SHARED EQUITY” AND “SHARED APPRECIATION” HOMEOWNERSHIP PROGRAMS 20 (2009).

¹⁸⁸ DAVIS & STOKES, *supra* note 186, at 27.

¹⁸⁹ *Id.* at 27–30.

¹⁹⁰ *Id.* at 29.

¹⁹¹ *Id.* at 30.

the study found only two instances where a public subsidy was lost in its entirety, and both cases involved foreclosure.¹⁹² Ninety-six percent of the time a CLT home changed hands, the home remained affordable enough that the purchase required zero increase in public investment.¹⁹³

II. FINANCING CLT HOMEBUYERS

The CLT model shares at least one characteristic with nearly every other type of homeownership: the need for homebuyer financing. While the CLT model subsidizes and locks in long-term affordability, buyers generally still need to borrow money to purchase the home. Often, the very provisions that make CLT homes affordable complicate the lending relationship, making homebuyer financing one of the most widespread challenges for CLT growth.¹⁹⁴

Some lenders view the CLT structure as a credit asset because the CLT's stewardship goals operate as a backstop in the event of a mortgage default. These lenders often work with CLTs to establish portfolios of CLT lending.¹⁹⁵ Most residential lenders, however, are unfamiliar with the ground lease structure and do not lend money to purchasers without a fee simple interest in the land.¹⁹⁶ Furthermore, lenders are skeptical of the CLT ground lease because its terms will encumber the property even in the event of foreclosure. In an effort to remedy this hesitation, CLT advocates have worked with Fannie Mae to develop a method by which mortgages to CLT homebuyers could be mainstreamed.¹⁹⁷ However, the fruits of these efforts, while they may encourage lenders to loan money to CLT homebuyers, jeopardize the fabric of the CLT model by threatening to strip the ground lease of its affordability provisions.

After outlining these challenges, this Part argues that the risk of lending to CLT homebuyers is not as great as is perceived and should not be addressed by holding hostage the provisions that ensure the long-term affordability of the CLT model, especially in cases where CLTs have been subsidized with public resources. Next, solutions are presented which propose stronger support of the

¹⁹² *Id.* at 29.

¹⁹³ *Id.*

¹⁹⁴ ICE (Third), *supra* note 87, § 20, at 2.

¹⁹⁵ Telephone Interview with Roger Lewis, Exec. Dir., NCLTN (Jan. 22, 2010).

¹⁹⁶ *Id.*

¹⁹⁷ ICE (Third), *supra* note 87, § 20, at 8.

CLT model by government and quasi-government entities already charged with the duty to promote affordable homeownership.

A. *The Need for CLT Homebuyer Financing*

CLT homeowners are income-qualified individuals¹⁹⁸—people who have typically stood at the margins of the housing market and therefore may be unfamiliar with lending practices. As is the case with most homebuyers, income-qualified individuals do not have access to enough cash to complete their purchases. They must acquire a mortgage. The terms of their mortgage agreements will structure their payment schedules, directly impacting the affordability of their purchases and the stability of their tenure. For this reason, and because some lenders have been known to take advantage of needy borrowers,¹⁹⁹ CLT ground leases generally limit the kind of mortgage product that a homebuyer may solicit.²⁰⁰ In the wake of the recent housing crisis, this practice has been extolled as one of the most important elements of CLT survival and success.²⁰¹

Specifically, the ground lease stipulates that the CLT must approve any mortgage before the purchaser may agree to it.²⁰² The CLT agrees to approve any mortgage that conforms to the Standard Permitted Mortgage (SPM) qualifications laid out in the ground lease.²⁰³ According to the Model Ground Lease, SPMs may only be granted to institutional lenders or Community Development Financial Institutions.²⁰⁴ SPMs must also be first liens on the property,²⁰⁵ and must grant the CLT the right to notice of a default in payment and the right to cure that default on behalf of the homebuyer.²⁰⁶ Because most

¹⁹⁸ This category is typically defined as persons making between 50% and 80% of area median income. DEP'T. OF URBAN AND REGIONAL PLANNING, UNIV. OF WISC.—MADISON, A SURVEY OF NATIONWIDE COMMUNITY LAND TRUST RESALE FORMULAS AND GROUND LEASES 3 (2002), available at <http://www.burlingtonassociates.com/resources/archives/ResaleFormulasandGroundLeases.pdf>.

¹⁹⁹ See, e.g., Gretchen Morgenson, *Piling on Borrowers Buried by Fees*, N.Y. TIMES, Apr. 20, 2008, at BU1.

²⁰⁰ ICE (Second), *supra* note 91, § 12, at 7 (discussing a “permitted mortgage”).

²⁰¹ Fireside, *supra* note 17 (“Unlike shady mortgage brokers, “[CLTs are] not going to let people take risky mortgage products . . .”).

