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"We're Not in Kansas Anymore": Using State and Local Power to Fulfill the Potential of the Opportunity Zone Program

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"WE'RE NOT IN KANSAS ANYMORE": USING STATE AND LOCAL POWER TO FULFILL THE POTENTIAL OF THE OPPORTUNITY ZONE PROGRAM

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INTRODUCTION

In late August, 2019, the *New York Times* published an explosive long-form article addressing the effects of a little-known federal program designed to bring billions of dollars in investment to some of the poorest neighborhoods in America.[1] The piece, titled "How a Trump Tax Break to Help Poor Communities Became a Windfall for the Rich," laid out a harsh indictment of the Opportunity Zone (OZ) program, calling it a "once-in-a-generation bonanza for elite investors."[2]

The article's authors, economics reporter Jesse Drucker and investigative reporter Eric Lipton, argued in exhaustive detail that a set of wealthy Americans — many of them with personal connections to President Trump, his family, or his administration — are exploiting the OZ program by taking advantage of its core tax benefits without expanding access to capital for underserved communities or investing in projects that will genuinely ameliorate poverty.[3] "Instead," the authors wrote,

> billions of [dollars of] untaxed investment profits are beginning to pour into high-end apartment buildings and hotels, storage facilities that employ only a handful of workers, and student housing in bustling college towns . . . ."[4] As a consequence, the federal government is effectively "subsidizing luxury developments — often within walking distance of economically distressed communities —

1. Jesse Drucker & Eric Lipton, *How a Trump Tax Break to Help Poor Communities Became a Windfall for the Rich*, N.Y. TIMES (Aug. 31, 2019), https://www.nytimes.com/2019/08/31/business/tax-opportunity-zones.html [https://perma.cc/E9DA-G4K9].

2. *Id.*

3. *Id.*

4. *Id.*

> that were in the works before Mr. Trump was even elected president.[5]

The story ignited a firestorm on Twitter — particularly from the OZ program's defenders, who argued that the piece had cherry-picked damning evidence instead of reporting in a manner that was fair and even-handed.[6] But perhaps the most innovative response was a Twitter thread written by Matt Wachter, Vice President of Finance & Development at the Erie Downtown Development Corporation (Erie DDC) in Erie, Pennsylvania, who offered a more local and nuanced critique of the *Times* article, tweeting that because of the OZ program:

> Instead of a 25-year redevelopment plan, @ErieDDC now anticipates it can revitalize a series of largely vacant or abandoned buildings at the heart of Erie's downtown in as little as five years while, in parallel, new investment is providing a shot-in-the-arm to Erie's emerging ecosystem of IT and cyber security small businesses, many of whom are women or minority-owned . . . . No federal policy in memory has galvanized as much excitement in our community.[7]

The responses cited above exemplify the current debate about the OZ program. Its proponents argue that it is a legitimate anti-poverty initiative, born from bipartisan consensus, with the potential to bring much-needed investment dollars to communities starved for access to capital and economic opportunity.[8] They emphasize the duration of

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5. *Id.*

6. *See, e.g.*, Steven Glickman (@StevenGGlickman), TWITTER (Sept. 1, 2019, 2:38 PM), https://twitter.com/StevenGGlickman/status/1168231608119439360 [https://perma.cc/B4RR-ZFJ6] ("I'm disappointed that the @nytimes chose to cherry pick a handful of anecdotes about the #OpportunityZones marketplace to support conclusions that don't reflect the reality of this bipartisan program that is having real impact around the country.").

7. Matt Wachter (@MWachter26), TWITTER (Sept. 20, 2019, 2:54 PM), https://twitter.com/mwachter26/status/1175121035592646657 [https://perma.cc/2K2B-V4QM]. Wachter later published his argument in a piece for LinkedIn Pulse. *See* Matt Wachter, *If Only the NY Times Visited Erie, PA*, LINKEDIN PULSE (Oct. 1, 2019), https://www.linkedin.com/pulse/only-ny-times-visited-erie-pa-matt-wachter?articleId=6584802717942759424#comments-6584802717942759424&trk=public_profile_article_view [https://perma.cc/TCN6-8TXR].

8. For instance, former Obama Administration official, OZ investor, and evangelist Steve Glickman has cited the involvement of Austan Goolsbee and Jared Bernstein, both alumni of the Obama White House. *See, e.g.*, Glickman, *supra* note 6; *see also* John C. Fleming, *Opportunity Zones Aren't a Gimmick — They're a Legitimate Investment Option*, FORTUNE (Sept. 23, 2019), https://fortune.com/2019/09/23/opportunity-zones-investment-trump-taxes/ ("Those looking for socially conscious investing can rest assured that these Opportunity Zone investments will target development in areas of the country that need it most. Last

the program and cite a range of projects with social benefits which are already in the development pipeline.[9] The program's critics, which include the *New York Times* Editorial Board in an article published two months after the late August long-form piece cited earlier, argue the OZ program is little more than a sophisticated handout to rich investors.[10] They contend that while the OZ program's "stated purpose is to drive big money into investment deserts," it is in reality, a "black comedy" allowing "a massive waste of public resources for the benefit of a wealthy few."[11] And caught somewhere in the middle are the state and local officials trying to make the program work.

The purpose of this Note is not to insert itself into the debate about the ethics or legitimacy of the OZ program. While there are good reasons to be skeptical of the program's effectiveness as an anti-poverty mechanism — not least the set of high-profile OZ Fund managers, like the recently-pardoned "junk bond king" Michael Milken,[12] who are not known for their concern for the poor — there are also early signs that the program is being leveraged to create social impact in some economically under-resourced areas.[13]

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year, the unemployment rate in Opportunity Zones was nearly 1.6 times higher than the average U.S. census tract. Similarly, the average poverty rate across Opportunity Zones exceeded 32%.").

9. Ben Carson, *Opportunity Zones: A New Dawn for Economic Opportunity*, REAL CLEAR POL'Y (Apr. 26, 2019), https://www.realclearpolicy.com/articles/2019/04/26/opportunity_zones_a_new_dawn_for_economic_opportunity_111177.html [https://perma.cc/H668-AM6T] ("Last week, I visited Birmingham, Alabama's 'Campus of Hope,' where thousands of residents in Birmingham public housing will soon get access to valuable resources to help put them on the path to financial self-sufficiency. I also traveled to Little Rock, Arkansas to tour the development of Cumberland Towers. Each of these sites is situated in an Opportunity Zone, which means today's snapshot represents the 'before' pictures on a self-development path made possible by the combined power of private-sector investment and this Administration's foresight in public policy.").

10. *Opportunity Zones — For Billionaires*, N.Y. TIMES (Nov. 16, 2019), https://www.nytimes.com/2019/11/16/opinion/trump-tax-opportunity-zones.html [https://perma.cc/V75L-5MSN].

11. *Id.*

12. Reis Thebault, *Who Is Michael Milken, the 'Junk Bond King' Trump Just Pardoned?*, WASH. POST (Feb. 18, 2020), https://www.washingtonpost.com/business/2020/02/18/michael-milken-pardon/ [https://perma.cc/466U-VNZ5]; *see also* Laura Davison, *Mnuchin Says He Didn't Know Milken Would Benefit from Tax Help*, ACCT. TODAY (Oct. 30, 2019), https://www.accountingtoday.com/articles/mnuchin-says-he-didnt-know-milken-would-benefit-from-tax-help [https://perma.cc/MM64-8L5D].

13. *See, e.g.*, Logan Hullinger, *Innovation District Plan in York City Receives Big Boost from Opportunity Zone*, YORK DISPATCH (Aug. 23, 2019), https://www.yorkdispatch.com/story/news/local/2019/08/23/innovation-district-plan-york-city-receives-big-boost-opportunity-zone/2083783001/

Furthermore, as an empirical matter, the jury is largely still out on whether the program will live up to its stated purpose — which its creators have been quick to point out. Measuring its effectiveness is especially complex since the OZ program's tax benefits are deferred over an extended time horizon.[14] And suggestions that the program should be completely repealed are politically impractical — at least for the foreseeable future, the OZ program is a legislative *fait accompli*.

This Note is also not primarily focused on suggesting remedies to the structure of the OZ program at the federal level. Possible federal fixes have been spelled out in a high degree of detail across many forums, from the halls of Congress to the pages of this very *Journal*.[15]

Instead, this Note looks at the implementation of the OZ program closer to the ground: in the states and localities where OZ Funds are investing capital and governments are engineering policy responses to attract and then channel that investment. This kind of analysis is warranted for a range of reasons — foremost among them is the fact that federal regulation surrounding the OZ program is distressingly skeletal.[16] The enabling statutory language, included in the 2017 Tax

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[https://perma.cc/QE7K-8RDR] ("The high-tech Innovation District planned for York City's Northwest Triangle is expected to be three times larger than initially planned, thanks to the area being a federally designated opportunity zone.").

14. *See* Glickman, *supra* note 6 ("This program is designed for patient investors, and the real value comes after 10 years, with only a very small incentive upfront. That means smart money will look for places that have a long runway for growth (i.e. South Side of Chicago, Atlanta, and Detroit).").

15. *See, e.g.*, Press Release, U.S. Senate Comm. on Fin., Wyden Introduces Legislation to Reform Opportunity Zone Program (Nov. 6, 2019), https://www.finance.senate.gov/ranking-members-news/wyden-introduces-legislation-to-reform-opportunity-zone-program- [https://perma.cc/9F3E-7W32]. Senator Wyden's bill would make four principal changes to the program:

> Require annual, public information reporting from Opportunity Funds and annual statements to the IRS from fund investors. Eliminate loopholes that could allow 'sin list' investments like casinos and prohibit investments in stadiums and luxury apartments. Terminate zones that are not low-income or impoverished, while allowing states to replace zones that are terminated. Tighten existing rules to ensure that this generous incentive goes to productive, new investments that are actually in zones, and not to projects that were already underway or investors trying to park their money tax-free.

Id. See also Victoria Lee, *Opportunity without Reach: The Problems with the Opportunity Zone Program and the Need for Clarification, Oversight, and Regulation*, 47 FORDHAM URB. L.J. 117, 143 (2019).

16. Furthermore, many of the programs acknowledge that this kind of local leadership is essential to making the program work. *See, e.g.*, John Lettieri & Steve Glickman, *Local Leadership Is Key for Successful Opportunity Zones*, THE HILL (Apr. 8, 2018), https://thehill.com/opinion/finance/382135-local-leadership-is-key-for-successful-oppo

Cut and Jobs Act (TCJA), is only six pages long.[17] And while the Internal Revenue Service (IRS) recently issued its final rules governing OZs — laying out the regulatory framework which will govern the mechanics of the program — those regulations are not intended to direct capital with any geographic specificity within existing OZs or to place additional federal restrictions around where and how capital can be invested at a granular level.[18] At least at this early stage, the purpose of the regulations seems to be to clarify the mechanics of OZ tax benefits.[19]

This bare-bones regulation is particularly striking given the sheer size and scope of the OZ program. Early predictions are that OZs will drive "billions — even trillions — of dollars in long-term investment into historically impoverished urban and rural census tracts across the country"[20] and will cost the federal government on the order of $1.6 billion in lost capital gains tax revenue from 2018–2027.[21] And since "new regulations stipulate that the program's

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rtunity-zones [https://perma.cc/QBL5-GZCA] ("The fate of Opportunity Zones ultimately won't be determined in Washington. Instead, Congress has placed a powerful tool in the hands of governors and mayors, who must ensure it is deployed thoughtfully to reinvigorate struggling communities and foster economic dynamism.").

