

# Common Ground

## Community-Led Development on Community-Owned Land

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**Abstract:** Land is typically the least creative aspect of community development, conceptually and practically. A departure from this norm is the community land trust (CLT), an innovative model of community-led development that rearranges relations of property and power in the place of residence. The foundation for a CLT, as well as for other nonprofit developers that operate in a similar fashion, is *common ground*: community-owned land that is never re-sold, but put to productive use through long-term ground leasing. There are difficulties involved in doing affordable housing and neighborhood revitalization this way, which dissuade many nonprofits from trying it, but common ground has operational, ethical, economic, and political advantages all its own. It may be harder to do, but the extra effort is worth it.

Land, labor, and capital are the holy trinity of production. Whether fabricating durable goods in a factory, building pricey homes in a suburb, or revitalizing the dilapidated blocks of an inner-city neighborhood, every analysis of a proposed project's feasibility begins with what economists have historically considered to be the primary factors of production.<sup>1</sup> Much creativity has gone into figuring out how to manage the costs and how to increase the efficiency and effectiveness of these essential inputs. That is especially true in the field of community development, where low-income people and low-income places are unable to pay the full cost of maintaining infrastructure, developing housing, expanding employment, or providing services. The production of these goods and services must be heavily subsidized out of public coffers that are never abundant relative to need, so every dollar must be inventively stretched and cleverly invested for maximum effect.

Land is a glaring exception to the general rule of innovation in community development. Far less creativity has gone into thinking about land than is regularly devoted to thinking about labor and capital. Consider how much experimentation has occurred in recent decades with regard to training, transporting, insuring, compensating, and empowering workers, including new options for cooperative enterprise and employee ownership. Consider how many community benefits agreements have been negotiated putting people from disinvested neighborhoods to work. Consider the progress that has been made in developing micro-lending programs and establishing individual development accounts. Consider the panoply of creative financing that makes possible a reduction in monthly payments so that low-income people can afford to rent or to purchase housing that would otherwise be beyond their reach.

By contrast, the role of land in community development remains mostly unexamined and largely unchanged. New ways of owning, controlling, or utilizing land for the improvement of distressed places and for the empowerment of the people who live there are rarely considered – or summarily rejected as too difficult to do.

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

That wasn't always so. As far back as 1898, Ebenezer Howard proposed an innovative land ownership arrangement for the Garden Cities he hoped to see developed in England.<sup>2</sup> Houses, stores, orchards, and factories would be privately owned by individuals, cooperatives, or for-profit businesses, but the underlying land would be acquired and owned by a nongovernmental organization. The land would never again be sold. It would be put to productive use, however, through long-term leaseholds, executed between the nonprofit landowner and any number of owners and operators of the new town's buildings and enterprises.

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

This commitment to *common ground* was the foundation on which the first Garden Cities were raised, starting with Letchworth in 1903 and Welwyn in 1919. It was the foundation for other reformist schemes as well, some influenced by Howard and some not, including the *ejido* system in Mexico, the capital district of Canberra in Australia, the *Gramdan* villages of India, and the *kibbutzim* and *moshavim* of Israel, cooperative agricultural settlements on large tracts of land that were leased from the Jewish National Fund.

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

American activists may have inherited this mixed-ownership model from other countries, but they steadily added organizational and operational features that turned it into something new. Organizationally, they designed community land trusts to ensure the continued accountability of the nonprofit landowner to the people and places it served.<sup>4</sup> Operationally, they designed community land trusts to ensure the lasting affordability of any buildings constructed on the nonprofit's lands, while promoting the regular maintenance of those structures and preventing foreclosures during downturns in the economy.<sup>5</sup>

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<sup>2</sup> Ebenezer Howard, *Garden Cities of To-Morrow*. Cambridge MA: MIT Press (1965).

<sup>3</sup> Philip Ross and Yves Cabannes, *21<sup>st</sup> Century Garden Cities of To-Morrow: A Manifesto* (December 2014). Available at [www.newgardencitymovement.org.uk](http://www.newgardencitymovement.org.uk)

<sup>4</sup> Organizationally most CLTs have an open membership and a three-part board, representing the interests of the people who live on the CLT's land, people who live within the CLT's service area, and institutions that serve that geography, including local government, churches, banks, businesses, and other NGOs.

<sup>5</sup> Operationally all CLTs continue to exert considerable control over the leaseholder's property. Contained in the ground lease are guidelines and limits on how the land may be used and developed. Additional lease provisions regulate the occupancy, upkeep, improvement, financing, behest, and resale of the leaseholder's buildings. These controls endure for a very long time, with the typical CLT ground lease lasting for 99 years. More information on key features of the CLT can be found in John Emmeus Davis (ed.), *The Community Land Trust Reader* (Cambridge, MA: Lincoln Institute of Land Policy, 2010).

Equally significant, this American model sidestepped what had always been the most daunting real-world impediment to the realization of Howard's grand vision. No one had to wait for the day when thousands of acres of vacant land might be acquired on which to build a new town accommodating thousands of families, homes, and enterprises. The promise of the CLT was that something resembling a Garden City could be launched right away. It could start small and grow incrementally. It could be developed through the construction of new buildings or it could be quietly woven into the drab fabric of a built environment already in place.

The CLT was premised, moreover, on a bottom-up approach to community development that had been missing in most of the mixed ownership models of the past. It was not "gentlemen of responsible position and of undoubted probity," as Howard had described them, who would be responsible for creating and governing a CLT, making all decisions about what land to buy and what infrastructure to build until some distant day when a "board of management" could be elected by the leaseholders. Participatory planning and direct democracy began on the day a CLT was organized. The involvement of prospective leaseholders and proximate neighbors began when a CLT started looking for land, or long before. This was not development on behalf of a needy population inhabiting a particular place, dictated from above by either a governmental body or a benevolent provider of social housing. It was development from below, initiated and guided by a locality's own residents: community-led development on community-owned land. Ownership and empowerment went hand in hand.<sup>6</sup>

As CLTs became widely established, they adapted their organizational and operational features to fit local conditions, priorities, and needs. Today's community land trusts are not all alike. Among the hundreds of CLTs in the United States, there are numerous variations in the way the organizations are structured, the land is utilized, and development is done. There are variations in the way in which the ground lease is crafted, with different CLTs setting different conditions for the occupancy, use, improvement, and resale of homes and other buildings on their land. Additional variations have arisen as the model has been adapted to fit national laws and customs in counties outside of the United States. CLTs are now well established in Australia, England, and Belgium and are being explored in Canada, France, and Italy as well.

It is noteworthy, too, that many community development organizations in the United States that are *not* CLTs, either in corporate name or in organizational structure, are similarly committed to hanging onto the land beneath their residential or non-residential projects, employing long-term ground leases to regulate both the land's use and the future affordability and condition of any buildings.<sup>7</sup> Ground leasing can be found, for example, among community development corporations, Habitat for Humanity affiliates, community gardening associations,

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<sup>6</sup> These democratic, participatory features of the modern-day CLT were added to the mixed-ownership model that had originated abroad as a direct legacy of the Civil Rights Movement in the American South. Beginning with New Communities Inc. in 1969, the inspiration for many of the CLTs that followed, there was a clear link in the minds of most early CLT organizers, especially in communities of color, between the common ownership of land and the collective power of people living on and around that land.

<sup>7</sup> My focus is on land that is *community* owned and on development that is *community* led, which necessarily excludes many worthy initiatives where ground leasing has been used to hold land and to preserve the affordability of housing. For instance, the public housing authority in Atlanta retained ownership of the land beneath a mixed-income community of 700 homes at West Highlands, using long-term ground leasing in the redevelopment of Perry Homes, a dilapidated, crime-ridden rental complex. West Highlands is a successful example of ground leasing and permanently affordable housing, but not of community-led development on community-owned land.

and resident-owned cooperatives in mobile home parks. In Denver, the Urban Land Conservancy has made extensive use of 99-year ground leases in holding land under residential and commercial buildings in multiple neighborhoods, a strategy designed to preserve affordable housing, to prevent displacement, to provide jobs and critical services, and to capture land gains resulting from transit-oriented development and other public investments.<sup>8</sup> In New York City, the Cooper Square Mutual Housing Association created a community land trust affiliate in 1991 to hold the land beneath 21 cooperatively owned residential buildings, containing 328 affordably priced apartments and 24 storefronts, as a second line of defense in making sure this low-income housing would never be lost.<sup>9</sup>

The proliferation of community land trusts, both in the United States and beyond, along with the wider use of ground leasing by CLTs and non-CLTs alike, would seem to contradict the claim of land being the factor of production least likely to be an object of experimentation. It must be remembered, however, that CLTs are a tiny minority among the multitude of non-profit organizations making up the field of community development. And the total amount of community-owned land held by CLTs and by non-CLTs is still relatively small. Beyond the protected shores of these sunny islands, land remains the one factor that is made of stone, not of clay. In the wider world of community development, land continues to be regarded as little more than a fixed obstacle that must be blasted aside before development can occur. It is rarely seen as a pliable opportunity for rearranging traditional relations of property and power in order to make development as equitable and sustainable as possible.<sup>10</sup>

When cultural norms, financial prerogatives, and institutional practices are weighted so heavily in favor of land being held as an individual commodity, not as common ground, alternative arrangements for the ownership, development, and stewardship of land are difficult for most people to imagine. A model of tenure like the community land trust can seem especially strange. As if removing land from the stream of commerce were not aberrant enough, CLTs are also committed to the de-commodification of housing, endeavoring to preserve its affordability forever. CLTs may do the same for commercial buildings, urban farms, community facilities, and other structures that are sited upon their holdings. Stranger still, most CLTs are committed to giving residents of their chosen service area a voice in saying how their lands will be developed and a voice in governing the organization itself.

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<sup>8</sup> The Urban Land Conservancy functions like a city-wide community land trust. Although it lacks the community membership and community-controlled three-part board of a “classic” CLT, ULC utilizes an intensive community engagement process in planning its projects. More on ULC can be found in Robert Hickey, “The Role of Community Land Trusts in Fostering Equitable, Transit-Oriented Development: Case Studies from Atlanta, Denver, and the Twin Cities,” Working Paper 13RH1 (Cambridge, MA: Lincoln Institute of Land Policy, 2013).

<sup>9</sup> More about Cooper Square and the intersection of co-ops and CLTs can be found in Tom Angotti, “Community Land Trusts and Low-Income Multifamily Rental Housing,” Working Paper 077A1 (Cambridge, MA: Lincoln Institute of Land Policy, 2007); and Meagan Ehlenz, “Community Land Trusts and Limited Equity Cooperatives: A Marriage of Affordable Homeownership Models,” Working Paper 14ME1 (Cambridge, MA: Lincoln Institute of Land Policy, 2014).

<sup>10</sup> The focus here is on the general lack of creativity in the ownership and use of land in developing affordable housing and redeveloping residential neighborhoods. In many *commercial* projects, however, including downtown skyscrapers, suburban shopping centers, and sports arenas, the rights, responsibilities, risks, and rewards of land are as likely to be creatively rearranged and reallocated as any other factor of production.

