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Keeping Revitalized Urban Neighborhoods Affordable

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COMMENTARIES

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INTRODUCTION

Last May, George Jackson Jr., the president and CEO of the Detroit Economic Corporation, gave a warm embrace to gentrification at a forum on Detroit's future, telling the audience, "I'm sorry, but, I mean, bring it on. We can't just be a poor city and prosper."[1] Jackson's remarks echo the views held by many residents of struggling postindustrial cities where the exodus of manufacturing jobs in tandem with suburbanization has resulted in cities hollowed out not only of their people but also their tax base. The Great Recession only intensified the economic decline of these once-booming production centers, leaving in its trail an ever-growing number of distressed buildings left tax delinquent, foreclosed, and abandoned. In the climate of this level of devastation, more affordable housing is often seen not only as unnecessary but counterproductive to a city's fate. Advocates of gentrification instead charge that the keys to revitalization are in attracting affluent urban professionals, incentivizing new businesses, and upgrading the public realm. Under this theory, housing affordability might be an issue in hot real estate markets like New York and San Francisco, but struggling cities like Detroit are deemed to already have too much affordable housing.

Affordable housing advocates counter that preserving and maintain affordable housing is essential to neighborhood revitalization. Several key observations undergird this view. First, market realities necessitate that housing still be priced within the reach of the existing population. While new luxury condos may move quickly in certain neighborhoods in a hot real estate market, they may languish empty during harder times, as occurred in numerous American cities after the 2007 housing market crash. Second, poorer cities often cope with high rates of vacancy in their older housing stock. While demolition and municipal shrinkage may be a viable solution for some cities, the exorbitant costs of demolition and historic preservation concerns compel other cities to redress vacancies through a rehabilitation approach. Since the cost of rehabbing vacant historic buildings is generally higher than the market price of the refurbished building, some level of subsidy is often essential to make those units affordable to prospective buyers and enable them to obtain a mortgage. Third, the perceived glut of poverty housing in a weak housing market might obscure the nuances of the city's actual housing demand. For example, in areas with high numbers of vacant and dilapidated single-family homes, there may still be a shortage of affordable one-bedroom rental apartments and studios. Providing this type of workforce housing would enhance rather than thwart revitalization. Even fiscally distressed cities can have tight housing markets. In Detroit, for example, the occupancy in its downtown and midtown neighborhoods is now hovering over 95 percent even amidst the city's spiraling into bankruptcy. Finally, affordable housing programs do not necessarily maintain cycles of poverty but can plant the seeds for downstream private investment and the recovery of a private housing market. For example, over the last 20 years, Harlem's Frederick Douglas Boulevard has undergone a well-documented transformation from a hardscrabble depressed corridor to a vibrant mixed use and mixed income strip. Since 2002, however, more than 1,650 units of income-restricted housing have been built along the boulevard.[2] It was this scale of affordable housing development that helped stabilize the area and that now provides some level of protection for lower-income households while property values and market rents have climbed considerably.

For all of these reasons, affordable housing has played an enduring role in federal urban policy since Congress adopted the Wagner Steagall Housing Act of 1937, under which the federal government paid 100 percent of the capital costs for public housing projects. This level of subsidy and federal stewardship no longer exists, while the private sector has become increasingly involved as a partner and financier of affordable housing. Federal programs like the Low-Income Housing Tax Credit (LIHTC), the New Market Tax Credit, and the HOME Investment Partnership program help developers secure private financing for housing development and overcome the cash-flow losses generated by income restrictions. Legislative changes at the state and local levels have introduced inclusionary zoning, land banks, and affordable housing trust funds that further help craft new forms of public-private partnership. Meanwhile, federal and state courts continue to debate the legally permissible boundaries of affordable housing requirements.

This commentary offers a critical review of the legal and financial strategies currently available to policy makers and urban planners trying to keep revitalized neighborhoods affordable. It does not attempt to comparatively evaluate the effectiveness of these programs in preserving area-wide affordability and contributing to revitalization. That level of evaluation, though essential to public policy formation, remains underdeveloped in the professional housing literature and is ripe for further study. Instead, the commentary relies mainly upon anecdotes from cities throughout the United States in order to conceptually illustrate the objectives of certain programs and reveal the spectrum of implementation challenges on both a legal and economic level. Section I focuses on federal housing programs, including civil rights protections and affordable housing tax credits and subsidies. Section II focuses on state and local programs, including fair share housing policies, land use regulations, and local investment strategies.