17. *See infra* Part I for a discussion about the creation of the OZ program. For the enabling legislation, see Tax Cuts and Jobs Act, H.R. 1, 115th Cong. § 13823 (2017).

18. *See, e.g.*, John Sciarretti & Michael Novogradac, *Opportunity Zones Final Regulations — A Detailed Look*, NOVOGRADAC (Jan. 15, 2020), https://www.novoco.com/notes-from-novogradac/opportunity-zones-final-regulations-detailed-look [https://perma.cc/SP46-JGXR]; *see also* Michael Novogradac, *Clarity Provided by Second Tranche of Treasury Regulations to Incent More Investment in Opportunity Zones Businesses (Part I)*, NOVOGRADAC (Apr. 17, 2019), https://www.novoco.com/notes-from-novogradac/clarity-provided-second-tranche-treasury-regulations-incent-more-investment-opportunity-zones [https://perma.cc/S7HC-4MSJ] [hereinafter Novogradac, *Second Tranche*] ("The biggest takeaway is that the guidance addresses gating issues that were limiting OZ-incented investment in operating businesses, and provides added tax clarity to the start-up, operation and wind-down of a qualified opportunity funds (QOFs).").

19. Novogradac, *Second Tranche*, *supra* note 18.

20. LOCAL INITIATIVES SUPPORT CORP., NAVIGATING THE OPPORTUNITY ZONES: COMMUNITY PARTNERS 4 (2019), https://www.lisc.org/media/filer_public/55/63/55635ee3-dffc-4d6d-8f5c-2e537ad567c8/072219_lisc_opportunity_playbook_community_stakeholders.pdf [https://perma.cc/VK8C-VVNZ]. Treasury Secretary Steven Mnuchin predicted that OZs would generate more than $100 billion in investment in October 2018. Julia Manchester, *Mnuchin Predicts $100B in Cap Investment from New Opportunity Zones*, HILL (Sept. 28, 2018), https://thehill.com/hilltv/rising/408980-mnuchin-predicts-100b-in-cap-investment-from-new-opportunity-zones [https://perma.cc/X8X4-6VMK].

21. SCOTT EASTMAN & NICOLE KAEDING, TAX FOUND., OPPORTUNITY ZONES: WHAT WE KNOW AND WHAT WE DON'T 1 (2019),

benefits [will] continue through 2047," the true revenue impact on the federal government could be decades long.[22]

However, despite thin regulation from the federal government of the OZ program, a diverse range of state and local governments across the country did not wait for the IRS to finalize its rules and have instead generated policy responses designed both to attract and channel investment and to also place additional guardrails on the OZ program.[23] This is not surprising — economic development is hardly the province of the federal government alone. And — to paraphrase Justice Louis Brandeis writing almost a century ago — states have always served as "laboratories of democracy" within our system of federalism, designing policy approaches to meet a range of issues.[24]

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https://files.taxfoundation.org/20190107155914/Opportunity-Zones-What-We-Know-and-What-We-Don%E2%80%99t-FF-630.pdf [https://perma.cc/WQ74-LAKH].

22. *Id.* It is worth noting that the OZ program is off to a slower than expected start. *See, e.g.*, Ruth Simon & Peter Grant, *Opportunity Zone Funds Are off to a Slow Start, Lagging behind Heady Expectations*, WALL ST. J. (Oct. 22, 2019), https://www.wsj.com/articles/opportunity-zone-funds-are-off-to-a-slow-start-lagging-behind-heady-expectations-11571742002 [https://perma.cc/KN9C-5KPM].

> [O]pportunity-zone funds have so far, on average, raised less than 15% of their goals, according to a new analysis by Novogradac & Co., a San Francisco accounting firm that advises fund managers and investors on tax incentives. The Novogradac data includes 103 funds set up to invest in opportunity zones. These funds, which include many of the industry's largest, have raised a combined $3 billion of the roughly $22.7 billion they seek. Novogradac said it is aware of 285 of these types of funds, though not all have shared fundraising details.

Id. That said, "it isn't surprising that the program is taking time to pick up steam, especially given that regulations aren't yet final and these are new markets for many investors." *Id.* As of January 2020, the most recent data from Novogradac show 292 OZ Funds reporting more than $6.7 billion in equity raised, a significant increase over the prior month when 184 funds reported having raised $4.46 billion. Michael Novogradac, *Opportunity Funds Listing Shows Strong Increase in Investment*, NOVOGRADAC (Jan. 8, 2020), https://www.novoco.com/resource-centers/opportunity-zone-resource-center/opportunity-funds-listing [https://perma.cc/Q4DP-G6MY] [hereinafter Novogradac, *Opportunity Funds Listing*].

23. *See, e.g.*, Michael Novogradac, *State, Local Governments Work to Steer Opportunity Zones Investment*, NOVOGRADAC (Apr. 1, 2019), https://www.novoco.com/periodicals/articles/state-local-governments-work-steer-opportunity-zones-investment [https://perma.cc/7KMN-J2SP] [hereinafter Novogradac, *State, Local Governments*].

24. New State Ice Co. v. Liebmann, 285 U.S. 262, 386–87 (1932); *see generally Laboratories of Democracy Database*, NEW AM., https://www.newamerica.org/in-depth/laboratories-of-democracy/ [https://perma.cc/VU72-96NV] (last visited Mar. 16, 2020).

> [M]any states and communities are fulfilling the role that Justice Brandeis envisioned when he called them 'laboratories of democracy.' Sometimes by direct ballot initiatives and sometimes by legislative action, states and

The purpose of this Note is to canvass these state and local policies to answer a compelling question: what can state and local governments do in response to a federal investment incentive program of this magnitude with so few guardrails?

Part I introduces the OZ program. It begins by tracing the history of the idea that became the first legislative attempt at enacting the OZ program into law, from its inception at a think tank called the Economic Innovation Group (EIG), to its inclusion in the TCJA, to its implementation by the IRS. It then explains the principal components of the program and summarizes the major critiques offered by observers.

Part II lays out one of the main challenges the OZ program faces: the danger of unconstrained investment. It delineates the difference between place-based and person-based economic development programs and stacks the OZ program up against some of its intellectual forerunners (like the Low-Income Housing Tax Credit (LIHTC) and the New Markets Tax Credit (NMTC)).

Part III analyzes the toolkit being developed and deployed by early adopters at the state and local level who are attempting to address the problem of unconstrained capital. Specifically, it looks at OZ programs in Louisville, KY; Cuyahoga County, OH; and Washington, D.C. It draws out the policy initiatives that are common across these different locations and also highlights their differences.

Finally, Part IV evaluates the policy choices made by these early adopters. It also suggests a range of other tools that state and (principally) local governments can use to attract capital, and then direct the flow of investment traffic.

I. THE ORIGINS AND MECHANICS OF THE OPPORTUNITY ZONE PROGRAM

A. Origins

The idea that eventually became the OZ initiative was first proposed in a 2015 whitepaper titled "Unlocking Private Capital to Facilitate Economic Growth in Distressed Areas," authored by two experts affiliated with the Economic Innovation Group (EIG), a

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> localities have been moving forward, toward a more inclusive democracy, and testing new ideas for financing campaigns, structuring voting systems, setting district boundaries, and expanding participation.

Id.

Washington, D.C.-based think tank.[25] Notably, despite writing for EIG, the authors credentialed themselves in the report based on their affiliations with think tanks at opposite ends of the ideological spectrum: the Center on Budget and Policy Priorities and the American Enterprise Institute.[26] The paper began with the premise that America's recovery from the financial crisis and the Great Recession had been robust but geographically uneven: "[W]hile certain areas of the country are doing remarkably well and nearing or exceeding their pre-recession economic states, the recovery has been profoundly uneven, with large swaths of the country facing chronic rates of long-term unemployment and historically low levels of new investment."[27] As an illustration, the report offered unemployment statistics from around the country — comparing in one instance, the

25. JARED BERNSTEIN & KEVIN A. HASSETT, ECON. INNOVATION GRP., UNLOCKING PRIVATE CAPITAL TO FACILITATE ECONOMIC GROWTH IN DISTRESSED AREAS (2015), https://eig.org/wp-content/uploads/2015/04/Unlocking-Private-Capital-to-Facilitate-Growth.pdf [https://perma.cc/GL5G-ED3F]. EIG was founded jointly by Sean Parker, the creator of Napster and Facebook's first president; John Lettieri, former vice president at the Organization for International Investment and once an aide to Senator Chuck Hagel; and Steven Glickman, an alumnus of the Obama White House. EIG describes itself as a "bipartisan public policy organization that combines innovative research and data-driven advocacy to address America's most pressing economic challenges." *About Us*, ECON. INNOVATION GRP., http://eig.org/about-us [https://perma.cc/QC5E-7ZB7] (last visited Mar. 4, 2020); *see also* Steven Bertoni, *An Unlikely Group of Billionaires and Politicians Has Created the Most Unbelievable Tax Break Ever*, FORBES (July 18, 2018), https://www.forbes.com/sites/forbesdigitalcovers/2018/07/17/an-unlikely-group-of-billionaires-and-politicians-has-created-the-most-unbelievable-tax-break-ever/#548158721485 [https://perma.cc/GEE3-YN3M]; Andrea Chang, *Entrepreneurs Launch Economic Innovation Group, a D.C. Think Tank*, L.A. TIMES (Mar. 31, 2015), https://www.latimes.com/business/technology/la-fi-tn-economic-innovation-group-20150331-story.html [https://perma.cc/8UDS-XXK4]. Tracing the history of the OZ concept is essential, since many of the early concepts EIG developed went on to be included in the TCJA in 2017.

26. BERNSTEIN & HASSETT, *supra* note 25.

27. *Id.* at 2. In this debate, one point of agreement is that communities of color have a significantly harder time accessing capital than white communities. *See, e.g.*, ROBERT FAIRLIE, ET AL., BLACK AND WHITE: ACCESS TO CAPITAL AMONG MINORITY-OWNED STARTUPS 2 (2016), https://siepr.stanford.edu/sites/default/files/publications/17-003.pdf [https://perma.cc/LF3B-BSED] ("Black-owned businesses are persistently smaller and face more difficulty in raising external capital. Large differences in credit worthiness are important for explaining the difference. Even controlling for credit worthiness, persistent differences in perceptions of treatment by banks are also important."); *see also Access to Capital Is Still a Challenge for Minority Business Enterprises*, MINORITY BUS. DEV. AGENCY (Mar. 1, 2010, 2:13 PM), https://www.mbda.gov/news/blog/2010/07/access-capital-still-challenge-minority-business-enterprises [https://perma.cc/WG48-KTXX].

unemployment rates in Fresno and San Francisco, California (11% and 5%, respectively, as of December 2014, even though the cities are less than 200 miles apart).[28]

The report painted a grim picture of the human cost of unemployment: "distressed and traumatized workers who face plummeting incomes, stalling career progressions, and cracking self-confidence. In addition to these intuitive tragic effects of unemployment, research has also identified other negative side effects, the most distressing of which is an increase in mortality following job loss."[29] The report next considered — and largely dismissed — a range of federal subsidies which have been attempted in order to spur development in distressed communities: "empowerment zones (EZ), renewal communities (RC), enterprise communities (EC), and the New Market Tax Credit (NMTC)."[30] The authors argued that the empirical research analyzing these programs had shown their results to be mixed, at best.[31]

Accordingly, EIG proposed a new mechanism — a "New Model for Attracting Private Investment."[32] Since the private sector had little incentive to invest in higher-risk neighborhoods and provide an injection of capital, the federal government ought to give them one.[33] This policy solution would attempt to spur private investment in distressed neighborhoods by taking advantage of the staggering quantity of unrealized capital gains in the United States, which EIG estimated to be roughly $2.26 trillion at the time the report was written.[34] The authors recommended a new kind of investment vehicle — a "structure analogous to that of a venture capital firm or

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28. BERNSTEIN & HASSETT, *supra* note 25, at 2.