Community-led development on community-owned land can be a tough slog down a muddy road. Hard as it may be to imagine an alternative form of tenure like the CLT, it can be even harder to implement. Public agencies that subsidize affordable housing must be persuaded to use the dollars and powers at their disposal to build a portfolio of debt-free lands and resale-restricted homes under the permanent stewardship of a community-based organization,<sup>11</sup> instead of recapturing those subsidies or allowing those homes to revert to market-rate housing later on. Private lenders must be persuaded to mortgage homes on leased land, accepting the borrower's leasehold interest as partial security for the loan and relinquishing the right to seize the land under housing they have earlier financed, should a mortgage go south. Municipal assessors must be taught how to value resale-restricted buildings on leased land. Prospective homebuyers must be helped to understand why they will not be allowed to purchase the underlying land and why there will continue to be so many limits on the home's current use and future resale.<sup>12</sup> Neighborhood residents must be actively educated and engaged, winning their support for the nonprofit's commitment to hanging onto the land instead of selling it, while soliciting their participation in planning for the land's development.

The difficulties and demands of doing development this way have caused many nonprofits to shy away from ground leasing. Others have walked away after using ground leases for a number of years, finally worn down by the resistance of public funders, the recalcitrance of private lenders, or the insistence of well-meaning colleagues that other mechanisms for preserving the affordability of publicly subsidized, privately owned housing are "just as good" as ground leases and much easier to use.

Even community land trusts can be reticent about the radical proposition at the heart of their model. They may continue to champion the cause of community-owned land, ardently believing in the moral and practical superiority of ground leasing, yet be leery about calling too much attention to it. As the sweet old lady confided to one of my colleagues, while talking about her own CLT which is involved in both urban agriculture and affordable housing, "What we are really about is land reform, dear, but we hide behind the tomatoes."

Developing homes and enterprises on community-owned land is complicated. Ground leasing is hard. But simple is not always better, nor is hard necessarily bad. I would argue just the opposite in lauding the CLT's unconventional approach to the improvement and empowerment of place-based communities. The benefits outweigh the burdens. There are reasons for believing, as Howard did, that a community should own itself. There are reasons for believing, as I do, that ground leasing has advantages that lift the entire game of community development to another level, raising the standard of play high above what competing strategies can achieve. Common ground is in a league of its own.

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<sup>11</sup> Historically the hardest "sell" in winning support from public officials has been to convince them to make their subsidies directly available to the CLT as an *equity* investment in order to bring land into a CLT's portfolio unencumbered by debt and to lower, thereby, the purchase price of any buildings located on the CLT's land.

<sup>12</sup> Much of the initial skepticism of prospective homebuyers about buying a resale-restricted home melts away as they come to understand the reasons and rewards behind the deal. (See Emily Thaden, Emily, A. Greer, and Susan Saegert, "Shared Equity Homeownership: A Welcomed Tenure Alternative Among Lower Income Households," *Housing Studies* 28 (8): 1175-1196, 2013.) It is a sound marketing strategy, therefore, for a CLT to take extra time and care in explaining in detail how its model works. Disclosing all of the conditions that encumber a CLT home is a moral and legal necessity as well, guaranteeing the *informed* consent of prospective buyers.

## Effective Stewardship, Comparative Advantage

Housing is not the only focus of community land trusts, nor of many other community development organizations that are doing ground leasing, but it tends to be their principal activity. Most of the lands in their possession are used for affordable housing of one kind or another. On leased land is to be found both housing that is newly built and housing that was already there when the land was bought; housing that is owner-occupied and housing that is renter-occupied; dwellings that are configured as houses, townhouses, condominiums, or mobile homes for single-family homeownership, dwellings that are configured for cooperative ownership, and dwellings that are managed as multi-unit rental housing.

Whatever the type or tenure of the housing on common ground, all of it is designed to last, particularly in the world of CLTs. Indeed, the main reason for siting these homes on leased land, the main reason for using a ground lease, is to give the nonprofit landowner the ability to ensure the housing's continuous affordability, its ongoing upkeep, and the enduring security and success of the people who occupy it. The nonprofit stays in the picture forever, managing land on behalf of its chosen community and watching over whatever housing is built upon it, performing the essential duties of stewardship.<sup>13</sup> As Connie Chavez, former executive director of the Sawmill Community Land Trust in Albuquerque was fond of saying, "We are the developer that doesn't go away."

This is a far cry from the build-and-bolt mentality of yesteryear, which once dominated nearly all housing policy in the United States. There was a time, not long ago, when anyone preaching a contrarian gospel of build-and-stay was dismissed as a misguided dreamer, babbling in the wilderness. It was a rather lonely business challenging the programmed loss of affordable housing that had been subsidized by public dollars, mandated by public laws, or incentivized by land donations, density bonuses, parking waivers, or other regulatory gifts lavished on private developers by generous governments. It was lonelier still for anyone who had the prescient temerity to voice concern about policies and programs that boosted low-income people into homeownership with no provision for keeping this housing affordable when times were good or for protecting its condition and preventing its foreclosure when times were bad.<sup>14</sup>

Their warnings fell on deaf ears for decades. The twin pillars of American housing policy were production and consumption. Few people in government, in banking, or in nonprofit housing were overly concerned about what might happen to publicly subsidized homes *after* they were built or what might happen to newly minted homeowners *after* they moved in. Stewardship was simply not on the nation's radar.

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<sup>13</sup> These essential duties – preserving affordability, promoting sound maintenance, and protecting security of tenure/preventing foreclosure – have been called by me and others the "three faces of stewardship." This trio made its first appearance in John Emmeus Davis, "Homes That Last: The Case for Counter-Cyclical Stewardship," *Shelterforce*, v. 30, no. 4:18–25 (2008). A more recent description, beating the same drum with different sticks, can be found in John Emmeus Davis, "Plugging the Leaky Bucket: It's About Time," *Rooflines* (January 27, 2015).

<sup>14</sup> Emily Achtenberg, Dean Baker, Rachel Bratt, Cushing Dolbeare, Peter Dreier, Chester Hartman, Peter Marcuse, and Michael Stone were among the first to lament the programmed loss of publicly subsidized housing, criticizing American policy for its short-sightedness. Many of my own writings have mined a similar vein, but I came later to the cause, standing on the shoulders of scholar-activists like these who saw it sooner and said it louder than I.

That began slowly to change under the sequential shocks of the Affordability Crisis of the 1980s and 1990s and the Great Recession of 2008. These disruptive fluctuations in markets and mortgages caused a gradual shift in the tectonic plates of American housing policy. Stewardship rose higher on the public agenda, as did the credibility of models and mechanisms within a sector that was variously described as nonspeculative housing, nonprofit housing, PARCC housing, third sector housing, shared equity homeownership, or permanently affordable housing.<sup>15</sup>

The documented success of this sector in countering the loss of subsidized homes in hot markets and cold markets alike, combined with the promotional efforts of national advocacy groups, steadily built a case for a housing policy composed of three legs instead of two.<sup>16</sup> Production and consumption continued to receive far more support from public funders than stewardship, but increased attention and money began to be directed toward organizations that were committed to sticking around for many years *after* a residential project was built, standing behind the housing that public resources had helped to create.

The conversation soon encompassed more than housing. As the policy focus got broadened to include not only the front end of the development process, but the back end as well, extending the timeline of public concern beyond the threshold of getting units built and lifting families into occupancy, a new set of possibilities came into view. If preventing the loss of the public's investment was a good idea when subsidizing housing, perhaps it was also a good idea when subsidizing a commercial corridor, transit-oriented development, or urban agriculture. If it was a good idea to build the capacity of nonprofit organizations to serve as watchful stewards of assisted housing, perhaps the same organizations could be enlisted to protect other uses and other buildings receiving financial or regulatory assistance from government. Stewardship was prudent and appropriate for all kinds of community development.

This was special vindication for practitioners working with community land trusts who, along with their counterparts in other forms of nonspeculative housing, had been championing stewardship for decades. But a funny thing happened on the way to the forum. Some of the models and mechanisms that had first brought stewardship into the spotlight were quietly nudged to the side. Doing place-based development through community-owned land, in particular, began to fall out of favor. Ground leasing became passé.<sup>17</sup>

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<sup>15</sup> These terms are not interchangeable. While most describe a sector encompassing nonprofit *rental* housing, "shared equity homeownership," a term that came into vogue after 2006, focused only on housing that is *owner-occupied*. "Nonspeculative housing" and "third sector housing," the first coined by Michael Stone and the second by me, both emphasized the decommodification of housing, but the latter added mutuality to the definitional mix. "PARCC housing," referring to homes that are "permanently affordable and resident-controlled or community-controlled," was proposed by the Institute for Community Economics in the 1990s. ICE's successor, the National CLT Network, has focused its recent policy advocacy on "permanently affordable housing," believing this single attribute to have the greatest potential for finding allies and building the sector.

<sup>16</sup> In the forefront of such advocacy have been the National Housing Institute, the Cornerstone Partnership, the National Housing Council, and the National Community Land Trust Network. Major funding for these advocacy efforts has been provided by the Ford Foundation and by the Lincoln Institute of Land Policy.

<sup>17</sup> Limited equity cooperatives and mutual housing associations have fared no better of late. Like ground leasing, they are regularly omitted from many discussions by national advocacy organizations of the best ways to preserve the affordability of publicly subsidized, privately owned housing.

There are now dozens of community development corporations, for example, that have come to embrace lasting affordability for the very first time, but choose to implement this new regime via deed covenants instead of ground leases. Covenants are perceived by them to be “less complicated” and homes are believed to be “easier to sell” if land accompanies the deal. There are cities that are implementing inclusionary zoning or awarding density bonuses for the very first time, extracting hundreds of affordably priced homes from private developers, but ground leases are eschewed by officials in these cities because covenants are believed to be “self-enforcing” and to impose fewer administrative burdens on municipal staff.

They have been joined in recent years by a chorus of advocates at the national level who extol the virtues of long-term affordability as a preferred policy in deeply subsidized homeowner-ship programs, while preaching the equivalency of deed covenants, ground leases, and mortgage liens. From their perspective, “it doesn’t really matter” which contractual mechanism is used, as long as subsidies are retained and affordability is preserved.

Admittedly, there are still places where state law, public policy, market conditions, or the resistance of private lenders have made it practically impossible to develop or to finance affordable housing on leased land. Practitioners who decide to use deed covenants or mortgage liens to extend the affordability of low-income or moderate-income housing cannot be faulted for avoiding ground leases if using the latter would prevent them from serving people in need.

Too often, however, residential ground leasing is called impossible when it is merely difficult. Too often, practitioners are quick to dismiss it without carefully weighing whether their organization’s charitable mission might be *better* served through community-owned land and whether stewardship might be *more* effective if done through ground leasing.

There are, in fact, three comparative advantages that ground leasing has over other contractual mechanisms when it comes to maintaining the affordability, condition, and security of publicly subsidized, privately owned housing. Enforcement is more durable. Intervention is more dependable. Failure is more graceful. The equivalency argument takes none of these advantages into account.