SECTION I: FEDERAL STRATEGIES

Civil Rights

One of the most powerful tools available for affordable housing advocates is Title VIII of the 1968 Civil Rights Act, more commonly known as the Fair Housing Act (FHA). As a safeguard against discrimination in the sale or purchase of housing, the FHA can also be used to invalidate municipal land use regulations that preclude the construction of housing demanded by minority groups.

For most of the years following the act's adoption, the U.S. Department of Housing and Urban Development (HUD) did not aggressively require cities to show compliance with the FHA in order to qualify for federal housing dollars. In 2009 HUD chartered a new path by brokering a settlement agreement with suburban Westchester County, New York. The agreement was intended to resolve a lawsuit that had charged the county with failing to build sufficient affordable housing in the county's suburban and disproportionately white communities. Following a federal ruling favorable to the plaintiffs, HUD and the county agreed in the settlement to build hundreds of new affordable housing units in heavily white parts of the county. While HUD and the county have continued to clash over compliance with the settlement, the agency has become even more proactive in its monitoring of civil rights compliance and proposed in July 2013 new rules for affirmatively furthering fair housing. In November 2013, echoing the Westchester case, the agency released its findings from its four-year investigation of affordable housing policy in Dallas. Invoking Title VI of the 1964 Civil Rights Act, HUD charged that Dallas had intentionally concentrated affordable housing in the southern part of the city, thereby exacerbating racial and economic segregation. HUD outlined an expansive set of remedies mandating the development of affordable housing in Dallas's nonminority areas in compliance with the FHA.

In neither the Westchester nor the Dallas case was blatant racial discrimination encoded into law. In both cases, it was the adverse effect of affordable housing decisions on minority groups that was seen as an indication of racial discrimination. Similarly, a federal district court ruled in December 2013 that Garden City, New York, had violated the FHA and other civil rights laws not through an explicit racial covenant but by precluding multifamily housing on a 25-acre redevelopment site. The court held that the zoning's effect would be to make housing less affordable and would therefore have a disparate impact on minorities and perpetuate segregation.

Funding Programs

These federal actions send a clear signal to localities that excluding affordable housing in more affluent areas may violate federal civil rights laws. However, it is the large and complex corpus of federal finance programs that focus on including affordable housing within poor areas. Whereas federal civil rights protections may be a powerful legal tool for enabling lower-income residents' access and inclusion in already strong neighborhoods, federal housing finance programs are the economic tool for making weak neighborhoods stronger.

LIHTC. Of all these federal programs, the LIHTC program has historically played the largest role in affordable housing development. Authorized by Congress in 1986 as part of the Tax Reform Act, LIHTC enables developers to purchase tax credits in exchange for investing equity in rental housing made affordable in accordance with HUD-defined income limits. The actual amount of the tax credits is dictated by the amount of the investment as well as the presence of federal subsidy. Investors in projects without federal subsidy are eligible for a higher amount of tax credit in exchange for their investment. The implications of the LIHTC program on neighborhood revitalization are less clear. One analysis produced by Lan Deng of the University of Michigan suggests that half of Detroit's LIHTC neighborhoods experienced improvements in socioeconomic status while the other half declined.[3] Another study, conducted by Nathaniel Baum-Snow of Brown University and Justin Marion of the University of California–Santa Cruz, suggests that LIHTC programs in gentrifying neighborhoods may "crowd out" the construction of new private housing.[4] In hotter real estate markets, where developers would build new housing without a subsidy, it may be that the public purpose of ensuring affordability could be better met through housing vouchers rather than tax credits. Meanwhile, in weaker markets, the LIHTC program may facilitate a larger inventory of housing units, but the actual difference between the income-restricted rent and the prevailing market rent may be quite narrow. So, while LIHTC may be essential in expanding the overall supply of affordable housing units in a distressed market, the use of the tax credits may actually have a negligible effect on providing housing that is more affordable than prevailing market rents.

> . . . LIHTC programs in gentrifying neighborhoods may "crowd out" the construction of new private housing.