29. *Id.*

30. *Id.* at 5. While the report argued that the NMTC was the most successful program of the set it considered, it still contended that "the NMTC is not structured to induce the kind of larger-scale investment that can accelerate the revitalization of an entire community." *Id.* at 10. Its criticism of all the programs it considered boiled down to complexity and underutilization, weak or misaligned incentives, the programs' restrictive scope, interaction with other programs, and the absence of force multipliers. *Id.* at 11–15.

31. *Id.* at 6.

32. *Id.* at 16. The report made the assumption that "[f]or political and fiscal reasons, large-scale public sector investment is unlikely to happen anytime soon." *Id.* Accordingly, this public sector investment would have to be "supplemented by private sector investment to support robust economic growth." *Id.*

33. *Id.* "Private sector investors have little current incentive to invest in higher risk ventures in economically depressed communities, but the return on investment for doing so may increase if the existing friction could be deferred or eliminated." *Id.*

34. *Id.*

mutual fund company," which would operate in specific geographic areas, and deploy special tax benefits established for them, which "would apply so long as the investments stayed" in those areas.[35]

Bernstein and Hassett argued this kind of policy would solve the shortcomings inherent in earlier economic development subsidies, like pooled assets, the elimination of first-mover problems, and lower risk to each individual investor.[36] Their report closed by making a recommendation for how the program could work mechanically: "[U]nrealized capital gains might be rolled over into special funds constrained to invest in distressed communities, with the capital gains taxed only if the money is withdrawn from the qualified funds down the road."[37]

Bernstein and Hassett's paper was the inspiration for the first legislative attempt at enacting the OZ program into law: the "Investing in Opportunity Act," introduced jointly by Senators Cory Booker (D-NJ) and Tim Scott (R-SC), and Congressmen Ron Kind (D-WI) and Pat Tiberi (R-OH), first during the waning months of the Obama Administration, and then again in February of 2017 — just weeks after President Trump was sworn into office.[38]

The bill's bipartisan sponsors were enthusiastic, describing the program's possible benefits in terms designed to appeal to constituencies on either side of the aisle. Senator Booker, a Democrat, emphasized the bill's potential to expand access to capital:

> [B]arriers stand between too many communities and access to the capital needed to generate economic growth and opportunity. In an era of capital moving overseas or going towards uses that don't maximize opportunity for most Americans, our bipartisan legislation will help lower these barriers and jumpstart economic development and entrepreneurship.[39]

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35. *Id.* at 17.

36. *Id.*

37. *Id.*

38. *See* OLIVIA BARROW, NAT'L LOW INCOME HOUS. COAL., OPPORTUNITY ZONES 8–11 (2019), https://nlihc.org/sites/default/files/AG-2019/08-04_Opportunity-Zones.pdf [https://perma.cc/Q25U-KHSK]. The bill was introduced concurrently in the House and the Senate. *See* Investing in Opportunity Act, H.R. 828, 115th Cong. (2017); Investing in Opportunity Act, S. 293, 115th Cong. (2017).

39. John Avlon, *Cory Booker and Tim Scott's Bipartisan Plan to Wage a Smart War on Poverty*, DAILY BEAST (Apr. 13, 2017), https://www.thedailybeast.com/cory-booker-and-tim-scotts-bipartisan-plan-to-wage-a-smart-war-on-poverty [https://perma.cc/QMG7-JK25].

Congressman Tiberi, a Republican, observed that the program would stimulate investment without requiring an outlay of government funds: "We're not writing a check from the federal government. We're getting private-sector dollars. It wouldn't be up to some bureaucrat or congressman in Washington, D.C. It would be up to the people in the community who would tailor the investment to what they think would actually work."[40]

The OZ concept reappeared several months later as a last-minute addition to the TCJA, the "biggest overhaul of the US tax code in more than 30 years."[41] It was added at Senator Scott's insistence; in interviews he connected the program to his upbringing in poverty in South Carolina.[42] Incidentally, at the time the TCJA was being debated, Kevin Hassett, the co-author of the EIG whitepaper proposing the OZ idea, had been appointed by President Trump to serve as the Chair of the White House Council of Economic Advisers. Hassett spoke approvingly of the addition in the weeks leading up to the bill's passage by Congress.[43] However, the inclusion of OZs to the TCJA went largely unnoticed.[44] The *New York Times* noted that

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40. *Id.*

41. *Trump Tax Plan: The Key Points from the Final Bill*, GUARDIAN (Dec. 19, 2017), https://www.theguardian.com/us-news/2017/dec/19/trump-tax-plan-whats-in-the-final-bill [https://perma.cc/68PX-9UA3] [hereinafter *Trump Tax Plan*].

42. *See* Jim Tankersley, *Tucked into the Tax Bill, a Plan to Help Distressed America*, N.Y. TIMES (Jan. 29, 2018), https://www.nytimes.com/2018/01/29/business/tax-bill-economic-recovery-opportunity-zones.html [https://perma.cc/V5RC-5968] ("The zones were included in the tax law by Senator Tim Scott, a South Carolina Republican who was born into poverty in North Charleston, and based on a bill he co-sponsored in 2017 with several Democrats . . . . 'I came out of one of these communities,' [Scott said], 'so I believe that there's untapped potential in every state in the nation.'").

43. *Id.* ("'This is a little billion-and-a-half dollar part' of the law, Kevin Hassett, the chairman of Mr. Trump's Council of Economic Advisers, said in an interview. 'But if it's successful, we'll look back 10 years from now and say this was one of the most important parts of the tax bill, and one we didn't talk nearly enough about.'"). The *Times* also took note of Mr. Hassett's connection to EIG and the research which proposed OZs to begin with:

> Mr. Hassett has a longtime interest in providing tax incentives for economic development in distressed areas. He said he first began discussing opportunity zones with Mr. Parker several years ago at a meeting in Mr. Parker's Greenwich Village home. Before joining the Trump administration, Mr. Hassett wrote several white papers to help elevate the idea as part of an extensive, multiyear effort by the Economic Innovation Group to win support.

Id.

44. Media Coverage of the TCJA focused much more on tax cuts for wealthy individuals and corporations, as well as changes to the standard deduction and the

while Senator Scott reported speaking with both President Trump and Hassett about the idea before the bill’s passage, “in the rush to pass the bill over the course of a few frenzied weeks, the idea was never debated on the floor of the House or Senate. It was never promoted by Republican leaders or the White House.”[45] President Trump signed the TCJA into law at the end of December 2017.[46]

B. Mechanics

This Section gives an overview of how OZs work mechanically. While the tax law surrounding OZs is complicated, at the heart of the program is a basic bargain: investors agree to inject revenue from capital gains into certain low-income census tracts for a prescribed length of time in exchange for tax benefits from the IRS.[47]

i. Opportunity Zone Selection

The first step of implementing the OZ program was assigned to America’s governors (as well as the chief executives of possessions and territories), who were allotted 90 days from the enactment of the TCJA to choose which low-income census tracts would be designated as OZs. For OZ selection purposes, the definition of “low-income census tract” comes from Section 45D(e) of the tax code, the NMTC.[48] Governors were permitted to designate up to 25% of

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State and Local Tax Deduction (SALT). For example, two widely circulated pieces on the TCJA did not mention the OZ program at all. *See Trump Tax Plan*, *supra* note 41; *see also* Heather Long, *The Final GOP Tax Bill Is Complete. Here’s What Is in It*, WASH. POST (Dec. 15, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/12/15/the-final-gop-tax-bill-is-complete-heres-what-is-in-it/ [https://perma.cc/VK8U-ALTL].

45. Tankersley, *supra* note 42. Despite giving the OZ concept a more favorable treatment than it would go on to do in 2019, the *New York Times* did express early skepticism, noting that “risks remain, including whether investors will steer dollars toward areas that really need investment.” *See id.*

46. John Wagner, *Trump Signs Sweeping Tax Bill into Law*, WASH. POST (Dec. 22, 2017), https://www.washingtonpost.com/news/post-politics/wp/2017/12/22/trump-signs-sweeping-tax-bill-into-law/ [https://perma.cc/8XDE-K4QF].

47. *Opportunity Zones Frequently Asked Questions*, INTERNAL REVENUE SERV., https://www.irs.gov/newsroom/opportunity-zones-frequently-asked-questions [https://perma.cc/AA7S-GLK8] (last visited Mar. 16, 2020) (“These zones are designed to spur economic development and job creation in distressed communities throughout the country and U.S. possessions by providing tax benefits to investors who invest eligible capital into these communities.”).

48. ECON. INNOVATION GRP., OPPORTUNITY ZONES: A NEW ECONOMIC DEVELOPMENT TOOL FOR LOW-INCOME COMMUNITIES 1 (2018), https://eig.org/wp-content/uploads/2018/02/Guidance-for-Governors-FINAL.pdf

eligible census tracts as OZs. Most significantly, they were also permitted to select a number of non-low-income census tracts as OZs with some restrictions, including the restriction that higher-income OZs must be geographically contiguous to low-income tracts and have roughly the same median family income (not exceeding 125% of a neighboring low-income tract).[49] The OZ program placed a cap on these higher-income OZs, so governors were able to designate only up to 5% of their OZs in this manner.[50] After finishing their selection process, governors submitted their designations of both low-income and higher-income tracts to the Treasury Secretary for certification.[51] Certification by the Department of the Treasury lasts a decade, irrespective of whether the underlying economics of a particular census tract change over time.[52]

[https://perma.cc/X64V-ZAGN] (summarized as "[1] Tracts in which the poverty rate is at least 20 percent; or [2] Tracts in which the median family income does not exceed 80 percent of the statewide median family income if located outside of a metropolitan area; or [3] Tracts in which the median family income does not exceed 80 percent of the statewide median family income or the metropolitan area median family income, whichever is higher"). This aspect of the OZ program was itself controversial from the start; the Treasury Department provided the census maps from the American Community Survey, dated from 2011–2015, and so was in some cases already six to seven years old at the time that governors were choosing OZs. *See, e.g.*, Adam Looney, *Will Opportunity Zones Help Distressed Residents or Be a Tax Cut for Gentrification?*, BROOKINGS INST. (Feb. 26, 2018), https://www.brookings.edu/blog/up-front/2018/02/26/will-opportunity-zones-help-distressed-residents-or-be-a-tax-cut-for-gentrification/ [https://perma.cc/GV9W-9G8W] ("[S]tates can designate once-poor neighborhoods that have already gentrified over the last several years. In Washington D.C., for instance, qualifying areas include the planned developments around DC United's new stadium at Buzzard Point, where investors plan to invest hundreds of millions in and around the stadium, and the NoMa neighborhood where office buildings and pricey apartments are sprouting."); *see also* Steven Berman & Louis Weller, *Opportunity Zone Investments: The New Emerald City of Tax Law*, 28 J. MULTISTATE TAX'N & INCENTIVES 8, 9 (2019) ("One of the things that one notices when reviewing the designated low income communities for NMTC purposes, and then the 25% of those census tracts that are designated for OZone purposes, is that many of those census tracts are already attractive locations for business investment even without the OZone designation.").