### ***Durable Enforcement: The Legal Argument for Common Ground***

In the United States, affordability covenants that “run with the land” have become the most widely used mechanism for preserving the affordability of publicly assisted, privately owned housing among nonprofit organizations and governmental agencies alike. This mechanism has been a particular favorite of state and municipal agencies that indirectly produce affordable housing through inclusionary mandates or regulatory incentives or that directly subsidize affordable housing through the investment of public funds.

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



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

Older deed covenants were also easier to administer, since the nonprofit and governmental entities that used this mechanism considered them to be "self-enforcing." They believed no extra work would be needed on their part to ensure compliance with a covenant's requirements. They assumed that title companies, mortgage underwriters, or closing attorneys would catch violations of a covenant's restrictions and block any resale involving an "unaffordable" price or an "ineligible" buyer. Furthermore, the term of most covenants was relatively short. Affordability covenants that lasted no longer than five to fifteen years were the norm. All restrictions then disappeared, allowing property owners to resell to anyone they like for any price they could get.<sup>18</sup>

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

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

Covenants have been steadily catching up, however, becoming more detailed, comprehensive, and complex. No longer can comparisons between deed covenants and ground leases be based primarily on either the content of the contracts or the commitment to stewardship by the entity that developed or funded the housing.<sup>19</sup> Increasingly, deed covenants are being crafted to contain many of the *same* terms and conditions as ground leases and, here and there, the *same* kind of stewardship regime is being instituted for covenants as was once the exclusive purview of community land trusts and limited equity cooperatives.

Equivalency in the *content* of covenants and leases does not make them equivalent when it comes to their *enforceability*, however. Indeed, one of the strongest arguments for the superi-

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<sup>18</sup> The affordability period for mortgage liens, when used as the mechanism of choice, would last only as long as the mortgage, typically 20-30 years.

<sup>19</sup> This has been somewhat true for mortgage liens as well, when used to preserve the affordability of publicly assisted privately owned housing. Many conditions on the use and improvement of subsidized homes are being inserted into these liens.

ority of residential ground leasing has always been that it is better able to withstand legal challenge – over a longer period of time. Without delving too deeply into arcane legal doctrines like the rule against perpetuity, the rule against unreasonable restraint on alienation, touch and concern, and privity, suffice it to say that long-lasting restrictions on the use and resale of privately owned real estate are generally considered to be more legally defensible when the party imposing those restrictions has a proximate interest in the restricted property and when the restrictions themselves have an end date – even if the restrictions last for many years. Ground leasing receives a passing grade on these legal tests, while perpetual covenants that “run with the land” frequently do not.<sup>20</sup>

Recognizing the vulnerability of deed covenants in this regard, several states have enacted statutes that give specific sanction to long-lasting affordability covenants when they are used to preserve the public’s investment in affordable housing. In Maine, Massachusetts, Oregon, and Vermont, for example, legislative action has put the enforceability of deed covenants on a stronger footing.<sup>21</sup> It is arguable that in these states – but only in these states – deed covenants may now be just as enforceable as ground leases, assuming there is someone standing reliably and vigilantly in the wings to do the enforcing.<sup>22</sup>

**How** they are to be enforced is an open question, however. The party that imposed a covenant’s restrictions on occupancy and use may conceivably pursue court action to compel compliance when there is a violation, but the judicial path to the enforcement of deed covenants is neither well traveled nor clearly marked. By contrast, the means for enforcing the terms of a ground lease is, as David Abromowitz has pointed out, “The relatively familiar process of declaring a default under the ground lease and, if the default remains uncured, obtaining judicial relief through the typical landlord-tenant summary process.”<sup>23</sup>

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

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<sup>20</sup> More on the enforceability of ground leases versus covenants can be found in David Abromowitz, “An Essay on Community Land Trusts,” pp. 213-231 in *Property and Values: Alternatives to Public and Private Ownership*, C. Geisler and G. Daneker, eds. (Washington, DC: Island Press, 2000); David Abromowitz and Kirby White, “Deed Restrictions and Community Land Trust Ground Leases: Two Methods of Establishing Affordable Homeownership Restrictions,” pp. 327-334 in J.E. Davis (2010); and John Emmeus Davis, “Durable Affordability,” pp. 76-80 in *Shared Equity Homeownership: The Changing Landscape of Resale-Restricted, Owner-Occupied Housing* (Montclair, NJ: National Housing Institute, 2006).

<sup>21</sup> Ryan Sherriff, “Shared Equity Homeownership State Policy Review,” *Journal of Affordable Housing and Community Development Law* v. 19, no. 3&4, page 283 (2010).

<sup>22</sup> In North Carolina and Ohio, state law and court precedents have caused some lawyers to question the legality of separating the ownership of land and residential buildings, even though shopping centers, office buildings, and other commercial structures are regularly developed on leased land in both states.

<sup>23</sup> Abromowitz, *op. cit.*, p. 216.

## ***Dependable Intervention: The Operational Argument for Common Ground***

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

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

The *formal* components of this system are (1) the collection of ground lease fees from homeowners (as well as from the owners of other buildings on a lessor's lands) and (2) notification from lenders of any mortgage delinquencies. The revenues raised from lease fees are useful in covering a portion of the steward's operating costs, but they serve another function as well. They give the steward's staff a regular glimpse into how the organization's leaseholders are faring. The first thing the owners of buildings on leased land tend to stop paying, when experiencing financial distress, are the lease fees owed to their benevolent landlord. A pattern of late fee payments or an accumulating arrearage is usually an indication of more serious problems, alerting the steward of the possible need to intervene.

Most organizations selling homes on leased land have a second tripwire built into their system. They become a party to the mortgage. The mortgage lender agrees to notify the landowner if any homeowners become seriously delinquent in their monthly mortgage payments.<sup>24</sup> A lender may do the same when receiving an application to refinance a home on leased land. As in the case of the late payment of lease fees, such notifications alert the steward to changes in the leaseholder's financial circumstances that may jeopardize the homeowner's ability to care for the home or hang onto it.

The *informal* components of a lessor's early warning system are (1) the continuing relationship between lessor and lessee after a home is sold and (2) the continuing visibility of the landowner in the eyes of close neighbors and city officials. The very structure of ground leasing requires the landowner and homeowner to stay in touch and, to some degree, to get along. If this relationship is a good one, the homeowner is more likely to volunteer information about disruptions and distress, giving the steward an opportunity to lend a hand. This marriage of convenience is forged early in the process of preparing a prospective homebuyer for

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<sup>24</sup> Banking law and privacy concerns will require a three-party agreement in most states among the homeowner, the lender, and the steward for the lender to be allowed to share such information with the steward.

life as a leaseholder on the steward's land. As described by Devika Goetschius, director of a community land trust in Petaluma, California, "During every community land trust homebuyer education class, I've looked each person in the eye and told them, 'When your financial circumstances change—good or bad—you call me.' " With predictable regularity, they do.<sup>25</sup>

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

**Leverage.** A ground lease gives a nonprofit steward a wider range of options in dealing with a homeowner who is not occupying the home as her primary residence, not maintaining adequate insurance, not keeping the home in good repair, or not fulfilling any number of other responsibilities to which she agreed when purchasing the home. The landowner's ultimate leverage in compelling compliance is the threat of eviction from the leasehold, but ground leases also contain a graduated series of less-drastic warnings, penalties, arbitration, and opportunities for injunctive relief. Nearly all violations are corrected long before reaching such dire straits as acting to remove a homeowner from a CLT's land.<sup>26</sup>

Equally important, by owning the land, a community land trust (or other nonprofit lessor) has greater leverage in negotiating with private lenders or public funders who hold a mortgage on a troubled home or, for that matter, on any other building on its land. What is mortgaged in most ground leasing programs – and what a lender is allowed to seize if a loan goes bad – is the house and other structural improvements, *not* the underlying land.<sup>27</sup> This strengthens the steward's hand, while multiplying the possibilities for dealing with mortgage defaults and

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<sup>25</sup> Quoted in Emily Thaden and John Emmeus Davis, "Stewardship Works," *Shelterforce*, v. 32, no. 3: 24-27 (2010).

<sup>26</sup> In serious situations, where leaseholders are clearly unable or unwilling to correct violations in the terms and conditions of the ground lease, most CLTs are more likely to repurchase the home, buying out the homeowner and enabling her to move elsewhere, instead of forcibly evicting her from the leasehold. Indeed, I know of no CLT to date that has actually evicted a homeowner/leaseholder, although the threat to do so has sometimes been used as leverage to persuade a homeowner who is not complying with the terms of her ground lease to move.

<sup>27</sup> Technically, what is mortgaged is the home and the "leasehold estate." Some ground leasing programs have been forced to subordinate the steward's interest in the land, however. In these less-than-desirable arrangements, the lender is allowed to seize both the house and the land in foreclosure.

foreclosures. The lender may enlist the nonprofit landowner's cooperation in negotiating a workout with the homeowner, keeping the mortgage in place while putting the homeowner on a schedule to resolve the delinquency. The nonprofit may accept a deed-in-lieu of foreclosure from the homeowner. The nonprofit may decide to buy the house from the lender following foreclosure.<sup>28</sup> Alternatively, the nonprofit may decide to let the lender sell the foreclosed home for whatever price the lender can get and to whatever buyer the lender can find. Whoever buys the building must then deal with the nonprofit owner of the underlying land.<sup>29</sup>

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

**Intervention.** Any steward worth its salt will have reserved the right to intervene to preserve the homeownership opportunities it has worked so hard to create. Regardless of whether this authority is granted through a deed covenant or ground lease, therefore, every steward should be able to block resales in violation of affordability controls, to correct deferred maintenance, and to arrest the slide toward foreclosure. Having the *right* to intervene is not the same as having the *will* to do so, however. In this regard, ground leasing comes out ahead.

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

If a public funder has been smart in investing its homeownership subsidies, moreover, that investment will have been granted or loaned to the owner of the land, not to the owner of a resale-restricted home. The public agency will then have the ability to go after the nonprofit steward if affordability is compromised or if maintenance is deferred.<sup>30</sup> That gives the land a stickiness all its own, for there is no place for the nonprofit steward to hide and no easy way for the organization to divest itself of assets that public dollars have helped it to acquire.

In the face of the many *disincentives* to intervention, including the time required, the money involved, and the risk of antagonizing homeowners who would rather be left alone, stewards

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<sup>28</sup> Under many financing arrangements for mortgaging homes on leased land, the landowner is given the first right to buy the house out of foreclosure. There is no reason, however, why the same right could not also be granted to a steward using deed covenants.

<sup>29</sup> The landowner has leverage, too, in dealing with the building’s new owner. The nonprofit will usually have the option of charging a market-rate ground rent if the home’s new owner is not another income-eligible household.