²⁰² ICE (Second), *supra* note 91, § 12, at 7.

²⁰³ *Id.*

²⁰⁴ *Id.* § 12, at 22.

²⁰⁵ *Id.* In other words, without specific approval of the CLT, CLT homeowners may not seek second mortgages or otherwise encumber their property title.

²⁰⁶ *Id.*

residential mortgages do not contain these provisions,²⁰⁷ the CLT is able to review the lending documents of its purchasers to screen out possible predatory lending practices.²⁰⁸ This practice is not only good for the homebuyer, it also protects the CLT from the instability of having its residents teeter on the edge of financial ruin. Providing stable, affordable homeownership is, after all, the primary organizational goal of most CLTs.

B. The Difficulty of Finding a Lender

In contrast to CLTs, which approach homeownership as an avenue for stable housing, lenders understand homeownership in terms of investment opportunity. Homebuyers need to borrow money, and lenders provide that money at interest for the purpose of generating a profit. If the homebuyer does not or cannot pay the lender back, the lender can resort to foreclosure and attempt to sell the house (and the lease to the land underneath it) to recover the amount due.²⁰⁹

Just as CLTs are cautious of some mortgage products, lenders are skeptical of some aspects of the CLT model. Although ground leases are quite common in commercial real estate transactions,²¹⁰ the vast majority of residential mortgages are initiated on a fee interest in the land—not a leasehold interest.²¹¹ Fortunately, some lenders are nonetheless willing to lend to CLT homebuyers.²¹² These lenders understand that lending to CLT homebuyers can be a secure investment because of the role of the CLT as a safety net.²¹³ For

²⁰⁷ Not because the terms are problematic, but because most homebuyers do not have a local community organization offering to step in to cure financial defaults. The most common security deed language can be found in each state's Fannie Mae and Federal Home Loan Mortgage Corporation ("Freddie Mac") Standard form. See *Security Instruments*, EFANNIEMAE.COM, <https://www.efanniemae.com/sf/formsdocs/documents/secinstruments/index.jsp> (providing a list of standard forms for every state).

²⁰⁸ Curtin & Bocarsly, *supra* note 9, at 373–74.

²⁰⁹ MARGE MISAK ET AL., NAT'L CMTY. LAND TRUST NETWORK, 2008 FORECLOSURE SURVEY 2 (2009), available at http://www.cltnetwork.org/doc_library/p238-2008%20CLT%20Network%20Foreclosure%20Survey%20Report%201009%20post.pdf. NCLTN has recently conducted and published a 2010 foreclosure survey resulting in similar findings. NCLTN worked with Vanderbilt University to produce a final report comparing the 2009 and 2010 surveys, and discussing the resilience of the CLT market against the prevailing dismal climate of the greater housing market. EMILY THADEN, NAT'L CMTY. LAND TRUST NETWORK, OUTPERFORMING THE MARKET: MAKING SENSE OF LOW RATES OF DELINQUENCIES AND FORECLOSURES IN COMMUNITY LAND TRUSTS (2010), available at <http://www.cltnetwork.org/index.php?fuseaction=Blog.dspBlogPost&postID=2173>.

²¹⁰ *Owning a CLT Home*, HOMESTEAD COMMUNITY LAND TRUST, <http://www.homesteadclt.org/pdf/OwningaCLThome.pdf> (last visited Aug. 16, 2010).

²¹¹ *Id.*

²¹² ICE (Third), *supra* note 87, § 20, at 1.

²¹³ DAVIS & STOKES, *supra* note 186, at 6.

example, lenders are happy to agree to provisions that allow the CLT to cure mortgagor default.²¹⁴

Unfortunately, although those lenders who originate mortgages with CLT purchasers enjoy the security of CLT default protection, they do not find the ground lease's affordability provisions as appealing. While the ground lease is intentionally chosen by the CLT as a durable method of delivering permanently affordable housing,²¹⁵ current demands of lenders threaten to unravel the very provisions that ensure affordability. Because any mortgage obtained on the CLT property is necessarily subordinate to the ground lease, the terms of the ground lease continue to operate even after foreclosure.

Lenders dislike provisions in the ground lease that could thwart their ability to recover their investment through foreclosure.²¹⁶ In particular, they are wary of resale-restrictions and income-qualified buyer limitations.²¹⁷ Incidentally, these are two of the CLT's most powerful tools for ensuring the long-term affordability of the unit.