49. Zachary Patton, *Need Help Understanding the Opportunity Zones Eligibility?*, ENTERPRISE (Feb. 9, 2018), https://www.enterprisecommunity.org/blog/understanding-opportunity-zones-eligibility [https://perma.cc/S7KN-CTBT] ("We have received questions on this regarding whether a tract has to meet the 125 percent threshold for all contiguous Low-Income Communities. Our understanding of the guidance provided by the IRS on February 8, 2018 is that it need only satisfy this requirement for at least one contiguous Low-Income Community.").

50. *Id.*

51. ECON. INNOVATION GRP., *supra* note 48, at 1 (governors with fewer than 100 low-income census tracts in their states could still designate up to 25 tracts).

52. *Id.*

ii. Commentary on the Opportunity Zone Selection Process

One common criticism of OZs focuses on this stage of the rollout process and takes issue with the ability of governors to choose relatively higher-income neighborhoods for inclusion. EIG, where OZs were born, wrote about this option in favorable terms, arguing that it provided governors with "real-world flexibility in assembling economically meaningful zones from individual census tracts."[53] Other observers expressed concern that it would funnel capital to already-gentrifying neighborhoods.[54] Another line of criticism in this same vein focuses on how gubernatorial selection of OZs was prone to rent-seeking and lobbyist influence,[55] or clerical error.[56]

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53. *Id.* at 2.

54. *See, e.g.*, Samantha Jacoby, *Potential Flaws of Opportunity Zones Loom, as Do Risks of Large-Scale Tax Avoidance*, CTR. ON BUDGET & POL'Y PRIORITIES (Jan. 11, 2019), https://www.cbpp.org/research/federal-tax/potential-flaws-of-opportunity-zones-loom-as-do-risks-of-large-scale-tax [https://perma.cc/N3VR-M9VL].

55. *See, e.g.*, Jeff Ernsthausen & Justin Elliott, *How a Tax Break to Help the Poor Went to NBA Owner Dan Gilbert*, PROPUBLICA (Oct. 24, 2019), https://www.propublica.org/article/how-a-tax-break-to-help-the-poor-went-to-nba-owner-dan-gilbert [https://perma.cc/F38A-PHYW] (Billionaire and Cavaliers owner Dan Gilbert "influenced the local [OZ] selection process, as well, other emails obtained by ProPublica show: Quicken's top lobbyist was so enmeshed in the process, his name appears on an opportunity zone map made by the city economic development organization, recommending part of downtown be included in the tax break. No other non-city officials are named on the document"); *see also*, Justin Elliott, et al., *A Trump Tax Break to Help the Poor Went to a Rich GOP Donor's Superyacht Marina*, PROPUBLICA (Nov. 14, 2019), https://www.propublica.org/article/superyacht-marina-west-palm-beach-opportunity-zone-trump-tax-break-to-help-the-poor-went-to-a-rich-gop-donor [https://perma.cc/38ZN-TAQU] ("The state of Florida, based on an analysis of unemployment and poverty rates, had not originally intended to pick the census tract containing the superyacht marina for the program. But those plans changed in response to [billionaire Wayne, Jr.] Huizenga's lobbying, according to documents from the Florida Department of Economic Opportunity obtained by ProPublica."); Jeff Ernsthausen & Justin Elliott, *A Trump Tax Cut Meant to Help Poor Areas Could Pay off for Kevin Plank and Goldman Sachs Thanks to Misaligned Maps*, BALT. SUN (June 19, 2019), https://www.baltimoresun.com/business/real-estate/bs-bz-plank-opportunity-zone-20190612-story.html [https://perma.cc/2NS7-HLQK] ("But the census tract became eligible to be picked as an opportunity zone because of misaligned maps. Tiny differences between the maps used to delineate opportunity zones and empowerment zones — a Clinton administration incentive for economically distressed communities — showed an overlap between them at that sliver of a parking lot, which the U.S. Treasury Department decided made the tract eligible. Maryland Gov. Larry Hogan chose the area for the program after his aides met with lobbyists for the project.").

56. Robert Orr, *These Opportunity Zones Shouldn't Exist — Scandal or Innocent Mistake?*, NISKANEN CTR. (Nov. 4, 2019),

Empirically, more than 42,000 census tracts around the country were eligible for designation as OZs; from those, governors selected roughly 8700, of which 230 were higher-income, contiguous tracts.[57] This represented 2.6% of all OZs chosen, well below the 5% cap imposed by the enabling legislation.[58] An early analysis of the tracts selected for inclusion in the OZ program, performed by the Urban Institute, found that "the designated tracts have lower incomes, higher poverty rates, and higher unemployment rates than eligible nondesignated tracts."[59] At the same time, however, "[the] analysis shows minimal targeting of the program toward disinvested communities by a measure of investment flows developed by the researchers."[60]

iii. Tax Benefits at the Core

The core of the OZ program is a set of two tax incentives offered to investors, which practitioners have christened the "Deferral Benefit" and the "Exclusion Benefit" in the legal literature.[61] The Deferral Benefit allows an investor to sell an asset, realize a capital gain, invest that gain (the "underlying gain") in a qualified OZ fund (OZFund), and defer payment of capital gains tax on the underlying gain until

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https://www.niskanencenter.org/these-opportunity-zones-shouldnt-exist-scandal-or-innocent-mistake/ [https://perma.cc/K5LV-ERTY].

> Apart from the improperly classified LIC tract in Detroit (tract ID 26163517200), misclassifications also appear to have occurred in Los Angeles, CA (06037206020) and Oklahoma City, OK (40109103200). Furthermore, these misclassifications were instrumental to the improper designation of two additional OZs through the Contiguous Tract Criteria (tracts 26163517000 & 06037206031 respectively). In total, five OZ tracts were misclassified. While two of these can retain their OZ status under a reclassification as contiguous tracts with legitimate LICs, the other three OZs are entirely improper — that is, they should not have qualified under the requirements stipulated by the TCJA.

Id.

57. BRETT THEODOS, ET AL., URBAN INST., DID STATES MAXIMIZE THEIR OPPORTUNITY ZONE SELECTIONS? 2 (2018), https://www.urban.org/sites/default/files/publication/98445/did_states_maximize_their_opportunity_zone_selections_1.pdf [https://perma.cc/75C6-68DK].

58. *Id.*

59. Brett Theodos & Brady Meixell, *Did Governors Target Opportunity Zones to Disinvested Communities?*, URB. INST. & BROOKINGS INST., TAX POL'Y CTR. (May 22, 2018), https://www.taxpolicycenter.org/taxvox/did-governors-target-opportunity-zones-disinvested-communities [https://perma.cc/G4MT-Z4UP].

60. *Id.*

61. *See, e.g.*, Berman & Weller, *supra* note 48, at 9.

2026.[62] The Deferral Benefit also provides a basis step-up: if the investor leaves the funds in an OZFund for a minimum of five years, she is granted a 10% basis-step up. If she leaves the funds in an OZFund for a period of seven years, she is granted an additional 5% basis-step up.[63] Put another way, if an investor takes full advantage of the Deferral Benefit, she will ultimately pay capital gains taxes on only 85% of the underlying gain.

The Exclusion Benefit exempts the investor from paying any capital gains tax at all on the investment in the OZFund entirely (the "new gain") if she holds that investment for a minimum of ten years.[64] Due to the total absolution of capital gains liability, commentators have observed that the Exclusion Benefit is potentially worth substantially more to investors over time than the Deferral Benefit.[65]

iv. Opportunity Zone Funds

OZFunds are the vehicle by which investors participate in the OZ program and take advantage of the Deferral and Exclusion Benefits. The enabling language in the TCJA requires that OZFunds invest directly in "qualified opportunity zone property" (OZProperty), or

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62. Or the sale date — whichever is earlier. *Id.*

63. *Opportunity Zones: A New Tool for Community Development*, NOVOGRADAC 1 (2018), https://www.novoco.com/sites/default/files/atoms/files/novogradac_opportunity_zones_fact_sheet_121318.pdf [https://perma.cc/T8BE-V9EU] ("A taxpayer who recognizes a gain from the sale of stock can invest the gain in an opportunity fund and postpone taxes on those gains until 2026. If the taxpayer holds the fund shares for five years, there is a 10 percent basis step-up. After seven years, there is another 5 percent basis step-up."). For a set of examples illustrating the two benefits, see Christopher Karachale, *Qualified Opportunity Funds: Deferral and Exclusion Possibilities for Investors*, 46 REAL EST. TAX'N, 39, 39 (2019).

64. *About Opportunity Zones*, NOVOGRADAC, https://www.novoco.com/resource-centers/opportunity-zone-resource-center/about-opportunity-zones [https://perma.cc/V2EP-7VJU] (last visited Apr. 4, 2020) ("Furthermore, as an additional incentive to make long-term, patient capital investments, taxpayer's holding Opportunity Fund investments for a period of at least 10 years are exempt from any additional gains beyond that which was previously deferred."). As a technical matter, the Exclusion Benefit works in this way: "[T]he basis of some or all of the taxpayer's interest in the OZFund will be treated as equal to the fair market value of such interest on the date that the interest in the OZFund is sold or exchanged. Thus, no gain ('New Gain') will be realized on that sale or exchange." Berman & Weller, *supra* note 48, at 10.

65. Berman & Weller, *supra* note 48, at 10 ("The second, and in our view potentially far more valuable, tax benefit . . . .").

indirectly in "qualified opportunity zone businesses" (OZBusinesses).[66] The definitions of these terms are analogous:

> A qualified opportunity zone business . . . is defined as a trade or business in which substantially all of the tangible property owned or leased by the business is OZProperty, substituting the term 'qualified opportunity zone business' for the term 'qualified opportunity fund' each place it appears in the definition of OZProperty.[67]

v. Proposed Rulemaking and Commentary

The TCJA tasked the IRS with promulgating rules governing the OZ program. The agency issued several rounds of proposed rules, and then a set of final rules in December 2019.[68] One of the most crucial rules is the 90% Qualifying Assets Test, which governs the percentage of OZFund assets required to be invested in eligible assets. As written, the rule is much more lenient towards indirect OZFund investments, in other words, investments into OZBusinesses, than to the direct purchase of OZProperty: the rule obligates OZFunds to hold 90% of their assets in qualifying investments, but OZBusinesses are subject to a 70% tangible property test.[69]

This disparity, some observers have argued, is cause for genuine concern since it may blunt the overall effectiveness of the initiative. It invites OZFund managers to hold 90% of the fund's assets in either stock or other ownership interest in OZBusinesses, which in turn hold only 70% of their assets in qualifying property.[70] At bottom, then, an

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66. *See id.* This is defined as either "OZStock . . . OZInterests . . . or OZProperty." *Id.* The accounting firm Novogradac drew up a chart explaining these possible investment structures. *See Opportunity Zones: A New Tool for Community Development*, *supra* note 63, at 3.

67. Berman & Weller, *supra* note 48, at 11.

68. Lisa Zarlenga, et al., *Final Opportunity Zone Regulations Provide Some Much-Needed Clarity*, STEPTOE (Dec. 27, 2019), https://www.steptoe.com/en/news-publications/final-opportunity-zone-regulations-provide-some-much-needed-clarity.html [https://perma.cc/J42H-UX9D].