<sup>30</sup> In some cases, municipalities have insisted that, as a condition of conveying their funds to the landowner/steward, the municipality itself will be able to take over the lessor’s stewardship responsibilities if the lessor is unable or unwilling to do so.

using mechanisms other than a ground lease are more likely to decide that the cost is simply too high (and, perhaps as suggested earlier, the judicial path to a corrective remedy too uncertain) to go to the extra trouble of rescuing a distressed property. Owning the land tends to nudge this calculation in the opposite direction, creating an incentive to act that outweighs the inclination to do nothing. Ground leasing, in this regard, is what behavioral economists would call a *commitment device*.<sup>31</sup> It locks the steward into living up to its own promises, raising the reputational cost of not intervening to protect the buildings upon its land. Stewardship is more certain when the organization assigned responsibility for stewardship is not only vigilant but vested, ensnared in a web of its own making, compelled to do the right thing even when tempted to look the other way.<sup>32</sup>

### ***Graceful Failure: The Organizational Argument for Common Ground***

It might seem incongruous (and counter-productive) to mention “failure” while extolling the virtues of ground leasing in community development. But the emphasis here is on *graceful* failure. This is a fault-tolerant principle lifted from the world of engineering and computer programming, where complex systems are intentionally designed to continue operating properly even when there is a flaw or failure in one of their components. Engineers do not set themselves the impossible goal of building a transportation network, an electrical grid, or a computer program that will never fail. They strive, instead, to create systems that are robust and resilient. Such a system when subjected to extreme conditions may bend, but doesn’t break. It may flicker, but doesn’t crash. It may eventually collapse, but with enough warning and backup to protect its most valuable components.

Graceful failure is designed into a housing delivery system whenever stewardship is added as a backup for low-cost homes and low-income households that have been assisted with public dollars or private dollars.<sup>33</sup> A stewardship regime makes failure less likely. It also helps to

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<sup>31</sup> See: Gharad Bryan, Dean Karlan, and Scott Nelson, “Commitment Devices,” *Annual Review of Economics*, v. 2, no. 1 (September 2010); and Colin Camerer, Samuel Issacharoff, George Loewenstein, Ted O’Donoghue, and Matthew Rabin, “Regulation for Conservatives: Behavioral Economics and the Case for “Asymmetric Paternalism,” *University of Pennsylvania Law Review*, v. 151, no. 3 (January 2003).

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

<sup>33</sup> Introduced to the concept of graceful failure by Greg Rosenberg, I have employed it several times before in making a case for the superiority of shared equity homeownership in preserving lower-priced homes and protecting lower-income homeowners. See, for example, J.E. Davis, “Shared Equity Homeownership: Designed to Last,” *Communities and Banking*, v. 20, n. 4 (2009). Mr. Rosenberg would likely object to the use I have made of the concept here, however, in making a case for the superiority of ground leasing. Indeed, he has argued that graceful failure is a virtue of deed covenants, not of ground leases, since covenants are easier to “unwind” if a nonprofit houser no longer has the capacity or the will to perform its stewardship role.

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

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

An underappreciated function of common ground is that it tends to make organizational failure less likely and, should the organization begin to founder, to render its distress or demise less catastrophic.

As for the first, one of the best ways to assure that a CLT or any other nonprofit steward will be around for the long haul is to build a diverse portfolio of revenue-generating assets, reducing the organization's dependency on outside funders. Ground leasing, in this regard, can contribute significantly to a steward's bottom line, depending on the magnitude of the organization's holdings. Most or all of the ground lease fees collected from the owners of buildings on the steward's land can be used to cover the landowner's operating costs, especially those incurred in meeting its stewardship responsibilities. When that portfolio includes multi-unit rental housing on leased land, moreover, and perhaps commercial buildings as well, the operational revenue from lease fees can be quite substantial.<sup>34</sup>

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

Should this landed asset appreciate in value – appreciation to which the organization's own neighborhood improvement efforts may have contributed – the original entry on its balance sheet does not increase, but the added value may be available for taking and using by the organization if needed down the road. The length of the typical CLT ground lease and the charitable mission of most nonprofit organizations that are doing ground leasing will necessarily and properly impede short-term profit taking on land gains, but there may be occasions when

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<sup>34</sup> These revenues will be meager when an organization's portfolio is small. It is only after a CLT (or other nonprofit landowner) is able to build a large and diverse portfolio that it will begin to generate a significant stream of revenue for its own operations. Even then, however, a community development organization engaged in many different activities will never be able to cover *all* of its operating costs through lease fees, only those directly related to stewardship. The goal of organizational self-sufficiency, when it comes to the stewardship of affordable housing, must be minimalist: an organization should strive to generate enough revenues from its own portfolio to cover the cost of watching over that portfolio, even if the organization were to cease all other activities.

this appreciating asset can be legitimately accessed and used to support the organization and its mission. The nonprofit landowner may sometimes choose to convert some of its land to a “higher” use than affordable housing, if conditions in the neighborhood have changed to the point where a different use of that land is warranted.<sup>35</sup>

There may also be times – fortunately rare to date – when a homeowner defaults on a mortgage and intervention fails. The CLT may find itself holding land under a home that a bank has seized through foreclosure and resold to a higher-income buyer. The CLT, as landowner and lessor, then has the ability under the ground lease to charge a higher lease fee to the new owner, if the building is no longer owned nor occupied by a low-income household. In short, there may be opportunities, now and then, for a nonprofit landowner to lease out parcels of land at a monthly rate much higher than the heavily subsidized lease fees that are typically charged to low-income homeowners, thus generating added revenue for the organization.

Under circumstances more dire, owning land may allow a wobbly organization to right the boat and to return to being an effective steward. Alternatively, owning land may help to entice another nonprofit into taking over the steward’s assets and responsibilities. “Where there is land, there is hope,” says Brenda Torpy, executive director of the Champlain Housing Trust (CHT), a community land trust in Burlington, Vermont. It’s an adage heard in the hallways of CHT whenever there is a distressed building on CHT’s land, especially a house that is owner-occupied. Landownership gives the steward more options in solving the problems of a failing homeowner, a failing building, or a failing mortgage. The same may be said of a distressed organization. Landownership gives the board of a failing steward more options in trying to save what is most important – and a greater incentive to do so.

What matters most in these situations is saving the homes into which public agencies and private donors have poured their money and into which low-income people have poured their savings and dreams. In a time of crisis, a nonprofit landowner with a charitable mission must think first of the wellbeing of the homeowners and renters who live on its land. Its primary obligation is to them. The governing board of a shaky steward must do whatever is necessary to protect its leaseholders, including perhaps the prudent decision to lease out some of its land for a “higher” use than housing or the painful decision to sell some of its land.<sup>36</sup>

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

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<sup>35</sup> It should be noted that such a change in use could occur only at the *endpoint* in a ground lease or when lessees decide to resell their buildings to the landowner and move away. The residential ground leases used by CLTs and by other community organizations do not allow the lessor to decide unilaterally to terminate the lease.

<sup>36</sup> Even community land trusts that are philosophically committed to *never* returning land to the speculative market have sometimes been forced to do so in service of their mission and their own survival. The model by-laws adopted by most CLTs make land sales very difficult, requiring approval by both the board and the membership, but it can be done.



The key here is not only that ground leasing gives the board of a faltering organization more options, but also more motivation to pursue them. Similar to what was said earlier about a CLT's commitment to oversight and intervention, a lessor and its lessees are married to one another in a mixed-ownership arrangement that is not easy to unwind. The difficulty of doing so can be a good thing in a time of crisis, forcing everyone to slow down, dig in, and work harder to solve the organization's problems.<sup>37</sup> When there is more at stake, as there is when low-income households live on the land an organization owns, the governing board will do almost anything to make things right – even to the point of sacrificing the organization itself through merger or dissolution if that means saving its leaseholders' homes.<sup>38</sup>

## Higher Purpose, Harder Path

Durable enforceability, dependable oversight, and graceful failure give ground leasing a competitive advantage in preserving the affordability, condition, and security of publicly assisted, privately owned housing, especially housing that is owner-occupied. To the extent that stewardship is made to last longer and to work better by a community's ownership of the underlying land, it is fair to say that ground leasing is worth whatever additional time and trouble it may entail.

Not everyone agrees. One of my closest colleagues has bemoaned the complexity of ground leasing and posed a reasonable question: "If housing is all that you do, why not take a simpler approach to protecting long-term affordability?"<sup>39</sup>

My immediate response would be that simpler is not the surest way to achieve this particular goal; ground leasing does it better. But a more compelling answer is implicit in the question itself, which is clearly where my colleague was headed when he asked it. Permanent affordability is not "all" that ground leasing can do, nor is it "all" that many community development organizations want to do. They have a broader mission, aspiring to bigger things. That includes many nonprofits that are developing affordable housing and nearly all that are committed to the comprehensive development of an entire neighborhood, town, or region. Some of these organizations are looking for a more ethical way of owning the land underneath their projects and allocating the value that accrues to it. Some are looking for a more equitable and sustainable way of doing large-scale development without displacing a community's most vulnerable residents. Some are looking for a more empowering way to involve individuals in planning and guiding the trajectory of their own neighborhoods.

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<sup>37</sup> At the same time, the difficulty of unwinding this deal should give pause to any nonprofit that is contemplating ground leasing for the very first time. A smaller nonprofit or a start-up nonprofit may not be ready for the added responsibilities and challenges that come with ground leasing. Such an organization may be better advised to use deed covenants instead, perhaps as an interim step, transitioning to ground leases when it has more administrative capacity and a broader political base to do ground leasing well.

<sup>38</sup> There have, in fact, been several instances where a CLT board has deliberately and successfully sought out another nonprofit to take over its lands, leaseholds, and stewardship responsibilities. In those cases, the lessor-lessee arrangement has remained intact, even when the corporate identity of the lessor has changed and the CLT has been absorbed into another nonprofit organization.

<sup>39</sup> Greg Rosenberg, "Troy Gardens: The Accidental Ecovillage," p. 421 in J.E. Davis, *The Community Land Trust Reader* (2010).

The choice of whether or not to do ground leasing, therefore, is not only a question of which mechanism may be the most effective in accomplishing the same mission. It is also a question of *which* mission an organization is trying to accomplish. Many nonprofit organizations doing community development have an ethical, economic, or political purpose that goes beyond the stewardship of permanently affordable housing. They have set their sights on higher ground. They have willingly set their feet on a harder path.

Community-owned land can get them there. It is a strategy both practical and aspirational. For nonprofit organizations that have already adopted a mission much broader than preserving the affordability of privately owned housing, common ground can *enable* the pursuit of bigger things.<sup>40</sup> For organizations with a narrower goal or smaller capacity, at least in the beginning, common ground may *entice* them into thinking bigger, attuning them to opportunities for an expanded mission down the road. A siren's song of possibility is woven into the vessel of holding land and managing leaseholds on behalf of a place-based community. The nonprofit landowner is put behind the wheel of a high-powered vehicle that whispers seductively, "go further, drive faster, do more." More is what common ground does best.

### ***Ethical Ownership: The Moral Argument for Common Ground***

Issues of morality surrounding the ownership and use of land are seldom discussed in countries like the United States, where the commodification and accumulation of land by private individuals is taken for granted. Even among practitioners and policymakers who are debating which strategy or mechanism might be "best" in developing affordable housing or promoting neighborhood revitalization, the ethics of land are unlikely to be part of the conversation, let alone a deciding factor. Practicality, not philosophy, is what wins the day.