Lenders view resale restrictions as threats to the value of their security.²¹⁸ If a buyer defaults in payment and the lender initiates foreclosure, lenders want to avoid any provisions that might hamper the property from selling for enough to cover the debt remaining on the mortgage. This is not merely out of concern for their own solvency, but also is symptomatic of the demands of secondary mortgage market investors, who prefer assets that can be easily liquidated.²¹⁹ The CLT ground lease is senior to the loan and therefore survives foreclosure proceedings, limiting (1) how much the property may sell for²²⁰ and (2) to whom the property may be sold.²²¹ If unmodified, the terms of the ground lease would apply to any foreclosure sale purchaser.

Because the CLT model requires homebuyer financing, lenders occupy a position of tremendous bargaining power. Evidence of this bargaining power

²¹⁴ However, lenders are less likely to agree to provisions requiring them to notify CLTs in the event of default. ICE (Third), *supra* note 87, § 20, at 4, 8.

²¹⁵ Abromowitz, *supra* note 8, at 221.

²¹⁶ ICE (Third), *supra* note 87, § 20, at 2.

²¹⁷ *Id.* § 20, at 5.

²¹⁸ Curtin & Bocarsly, *supra* note 9, at 378–79.

²¹⁹ Fannie Mae, for example, reports its assets in terms of the outstanding principal on its mortgages, indicating the amount that investors should recover either through payments or through foreclosure. *See, e.g.*, Fed. Nat'l Mortg. Ass'n, Quarterly Report (Form 10-Q), at 54 (Aug. 6, 2009).

²²⁰ ICE (Second), *supra* note 91, § 12, at 11.

²²¹ *Id.*

can be found in section 8.3 of the Model Ground Lease, entitled “Removal of Certain Provisions Pursuant to Foreclosure.”²²² This section provides that in the event of foreclosure or assignment of a deed in lieu of foreclosure, sections 10.1–11 “shall be deleted and thereupon shall be of no further force or effect.”²²³ The deleted sections of the ground lease stipulate the terms by which the property may be transferred, including resale price formula, income qualifications for potential buyers, and the CLT’s right of first refusal—nearly every provision that ensures long-term affordability of CLT homes. Quite obviously, a CLT would not choose to strip itself of these provisions unprompted. In this way, lenders use their superior bargaining power to compel CLTs to shoulder any risk associated with CLT homebuyer financing. If the homebuyer does not pay back the loan, the CLT must sacrifice the future affordability of the unit.

In addition to resale restrictions, prospective mortgagees fear the CLT’s termination rights under the ground lease.²²⁴ Although mortgagees could easily cure a lapsed ground rent payment, they have no easy way of curing the nonmonetary defaults of the lessee, such as ones requiring the use of the premises as a primary residence. Although preferably the CLT would negotiate with the homeowner to address any violations, the underlying power of the lease grants the CLT legal right of termination if an agreement cannot be reached.²²⁵ For lenders this power threatens their interest in the property because termination of the ground lease can result in forfeiture of the unit to the CLT.²²⁶ In this way, lenders and CLTs find themselves in a bind: the CLT needs to be able to enforce the provisions of its lease, and the lender does not want the incurable behavior of the lessee to threaten its security.

One solution that has been discussed would be to assign a monetary value to each nonmonetary default so that the lender could cure it.²²⁷ Another solution is to add a cross-default clause into the terms of the mortgage, which would equate default under the ground lease with default under the mortgage.²²⁸ These solutions address the related problems of CLT and lender

²²² *Id.* § 12, at 8.

²²³ *Id.*

²²⁴ *Id.* § 12, at 15.

²²⁵ *Id.*

²²⁶ See Abromowitz, *supra* note 8, at 216 (discussing ground lease termination due to default as a total forfeiture).

²²⁷ ICE (Third), *supra* note 87, § 20, at 5. Under the terms of most mortgages, when a lender incurs costs associated with its interest in a property, it is permitted to add this amount to the principal due on the loan.

²²⁸ See *infra* note 240 and accompanying text.

by merging the homebuyer's duties as lessee with her duties as mortgagor. However, in doing so, homebuyer default under the ground lease becomes a liability under the mortgage. Because of the ground lease-stripping provisions outlined in section 8.3, this liability either forces the CLT to bail out the borrower—and effectively pay for violations to its own ground lease—or it edges the homebuyer closer and closer to foreclosure—and the impending loss of long-term affordability provisions. In other words, these “solutions” force the CLT to take on any and all risk associated with the homebuyer's duties under both the ground lease and the mortgage. Lenders, on the other hand, are in a position to either collect profit-generating interest from monthly payments or foreclose on the property and sell it at a price even the homebuyer would not have been able to realize. In both cases, the lender or the foreclosure sale purchaser—often one and the same—appropriate public subsidies that would have otherwise been captured in the CLT model for the purpose of affordable homeownership. Despite this apparent double standard, CLTs have consistently had to sacrifice crucial affordability provisions to ensure homebuyer financing.²²⁹