69. John Schrier, et al., *Qualified Opportunity Zone Funds: Structuring and Implementing Tax-Advantaged Fund Transactions*, MAYER BROWN 12 (Apr. 22, 2019), https://www.mayerbrown.com/-/media/files/perspectives-events/events/2019/04/qualifiedopportunityzonefundspresentation.pdf [https://perma.cc/4VY3-AVUN].

70. Berman & Weller, *supra* note 48, at 14. Practically speaking, this allows an OZFund to hold substantial percentages of its assets outside of OZs by using the intermediary of investing in OZBusinesses. *See also* Schrier, *supra* note 69, at 18 (explaining that an OZFund with $10 million in assets could hold only $6.3 million inside an OZ by "investing $9 million in a partnership and having the partnership

OZFund seeking to take full advantage of this proposed rule can hold only 63% of its assets in an OZ.[71]

Observers have also criticized the IRS's penalties for failure to meet these benchmarks. The law imposes a penalty on OZFunds that fail to meet the percentage thresholds described above.[72] However, as codified in the rules, while noncompliant funds are charged a fee for each month they fail to meet the required investment thresholds, and the proposed penalty diminishes the value of the Deferral Benefit with time, these funds do not lose the ability to take the Exclusion Benefit after the ten-year investment period.[73]

In view of the weaknesses of both the enabling legislation and the IRS's final rules, the abuse potential of the OZ program is clear: not only has the federal government failed to put in place meaningful guardrails to channel capital, but also it has constructed a regulatory regime which allows investors to claim the core benefit of the

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invest $6.3 million (i.e., 70% of its assets) in qualified opportunity zone business property," and then holding onto the remainder in cash and investing it in other investment vehicles. By contrast, if the fund buys OZProperty directly, "it would have to buy $9 million of qualified opportunity zone business property, all of which would have to constitute tangible assets").

71. Berman & Weller, *supra* note 48, at 14.

72. *See generally* Lydia O'Neal, *Opportunity Zone Rules Leave out Data Reporting, Penalty Details*, BLOOMBERG TAX (Apr. 22, 2019), https://news.bloombergtax.com/daily-tax-report/opportunity-zone-rules-leave-out-data-reporting-penalty-details [https://perma.cc/Z8HH-5EYJ].

73. *See* Berman & Weller, *supra* note 48, at 16 ("The penalty is calculated based on the excess of 90% of the amount of the assets in the OZFund over the aggregate amount of the 'qualified opportunity zone property' held by the OZFund, multiplied by the underpayment rate established under the IRC for such month. This penalty, in effect, chips away at the Deferral Benefit until December 31, 2026, but does nothing to mitigate or take away the Exclusion Benefit. By the standards of penalty provisions in the IRC, this one is particularly gentle, as the currently applicable interest rate under Section 6621(a)(2) is about 6.0% per annum."). A final concern covered in the piece is the "working capital rule" included in the proposed rules:

> With respect to the temporal aspect relating to an entity's holding period for OZProperty, the issue is how the test will be applied when the entity does not have existing operations or assets when the OZFund invests, but intends to use OZFund capital to fund operations or acquire assets. The Proposed Regulations take much of the pressure off of this issue by providing a 'working capital' rule modeled after Section 1397C(e)(1), permitting an OZFund that is developing a new business or constructing or rehabilitating real estate (or the entity representing an issuer of OZStock or OZInterests) to deploy its capital over a 31-month period provided that it has: (a) a written plan to utilize capital to create OZProperty; (b) establishes a written schedule of how the capital will be deployed in pursuit of this end, (c) and adheres to the plan and schedule.

Id. at 14–15.

initiative while, at times, investing barely over half of the capital in their OZFunds in actual OZs by using an intermediary.

II. THE DANGER OF UNCONSTRAINED CAPITAL AND THE TENSION BETWEEN PLACE-BASED AND PERSON-BASED PROGRAMS

Essential to the debate over the efficacy of OZs is a distinction between economic development programs that target "distressed communities" and those that target "distressed people" — in other words, between what scholars term "place-based" programs (the former) and "person-based" programs (the latter).[74] Both styles of the initiative have defenders and detractors. In recent years, place-based programs have been a particular lightning rod in the economic development literature. Advocates for place-based programs argue, variously, that "large, place-making developments can help revitalize low-income areas," or that "the collection of neighborhoods making up an inner city are an ideal sub-region for a place-based approach."[75] Critics respond that place-based programs ignore the "corporate and political forces that create economic inequality and widespread poverty," and that while "American workers today face declining job security and dwindling earnings as companies downsize, move overseas, and shift more jobs to part-time workers," place-based programs "cannot address these major trends."[76]

74. Randall Crane & Michael Manville, *People or Place?: Revisiting the Who versus the Where of Urban Development*, LINCOLN INST. LAND POL'Y 2 (July 2008), https://community-wealth.org/sites/clone.community-wealth.org/files/downloads/article-crane-manville.pdf [https://perma.cc/S2SF-R9SG].

75. CTR. ON PHILANTHROPY & PUB. POLICY, SOL PRICE CTR. FOR SOC. INNOVATION, PLACE-BASED INITIATIVES IN THE CONTEXT OF PUBLIC POLICY AND MARKETS: MOVING TO HIGHER GROUND 3 (2015), https://socialinnovation.usc.edu/files/2014/12/Prioritizing-Place-Moving-to-Higher-Ground.pdf [https://perma.cc/Z2YT-LPQ3].

76. Peter Dreier, *Philanthropy's Misguided Ideas for Fixing Ghetto Poverty: The Limits of Free Markets and Place-Based Initiatives*, NONPROFIT Q. (Mar. 19, 2015), https://nonprofitquarterly.org/philanthropy-ideas-for-fixing-ghetto-poverty-the-limits-of-free-markets-and-place-based-initiatives/ [https://perma.cc/GRM7-LDYU] ("American workers today face declining job security and dwindling earnings as companies downsize, move overseas, and shift more jobs to part-time workers . . . . As indicated above, place-based policies cannot on their own address the major trends that have led to widening inequality, a decline in the overall standard of living for most Americans, and an increase in poverty."). For an analysis of why the efficacy of place-based programs is challenging to measure, see AUSTIN NICHOLS, URBAN INST., EVALUATION OF COMMUNITY-WIDE INTERVENTIONS 1 (2013), https://www.urban.org/sites/default/files/publication/23766/412855-Evaluation-of-Community-Wide-Interventions.PDF [https://perma.cc/5YCA-98YR]. Professor Michelle Layser has been similarly pointed in her criticism of place-based programs:

As a place-based initiative, the OZ program finds itself squarely at the center of this debate. In relevant ways, it is similar to the place-based initiatives that preceded it at the federal and state levels, including national programs like Empowerment Zones (EZs) and the Renewal Communities (RC) project which succeeded it,[77] as well as the Low-Income Housing Tax Credit (LIHTC), the New Markets Tax Credit (NMTC), and state Enterprise Zones.[78] Like NMTCs, for example, OZs require investing in a pre-selected geographical area for a preset length of time. However, one crucial difference between the OZ initiative and its intellectual grandparents is the absence of a competitive process and the comparatively skeletal federal regulatory regime. The LIHTC and the NMTC are competitive grant programs: state housing finance agencies, or HFAs (for LIHTC), and the Department of the Treasury (for NMTC) evaluate applications and

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"In sum, spatially oriented investment tax incentives are the dominant form of place-based investment tax incentives under current law. This is true despite a lack of empirical evidence to suggest that such tax laws help poor communities, even though their proponents claim that helping poor communities is an important goal." Michelle Layser, *The Pro-Gentrification Origins of Place-Based Investment Tax Incentives and a Path toward Community Oriented Reform*, 2019 WIS. L. REV. 745, 771 (2019).

77. *Community Partners*, LOC. INITIATIVES SUPPORT CORP., https://www.lisc.org/opportunity-zones/community-partners-playbook/introduction/ [https://perma.cc/5VK3-DYZQ] (last visited Apr. 4, 2020) ("Opportunity Zones are certainly not the first tax incentives for investments in distressed communities. The Empowerment Zone (EZ) program, created in 1993, enabled businesses located in low-income communities selected by HUD and USDA to claim certain tax benefits. In competitions held in 1994 and 1998, HUD selected 30 different urban EZs, and the USDA selected 10 rural EZs. In 2000, Congress created the Renewal Communities (RCs) program to replace the Empowerment Zone program, and in 2001 HUD selected 40 RCs, 28 in urban areas and 12 in rural areas. While HUD and the USDA are no longer designating new EZs and RCs, businesses operating in those communities can continue to claim certain tax benefits.").

78. *Id.* ("In 2000, in the same legislation that authorized the Renewal Communities program, Congress enacted the New Markets Tax Credit (NMTC) program. Under this program, investors can claim tax credits for investing in Treasury-certified Community Development Entities (CDEs), which in turn provide loans and investments to businesses and real estate projects in low-income communities. The investor may claim tax credits valued at 39% of the total investment in the CDE, phased in over a seven-year holding period. The total tax credit allocation authority is currently capped at $3.5 billion annually, meaning that CDEs must apply to the Treasury Department for the authority to issue tax credits to their investors."). Place-based incentives have been launched by states as well. *See, e.g.*, *Urban Enterprise Program*, NJ.GOV, https://www.nj.gov/njbusiness/financing/uez/ [https://perma.cc/M3R9-5ULW] (last visited Mar. 16, 2020). There is evidence that state-based programs are effective at sparking job creation. *See, e.g.*, Stephen B. Billings, *Do Enterprise Zones Work?: An Analysis at the Borders*, 37 PUB. FIN. REV. 68 (2008).

decide which proposals to approve.[79] The LIHTC application process is particularly exacting, involving multiple layers of safeguards with restrictions imposed by both the federal government and the states.[80] State HFAs have the ability to set extended affordability requirements, establish that certain kinds of projects — like permanent supportive housing or housing for senior citizens — are state priorities, geographically restrict the grant of tax credits, and incentivize the use of companies owned by minorities or women.[81] By contrast, OZs are far less regulated: "With the opportunity zones incentive, any eligible taxpayer — individuals or corporations — can make investments funded by realized gains in opportunity funds. There is no cap."[82]

Even a robust regulatory program undergirding a place-based incentive is no guarantee of unmitigated success. Since their inception, the LIHTC and the NMTC have both attracted their fair share of detractors. For instance, critics have argued that the LIHTC, though extremely expensive for the federal government, is ineffective at generating long-term affordability, or that the NMTC ends up benefitting residents of higher-income neighborhoods who commute

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79. *Opportunity Zones: A New Tool for Community Development*, *supra* note 63, at 1–2.

80. *See, e.g.*, CORIANNE PAYTON SCALLY, ET AL., URBAN INST., THE LOW-INCOME HOUSING TAX CREDIT: HOW IT WORKS AND WHO IT SERVES 3 (2018), https://www.urban.org/sites/default/files/publication/98758/lithc_how_it_works_and_who_it_serves_final_2.pdf [https://perma.cc/2G4Q-PPTK] ("The 9 [LIHTC] percent credits are allocated to states annually by the IRS to distribute to eligible projects through a competitive process through state housing finance agencies. Award criteria are updated each year through a state's Qualified Allocation Plan, which outlines the state's priorities and scoring criteria.").