HOME. Another key federal financing source is the HOME Investment Partnership program, which provides states and local governments with grants to fund the acquisition, construction, or rehabilitation of housing units. Enacted as part of the Cranston-Gonzalez National Affordable Housing Act of 1990, HOME funds include tenant-based rental assistance, housing rehabilitation, and down-payment assistance for home buyers. The program has benefitted more than 450,000 affordable housing units. Like the LIHTC program, housing units served by HOME must be made affordable to low-income households in accordance with HUD-defined income limits. The required duration of the affordability, ranging from five to 15 years, depends on the use of the funding and the level of subsidy offered. HOME funds can be especially useful in ensuring continued construction of affordable housing units even during gentrification cycles. For example, between 2007 and 2012 in Cambridge, Massachusetts, HOME funds were used to construct 217 units of affordable housing while property values stayed relatively high in spite of the recession.[5] On the west side of Buffalo, New York, a market where property values have more than tripled over the past 10 years, HOME funds were recently used to construct 14 affordable housing units as part of the adaptive reuse of a historic livery building. In the absence of these funds, these affordable housing units probably would not have been created. On the other hand, the impact that HOME funds have upon the overall affordability of a rapidly gentrifying neighborhood is probably negligible. Where HOME funds are likely to have a more significant impact are in hyper-distressed markets like Chester, Pennsylvania, where a dilapidated housing stock was upgraded in part with HOME funds leveraged with other urban revitalization programs.

Community Development Block Grant. Whereas the LIHTC and HOME programs focus on affordable housing development, the federal Community Development Block Grant (CDBG) program enables states and local jurisdictions to receive funding for affordable housing but also for neighborhood revitalization through the elimination of blighted areas, provision of public facilities, and support to local businesses. Established by Congress under the Housing and Community Development Act of 1974, CDBG programs are geared specifically to facilitate neighborhood revitalization efforts and expand economic opportunities in low-income areas. CDBG funds comprise a significant portion of the total amount of HUD funds received by cities. Trenton, New Jersey, for example, was awarded a total of $3.77 million in HUD monies in 2012, of which $2.7 million consisted of CDBG funds and almost $900,000 came in the form of HOME funds.[6] While some of the CDBG funds were allocated to housing rehab, close to $800,000 was allocated to nonprofit organizations engaged in social service provision, including job training and financial literacy.

CDBG funds are contingent upon the participating jurisdiction complying with a host of reporting and compliance requirements. However, local governments can also request that a certain area be designated as a Neighborhood Revitalization Strategy Area (NRSA). This designation, available to especially distressed neighborhoods, grants the sponsoring government enhanced flexibility in using the funds and streamlines the reporting process to HUD. In Canton, Ohio, the Canton Development Department successfully secured a NRSA designation in 2013 for the northeast side, the part of the city hit hardest by the foreclosure crisis and home to an especially high volume of physically deteriorated housing units. The NRSA designation enables Habitat for Humanity to use federal HUD monies toward the demolition, rehabilitation, and new construction of housing on the northeast side. Under typical CDBG guidelines, Canton would be subject to much tighter regulations with regard to the allowable allocation of HUD monies to nonprofit organizations and with HUD's income eligibility requirements for new housing units. With the NRSA designation, though, Habitat for Humanity became eligible for almost $400,000 in federal funding and is able to comply with the income requirements so long as 51 percent of the tenants in its new homes are low- or middle-income households.[7]

Choice Neighborhoods. In tandem with the CDBG program, HUD also supports neighborhood revitalization through the Choice Neighborhood program. This program is the successor to HUD's controversial HOPE VI program that aimed to convert public housing projects into mixed-income neighborhoods. The program has been controversial for many reasons including the fact that monies have been used to finance the demolition of tens of thousands of public housing units with an insufficient number of affordable units built in their place. The Choice Neighborhoods program carries forward HOPE VI's intention to reduce concentrations of poverty but places greater emphasis on locally based neighborhood planning. In order to qualify for Choice Neighborhood grants, the applying jurisdiction must first draft a Transformation Plan (TP), a comprehensive neighborhood revitalization strategy. Localities that complete a TP can also apply to HUD to obtain a NRSA designation under the CDBG program.