C. *The Fannie Mae Uniform Rider and the Secondary Mortgage Market*

Generally, lenders mitigate the financial risk of lending by ensuring that their loans conform to the standards set by government-sponsored enterprises (GSEs) like Fannie Mae and the Federal Home Loan Mortgage Corporation (“Freddie Mac”). Chartered by the federal government, the GSEs purchase loans from lenders, securitize them, and sell them to investors on the secondary mortgage market.²³⁰ When they use GSE standard forms, lenders make their loans eligible for purchase should they need or choose to sell them to free up capital.²³¹

However, CLT homebuyers cannot use the standard mortgage forms because the terms of conforming mortgages do not account for ground lease provisions.²³² Therefore, lenders cannot be certain that they will be able to sell the loan in the secondary mortgage market via Fannie Mae or Freddie Mac.

²²⁹ Curtin & Bocarsly, *supra* note 9, at 378.

²³⁰ *About Fannie Mae*, FANNIE MAE, <http://www.fanniemae.com/kb/index?page=home&c=aboutus> (last visited Aug. 16, 2010).

²³¹ FANNIE MAE, SELLING GUIDE: FANNIE MAE SINGLE FAMILY 21–24 (2009) (describing extra requirements and warrants that lenders must make to sell nonstandard documents to Fannie Mae), available at <https://www.efanniemae.com/sf/guides/ssg/sg/pdf/sg1209.pdf>.

²³² See ICE (Third), *supra* note 87, § 20, at 8 (describing the purpose of the Fannie Mae Rider as a document necessary to provide conformity among CLT loans).

Without the standard forms, the GSEs would need to look at each loan individually before purchasing it—a time-consuming process that all but prevents purchase.²³³ Therefore, instead of mitigating the risk of lending to CLT homebuyers, GSE standardization creates a disincentive for lenders to work with CLT buyers.

To alleviate this problem, CLT advocates from the Institute for Community Economics and NCLTN have worked to negotiate a method for standardizing CLT mortgages.²³⁴ As a result of these negotiations, in 2006 Fannie Mae announced that it would purchase CLT mortgages from lenders so long as the parties sign a Uniform Rider that certifies the approved uniformity of CLT mortgages.²³⁵ Essentially, the Rider bypasses the individual review process Fannie Mae would otherwise require,²³⁶ mitigating the risk of lending to a CLT homebuyer with increased liquidity in the secondary market.

While the existence of the Rider may facilitate CLT homebuyer lending by mitigating the risk to lenders, the language of the Rider perpetuates the sacrifice of affordability provisions that has plagued the CLT lending process from the start.²³⁷ The Fannie Mae Rider institutionalizes the principle that if CLT homebuyers need to borrow money, then the CLT must shoulder the risk of borrower default by placing the ground lease—and long-term future affordability—on the chopping block.

Fannie Mae's Rider amends the ground lease for the period of time during which the mortgage remains outstanding.²³⁸ The Rider institutionalizes many of the provisions that individual lenders imposed upon CLTs.²³⁹ It also provides for ground lease enforcement by instituting a cross-default clause between the mortgage and the ground lease, as discussed earlier.²⁴⁰

²³³ *Id.*

²³⁴ *Id.*

²³⁵ FANNIE MAE, ANNOUNCEMENT 06-03, PROPERTIES SUBJECT TO RESALE RESTRICTIONS OR LOCATED ON LAND OWNED BY COMMUNITY LAND TRUSTS 10 (2006), available at <https://www.efanniema.com/sf/guides/ssg/annltrs/pdf/2006/06-03.pdf>.

²³⁶ *Id.*

²³⁷ See FANNIE MAE, *supra* note 132, at 4.

²³⁸ *Id.* at 1.

²³⁹ See discussion of lender-imposed changes to the ground lease *supra* notes 218–29 and accompanying text.

²⁴⁰ FANNIE MAE, *supra* note 132, at 5 (“A default by the Lessee under the Lease shall constitute a default under the Specified Mortgage.”).

However, what Fannie Mae gives in enforcement rights, it takes away in the event of foreclosure. In the event that the Mortgagee acquires title to the property through foreclosure or assignment in lieu of foreclosure, the Rider states that:

[A]ll provisions of the [Ground] Lease regarding (a) occupancy of the Leased Premises as a primary residence by the Lessee, (b) any limitation on the assignment of, or sublease under, the Lease, (c) any obligation to target certain populations in marketing the leasehold estate to potential transferees, (d) the price at which the leasehold estate may be transferred, and (e) the income of successive transferees, and their successors and assigns, *shall be of no further force or effect with respect to such Specified Mortgagee or its successive transferees, assignees or successors.*²⁴¹

This single provision strips five sections from the Model Ground Lease, each of which contains an important element of the CLT affordability model.²⁴²

In exchange for the power to strip the ground lease of every provision that ensures continuous affordability, the Rider offers the CLT one major benefit: the option to redeem the home after foreclosure by purchasing it for the cost of the outstanding debt.²⁴³ However, this option is contingent upon the lender acquiring the property via foreclosure sale or assignment in lieu of foreclosure.²⁴⁴ If someone else purchases the property at foreclosure or if the CLT does not have the financial stability to purchase the property within the allotted time period, “the leasehold estate may be transferred, mortgaged and sublet an unlimited number of times, and the Lessor shall not require a credit review or impose other qualifying criteria on any such transferee, mortgagee or sublessee.”²⁴⁵

²⁴¹ *Id.* at 4 (emphasis added).