81. *Id.* at 4 ("The 9 percent credits are highly competitive, with many more projects requesting credits than can be funded. Because developers have strong incentives to score the most points possible, the preferences spelled out in a state's Qualified Allocation Plan have a powerful ability to shape the type and location of housing built."). To take one example, the New York State HFA established the development of supportive housing and senior citizen housing as goals. *See* 2019 *Mission Statement for the New York State Housing Finance Agency & Its Subsidiary the New York State Affordable Housing Corporation*, N.Y. ST., HOMES & COMMUNITY RENEWAL (2019), https://hcr.ny.gov/system/files/documents/2019/04/2019-hfa-mission-statementdocx.pdf [https://perma.cc/85HN-VBKN]. New York State also has goals to promote equity through its Minority and Women Owned Business Enterprise (M/WBE) program. *See, e.g.*, *Minority and Women-Owned Business Enterprise Compliance*, N.Y. ST. EDUC. DEP'T., http://www.archives.nysed.gov/grants/lgrmif-mwbe-compliance [https://perma.cc/P5MD-YDRX] (last visited Apr. 4, 2020).

82. *Opportunity Zones: A New Tool for Community Development*, *supra* note 63, at 2.

to targeted areas.[83] There is also a concern that place-based initiatives, even when tightly regulated, can either cause or accelerate gentrification and displacement.[84]

These concerns are amplified for the OZ program. The differences between OZs and other place-based initiatives highlight a central challenge: the deployment of unconstrained capital with almost no federal guardrails directing it. This is perhaps *the* central roadblock to OZs achieving their stated aim of addressing poverty. There is, for instance, no requirement in the program that projects claiming OZ benefits create any jobs at all, let alone for poor workers.[85] There is no obligation for OZ investors to build affordable housing that is accessible to longtime residents of neighborhoods designated as OZs.[86] In fact, there are no federal safeguards at all to ensure that communities have any say over how and where capital is invested.[87]

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83. *Urban Institute Evaluates the Low Income Housing Tax Credit*, NAT'L LOW INCOME HOUSING COALITION (July 23, 2018), https://nlihc.org/resource/urban-institute-evaluates-low-income-housing-tax-credit [https://perma.cc/6JVG-C4AY] ("Despite its popularity, LIHTC falls short in several critical areas. First, LIHTC investment does not permanently address affordability problems — properties are only required to be affordable for up to 30 years. The report cites an NLIHC estimate that more than 115,000 units could expire in the next five years. Additionally, LIHTC properties have struggled to meet the needs of extremely low-income renters (those earning below the federal poverty level or 30% of the area median income, whichever is greater) without additional federal rental assistance. The lengthy and complicated tax credit allocation process is also inefficient, and projects have few incentives to bring down costs."); *see also* Matthew Freedman, *Place-Based Programs and the Geographic Dispersion of Employment*, 53 REGIONAL SCI. & URB. ECON. 1, 1 (2015) ("This paper examines the labor market impacts of investment subsidized by the U.S. federal government's New Markets Tax Credit (NMTC) program, which provides tax incentives to promote business investment in low-income neighborhoods . . . . I find evidence that many of the new jobs created in areas that receive subsidized investment do not go to residents of targeted neighborhoods. The results suggest that the local economic benefits of place-based programs may be diluted when subsidized businesses have scope to hire from broader regional labor markets.").

84. *See, e.g.*, Nathaniel Baum-Snow & Justin Marion, *The Effects of Low Income Housing Tax Credit Developments on Neighborhoods*, 93 J. PUB. ECON. 654, 663 (2009) (acknowledging that isolating cause and effect here is challenging, but finding that "LIHTC developments significantly increase turnover of owner-occupied households within 1 km").

85. *See* Daniel Hemel, *A Place for Place in Federal Tax Law*, 45 OHIO N.U. L. REV. 525, 533 (2019) ("An enterprise could, for example, acquire an existing factory in a high-poverty area, fire all the workers, replace them with robots, and still claim all the opportunity zone tax benefits for its investment.").

86. *Id.* ("A developer could buy a building in an opportunity zone currently occupied by low-income tenants, tear it down, replace it with luxury rentals, and claim the opportunity zone tax benefits.").

87. Contrast this with the fact that there is at least some political responsiveness baked into LIHTC. "Although they vary widely in characteristics such as their

Professor Michelle Layser has gone so far as to suggest that spurring gentrification is a feature of the OZ program, and not a bug: "[a]t the time when the [2017 TCJA] tax law was introduced, the Trump Administration's primary focus was on creating a favorable, pro-growth business environment."[88] The staff of EIG who first helped to dream up OZs would undoubtedly disagree with that characterization; regardless of its veracity, however, the most egregious excesses of the OZ program — especially those highlighted in the media — tend to be clear examples of this abuse liability.[89]

III. EARLY ADOPTERS: STATE AND LOCAL RESPONSES TO THE OPPORTUNITY ZONE INITIATIVE

A. Overview

In the two years since OZs were first enacted into law, researchers, commentators, and practitioners have written widely about how the program can be improved by adding guardrails to direct funding to areas where it is most needed and where it will be least likely to generate gentrification and displacement.[90] One of the most

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relationship to state government, most HFAs are independent entities that operate under the direction of a board of directors *appointed by each state's governor*. They administer a wide range of affordable housing and community development programs." *About HFAs*, NAT'L COUNCIL ST. HOUSING AGENCIES, https://www.ncsha.org/about-us/about-hfas/ [https://perma.cc/7R45-MQ8H] (last visited Apr. 4, 2020) (emphasis added).

88. Layser, *supra* note 76, at 788. She continues:

> Given this political context, even some members of the development community were skeptical of the program's objectives . . . . This critique of Opportunity Zones is understandable, given the law's spatially oriented form. But the form itself was to be expected. Notwithstanding claims that the mission of Opportunity Zones is to help poor communities, the context and design of the new law reflect the same pro-gentrification origins that underlie the vast majority of place-based investment tax incentives.

Id. at 788–89.

89. *See generally* Drucker & Lipton, *supra* note 1.

90. *See, e.g.*, Morgan Simon, *What You Need to Know about Opportunity Zones*, FORBES (Mar. 30, 2019), https://www.forbes.com/sites/morgansimon/2019/03/30/what-you-need-to-know-about-opportunity-zones/#2a7627056ae2 [https://perma.cc/2KSY-T4PB] (drawing a distinction between "extractive" and "non-extractive" projects: "A non-extractive OZ project is one where the value created is shared. I'd like to see a good blend of broad-based ownership for employees and contractors, training and apprenticeships, and general acknowledgement of existing community efforts. A lot of people are doing these things, but they are on the margins. We need to ask . . . if a project generates $100M in profits, where does this money flow? How much of it is left in the community? I just wanted to call out that a $100M dollar investment with a little bit of philanthropy wrapped around it and some kind of job fair, that doesn't really cut

comprehensive reports is the “Opportunity Zone Playbook” drafted by the Local Initiative Support Center (LISC), which proposes six concrete steps that community partners can take to direct streams of OZ funding:

> Step 1: Hold a Stakeholder Meeting/Get the lay of the land, educate partners about Opportunity Zone policy and engage key players . . . . Step 2: Embarking on a Plan for Work in the Opportunity Zones/Assess the terrain, map and support community planning . . . . Step 3: Incentives and Guardrails in the Opportunity Zones/Tapping policies and public programs that can help bolster success — and minimize risks — for communities . . . . Step 4: Collaborating to Build Pipeline & Leverage Local Expertise/By forging a consortium or grant programs, or by modeling the financial feasibility of projects, community partners can begin to kindle Opportunity Zone projects . . . . Step 5: Ramp Up Your Investor Marketing/Creating a prospectus, marketing your zone and other strategies for connecting with investors . . . . Step 6: Develop Impact Metrics & Encourage Transparency/Rigorous evaluation and accessible reporting are keys to inclusive and equitable success in the Opportunity Zones.[91]

Another is the Governance Project’s “Toolkit for Maximizing the Impact of Opportunity Zones.”[92] Across these varied approaches,

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it”); *see also Prioritizing and Achieving Impact in Opportunity Zones*, U.S. IMPACT INVESTING ALLIANCE 2, https://ozframework.org/s/Opportunity-Zones-Reporting-Framework-June-2019.pdf [https://perma.cc/9SCE-HZAF] (last visited May 20, 2020) (arguing that “[w]e are optimistic about the possibilities that Opportunity Zones and Opportunity Funds offer to combat economic inequality and barriers facing low-income and underinvested communities. We also believe that doing so will require focus on these goals, as well as diligent efforts to avoid unintended outcomes. These principles are designed to guide stakeholders, of all kinds, as they conceptualize and implement their Opportunity Zones activities. 1. Community Engagement: Opportunity Fund investors should request that fund managers integrate the needs of local communities into the formation and implementation of the funds, reaching low-income and underinvested communities with attention to diversity. 2. Equity: Opportunity Fund investments should seek to generate equitable community benefits, leverage other incentives and aim for responsible exits. 3. Transparency: Opportunity Fund investors should be transparent and hold themselves accountable, with processes and practices that remain fair and clear. 4. Measurement: Opportunity Fund investors should voluntarily monitor, measure and track progress against specific impact objectives, identifying key outcome measures and allowing for continuous improvement. 5. Outcomes: Opportunity Fund metrics should track real change, with an understanding that both quantitative and qualitative measures are valuable indicators of progress”).

91. *See Community Partners*, *supra* note 77.

92. *Toolkit for Maximizing the Impact of Opportunity Zones*, GOVERNANCE PROJECT 1–5 (2019), https://governanceproject.org/wp-content/uploads/2019/07/TGP_Toolkit.pdf [https://perma.cc/YD25-Q9YV] (“1. Start with a Vision or Prospectus . . . 2. Identify

common themes have emerged: community participation, transparency, scale, and impact.[93] Since the goal of this Note is not to suggest criteria by which to measure the success of OZs, I adopt these four goals as normatively desirable.

The purpose of this Part is to lay out and evaluate a broad spectrum of state and local government responses to the OZ initiative. The following Sections analyze the work of three early adopters: Louisville, Kentucky; Cuyahoga County, Ohio (whose county seat is the city of Cleveland); and Washington, D.C.

The selection of these three cities and their presentation order is intentional. They represent a wide range of possible policy responses to the OZ initiative, from informal to formal policymaking power. They are also politically, demographically, and geographically varied: Louisville and Cuyahoga County have Democratic chief executives,[94]

Zone-Specific Needs . . . 3. Identify Community Resources . . . 4. Select Priority Projects from the Intersection of Needs & Resources . . . 5. Develop Financing Models to Refine Priorities . . . 6. Progress Priority Projects into Deals."); *see also* HOWARD WIAL, INITIATIVE FOR A COMPETITIVE INNER CITY, WHAT IT WILL TAKE FOR OPPORTUNITY ZONES TO CREATE REAL OPPORTUNITY IN AMERICA'S ECONOMICALLY DISTRESSED AREAS (2019), http://icic.org/wp-content/uploads/2019/04/ICIC_OZ_PolicyBrief.pdf [https://perma.cc/T3S8-XPEU] (discussing other processes and steps for maximizing the impact of OZ).