Nevertheless, for hundreds of years and in many countries, cultures, and religions, people have been drawn to common ground out of concerns that are primarily ethical in nature. They have justified the creation of planned settlements, affordable housing, and profitable enterprises on community-owned land not because this form of tenure was judged the most expedient way to get things done, but because it was considered the most moral way to do them.

There are three different but overlapping strands to this ethical argument. The first asserts it is wrong to turn land and other natural resources into private property. The second asserts it is wrong to own more land than one personally needs. The third asserts it is wrong to allow wealth created by the community to be captured by a fortunate few. Common ground becomes the virtuous answer to all three.

***Private possession of natural resources.*** Land has been viewed in many traditions as a bountiful gift given to all humanity by a generous God. Like rivers, seas, sky, and sun, land is a sacred trust. It may be temporarily used by individuals, but not permanently owned. In ancient India, for example, there was a Vedic prohibition against the deeding of land. In ancient

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<sup>40</sup> That is not to denigrate those nonprofit organizations, including many CLTs, that make a principled choice to focus only on affordable housing. There is nothing "small" about providing housing for people in need, especially when an organization is committed to "going to scale" as a developer and "going the distance" as a steward of homes designed to remain affordable for many years. My point is simply that any number of community-based nonprofits have a mission more expansive, more multi-faceted than housing alone. When housing is not "all" that an organization does – or hopes to do – common ground can be a powerful tool for accomplishing that mission.

Israel, the Torah portrayed Yahweh commanding that, “The land is not to be sold in perpetuity, for the land is mine” (Leviticus 25: 23). In a similar vein, philosophers of the early Christian church challenged the Roman custom of individuals holding land as property in fee simple absolute. These church fathers considered land to be a communal means of life and livelihood that should be available to the entire community.<sup>41</sup>

Many native peoples of the New World had a similar sense of land, water, mountains, and sky being sacred gifts that are shared by all and belong to none. Indeed, for them, the whole idea of owning land seemed ludicrous. Chief Seattle’s eloquent letter of 1854, responding to a request from the federal government to purchase tribal lands in the Pacific Northwest, captures this sentiment well:

*The President in Washington sends word that he wishes to buy our land. But how can you buy or sell the sky? The land? The idea is strange to us. If we do not own the freshness of the air and the sparkle of the water, how can you buy them?*<sup>42</sup>

Objections to the private ownership of land have not always had a spiritual dimension. Many secularists have objected as well. The Diggers of the Cromwellian period in England, for example, embraced a creed of common ownership that would have not sounded “strange” to the ears of Native Americans: “The earth was made by Almighty God to be a common treasury of livelihood for the whole of mankind.”<sup>43</sup> Much later in the 1930s, the American decentralist, Ralph Borsodi, was so vehemently opposed to individual landownership that he refused even to call land “property.” He preferred a term he had coined himself, “trusterty,” arguing that:

*When you make something with your own labor you have, so to speak, frozen your labor into that thing. That is the way in which you create a moral title to that thing, by producing it. You can sell it to somebody else and, in return for what he pays you, you can give him your moral title to whatever it is. But no man created the earth or its natural resources. And no man or government has a moral title to the earth’s ownership. If it is to be used, and we have to use it in order to live, then it has to be treated as a trust.*<sup>44</sup>

Ground leasing provided a solution to the moral dilemma of individuals needing to use land for farming, housing, and other activities, but being prohibited by their principles from holding land as a permanent, individual possession. Leases, unlike deeds, have an end date; they expire after a specified number of years. Land held under a lease is not, in the words of Leviticus, “sold in perpetuity.”<sup>45</sup>

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<sup>41</sup> Peter Salsich, “Toward a Property Ethic of Stewardship,” pp. 48-65 in J.E. Davis, *The Community Land Trust Reader* (2010).

<sup>42</sup> If authentic, which has sometimes been disputed, this letter would have been sent to the 14<sup>th</sup> President of the United States, Franklin Pierce. It is probably safe to say that the lawyer and landowner from New Hampshire to whom Chief Seattle’s words were directed would have found the idea just as “strange” that natural resources should be cherished instead of buying, selling, timbering, or mining them.

<sup>43</sup> Gerard Winstanley, “Declaration of the Poor Oppressed People,” a Digger pamphlet printed in 1649.

<sup>44</sup> “Plowboy Interview: Ralph Borsodi,” p. 164 in J.E. Davis *The Community Land Trust Reader* (2010).

<sup>45</sup> In Roman-based legal systems, this was known as a “usufruct,” the temporary (as opposed to permanent) right to the use, the fruits, and the enjoyment of land or other property owned by another.

Leases also have the advantage of enabling land to be readily held as a communal asset, while allowing anything that happens upon that land to be grown, built, bought, or sold as individual property. Mixed ownership creates a unique moral hybrid, combining a communitarian sensibility around the use and stewardship of land that is distinctively Native American with individual opportunity for profit that is distinctively European. Ground leasing allows people to have their ethical cake and to eat it too.

***Private accumulation in excess of need.*** There is a second strand to the moral argument for ground leasing that finds nothing inherently wrong with the ownership of land. Indeed, the validity of all private property is affirmed. But accumulating more than what is needed for one's personal wellbeing is deemed immoral. Worldly goods should be used not only for the betterment of their owners, but for the benefit of the community as well. There is, to employ the words of a series of encyclicals handed down by the Roman Catholic Church, a "social mortgage" on all private property.<sup>46</sup> This is especially true for limited resources like land and water, where concentrated ownership by a privileged minority can deprive the majority of what they need in order to survive and to prosper.<sup>47</sup>

This "ethic of stewardship," as it is commonly known in the Christian tradition, has its counterpart in Mahatma Gandhi's concept of "trusteeship." Despite his personal asceticism, Gandhi did not assume that others would eschew all material goods, nor did he condemn the private ownership of land. What he condemned, in a country of vast poverty that was just emerging from colonial rule, was accumulation in excess of one's personal needs. In his words:

*What belongs to me is the right to an honourable livelihood, no better than that enjoyed by millions of others. The rest of my wealth belongs to the community and must be used for the welfare of the community.*<sup>48</sup>

It fell to Vinoba Bhave to put that principle into practice. After Gandhi's assassination in 1948, Bhave and other followers of Gandhi began walking across India, challenging rich landowners to donate their surplus lands to be used for the welfare of the community. During the first years of the *Boodhan* ("Land Gift") Movement, the deeds to donated lands were given directly to individual farmers. After seeing that much of this land was being quickly lost to creditors, however, Bhave altered course and began insisting that title be given to local, not-for-profit village trusts instead. These lands were then leased, not given or sold, to the rural poor. The *Gramdan* ("Village Gift") Movement was born, eventually spawning nearly 130,000 villages throughout India where lands were held in trust for present and future generations.

A generation later Clarence Jordan, a Christian pastor in the United States, happened upon a similar solution when faced with the problem of how best to steward the private donations

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<sup>46</sup> Peter Salsich, p. 57 in J.E. Davis, *The Community Land Trust Reader* (2010).

<sup>47</sup> Similarly, many people who created the first CLTs in the United States were troubled less by the private ownership of land than by its concentration in fewer hands. Typical of this period were the sentiments expressed in a 1976 brochure of the Valley CLT in Greenfield, Massachusetts: "A system of private ownership of land, which once led to high productivity and personal independence, has become a major source of economic and social inequity. . . . The CLT restores the concept of land stewardship or trusteeship. It creates an institutional alternative to existing practices of landholding based on a more ethical pattern of distribution and use."

<sup>48</sup> M.K. Gandhi, *Trusteeship* (Ahemadabad, India: Navajivan Trust, 1960).

given by prosperous people to help in housing the poor. In 1942, Jordan had co-founded an intentional community in southwest Georgia named Koinonia Farm. By 1968, he was looking to take his ministry in a new direction. Like Gandhi, Jordan believed that people of faith are called by God to share with their neighbors any wealth in excess of what they personally need, especially a community's more impoverished members. He was fond of quoting Saint Augustine's dictum that "he who possesses a surplus, possesses the goods of others," to which Jordan bluntly added, "That's a polite way of saying that anybody who has too much is a thief."<sup>49</sup>

Koinonia Partners and the Fund for Humanity, prototypes for what later became Habitat for Humanity, were the nonprofit organizations created by Jordan and his friend, Millard Fuller, for receiving and using whatever portion of these "stolen goods" their co-religionists were motivated to share. Koinonia Partners was to be the builder of affordable housing and the developer of labor-intensive enterprises aimed at relieving the plight of the poor. The Fund for Humanity was to be the repository of any donations received from the rich, as well as the owner and steward of the land beneath houses, farms, and enterprises being developed by Koinonia Partners. Jordan declared that, "All land will be held in trust by the Fund for Humanity, but will be used by the partners free of charge. Thus, usership will replace ownership."<sup>50</sup>

For Jordan, as for Bhavé, ground leasing became the *practical* answer to the problem of how to ensure that assets donated to the poor would not be lost down the line. Ground leasing had a *moral* dimension as well. It was a way, in Jordan's words, to free land from the "evils of speculation." It was also a way for both rich and poor to do the "right" thing in sharing whatever surplus they might have, whether accumulated through their own efforts or accruing to them because of the contributions of others.<sup>51</sup> This was an ethical way that land could be used to secure what Gandhi had called an "honorable livelihood" for impoverished people who wanted to farm the land or merely to secure a place to live. But nobody would get more land than he or she needed, nor would the poor of future generations be deprived of land because of personal misfortunes or bad decisions of their predecessors. Land would be stewarded for all.

***Private capture of community wealth.*** There is a third tradition that condemns neither individual ownership nor profitable enterprise, but deems the privatization of wealth created by others to be morally questionable and socially unjust. This particular line of ethical and political argument can be traced from the "unearned increment" of John Stuart Mill, through the "single tax" crusade of Henry George, to the Garden Cities of Ebenezer Howard. All three of

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<sup>49</sup> Clarence Jordan, "A Personal Letter to Friends of Koinonia" (October 21, 1968).

<sup>50</sup> Jordan led by example, transferring title to the land at Koinonia Farm to the Fund for Humanity before his untimely death in 1969. The first housing completed by Koinonia Partners was constructed on lots previously sold by Koinonia Farm, but the next 22 houses were developed according to Jordan's "partnership principles." The land underneath was owned by the Fund for Humanity and leased for a nominal fee to the families buying these houses. This principle of "usership," so dear to Jordan, was never embraced by the more pragmatic Fuller. Very few affiliates of Habitat for Humanity made ground leasing a central part of their programs – until recently.

<sup>51</sup> Clarence Jordan believed that it wasn't just the rich who should share their surplus with the poor; the poor should do so as well. The poor should have an opportunity to give back to the community that had helped them to find better housing. In his words, families who had been lifted into homeownership with a zero-percent mortgage from Koinonia Partners "will be encouraged to share at least a part of the savings on interest with the Fund for Humanity."

them – Mill, George, and Howard – focused on the just allocation of gains in value that accrue to land because of the growth and development of society. Since most of this appreciation, what the British call “betterment,” is not created by the industry or investment of the people who actually own the land, their claim to this socially created wealth is immoral. Society created it, so it is fitting and proper for society to capture it for the benefit of all. In George’s words, “It is the taking by the community, for the use of the community, of that value which is the creation of the community.”<sup>52</sup>

While these thinkers agreed on the ends, they disagreed on the means. For Mill and George, the mechanism of choice for preventing landowners from privatizing socially created wealth was taxation.<sup>53</sup> Government should capture betterment for the benefit of all. Again, in George’s words, “The tax upon land values is, therefore, the most just and equal of all taxes. It falls only upon those who receive from society a peculiar and valuable benefit, and upon them in proportion to the benefit they receive.”