²⁴² Upon foreclosure, the Rider strips the following provisions from the ground lease: Article 4, section 1 (Residential Purposes) and possibly section 4 (Occupancy); Article 11 (Assignment and Sublease); and the following provisions of Article 10: 10.2 (Transfer to Income-Qualified Person), 10.6 (Lessor’s Purchase Option), and 10.10 (Resale Restriction). In addition to these modifications, the Model Ground Lease, which Fannie Mae requires as a prerequisite to using its Rider, provides for the removal of Article 10 “Transfer Sale or Disposition of Improvements” entirely. ICE (Second), *supra* note 91, § 12, at 8.

²⁴³ FANNIE MAE, *supra* note 132, at 3 (“Should the Lessor not choose to cure an Event of Default as specified above, the Lessor shall nevertheless have the option to purchase the leasehold estate from the Specified Mortgagee for [debt owed to Specified Mortgagee] as of the date of closing of the purchase . . .”).

²⁴⁴ *Id.*

²⁴⁵ *Id.*

Although the Fannie Mae Rider might increase availability of credit for CLT purchasers,²⁴⁶ it has not mitigated many of the most crippling compromises that lenders impose on the CLT model. By requiring the Rider, Fannie Mae is able to orchestrate changes in the ground lease that would otherwise take tremendous political will if attempted within the governing framework of the CLT.²⁴⁷ Outside of Fannie Mae's Rider, other important government entities such as Freddie Mac or Rural Development do not have any uniform policy regarding CLTs.²⁴⁸ Furthermore, CLT homebuyers generally cannot access FHA-insured mortgages because FHA regulations are either incompatible with or have been interpreted to conflict with some CLT affordability mechanisms.²⁴⁹

D. Against the Sacrifice of Ground Lease Affordability

Federal and state housing and development programs serve as major funding sources for CLTs.²⁵⁰ The high rate of subsidy-recapture inherent in the CLT model²⁵¹ can be a selling point for public funding. When a CLT unit is sold in foreclosure and all affordability provisions are stripped from the ground lease, it can be bought and sold by anyone at any price. The enterprising new homeowner—who has no formal commitment to the CLT and its affordability goals—effectively captures all previous federal, state, municipal, or community investment in the unit. With the help of the Fannie Mae Rider, the foreclosure sale transforms a CLT unit from a bulwark of affordability into a publicly subsidized investment opportunity.²⁵²

The affordability-stripping provisions outlined in the Rider impact the growth of the CLT movement nationwide.²⁵³ The CLT startup process

²⁴⁶ In actuality, the vast majority of CLT lenders have kept CLT mortgages in their portfolios instead of passing them downstream to Fannie Mae. Telephone Interview with Roger Lewis, *supra* note 195.

²⁴⁷ Bylaws typically require a supermajority to amend the ground lease. *See supra* notes 99–102.

²⁴⁸ ICE (Third), *supra* note 87, § 10, at 4.

²⁴⁹ *CLT Homeowners Access to FHA Insured Mortgages*, NAT'L COMMUNITY LAND TRUST NETWORK, http://www.cltnetwork.org/doc_library/CLT%20Homeowners%20Access%20to%20FHA%20Insured%20Mortgages%20051809.pdf (last visited Aug. 16, 2010).

²⁵⁰ *See* DAVIS, *supra* note 50, at 64 (discussing CLTs as developers and as property managers).

²⁵¹ *See* discussion of public subsidy retention through the CLT model *supra* notes 182–93 and accompanying text.

²⁵² The CLT Legal Manual offers a rosy spin to the “enterprising new homeowner” scenario by explaining that the ground lease provides for an increase in ground lease fees when the property is released from resale restrictions: “In situations where land values are high and the amount of the lease fee has previously been subsidized, the increase in revenue for the CLT can be substantial.” ICE (Third), *supra* note 87, § 2, at 5.