93. Commentators have also suggested applying criteria from outside the OZ literature to guide OZ investment. *See, e.g.*, Nestor M. Davidson, *A Better Approach to Urban Opportunity*, 27 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 449, 456 (2019) (arguing that "Dyal-Chand argues convincingly for prioritizing the economic stability of workers through democratic participation, vocational training focused on long-term individual growth, and strong wages and benefits. She likewise argues for businesses to find niches that would allow for multiple bottom-line approaches, tools for connecting to broader markets and sources of finance, and collaborative structures to spread risk and leverage management expertise"). For a notable example of the ways in which community participation can ensure that investment achieves meaningful results for impacted communities, see Timothy Fields, Jr., *A Dream Realized: Community Driven Revitalization in Spartanburg*, EPA BLOG (Aug. 26, 2014), https://blog.epa.gov/2014/08/26/a-dream-realized-community-driven-revitalization-in-spartanburg/ [https://perma.cc/8NG9-JCQX].

94. *See Mayor Greg Fischer*, LOUISVILLEKY.GOV, https://louisvilleky.gov/government/mayor-greg-fischer [https://perma.cc/P627-79JY] (last visited Apr. 4, 2020); *Office of the Executive*, CUYAHOGA COUNTY, OHIO, http://executive.cuyahogacounty.us/ [https://perma.cc/QPL6-N7G5] (last visited Apr. 4, 2020); *see also* Amina Elahi, *Mayor Greg Fischer to Be Inaugurated for Third Term Monday*, WFPL (June 6, 2019), https://wfpl.org/mayor-greg-fischer-to-be-inaugurated-for-third-term-monday/ [https://perma.cc/HZM9-PGY7]; Mark Naymik, *Cuyahoga County Executive Armond Budish Is Lucky His Opponent Is a Nothingburger*, CLEVELAND.COM (Jan. 29, 2019),

while Republicans dominate the Kentucky and Ohio state legislatures.[95] Because it is not a state and has limited home rule, Washington, D.C.'s political powers are constrained by the federal government.[96]

B. Coordination Problems

Perhaps the single greatest obstacle to using OZs for impact and returns (as opposed to returns alone) is a coordination problem: the community of investors with capital gains to deploy does not, in many instances, overlap with local stakeholders inside of OZs who have the most knowledge about which projects, if given access to capital, could create impact.[97] Stephanie Copeland, CEO of the Governance Project, a leading think tank partnering with states and municipalities across the country to leverage OZs to create impact, phrased it this way: "Who knows best what communities really need? It's the local stakeholders, who are often ill-equipped to attract capital because of

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https://www.cleveland.com/naymik/2018/09/cuyahoga_county_executive_armo.html [https://perma.cc/QF9R-YKCR].

95. *See Kentucky General Assembly*, BALLOTPEDIA, https://ballotpedia.org/Kentucky_General_Assembly [https://perma.cc/7U8U-QKC4] (last visited Mar. 16, 2020); *Ohio General Assembly*, BALLOTPEDIA, https://ballotpedia.org/Ohio_General_Assembly [https://perma.cc/WT9R-4URS] (last visited Mar. 16, 2020) (note that Ohio has a Republican "trifecta": both houses of its legislature and its governor's office is held by a Republican).

96. *See DC Government Organization*, OFF. CITY ADMIN., https://oca.dc.gov/page/dc-government-organization [https://perma.cc/5QZJ-WEZP] (last visited Mar. 16, 2020) ("The current form of government was established by the District of Columbia Home Rule Act in 1973. Although local officials have the authority to pass laws and govern local affairs, the United States Congress maintains the power to overturn local laws. Furthermore, unlike any other jurisdiction in the country, residents of the District of Columbia are not represented by voting members of the United States Congress."); *see also* Martin Austermuhle, *Four Decades after Getting Home Rule, the Fight in D.C. Goes On*, WAMU 88.5 (Nov. 15, 2013), https://wamu.org/story/13/11/15/four_decades_on_dc_continues_fighting_for_home_rule/ [https://perma.cc/8MA8-26HA].

97. *See, e.g.*, *Opportunity Zones Reality Check*, LOC. INITIATIVES SUPPORT CORP. (Oct. 10, 2019), https://www.lisc.org/our-stories/story/opportunity-zones-reality-check [https://perma.cc/C3UD-QMXV] ("Participants noted that Opportunity Zone investments take time to structure and close, and *require careful coordination with local stakeholders to ensure that community needs are met. Opportunity Zone funding might gravitate toward areas where development would have happened anyway, and one challenge would be how to direct funding to places where it would not have gone otherwise.* Still, many investors may be looking to deploy capital by the end of this year in order to gain the full tax benefits of the program." (emphasis added)).

structural disadvantages."[98] Another factor compounding this challenge is the reality that "capital tends to follow very hard paths" with "very specific ways of underwriting risk."[99] This Note concludes with an analysis of tools adopted across these three cities; however, as a threshold matter, the many practitioners I interviewed for this Note all agreed that solving this basic coordination problem is crucial to making the OZ program work on the ground.

C. Case Studies

i. Louisville, KY

On a spectrum of government action directing OZ investment, where one end represents the exercise of informal government power (through networking and agenda-setting) and the other end represents the exercise of formal government power (through official actions of the chief executive or the legislature), Louisville firmly represents the "informal" end of the spectrum.

Louisville Mayor Greg Fischer was an early proponent of the OZ initiative: many of the first law journal articles analyzing the program specifically mentioned him as an early adopter.[100] In a late-2018 op-ed in the *Louisville Courier Journal*, Mayor Fischer himself wrote that:

> As a former entrepreneur, I know that one of the biggest challenges that start-up businesses face is equitable access to capital . . . . We want responsible development and projects that benefit our citizens by providing investment without displacement . . . . If we use any local incentives, we will look for Opportunity Funds that would

98. Telephone Interview with Stephanie Copeland, CEO, Governance Project (Dec. 13, 2019).

99. *Id.*

100. *See, e.g.*, Diane Lupke, *Opportunity Zones: A Different Zone Opportunity*, J. TAX'N 24, 44 (2019) ("In Louisville, Mayor Greg Fischer praised Opportunity Zones for attracting investment in a major business expansion . . . . One of the first Louisville investors to take advantage of the recently designated Opportunity Zone is the Marion [sic] Group through its spin-off and expansion of Blacksmith Iron Works, a fabrication and custom metal solutions business that recently moved into a 20,000 square-foot facility at 3100 Vermont Avenue in the Russell neighborhood."); *see also* Kriston Capps, *The Obscure Tax Program That Promises to Undo America's Geographic Inequality*, CITYLAB (Apr. 25, 2018), https://www.citylab.com/equity/2018/04/can-opportunity-zones-save-the-country/558266/ [https://perma.cc/C9GK-EJY3] ("In Louisville, for example, that might mean turning an under-used high school into a vocational training facility. That's one idea for an investment opportunity in Louisville's historically black, near-downtown neighborhood of Russell.").

> make a social impact by hiring and partnering with local residents who can also benefit from any income and wealth that is created.[101]

Mayor Fischer's desire to attract capital makes sense in the context of economic conditions in his city: several months before his op-ed ran in the *Louisville Courier Journal*, the paper reported the results of a study from the Greater Louisville Project showing that one in five children in the city live in poverty, and that its poverty level cost the city $200 million each year in lost economic growth.[102]

Around the same time that Louisville was looking to attract OZ investment, the nonprofit Accelerator for America (AFA) worked with local government expert Bruce Katz and his New Localism Advisors team to create "a replicable product — an Investment Prospectus — to enable cities, counties, and states to communicate their competitive advantages, trigger local partnerships, and identify sound projects that are ready for public, private, and civic capital."[103] Louisville jumped at the chance to work with Katz and AFA: they enlisted Katz to work with economic development staff like Mary Ellen Wiederwohl, Chief of Louisville Forward (the city's economic development arm) and Senior Policy Advisor Eric Burnette, and to draft a version of the prospectus that AFA envisioned.[104]

The result was a document called the "Louisville Opportunity Zone Prospectus: A Platform for Action."[105] The prospectus is now on its second iteration: the original version was nearly 50 pages long and is essentially a sophisticated pitch deck aiming to connect investors to the city. The document's executive summary lays out, in

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101. Greg Fischer, *The City of Louisville Is Harnessing Opportunity Zones*, COURIER J. (Nov. 7, 2018), https://www.courier-journal.com/story/opinion/contributors/2018/11/07/louisville-harnessing-opportunity-zones/1863466002/ [https://perma.cc/K6QM-KM2U].

102. Phillip M. Bailey, *1 in 5 Louisville Kids Lives in Poverty and a Report Says It's Holding the City Back*, COURIER J. (Apr. 10, 2018), https://www.courier-journal.com/story/news/local/2018/04/10/child-poverty-louisville-report-2018/502214002/ [https://perma.cc/4SGL-JCEY].

103. BRUCE KATZ & KEN GROSS, ACCELERATOR FOR AM., INVESTMENT PROSPECTUS GUIDE: A HOW-TO FOR OPPORTUNITY ZONES 1, 3 (2018), https://static1.squarespace.com/static/5d9f9365f67b454b1ce2dc2f/t/5e38ae218a999b24d895fe2e/1580772908835/New+AFA+Prospectus+Guide.pdf [https://perma.cc/N23K-3E5L].

104. Telephone Interview with Eric Burnette, Senior Policy Advisor, Louisville Forward (Nov. 20, 2019).

105. ACCELERATOR FOR AM., LOUISVILLE OPPORTUNITY ZONE PROSPECTUS: A PLATFORM FOR ACTION (2018) [hereinafter LOUISVILLE OPPORTUNITY ZONE PROSPECTUS], https://louisvilleky.gov/sites/default/files/louisville_forward/louisville_prospectus_version_13_11.5.2018.pdf [https://perma.cc/F9YU-SHQ5].

brief, Louisville's argument for why investors should inject capital there: it is an expanding city, with a diverse and growing economy, whose OZs were chosen "intentionally" to "maximize the impact of Opportunity Zone investment."[106]

The pages that follow the summary give an overview of how the OZ program functions and explain Louisville's assets in greater detail (with a focus on demographics and major industries). But the heart of the document is a neighborhood-by-neighborhood breakdown of Louisville's opportunity zones — with specific projects detailed on subsequent slides. Each project slide explains the neighborhood's assets, as well as tailor-made investment opportunities for investors to consider. These slides also include maps (termed "mental maps" by AFA), which show the various OZs, as well as "land use" and other "assets."[107] As an example, slide 29, titled "Central Business District Catalytic Investment: Louisville Gardens," describes a "[c]ity-owned, historic 6,000-seat performance venue," which is "[p]rimed for restoration as an arts and entertainment venue, convention facility, and mixed-use space, at an estimated cost of $65 million," and is "[l]ocated in the heart of downtown" near "10 new downtown hotels since 2009."[108] Immediately underneath this information, a box titled "The Opportunity" gives investors the hard sell: "City seeking development partner to create a new mixed-use facility" and "City offering other incentives and land."[109]

Louisville Forward released version two of the prospectus in late November 2019. Like its predecessor, this new version begins with an overview of the city's assets and makes a clear argument for investors to deploy capital there.[110] However, unlike version one, version two of the pitch deck includes an entire category of possible projects called "Projects with a High Social Return" in a section called "Louisville Priorities."[111] The deck identifies four types of such projects: "[s]mall businesses and start-ups," "[a]ffordable housing,"

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106. *Id.* at 2.

107. *See id.* at 6. This map was later made available as a standalone product. *Opportunity Zones — Public*, ARCGIS, https://www.arcgis.com/home/webmap/viewer.html?webmap=0d58a1018f4d46f8a0896cb1204960ec (last visited Mar. 22, 2020).