One example of a Choice Neighborhood project is Yesler Terrace, a 30-acre public housing neighborhood built in the early 1940s and currently home to 1,200 residents living in 561 housing units.[8] The Seattle Housing Authority's redevelopment plan for Yesler Terrace entails the demolition of all existing buildings and replacing them with a significantly larger, mixed-income residential community eventually supporting as many as 5,000 housing units.[9] Under the Choice Neighborhood plan, all 561 housing units that are currently serving very low-income residents earning incomes below 30 percent of the average median income (AMI) will be replaced on a one-to-one basis with new units affordable at the same income level. Also to be built are 290 apartments serving residents with incomes below 60 percent of AMI, 850 apartments for residents below 80 percent of AMI, and 3,200 market-rate units.[10] While the plan for this Choice Neighborhood has provoked considerable debate regarding its scale as well as the relocation of the current population, the proposed housing plan's inclusion of total replacement for very low-income units is a notable departure from HOPE VI practices.

SECTION II: STATE AND LOCAL POLICIES AND PROGRAMS

Civil Rights

Little FHAs. Some states have adopted their own version of a fair housing act. Unlike the federal Fair Housing Act, however, the state housing laws are more proactive in that they go beyond checking discrimination and formally mandate localities to build their fair share of affordable housing. For example, Massachusetts adopted the Comprehensive Permit Law in 1969, called 40B, in order to statutorily mandate the number of affordable housing units that must be built in a locality. If a developer in Massachusetts proposes to build a number of affordable housing units that exceeds the allowable number of units specified by a locality's zoning resolution, that developer may request a state housing appeals committee to review the proposed project. Under the 40B process, the state appeals committee has the authority to override the zoning ordinance and mandate local approval of the requested number of units while also considering the safety, public health, and environmental impacts of the project. Connecticut and Rhode Island have similar state housing appeals processes that allow affordable housing developers to override local zoning regulations.

Fair-share housing. Much more aggressive than the appeals process is the fair-share housing plan approach in California and New Jersey. The appeals process only comes into effect when a specific developer desires to build a specific project with an affordable housing component. In California and New Jersey, however, localities are legally required to prepare a formal housing plan that demonstrates their efforts to achieve a required number of affordable housing units through their land use and zoning regulations, development approval processes, and funding approaches. Under California's Housing Element Law, adopted in 1969, cities and counties are required to build their share of affordable housing units as determined by their representative regional council of governments. In New Jersey, the statewide Council of Affordable Housing (COAH) is charged with allocating housing needs on a municipal fair share basis and reviewing municipal housing plans.

Since 1969, California's fair share housing policy has been periodically amended. However, the general principles undergirding the original legislation have not evolved considerably. New Jersey's path has been more contentious. Fair-share housing in New Jersey emerged as an outcome of two key court decisions, commonly known as *Mount Laurel I* in 1975 and *Mount Laurel II* in 1983. Going beyond simply invalidating exclusionary zoning, this pair of decisions from New Jersey's Supreme Court established the principle that municipalities should affirmatively use their zoning powers in order to provide a "realistic opportunity" to build housing affordable to middle- and lower-income households. This principle was then codified into state law in 1985 under the Fair Sharing Housing Act, which created the COAH and formally established its authority to determine fair-share basis. However, the program has languished in recent years due to a decision made in 2008 by the COAH to relax the compliance rules. Prior to 2008, municipalities could meet their fair share of housing either by paying a fee to transfer their share to another community under a process known as a Regional Contribution Agreement. Under the relaxed rules, municipalities could be exempt from affordable housing requirements if they experienced little or no population growth. This "growth-share concept" was met with heated opposition by affordable housing advocates and resulted in years of confusion and litigation. Amidst the uncertainty, affordable housing production in New Jersey stalled, and affordable housing trust funds went untapped while municipalities waited for clarity on the state policy. Finally, in September 2013, the New Jersey Supreme Court ruled that COAH's growth-share approach violated the New Jersey Fair Housing Act. Reaffirming the spirit of the *Mount Laurel* doctrine, the court directed COAH to draft new rules that would support the municipalities' legal obligation to build a minimum number of affordable housing units.