²⁵³ Although the number of operating CLTs has increased significantly over the past decade, many CLTs remain inactive. Sungu-Eryilmaz & Greenstein, *supra* note 7, at 7–11.

requires the proper alignment of community initiative, local support, financial backing, and resource availability.²⁵⁴ In order to protect its stewardship interest in its property, a CLT must maintain constant access to the financial resources necessary to redeem a unit from foreclosure.²⁵⁵ This is especially arduous for startup CLTs, which generally operate for three years before they can survive off of ground lease fees.²⁵⁶

Lending interests, including GSEs like Fannie Mae, should not be so reticent in their approach to CLT lending: a CLT is a nonprofit community corporation that operates to ensure the long-term affordability of housing. By the time it is negotiating for financing on behalf of a buyer or discussing uniform riders with Fannie Mae, its intentions and operations have long been vetted by the government.²⁵⁷ It may even have developed strong working relationships with a local municipality.²⁵⁸ Many CLTs have not only been granted tax-exempt status, but they have been dubbed CHDOs simply for being organized as a CLT, and are thus automatically eligible for federal funding under that title.²⁵⁹ The CLT is a mainstreamed entity acknowledged for its successful model,²⁶⁰ and yet it must compromise that model to negotiate financing for homebuyers, for fear that the collateral is not adequately standardized or substantially liquid.

Meanwhile, the secondary mortgage market, including the GSEs, spent the last decade purchasing subprime loans from independent, unregulated lenders under terms that were all but certain to drive mortgagors into default.²⁶¹ Interestingly, the financial and social profiles of CLT buyers are not resoundingly different than those of their subprime mortgagor counterparts.

²⁵⁴ See DAVIS, *supra* note 50, at forward.

²⁵⁵ If the property goes into foreclosure and the CLT is unable to purchase it, the foreclosure sale purchaser is under no obligation to comply with any of the affordability requirements outlined in the ground lease. However, the CLT is required to maintain a lessee-lessor relationship with the new homeowner.

²⁵⁶ CLT experts recommend that start-up CLTs secure three years of operational funding before they launch. DAVIS, *supra* note 50, at 59.

²⁵⁷ See, e.g., ICE (Third), *supra* note 87, § 6, at 1 (discussing the vetting process for tax-exempt status, and other benefits that follow).

²⁵⁸ For a discussion of municipal involvement in CLTs, see Milne, *supra* note 22 (discussing the benefits and drawbacks of Limited Equity Cooperative and CLT cooperation with municipal governments).

²⁵⁹ See discussion of CLT per se CDHO status *supra* note 83 and accompanying text.

²⁶⁰ Fireside, *supra* note 17 (discussing the Champlain Housing Trust's recent international recognition for its affordable housing work).

²⁶¹ David S. Hilzenrath, *Fannie's Perilous Pursuit of Subprime Loans*, WASH. POST, Aug. 19, 2008, at D01.

Indeed, a prospective CLT buyer and a target subprime borrower generally fall within the same margin of the area median household income.²⁶²

However, one major difference exists between subprime and CLT borrowers: a recent survey of CLT foreclosure statistics revealed that even in the midst of the current foreclosure crisis, CLT mortgages were six times less likely to be in foreclosure than any other mortgage—prime or subprime—nationally.²⁶³ Similarly, the likelihood of default was far lower for loans secured by CLT properties.²⁶⁴ On December 31, 2008, only 1.4% of reported CLT mortgages were 90+ days delinquent, as compared to 3.74% of all prime loans, and 23.11% of all subprime loans, nationally.²⁶⁵ This statistical data reveals a tremendous gap between the perceived and actual risk of lending to CLT homebuyers. These statistics also indicate that the CLT, which relies on conventional mortgage products, is a safe and effective way to encourage low-income homeownership, and beckons greater institutional support—government and otherwise.

E. Eliminating Affordability-Stripping from the Fannie Mae Rider

The CLT model offers sustainable affordability to low-income homebuyers, supports opportunities for below-market rental units,²⁶⁶ and simultaneously presents lenders with a relatively secure investment, as it has thrived during a period of record-high mortgage foreclosures.²⁶⁷ This resilience results from a series of organizational commitments and legal structures that define the CLT model—each of which is threatened by current lending practices. While the Fannie Mae Rider standardizes CLT loans for sale on the secondary market, in doing so it institutionalizes the stripping of ground lease provisions that ensure long-term affordability and leaves public investment open to the possibility of private capture.

This section argues that Fannie Mae should amend its Rider language to further the financing of CLT homes without undermining the long-term

²⁶² Curtin & Bocarsly, *supra* note 9, at 386.

²⁶³ MISAK ET AL., *supra* note 209, at 3–4.

²⁶⁴ *Id.* at 3.

²⁶⁵ *Id.*

²⁶⁶ See *supra* text accompanying note 17.