Howard proposed a different approach. He shied away from demonizing an entire class of people, recognizing the political reality that small homesteaders are no different than big landlords in wishing to claim for themselves whatever gains in value might accrue to their holdings. Like Mill and George, Howard intended to capture all gains in value for the common good, but his mechanism of choice was collective ownership of the land. Instead of taxing away gains in value that would otherwise be claimed by individual landowners, the community itself would own the land underneath all of the houses, stores, factories, and farms he envisioned being created in his Garden Cities. The land would be overseen by “gentlemen of responsible position and of undoubted probity and honour . . . who hold it in trust (after payment of the debentures) for the whole community, so that the entire increment in value gradually created becomes the property of the municipality.”<sup>54</sup>

Howard arrived at ground leasing, first and foremost, because he considered it to be a practical path to land reform, one more likely to be politically palatable for the “average man” than the strategy advanced by Henry George.<sup>55</sup> But running through his argument for the Garden

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<sup>52</sup> Henry George, *Progress and Poverty*, Book VII, Ch. 1, 1879 (repr. New York, NY: Robert Schalkenbach Foundation, 2010).

<sup>53</sup> The starting point for both Mill and George was the former’s assertion that taxing away the unearned increment was the most “socially just” way for a society raise funds. In the words of Mills, “The ordinary progress of a society which increases in wealth, is at all times tending to augment the incomes of landlords; to give them both a greater amount and a greater proportion of the wealth of the community, independently of any trouble or outlay incurred by themselves. They grow richer, as it were in their sleep, without working, risking, or economizing. What claim have they, on the general principle of social justice, to this accession of riches? In what way would they have been wronged if society had, from the beginning, reserved the right of taxing the spontaneous increase of rent, to the highest amount required by financial exigencies?” John Stuart Mill, “On the General Principles of Taxation,” in *Principles of Political Economy with Some of their Applications to Social Philosophy*, 1848 (repr., New York: Oxford University Press, 1994).

<sup>54</sup> Ebenezer Howard, *Garden Cities of To-Morrow* (Cambridge, MA: Massachusetts Institute of Technology, 1965). Quotes are taken from pages 50 and 59. See, too, page 136, where Howard is explicit in acknowledging his debt to George while arguing that the Garden City’s path to land reform is more likely to garner widespread support.

<sup>55</sup> The land reform preached by Howard and practiced by CLTs is very different than either the statist approach to “redistributing ownership” or the regulatory approach to “restricting use.” See: J. E. Davis, “Reallocating Equi-

City there is a bright moral thread, what Mill had called a “general principle of social justice.” Howard believed it was wrong for people to claim “wealth of the community” which they had no hand in creating. He would do land reform “by the force of example,” setting up a system that was capable of equitably transforming the “unearned increment” of private landlords into the “collectively earned increment” of the Garden City. He discovered in ground leasing an effective – and moral – means for capturing land-based wealth for the public good.<sup>56</sup>

### ***Equitable Development: The Economic Argument for Common Ground***

The economic rationale for community-owned land starts where George and Howard left off, taking the distributionist strategy they had applied to nation and city and tailoring it to fit the just allocation of property-based wealth across classes and generations in place-based communities.<sup>57</sup> Mostly missing from the Georgist conversation about capturing land gains for the benefit of an entire society, and from Howard’s reformulation where land was to be held for the benefit of a city’s citizenry, were interventions occurring at the more micro level of household and neighborhood. This is the level at which community land trusts and their nonprofit cousins have had their greatest impact: improving the wealth and wellbeing of households who have been excluded from the economic mainstream, and improving the neighborhoods in which these people live.

The economic argument for ground leasing is not only about distributing gains but also about protecting them, making sure they *last*. Common ground becomes a shield against financial risks that can strip low-income people of the prosperity they thought might finally be theirs. It becomes a bulwark against market forces that can deplete residential places of uses and spaces on which low-income people depend and can displace the people themselves, as the neighborhood improves and land values rise. Doing development on land that is community-owned increases the odds of having an economic impact that is both equitable and sustainable.

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

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ty: A Land Trust Model of Land Reform,” pp. 209-232 in Charles C. Geisler and Frank J. Popper (eds.), *Land Reform, American Style* (Totowa, NJ: Rowman & Allanheld, 1984).

<sup>56</sup> It is ironic that, in the country that gave rise to the Garden City, the use of leaseholds for residential property has become a complicated affair. CLTs have been forced to navigate creatively around the Leasehold Reform Act of 1967, through which leaseholders were granted the right to purchase the freehold (through a process known as “enfranchisement”) or to obtain an extended lease that is 50 years longer than their lease’s current term.

<sup>57</sup> Many of these organizations have been expanding their service areas beyond a single neighborhood in recent years, doing ground leasing in multiple neighborhoods or across a city, county, or region. Even when serving a wider territory, however, the economic benefits of common ground are realized at the micro-level of household and neighborhood.

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

The first of these advantages occurs in jurisdictions that do not require the subdivision of a large parcel of land on which multiple dwellings are to be constructed, if the land underneath these buildings is leased rather than deeded. Assuming that the savings in time and money that result from *not* having to subdivide the land are passed along to the eventual buyers of these finished homes, rather than retained by the developer, residential ground leasing will bestow a financial benefit on each buyer in the form of a lower purchase price.

A more significant economic advantage is the opportunity provided by ground leasing for creating and capitalizing a *stewardship fund* to help the owners of resale-restricted homes to bear the future cost of major repairs. A small charge may be added to the monthly lease fee collected by the steward, which can either be deposited into a separate reserve for each home or aggregated into a pooled reserve for the portfolio as a whole.<sup>58</sup> These escrowed increments – essentially forced savings – become a boon for low-income homeowners down the road, when they are predictably or unexpectedly confronted by a major capital expense like replacing a roof or furnace, rebuilding a chimney, or rehabilitating some other big-ticket system.<sup>59</sup>

Finally, there is an economic benefit that comes from the operational and organizational umbrella that protects a homeowner’s equity against loss. If it is true, as previously argued, that ground leasing provides superior stewardship, committing a steward to closer vigilance and surer intervention in times of trouble, that same protection necessarily extends to covering the substantial investment that low-income families have made in their resale-restricted homes. A painful lesson of the Great Recession of 2008 was that personal wealth, when embedded in residential real estate, is more precarious than supposed. That was especially true for the owners of market-rate homes, whose expectation of back-end profits and susceptibility to the front-end blandishments of private lenders led them to assume higher mortgages than their counterparts in resale-restricted homes. What the latter had that the former did not was a third party that stood protectively in between them and their lenders. There was someone there to review and to approve proposed mortgages, preventing burdensome payments and predatory terms. There was someone there to intervene should homeowners get behind in

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<sup>58</sup> It should be noted that some homeownership programs using deed covenants have also begun collecting monthly “stewardship fees” from their homeowners. It is less obvious how defensible they would be, however, either legally or politically, were the owners of such resale-restricted homes to challenge this extra charge, unless collected as part of a condo association fee.

<sup>59</sup> New banking laws in the United States have made it difficult for a mortgagee to escrow payments beyond those covering the mortgage, taxes, insurance, and association or lease fees. Nonprofit organizations like Habitat for Humanity that offer mortgages for low-income homebuyers are similarly impeded from collecting extra fees that might be used in building up a maintenance and replacement reserve. When such a “stewardship fee” is part of a ground lease fee, however, it is more likely to be allowed, as long as a Habitat affiliate is not only the mortgagee but also the owner and lessor of the land underneath a Habitat home. This opportunity has helped to persuade a number of Habitat affiliates in the USA to add ground leasing to their program mix. More on the evolving connection between Habitat and CLTs can be found in John Emmeus Davis, “Braided Lives,” *Rooflines*, March 28, 2013.



their payments, reducing the incidence of mortgage foreclosure and preventing the loss of household wealth.<sup>60</sup>

**Community economics.** Although community-owned land has been used most commonly to date in programs focused on owner-occupied housing, it can be applied more expansively – and often is. Beyond homeownership, CLTs and other nonprofit organizations have used ground leasing for the development of multi-unit rental housing, single-room occupancy dwellings, and homeless shelters. Beyond housing, ground leasing has been used in the development of day care centers, community centers, greenhouses, offices for other nonprofits, and commercial buildings for neighborhood retail, as well as for the preservation of open spaces, community gardens, and agricultural lands in city and country.<sup>61</sup>

Common ground is a versatile *platform* on which any type of building can be constructed and on which any use of land can be encouraged. Furthermore, any type of partner can be employed in developing, managing, or farming that land, including individuals or groups who want to build their own housing or start their own enterprises; cooperatives for producers or consumers; and even for-profit developers, builders and entrepreneurs.

Such versatility is essential whenever an NGO is focused more on the development of place than on the development of housing; whenever its primary goal is not to build as many residential units as possible, scattered across a wide geography, but to re-build and to revitalize a marginalized, disinvested neighborhood that a stratified economy has left behind.<sup>62</sup> Common ground gives a nonprofit lessor the flexibility to tailor the development and use of a neighborhood's land to meet a variety of residential, commercial, and recreational needs. It also adds resiliency, allowing the lessor to adjust the uses of its holdings to accommodate changing needs, a changing economy, or the changing priorities of its principal funders.

A particular strength of this platform is not only the diversity it allows in *what* is developed and in *who* is doing it, but the opportunity it allows for a place-based community to impose its will on both fronts, making collective decisions about the common good. As Harry Smith has said about his own organization, the community land trust created by the Dudley Street Neighborhood Initiative in Boston, “the land trust doesn’t exist just to acquire and manage land. It’s really about engaging community to decide together what they want on their land.”<sup>63</sup>

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<sup>60</sup> Evidence for the effectiveness of CLTs in preventing the loss of homeowner equity through mortgage foreclosure can be found in Emily Thaden, *Stable Homeownership in a Turbulent Economy: Delinquencies and Foreclosures Remain Low in Community Land Trusts*, Working Paper 11ET1 (Cambridge, MA: Lincoln Institute of Land Policy, 2011) and in John Emmeus Davis and Alice Stokes, *Lands in Trust, Homes That Last: A Performance Evaluation of the Champlain Housing Trust* (Burlington, VT: Champlain Housing Trust, 2009). See also, FN 32 above.

<sup>61</sup> Greg Rosenberg and Jeffrey Yuen, “Beyond Housing: Community Land Trusts and Urban Agriculture and Commercial Development,” Working Paper 13GR1 (Cambridge, MA: Lincoln Institute of Land Policy, 2013); Jeffrey Yuen, “City Farms on CLTs,” *Land Lines* (April 2014).