Inclusionary zoning. At the local level, the most powerful tools for cities to le-

Fair Share Housing Development/Mark Lozier

Residents of the Ethel R. Lawrence homes in Mount Laurel Township, New Jersey, represent a wide range of income levels.

gally mandate affordable housing have been inclusionary zoning programs. The general purpose of these programs is to capitalize on the financial capacity of private developers to build affordable housing units alongside market-rate housing. However, inclusionary zoning programs vary considerably from city to city. In New York City, for example, inclusionary zoning is mainly an optional incentive program in which private developers may build at a higher level of density than allowed under the zoning resolution if they build a certain number of affordable housing units. In San Francisco, however, inclusionary zoning policy is mandatory. Section 415 of the San Francisco Planning Code requires new housing developments with 10 or more units to pay an Affordable Housing Fee. As an alternative to paying the fee, developers can provide 12 percent of their units on-site or 20 percent of their units off-site as affordable to low- to moderate-income households.

Inclusionary zoning is a controversial policy measure. Some critics charge that the density bonuses offered in such programs may actually worsen a city's affordable housing shortage by raising the supply of luxury housing units and leading to gentrification. Others contend that the volume of units created in an inclusionary zoning program is too small to have a substantial effect on the availability of affordable housing in a hot market. In San Francisco, for example, housing costs have soared in spite of a mandatory version of the policy. Meanwhile, inclusionary zoning is vulnerable to legal attacks under several theories. In Los Angeles, the California Court of Appeal for the Second Appellate District ruled in 2009 against the city's inclusionary zoning policy on grounds that it violated the state's Costa-Hawkins Rental Housing Act that empowers property owners to establish the rents for new housing units. More recently, in 2013, the Sixth District Appellate Court of California upheld the constitutionality of San Jose's inclusionary zoning policy on grounds that it was reasonably related to a legitimate public purpose such as public need for affordable housing. The California court's holding, however, is complicated by the U.S. Supreme Court's ruling in June 2013 in *Koontz v. St. Johns River Water Management District*. In *Koontz*, the court ruled that land use approval bodies may not reject a permit on the basis of an applicant's refusal to meet an exaction requirement without also determining that the requested exaction is related and proportional to the proposed development's impacts.

The seeming divergence between the California appeals court and the Supreme Court can be reconciled by the unique circumstances surrounding each case. The California court upheld the legitimacy of a formally adopted set of development rules, whereas the *Koontz* decision focused on the legitimacy of an *ad hoc* decision regarding a permit. The message conveyed by the combination of these and other decisions is that inclusionary zoning programs are better able to withstand judicial scrutiny if the rules are clear and consistently applied. However, inclusionary zoning programs that hinge on a greater level of discretionary authority, especially with regard to negotiable in-lieu impact fees, may be more vulnerable to attack under arguments that they violate constitutional restrictions on land use exactions from developers.

Funding Programs

Housing trust funds. Beyond legal tools, states and municipalities also have a variety of funding tools that can be used to ensure affordability in the context of urban revitalization. In the context of increased competition for limited federal funds, municipalities are increasingly exploring opportunities for creative approaches to enlisting the private sector in funding affordable housing. One strategy is the establishment of a formal affordable housing trust fund in which a funding stream, independent of annual appropriations, is dedicated to the preservation and production of affordable housing. Potential revenue sources include real estate transfer tax, real estate recording taxes, and penalties assessed against property owners for late payments on real estate taxes. In 2008 the Obama administration established the National Housing Trust as part of the Federal Housing and Economic Recovery Act of 2008. However, it has to be funded and so remains simply an idea. On the other hand, there are currently more than 700 trust funds in the United States that are sponsored by states, cities, and counties. One of the most established funds is the Massachusetts Affordable Housing Trust Fund, which subsidizes the development of affordable housing for households with incomes that do not exceed 110 percent of median income. A notable municipal example is the Washington, D.C., Housing Production Trust Fund. Supported with revenues from the Deed Recordation and Transfer Tax, D.C.'s fund is used not only to help finance affordable housing but also to support tenant-based vouchers and a home purchase assistance program. Since its creation in 1988, the fund has enabled the development of more than 7,000 units of affordable housing.[11]

Land trusts. Land Trusts are a strategy that cities in gentrifying markets are using in order to ensure the present and future possibility of using land for affordable housing development even while property values continue to rise. There are more than 160 community land trusts in the United States. In the land trust model, a nonprofit community-based organization owns the land and leases it to residents living in housing units on the land. The lease is controlled with a resale formula that limits the amount of return that the tenant is able to capture in transferring the lease to another household. In so doing, housing built on trust-owned land is insulated from the speculative upswings in housing prices in a hot market. The Athens Land Trust (ALT), founded in Georgia in 1994, offers one example of a land trust formed to maintain housing for low- and moderate-income families while also facilitating neighborhood revitalization. ALT formalized a limited-equity model in order to ensure that homes within the trust remain owner-occupied and permanently affordable amidst a rising spike in property values and taxes in the historically African American Hancock neighborhood. Concurrent with housing rehabilitation, ALT has also worked to expand open space.