²⁶⁷ Aaron Miripol, *Colorado: Invest Wisely to Fix Real Estate Crisis*, ROCKY MOUNTAIN NEWS, Aug. 11, 2008, <http://www.rockymountainnews.com/news/2008/aug/11/colorado-invest-wisely-fix-real-estate-crisis>; Van Temple, *What Foreclosure Crisis? Community Land Trusts Offer Secure Homeownership*, ROOFLINES (July 10, 2008), http://www.rooflines.org/1026/what_foreclosure_crisis_community_land_trusts_offer_secure_homeownership.

viability of the model. Fannie Mae has “an affirmative obligation to facilitate the financing of affordable housing for low- and moderate-income families”²⁶⁸ It is supposed to fulfill this obligation “in a manner consistent with [its] overall public purposes, while maintaining a strong financial condition and a reasonable economic return”²⁶⁹ This language speaks to the important public purposes GSEs are intended to carry out.

Unfortunately, literature produced by the CLT movement assumes the rather defeatist position that ground lease affordability stripping is a concession CLTs must make to provide affordable homeownership.²⁷⁰ From the CLT’s current bargaining position, this may be so, especially after CLT advocates spent years negotiating with Fannie Mae to produce the current Rider. However, Fannie Mae already provides for the survival of resale restrictions for non-CLT properties—even ones that operate through ground leases.²⁷¹ Fannie Mae, in its unique position as a GSE, can mitigate risk for lenders while simultaneously supporting the CLT commitment to long-term affordable homeownership. To this end, this section proposes amendments to the Fannie Mae Rider that would allow resale restrictions and other affordability provisions to survive foreclosure and simultaneously buffer lenders’ risk.

Removing affordability-stripping provisions from the Rider will not significantly increase the risk of lending to CLT homebuyers because they carry a disproportionately low repayment risk.²⁷² Rider language that strips affordability provisions from the ground lease does so to increase the likelihood that the property will recover debt in foreclosure.²⁷³ But CLT mortgages are less likely to end up in foreclosure than their conventional counterparts.²⁷⁴ While individual lenders may choose to ignore this fact, Fannie Mae has a duty to facilitate lending for affordable housing.²⁷⁵

²⁶⁸ 12 U.S.C. § 4501(7) (2006) (charging the GSEs with an affirmative obligation to further affordable homeownership).

²⁶⁹ *Id.*

²⁷⁰ ICE (Third), *supra* note 87, § 20, at 5 (“CLTs, though they would prefer to see these restrictions retained, have generally recognized the need to accommodate mortgage lenders on this point.”).

²⁷¹ When the resale restrictions survive foreclosure, the lender must “represent[] and warrant[] that the resale restrictions do not impair the servicer’s ability to foreclose on the restricted property.” FANNIE MAE, *supra* note 132, at 4.

²⁷² For example, CLT homebuyers have lower default rates than other borrowers on a nationwide basis. See MISAK ET AL., *supra* note 209.

²⁷³ ICE (Third), *supra* note 87, § 20, at 5.

²⁷⁴ See *supra* note 263 and accompanying text.

²⁷⁵ 12 U.S.C. § 4501 (2006).

The Rider seems to have been crafted by simply replicating the affordability-stripping practices of profit-driven lending institutions, which have no chartered duty to promote affordable housing. In doing so, Fannie Mae falls short of its public duty as a GSE. In fact, the Rider language has a more detrimental effect on the CLT model than any individual lender's decision to strip affordability provisions because it institutionalizes and nationalizes that practice. Now, if a CLT were to convince a lender to finance homebuyers without modifying the ground lease, that lender would be unable to sell the loan to Fannie Mae.²⁷⁶

While affordability stripping overstates the risks of ground lease resale restrictions, there are other risks of securing a mortgage with a leasehold estate that should be attended to. Lenders justifiably fear termination of the ground lease, which, if unaddressed in the loan document, could result in forfeiture of the mortgage security.²⁷⁷ For this reason, it is appropriate to maintain Rider language that equates a default under the ground lease with a default on the mortgage. With the removal of provisions that strip the ground lease of its signature affordability mechanisms, the cross-default clause benefits both the CLT and the lender by holding the borrower-lessee accountable without sacrificing the long-term affordability of the unit.

Assuming that the actual risk of lending to CLT homebuyers is much lower than the perceived risk,²⁷⁸ state actors can easily change the landscape of CLT homebuyer financing by underwriting that risk without assuming tremendous liability. Because many of the policies that control lending availability are discretionary, the changes proposed require surprisingly little political will.²⁷⁹ The impact that GSE policy could have on CLT homeowner financing probably encouraged CLT advocates to approach Fannie Mae for a uniform policy to begin with. However, it is now time to revisit the assumptions underlying Fannie Mae's decision. Amending the Rider language as

²⁷⁶ FANNIE MAE, *supra* note 132, at 10.

²⁷⁷ Abromowitz, *supra* note 8, at 214.