<sup>62</sup> Community development and housing development often go hand-in-hand, but they are not the same. Constructing new housing or rehabilitating old housing is rarely enough to revitalize a disinvested neighborhood. The multiplicity of needs and strategies that characterize the field of community development are captured well in James DeFilippis and Susan Saegert (eds), *The Community Development Reader* (New York: Routledge, 2012).

<sup>63</sup> Quote in Penn Loh, “How One Boston Neighborhood Stopped Gentrification in Its Tracks,” *YES! Magazine* (Winter 2015).

Land that is community-owned provides a foundation for development that is community-led. It opens the door for community participation in saying what kinds of improvements might do the most to make a neighborhood a nicer, healthier, and safer place to live. It then provides the means to make that happen, while protecting lower-income populations and lower-value land uses that are often displaced when economic conditions take a turn for the better. It allows a place-based community to “plan for success,” erecting a landed bulwark against the possibility of the community itself being pushed aside should a trickle of improvement later become a flood of speculation and gentrification.<sup>64</sup>

Affordable housing is not the only “lower” land use that is regularly pushed aside when neighborhoods improve. The same happens to many non-residential land uses that serve or employ people of modest means. Common ground can be a bulwark here as well. A community-based organization that holds land under a variety of buildings and leases out land for a variety of purposes has the capability to prevent the loss of small manufacturers, retail establishments, artist spaces, community facilities, and open lands that are put under pressure whenever real estate values rapidly rise. It can prevent the loss of cooperatively owned enterprises that may be tempted to “demutualize” as their fortunes improve.<sup>65</sup> Community-owned land can also be effective in mitigating the negative externalities of transit-oriented development: preventing the displacement of “lower” uses and vulnerable people precipitated by the massive investment of public funds in subway lines, light rail, bike paths, or hiking trails.<sup>66</sup>

Especially vulnerable in neighborhoods undergoing rapid improvement in their fortunes are sites that Ray Oldenberg has called “third places.”<sup>67</sup> These are informal, celebratory spaces in which community happens, in which neighboring occurs. Among the most important – and precarious – of these spaces in neighborhoods with a large concentration of lower-income people, Yuen and Rosenberg have argued, are community gardens:

*The third places of lower-income neighborhoods do not always get a lot of press, but serve important community functions such as establishing a sense of place, fostering broad and inclusive social interactions, and supporting civic engagement. They can take*

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<sup>64</sup> The danger of being pushed aside as a neighborhood’s land grows more valuable is especially acute in squatter communities – in the United States and elsewhere. In many of these settlements, people have become firmly rooted over several generations, even to the point of constructing permanent or semi-permanent dwellings. But they have no legal right to occupy the land. They have no security of tenure. Community land trusts have been proposed as a possible strategy for securing the homes of squatters through long-term leaseholds. In San Juan, Puerto Rico, the first large-scale test of this strategy is underway: the Cano Martin Pena Community Land Trust, an initiative sponsored by the Corporacion del Proyecto ENLACE del Cano Martin Pena. Over 27,000 people presently live along the Martin Pena Canal. Half have neither a deed nor a lease for the land on which they live.

<sup>65</sup> A rise in the value and profitability of a cooperatively owned enterprise can tempt the owners of the firm’s shares to sell out to an outside buyer, removing the cooperative structure and reaping personal gains, a process known as “demutualization.” Just as the leased land beneath a limited equity housing cooperative can prevent its conversion to a market-rate cooperative or condominiums, ground leasing underneath a worker cooperative or consumer cooperative can give a CLT (or other nonprofit landowner) the ability to prevent demutualization.

<sup>66</sup> Robert Hickey, “The Role of Community Land Trusts in Fostering Equitable, Transit-Oriented Development: Case Studies from Atlanta, Denver, and the Twin Cities,” Working Paper 13RH1 (Cambridge, MA: Lincoln Institute of Land Policy, 2013).

<sup>67</sup> Ray Oldenberg, *The Great Good Place* (Boston, MA: Da Capo Press, 1989).

*a variety of forms, such as bars, religious institutions, community centers, barbershops, and even simple building stoops. But few of these informal hangouts can activate a space and create an engaged constituency quite like the community garden.*<sup>68</sup>

When a neighborhood is economically depressed, the supply of land for community gardens is often cheap and plentiful. When the neighborhood rebounds and land values rise, sometimes as an indirect result of residents cleaning up vacant lots and planting verdant gardens, third spaces are the first to go. Public ownership can be flimsy protection, as community gardeners in New York City discovered in 1999 when Mayor Rudy Giuliani proposed to auction off 114 city lots beneath thriving community gardens. Although community ownership is hardly proof against every proposal to convert open lands into high-density development, it does add more security for the lower uses that higher values put at risk. It allows community residents instead of government officials to determine whether a community asset is to be converted into another use.<sup>69</sup>

In sum, common ground provides both a versatile platform for the multi-faceted development of place-based communities and a powerful protection for people, uses, and spaces that were stubbornly there long before those places began to improve. Long-term ground leasing on community-owned land can ensure that the *burdens* of development do not fall disproportionately on individuals who are least able to bear them. Conversely, it can ensure that the *benefits* of development do not accrue primarily to those who had the fortune and foresight to buy up a neighborhood's real estate when prices were depressed. This more equitable distribution of benefits and burdens is made to last, moreover, by a nonprofit landowner that stays in the picture long after development is done. Common ground bends the arc of prosperity toward justice.

### ***Community Empowerment: The Political Argument for Common Ground***

Ground leasing forces a nonprofit steward of affordable housing and other buildings on community-owned land to take greater account of its beneficiaries and its neighbors: including them in the organization's activities; engaging them in the neighborhood's improvements; and building a community-based constituency that is capable of defending and advancing the interests of all who call that place their home.

That is *not* say that all nonprofits doing ground leasing are equally committed to sharing power with the people who reside on their land, nor that all are actively engaged in organizing their communities for collective action.<sup>70</sup> It is to say that ground leasing introduces a different political dynamic, tugging a nonprofit organization toward sharing, building, and wielding

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<sup>68</sup> Jeffrey Yuen and Greg Rosenberg, "Hanging on to the Land," *Shelterforce*, Fall (2012).

<sup>69</sup> It cannot be assumed that the highest priority for a community's residents – and for a nonprofit landowner representing their interests – will always be the preservation of open space. Darrin Nordahl offers the example of a neighborhood in Chicago where NeighborSpace was unsuccessful in developing an urban agriculture demonstration project because residents wanted housing to be developed on the vacant site. See pp. 62-63 in *Public Produce: The New Urban Agriculture* (Washington, DC: Island Press, 2009).

<sup>70</sup> Even among nonprofits organized and operated as community land trusts, not all are equally committed to keeping the "C" in CLT. See: Emily Thaden and Jeffrey S. Lowe, "Resident and Community Engagement in Community Land Trusts," Working Paper 14ET1 (Cambridge, MA: Lincoln Institute of Land Policy, 2014).

power on behalf of the community it serves. Furthermore, the very act of converting land from a private commodity into a public good, while capping the price for which housing and other buildings can be resold, presents an inherent challenge to the status quo. Long-term leaseholds on community-owned land, the model championed by community land trusts, hold the potential for transforming basic relations of property and power in the place of residence, “besieging what exists with a provocative alternative.”<sup>71</sup>

**Sharing power.** There has never been only one way to involve the beneficiaries of a nonprofit organization’s community development work in determining how that work gets done. There have been – and continue to be – a plethora of strategies for engaging and empowering the people for whom affordable housing is being built, for whom neighborhood improvements are being made, and for whom services and jobs are being expanded. Among the many nonprofits that are doing this kind of work, however, there has been a noticeable decline in the number that assiduously incorporate participatory strategies and structures into their organizations and operations. Community development corporations, community development financial institutions, Habitat for Humanity affiliates, and community land trusts have all been drifting away from what used to be an article of faith among nonprofit organizations helping to house low-income people or to revitalize low-income neighborhoods; namely, a core belief that the beneficiaries of an organization’s projects and services should have a voice in planning those activities and in guiding and governing the organization that carries them out.

Ground leasing is hardly a fail-safe buffer against organizational drift, but it may impede the slide. It is much harder for a nonprofit landowner to ignore the wishes or to exclude the voices of those who, by virtue of occupying its land, have a personal stake in making sure that particular organization is responsibly run and responsively attuned to the leaseholders’ needs. The landowner, meanwhile, has a reputational and operational stake in maintaining a degree of harmony with its leaseholders, long after they have begun living, working, or farming on leased land. Landowner-leaseholder relations are not always smooth, to be sure. They can become downright bumpy, an ever-present possibility in the dual-ownership intricacies and intimacies of ground leasing. A desire to reduce the severity of these clashes can be a strong motivation for a nonprofit landowner to create a structure and culture for leaseholder engagement.

An organization’s philosophical commitment to democratic governance may be a factor as well, although that is hardly unique to organizations using ground leases. What is unique to ground leasing is the practical necessity of anticipating and managing the risk of leaseholder discontent. Aside from being an effective and responsive steward, the easiest way for a nonprofit organization to ensure that its beneficiaries are cheerleaders rather than critics is to make them partners in guiding and governing the organization itself.

Cost may be a part of the landowner’s calculation. The least expensive stewardship regime is one in which compliance is routine and enforcement is unnecessary; one in which owners and occupants of price-restricted buildings police themselves, willingly abiding by the contractual

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<sup>71</sup> This lovely phrase comes from Ulrich Beck, who talks about the impact that a “creative construction” can have in “bringing pressure to bear on the existing system of beliefs, putting it to the test intellectually and politically.” See Beck’s *Individualization: Institutionalized Individualism and Its Social and Political Consequences* (Thousand Oaks, CA: Sage, 2005).

conditions that encumber their homes. Voluntary compliance with the steward's restrictions is more likely when the people who live or work on a steward's lands are directly involved in guiding and governing the organization which has a continuing responsibility for managing the land beneath their feet and for overseeing the buildings in which they live.

**Wielding power.** A nonprofit landowner has a powerful incentive to defend its leaseholders in the face of outside threats to their interests and to look for allies in waging such fights. The ground lease that is widely used by community land trusts and by many other nonprofits gives the lessor the authority to intervene on a building owner's behalf to remove liens, to contest unfair property taxes, or to resist eminent domain. While deed covenants or mortgages may be crafted to give a steward the same rights, the question raised earlier about the *will* to intervene has relevance here as well. Is a steward holding a bushel of arms-length covenants or liens as likely to fight for the people living in "its" homes as a steward holding parcels of land underneath a portfolio of houses, townhouses, condominiums, cooperatives, or apartments? I believe the answer is "no." The psychological and political incentive to fight the good fight is much greater when such housing is sited on land that the steward owns.