Land banks. Land banks are somewhat similar to land trusts in that they also acquire land, rehab buildings, and work to maintain a supply of affordable housing for low-income residents. However, land banks are generally enlisted in weak housing markets rather than gentrifying ones. Rather than attempting to safeguard land for affordable housing in rapidly gentrifying markets, land banks are enlisted primarily to redress the adverse effects of vacant, foreclosed, and physically deteriorated buildings. Another key difference between land trusts and land banks are the rules surrounding their operation. Whereas land trusts are governed by private contractual agreements, land banks are generally created through state enabling legislation and therefore subject to the regulations and procedural requirements outlined in state administrative law.

Compared with municipal housing authorities, land banks have greater latitude in their ability to acquire distressed parcels, assemble contiguous vacant properties, and redevelop them. Moreover, land banks are often more tax advantaged than other types of housing development entities such as nonprofit housing developers or housing development finance corporations. Another advantage of land banks is that they may be eligible for a wider variety of funding sources, including monies available for nonresidential development. As such, land banks may be better positioned to foster mixed use communities. New York State adopted legislation in 2011 that allowed for the formation of five land banks, including the Newburgh Community Land Bank. After preparing a comprehensive neighborhood revitalization strategy for one of the most distressed sections of Newburgh, the land bank is now proceeding to acquire parcels and redevelop the area as a mixed use and mixed income neighborhood. Funding for the redevelopment was made available through monies released from the New York State attorney general exclusively to land banks. These monies flowed from the National Mortgage Settlement with the five largest banks implicated in the housing market collapse.

Local investment funds. A final tool of mounting importance in weak markets is the formation of local investment funds supported by partnerships between community development finance institutions (CDFI) and private foundations. CDFIs are similar to Community Development Enterprises (CDEs) in that both entities are established to function as financial intermediaries that help capitalize redevelopment projects in low-income areas. And some CDFIs are also established as CDEs. The primary difference between the CDEs and the CDFIs is that the CDEs are created to administrate the federal New Markets Tax Credit program whereas CDFIs can harness capital from a broader variety of sources in order to facilitate the revitalization of low-income neighborhoods. In Detroit, for example, the Woodward Investment Fund brings together capital from NCB Capital Impact, a Washington, D.C.-based CDFI and the Kresge Foundation, the philanthropic arm of a Detroit-based company. Along with capital infusions from other private partners, the fund has amassed $30 million to support ongoing revitalization efforts along Detroit's Woodward Avenue corridor in the heart of the city's downtown and midtown districts. While the fund is targeted for urban revitalization, promoting affordable housing remains a key goal. Housing developers applying for financial support from the Woodward Investment Fund must commit to keeping 20 percent of their units affordable.

CONCLUSION

One of the largest challenges for affordable housing developers is navigating the constantly evolving rules for different types of neighborhood revitalization and housing programs. Also difficult is determining the regulatory and financial implications of layering different programs and funding sources on top of each other. While some of the programs described in this article are complementary, the programmatic requirements for various programs are sometimes in conflict and necessitate tough choices on the best approach. Moreover, neighborhoods slated for revitalization vary considerably in terms of their particular state of distress. For hyper-distressed areas with large volumes of vacant properties, strategies like land banks and low-income housing tax credits are key because they can stabilize a neighborhood through the reconstruction of whole blocks and removal of public health hazards. But for neighborhoods already on a path toward gentrification, the combination of fair housing laws, inclusionary zoning, and community development funds will likely be more important strategies because they are better suited for retaining affordability amidst revitalization.

ENDNOTES

1. *Available at* http://motorcitymuckraker.com/2013/05/16/bring-on-more-gentrification-declares-detroits-economic-development-czar-george-jackson.
2. *Available at* http://www.nytimes.com/2014/01/05/realestate/frederick-douglass-boulevard-newly-revived.html?_r=0.
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