²⁷⁸ Again, this is indicated by the foreclosure statistics presented earlier, *see supra* text accompanying notes 263–65, as well as the fact that current methods for calculating financial risk have developed in an ownership paradigm that does not account for the CLT model, which prizes stewardship of affordable homeownership and land tenure.

²⁷⁹ Amending the Fannie Mae Rider is only one of many ways that federal policy could encourage financing that complements CLT long-term affordability goals. Another proposed solution involves amending FHA regulations to ensure that CLT homebuyers are eligible for FHA homeowner insurance. *See* NAT'L COMMUNITY LAND TRUST NETWORK, *supra* note 249 (suggesting material changes to FHA regulations governing the eligibility of nonprofit affordable housing programs). FHA regulations generally also guide access to state FHA assistance, another counterintuitive source of resistance to CLT homebuyer support. *Id.*

recommended should continue to mitigate lender risk by maintaining CLT loan access to the secondary mortgage market and by protecting lenders from total loss of security. These proposed amendments use Fannie Mae's involvement in the secondary mortgage market to bolster and support CLT homebuyer financing for low-income individuals, echoing the congressional findings that established Fannie Mae's operational objectives.²⁸⁰

CONCLUSION

This Comment discussed the CLT model for creating and preserving affordable homeownership as it developed over the past four decades and as it operates currently. The CLT model, although not the only viable model for affordable homeownership, operates innovatively within current legal structures to establish and enforce long-term affordable housing. The model presents an efficient, resilient project for public investment.

This Comment addressed the importance of mortgage financing to the CLT model of homeownership and described some of the challenges that CLT homebuyers face in securing loans. So far, measures intended to increase CLT homebuyer credit access have required that CLTs concede to the stripping of long-term affordability provisions from their ground leases in the event of foreclosure. Most notably, Fannie Mae—a GSE with the duty to support affordable homeownership—implemented such affordability-stripping practices in its required Uniform Rider.

This Comment suggests that federal and state entities ought to begin affirmatively supporting the CLT model. Specifically, it argues that Fannie Mae should amend its Rider to demonstrate confidence in the CLT model's ability to offer affordable, sustainable homeownership to low-income individuals. These amendments are not drastic changes, and they do not betray Fannie Mae's corporate goals. They also do not solve all of the problems that the CLT model faces.²⁸¹ The amendments would, however, mark a change of course for the lending industry—a timely adjustment, in light of the most recent economic crisis.²⁸²

²⁸⁰ See discussion of Fannie Mae's affirmative obligation to further affordable housing *supra* note 271 and accompanying text.

²⁸¹ These changes do not address difficulties CLTs face when funding property acquisition or housing development, for example. Nor do they address challenges that may arise out of state law, which governs contract and property claims.

²⁸² For more on Fannie Mae's role in the subprime mortgage crisis, see IMMERGLUCK, *supra* note 176.

Over the past four decades, a litany of federal regulations and programs have aimed to expand credit to underserved communities in an effort to increase homeownership across racial and class lines.²⁸³ Concurrent with these developments, CLTs fashioned a complementary strategy: a model for lowering the cost of homeownership entirely, reducing the amount of money homebuyers need to borrow. These two approaches, far from incompatible, nonetheless find themselves at an impasse.

In addition to the federal policies that incentivize low-income lending, the Department of Housing and Urban Development requires that a certain percentage of Fannie Mae's loan purchases consist of mortgages to low-income individuals. These kinds of policies ought to have mitigated the standoff between lenders and CLTs.²⁸⁴ Instead, these policies resulted in Fannie Mae expanding its investment in high-risk mortgage products,²⁸⁵ while simultaneously stripping affordability provisions out of CLT ground leases in the name of risk mitigation. Ironically, today Fannie Mae rests in federal conservatorship, "unable to fulfill [its] mission of providing liquidity, stability, and affordability to the housing market[.]"²⁸⁶ while CLT borrowers enjoy the security of having default and foreclosure rates significantly below national averages. Surely, the time for revision is upon us.

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²⁸³ *Id.* at 164.

²⁸⁴ For example, HUD sets affordable housing goals for the GSEs, requiring a certain percentage of their loan purchases consist of mortgages to low-income individuals. 12 U.S.C. § 4561 (2006); 12 C.F.R. §§ 1282.12, 1282.14 (2010).

²⁸⁵ IMMERGLUCK, *supra* note 177, at 4.

²⁸⁶ *Turmoil in the U.S. Credit Markets: Examining Recent Regulatory Responses: Hearing Before the S. Comm. on Banking, Hous. & Urban Affairs*, 110th Cong. 2 (2008) (statement of James B. Lockhart, III, Director, Federal Housing Finance Agency) (on the occasion of the GSE placement in federal conservatorship).

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