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

Aside from a legal right to intervene, many nonprofit landowners have discovered that the best way to prevail in such land-use battles is to cultivate a political base to defend the people they serve. A nonprofit doing ground leasing cannot play it safe, confining its activities to being a developer of affordable housing or other community facilities; it must be an organizer and advocate as well. That is not only because its leaseholders may sometimes insist on their "landlord" entering the fray on their behalf, but also because the difficulties that accompany this unfamiliar form of tenure make it *necessary* for a nonprofit lessor to build awareness, acceptance, and power at the same time that it is building housing. The very things that make ground leasing harder to do tend to force a nonprofit doing ground leasing to behave (at times) like a community organizer and to use (on occasion) whatever power it has accumulated to defend the interests of its leaseholders, its community, and itself.<sup>72</sup>

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<sup>72</sup> Three excellent examples of nonprofit landowners that are effective and committed organizers as well, consciously combining community ownership and community empowerment, are T.R.U.S.T. South LA in Los Angeles, the Women's Community Revitalization Project in Philadelphia, and the Dudley Street Neighborhood Initiative in Boston. The story of the last is told by Peter Medoff and Holly Sklar, *Streets of Hope: The Fall and Rise of an Urban Neighborhood* (Boston: South End Press, 1994).

The very things that make ground leasing so versatile, moreover, allowing community-owned land to function as a platform for many different kinds of development, can contribute to the success of this political venture. A diversity of land uses tends to broaden the base of a lessor's support beyond the small cadre of activists in any community who vocally care about affordable housing. Shopkeepers, service providers, and community gardeners, when added to the ranks of an organization's leaseholders, are added to the ranks of its potential allies as well, along with many neighborhood residents who consume these goods and services. The more people who are drawn into the organization's orbit, the larger becomes the constituency on which the organization can draw, should it later need their collective clout. Common ground, in this regard, may be not only a *commitment* device giving a nonprofit landowner a greater incentive to wield power, but also a *recruitment* device giving the landowner a greater ability to do so.

**Non-reformist reform.** Fifty years ago Andre Gorz, a social philosopher living in France, drew a distinction between ameliorative measures that buttress existing relations of property and power versus structural changes that slowly accumulate over time to present an ideological and political challenge to the status quo. He called the first "reformist reform," the second "non-reformist reform."<sup>73</sup>

Gorz's categories have been recently revived by James Meehan and provocatively applied to an examination of community land trusts in the United States, using the Dudley Street Neighborhood Initiative as his main case. He concludes:

*It is clear that CLTs, in their diverse character and situations, walk the fine dividing line between the two tendencies of reformist and non-reformist. In many cases, the CLT legal model has been used as a gimmick to keep low-income housing costs low (thus taking pressure off the state and the private sector). In others, they play a role in raising consciousness to the realities of power in regard to land, questioning speculative ownership of land, and enabling some degree of community control over the local land base.<sup>74</sup>*

What Meehan captures here is both the internal contradiction and transformative potential of the CLT's approach to real property. By expanding access to home mortgages for populations and places that have experienced redlining and disinvestment, CLTs contribute to the legitimization of a system of private finance that has been a source of woe for many low-income communities. By expanding access to homeownership for people who have been excluded from the private market, CLTs contribute to the individualization of property that has been a flashpoint in the politics of place, where interests of property often drive a contentious wedge between owners and renters, haves and have-nots.

At the same time, these traditional props of the status quo may be rattled a bit by a nonmarket form of tenure that operates within the system but outside the mainstream. An ideology of possessive individualism, long used by landlords and homeowners alike to justify their capture of all gains in value accruing to real property, is challenged by a CLT's dogged pursuit of a more equitable balance between the "legitimate" interests of individuals and the larger com-

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<sup>73</sup> Andre Gorz, *Strategy for Labor: A Radical Proposal* (Boston: Beacon Press, 1964).

<sup>74</sup> James Meehan, "Reinventing Real Estate: The Community Land Trust as a Social Invention in Affordable Housing," *Journal of Applied Social Science* v. 20, n, 10: 1-21 (2013).

munity in which they live, secured though the communal ownership of land and the durable imposition of use and price controls on any buildings sited upon it.<sup>75</sup> The power of private lenders is ameliorated by the CLT's *a priori* right to approve all proposed mortgages for the housing on its land, screening against predatory lending, and by the CLT's back-end right to intervene in curing defaults before mortgages can slide into foreclosure. The politics of place are modified by a nonprofit landowner that is drawn into sharing power and wielding power on behalf of the people who inhabit its chosen service area.

These are radical departures from business as usual, especially when it comes to the perception, possession, and operation of residential property. As Peter Marcuse has pointed out:

*Community land trusts challenge the arrangements of a housing market used to the pleasures and pains of speculating on housing value. . . . They can move from seeing housing as a commodity, valued for its exchange value, the profit it can produce, and see it rather as a necessity of life, even perhaps up to a certain configuration as a public good.*<sup>76</sup>

In sum, it is true that this particular form of tenure can function as an effective “gimmick” for reducing housing costs, preserving affordability, promoting upkeep, and preventing foreclosures. It is a short-term repair for a broken system. But the cumulative effect of community-owned land may be to transform that system, slowly and steadily, into something else. CLTs may sometimes “hide behind the tomatoes,” but what they are “really about” is replanting the contested ground at the intersection of property, power, and place.

## In Praise of Difficulty

As compelling as I believe these arguments to be for the superiority of community-owned land, long-term ground leasing, and community-led development, it must be acknowledged that few of them have been systematically studied. They are plausible, not proven, something on the order of working hypotheses for what I have seen and suspected while working for many years in the field. Colleagues more academically inclined than I will have to sift through whatever data they can find to assess how widely and dependably common ground actually produces the favorable outcomes I've described.

I see no reason to sit quietly by, however, waiting for academia to render a verdict. A solid case can already be made for community-led development on community-owned land, draw-

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<sup>75</sup> From the earliest days of the CLT, advocates for the model have wrestled with the philosophical question of exactly what these “legitimate” interests might be and the practical problem of how to achieve an equitable balance between individuals and their communities in allocating the benefits of real property. A seminal discussion of this issue can be found in the opening chapters of *The Community Land Trust Handbook*, published by the Institute for Community Economics (Emmaus: Rodale Press, 1982). Many political theorists have wrestled with the same issue. See, in particular, R.H. Tawney, “Property and Creative Work,” in *The Acquisitive Society* (New York: Harcourt, Brace and World, 1920) and Reinhold Niebuhr, “The Community and Property,” in *The Children of Light and the Children of Darkness* (New York, Charles Scribner and Sons, 1944).

<sup>76</sup> Peter Marcuse, “Community Land Trusts as Transformative Housing Reforms.” Blog #54 (July 23, 2014). Available at: [www.pmarcuse.wordpress.com](http://www.pmarcuse.wordpress.com)

ing on social history, legal precedent, daily practice, and common sense. Making that case has some urgency, I believe, at a time when fewer voices can be heard proudly singing the praises of common ground. Silence is no friend to this innovative form of tenure, tempting skeptics to dismiss it and adherents to abandon it. Even long-time advocates for community land trusts occasionally need a gentle reminder of why there's an "L" in CLT, jogging their collective memory of a heritage rooted in Ebenezer Howard's seminal idea that the equitable development of place depends on the common ownership of land.<sup>77</sup>

Many other practitioners, especially those involved in affordable housing, clearly need a less-gentle jolt to their complacency. The moment is long overdue, in my estimation, for them to be shaken awake and forced to defend their sleepy embrace of mechanisms that are said to be "just as good" as ground leases and reputed to be simpler and easier to use. When the curtain is pulled back on these sunny claims, however, they are not always what they seem. If homes are similarly regulated and if stewardship is similarly conducted, the contractual complexity of ground leases, deed covenants, and mortgage liens should be almost identical; the administrative burden of monitoring and enforcing compliance should be practically the same.

Even so, it is impossible to avoid the rather obvious fact that frequently – maybe usually – it really is more difficult to provide affordable housing or to do other kinds of community development when community-owned land is part of the deal. That is due partially to the inherent challenge posed by this nonmarket form of tenure to so many cultural, institutional, and political norms, but a more prosaic explanation is also true. The role of land in community development has not been treated to the same sort of creative rethinking and retooling that can be found among the other factors of production. New ways of owning, controlling, and utilizing land have not benefited from the same process of refinement and assimilation that converts a cheeky innovation into a respectable institution. When nonprofit organizations begin boldly experimenting with common ground, therefore, they tread a rocky path through unfamiliar woods. They regularly experience much tougher going than their more cautious colleagues who have chosen to remain on the well-lighted road where land is individually owned as a marketable commodity.

I would readily concede that ground leasing is harder to do, but I would still contend that doing community development this way is worth the trouble. Not only is ground leasing a more durable and dependable mechanism than covenants or liens for furthering an affordability agenda, it is also a powerful vehicle for achieving loftier aims in the right hands, giving a non-profit landowner the ability to pursue a more expansive, transformative agenda. Community-owned land provides the means for private property to be used more ethically, for community

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<sup>77</sup> I will confess to my own failings here. During the years that I served as dean of the National Community Land Trust Academy, I believed that the most important lessons we had to teach were keeping the "C" in CLT and broadening the "T" in CLT. The first was focused on ensuring that the model's historic commitment to community engagement and empowerment was not diluted. The second was focused on augmenting the model's historic concern for permanent affordability, expanding the concept of "trusteeship" to include a commitment to preserving the condition of any buildings on a CLT's land and a commitment to protecting the occupants' security of tenure, especially in the face of foreclosure. Except for teaching about the model's roots, however, where common ground was discussed as a priority of people like Ebenezer Howard, Ralph Borsodi, and Arthur Morgan who inspired the modern-day CLT, I never saw a need for the Academy to develop a course or to make a case for keeping the "L" in CLT. This essay may be viewed as belated penance for that oversight.



development to be done more equitably, and for a neighborhood's residents to become more forceful and effective in determining the fate of their own locale.

What is frequently overlooked in the endless debate over which mechanism might be "best" in making permanently affordable housing a reality is that for many nonprofit landowners, CLTs and non-CLTs alike, this laudable goal is not their only mission. Their commitment to stewardship goes beyond keeping housing affordable. Their commitment to rebuilding place goes beyond housing. Land reform, equitable development, or community empowerment is what they are "really" about. They are using their lands and leases to play a different game, therefore, than organizations with a narrower purpose. Rather, they are playing the same game at a different level, choosing what is hard because it promises more.

I am put in mind of an old baseball movie, *A League of Their Own*. Near the film's end, there is an emotional exchange between the two leading characters. Jimmy Dugan, the crusty coach of a professional women's baseball team, is shown trying to convince the team's star catcher, Dottie Hinson, that she is making a terrible mistake by abruptly deciding to leave the team:

Jimmy: "I'm in no position to tell anyone how to live. But sneaking out like this, quitting, you'll regret it for the rest of your life. Baseball is what gets inside you. It's what lights you up, you can't deny that."

Dottie: "It just got too hard."

Jimmy: "It's *supposed* to be hard. If it wasn't hard, everyone would do it. The hard is what makes it great."

Community-led development on community-owned land is a big league departure from business as usual. It flies in the face of popular conceptions of private property. It challenges the speculative prerogatives of powerful interests and the conventional practices of public funders, private bankers, and many nonprofit housers as well. It swings for the fences. Of *course* it is hard. The hard is what makes it great. Common ground is how the game of community development *ought* to be played.

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