108. LOUISVILLE OPPORTUNITY ZONE PROSPECTUS, *supra* note 105, at 29.

109. *Id.*

110. *See generally* ACCELERATOR FOR AM., LOUISVILLE OPPORTUNITY ZONE DEAL BOOK (2019), https://louisvilleky.gov/sites/default/files/louisville_forward/louisville_oz_deal_book_11.26.2019.pdf [https://perma.cc/V787-Z8WD].

111. *Id.* at 12–13.

"[c]ommunity spaces and surrounding commercial uses," and "[f]ocus on tech."[112] It also pitches specific projects already in the development pipeline, which are looking to attract additional investment — like a company called "Weather Check," a black-owned business located in an OZ and part of the Y-Combinator incubation program in 2019.[113]

In addition to drafting and releasing this pitch book, Louisville Forward has used the city's informal power to attract investment in other ways. It, for instance, established a relationship with OneWest, a nonprofit development company, which purchased a large plot of land in the city with plans to develop it.[114] Additionally, the city partnered with the Louisville Urban League to help fund the construction of a large athletic facility called the "Track on Ali," located in an OZ.[115]

Finally, Louisville worked extensively with the Governance Project to develop a ready-made "plug-and-play" tool that will allow public officials to identify socially impactful OZ projects and then build out the kind of projections and deal documents which investors require when weighing the attractiveness of a potential investment.[116] The tool, which is sponsored by the MasterCard Center for Inclusive Growth, is named GroundUp; Governance Project's CEO Stephanie Copeland describes it as "Turbo Tax for Opportunity Zone deals": "[I]t asks a set of questions about the deal, and then auto-generates many essential deal documents."[117] The value of this sort of tool is its bridging of the gap between two communities whose partnership is essential for using OZs for impact: investors and public officials. Since "a big part of community development is figuring out the financing structure, this tool will give public officials more of an active voice in conversations with the investment community, in terms that investors are familiar with."[118]

Louisville's work to attract and funnel OZ investment has been constrained in two senses. The first is that Kentucky, under now-former Governor Matt Bevin, was largely unwilling to extend

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112. *Id.* at 13.
113. *Id.* at 17.
114. *Id.* at 19.
115. *Id.* at 20.
116. *See* Telephone Interview with Stephanie Copeland, *supra* note 98.
117. *Id.*
118. *Id.*

additional funding to incentivize investment.[119] While some states have proposed layering additional tax incentives on top of the OZ program, Kentucky has not yet adopted that approach.[120] Additionally, as the consequence of a decision made by the Kentucky Retirement Systems Board, which manages the state's public employee pension system, Louisville faces an increased pension obligation which amounts to "a looming budget hole over the next four years that will grow to roughly $65 million."[121] As a consequence, Louisville is unable to offer any additional economic incentives to OZ investors — which it might not have done even in an alternate fiscal reality in which its pension obligation had been lower.[122]

ii. Cuyahoga County, Ohio and National Work by the Kresge Foundation

One of the most demanding policy regimes developed so far to govern capital flows in the OZ space was created by the philanthropic sector and not by government. In May 2019, the Detroit-based Kresge Foundation announced a $22 million investment, with substantial restrictions, into two OZFunds: Arctaris Impact (based in Boston, Massachusetts) and Community Capital Management (based in Ft. Lauderdale, Florida).[123] These two funds were, according to the foundation, the first in the country to agree to "voluntary reporting,

119. *See* Telephone Interview with Eric Burnette, *supra* note 104. Although, concededly, it was one of the first 18 states to have its OZs certified. *See* Press Release, Team KY, Cabinet for Econ. Dev., Gov. Bevin: Kentucky Opportunity Zone Initiative Holds Promise of Economic Growth for Local Communities (Apr. 9, 2018), http://thinkkentucky.com/newsroom/NewsPage.aspx?x=04092018_Opportunity_Zones.html [https://perma.cc/WV6S-LV9T].

120. *See 2020 State Opportunity Zones Legislation*, NOVOGRADAC, https://www.novoco.com/resource-centers/opportunity-zones-resource-center/state-opportunity-zones-legislation [https://perma.cc/9NFX-97WZ] (last visited Mar. 22, 2020).

121. Darcy Costello, *Bevin to Louisville Mayor: How Could You Be 'Oblivious' to Pension Problem*, COURIER J. (Feb. 13, 2019), https://www.courier-journal.com/story/news/politics/metro-government/2019/02/13/kentucky-governor-bevin-calls-louisville-mayor-greg-fischer-oblivious-to-pension-problem/2859359002/ [https://perma.cc/9FT4-LP5U].

122. *See* Telephone Interview with Eric Burnette, *supra* note 104.

123. Press Release, The Kresge Found., Kresge Foundation Commits $22M to Back Arctaris, Community Capital Management Opportunity Zone Funds (Mar. 18, 2019) [hereinafter Kresge Foundation Press Release], https://kresge.org/news/kresge-foundation-commits-22m-back-arctaris-community-capital-management-opportunity-zone-funds [https://perma.cc/5H2N-LFPE] .

metrics and transparency measures."[124] Kresge and its staff chose to focus on OZ investing, particularly because of a perceived gap in regulation from government actors:

> [W]hen public policy has a gap . . . there's a moment for philanthropy to really do its job. That's what we have tried to do with Opportunity Zones, and we hope others in the philanthropic community will find unique ways to do the same in Opportunity Zones and in other places.[125]

Much of Kresge's funding comes in the form of an investment structure called principal protection, or "catalytic first loss capital" (CFLC).[126] Under this relationship, the Foundation will provide a kind of insurance to the investors in the OZFund, a guarantee that Kresge will bear the first losses — up to a certain threshold — if investments decline in value. The Global Impact Investing Network defines the concept this way: "CFLC aims to channel commercial capital towards the achievement of certain social and/or environmental outcomes . . . . [G]rants and guarantees provided expressly as CFLC are distinct because they always take the first loss . . . in the event of losses."[127]

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124. *Id.*

125. Joshua Pollard, *Driving Social Impact: 1-On-1 with Kresge Foundation on Opportunity Zones*, FORBES (June 7, 2019), https://www.forbes.com/sites/joshuapollard/2019/06/07/driving-social-impact-1-on-1-with-kresge-foundation-on-opportunity-zones/#2880db4e6f9a [https://perma.cc/ZHD6-HYXF].

126. *See* Kresge Foundation Press Release, *supra* note 123.

127. GLOB. IMPACT INVESTING NETWORK, CATALYTIC FIRST LOSS CAPITAL: ISSUE BRIEF 5 (2013) [hereinafter CATALYTIC ISSUE BRIEF], https://thegiin.org/assets/documents/pub/CatalyticFirstLossCapital.pdf [https://perma.cc/K459-JN5T]. The Global Impact Investing Network has identified several possible benefits of catalytic first loss capital.

> (1) Impact acceleration: By offering CFLC, Providers can typically attract greater amounts of capital towards a targeted impact than they could aggregate by utilizing their own funds alone, thus multiplying the scale of impact many-fold. (2) Resource optimization: By incenting commercial investors to explore a new market, providers can potentially demonstrate the market's long-term commercial viability, encouraging investors to continue to invest without credit enhancement. This allows Providers to channel their scarce resources towards issues and areas where the market case is not yet proven.
>
> (3) Better terms for Investees: By reducing the risk for Recipients, and by fostering greater competition in new financial markets, Providers can enable improved terms — such as lower cost of capital — for end Investees that are working on addressing important social and/or environmental problems.

Id. at 7.

Principal protection/CFLC is a form of credit enhancement — in the same family as letters of credit from a bank used on an LIHTC-funded affordable housing transaction or a Small Business Administration loan guarantee.[128] It is often provided by philanthropic organizations or governments as a means of attracting capital from investors who would otherwise perceive deals as too risky due to "a lack of information or track record given the novelty of either the market or a particular type of investment opportunity."[129]

For OZFunds like Arctaris, CFLC is more valuable than other incentives because of the funds' focus on investment in growth or mid-stage investing in businesses rather than investment in real estate.[130] State-level economic incentives like tax increment financing (TIF) or local incentives like accelerated zoning approval are far less important to OZFunds whose investments are not real estate-based.[131] In this instance, the Kresge Foundation has agreed that its contribution will insure a certain percentage of these two funds' investments in OZs around the country.

In return for this commitment, the OZFunds have agreed to abide by a strict set of criteria — far beyond the requirements established in the OZ legislation — which are codified as covenants.[132] The first metric Arctaris agreed to meet relates to scale: for every dollar of insurance provided by the Kresge Foundation, the fund has committed to raising $9 of additional capital.[133] The logic underlying

128. *Id.* at 3.

129. *Id.*

130. Interview with Jonathan Tower, CEO, Arctaris (Dec. 15, 2019. This was, after all, the original intent of the OZ program. *See, e.g.*, Sophie Quinton, *So Far, Real Estate Dominates a Tax Break Meant for Businesses*, PEW CHARITABLE TR. (June 12, 2019), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/06/12/so-far-real-estate-dominates-a-tax-break-meant-for-businesses [https://perma.cc/NH9U-QN4W] (pointing out that "[t]he incentive 'will unlock new private investment for communities where millions of Americans face the crisis of closing business, lack of access to capital and declining entrepreneurship,' said a bipartisan congressional group — Sens. Tim Scott, a South Carolina Republican, and Cory Booker, a New Jersey Democrat, and Reps. Pat Tiberi, an Ohio Republican, and Ron Kind, a Wisconsin Democrat — in announcing the idea").

131. *See* Telephone Interview with Stephanie Copeland, *supra* note 98.

132. Press Release, The Kresge Found., *supra* note 123 ("In the absence of a regulatory mandate, Arctaris and CCM have committed to making investments that reflect the stated social and community goals of the Opportunity Zones program and address unmet needs in under-resourced communities.").

133. Interview with Jonathan Tower, *supra* note 130; *see also* Press Release, The Kresge Found., *supra* note 123 ("Leveraging the Kresge guarantee, Arctaris plans to

this requirement is that the foundation wants to ensure that its investment would be paired with significant capital from the fund to reach as broad a scale as possible.

The second is an impact requirement. Arctaris has committed to making investments that are beneficial for neighborhoods: prioritizing affordable housing, “pathways to prosperity for residents of low-income communities,” and “investments in operating businesses that create quality jobs” — and also to forming “community advisory boards similar to those in the New Markets Tax Credit Program.”[134]

Third, Arctaris has committed to avoid net-negative investments, like those that create displacement, or non-productive investments, like self-storage facilities.[135] Finally, Arctaris has agreed to a set of transparency requirements, most notably, measuring and then disclosing the number of jobs created in each census tract by its investments.[136]

These principles are generally aligned with the U.S. Impact Investing Alliance framework referenced above. They also reflect the Kresge Foundation’s belief that since “the underlying legislation was passed without minimum transparency or reporting guidelines,” OZs present a “ripe opportunity for misuse.”[137] Arctaris views this investment from Kresge as having the potential to turbocharge its work: to create an “exponential” impact by demonstrating to other foundations, municipalities, counties, and states that this kind of investment is worth making. It also views the restrictions as very stringent: Jonathan Tower, Arctaris’s CEO, explained that these covenants will not disincentivize investment (otherwise the fund would never have agreed to them in the first place), but they do demarcate the outer boundary of the kind of “strings attached” that the fund would have accepted in exchange for CFLC.[138]

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launch a principal-protected Opportunity Zone fund with more than $500 million in initial capitalization from U.S. commercial banks, institutional investors, and family offices. Supplementing Kresge’s catalytic support, Arctaris expects to secure additional guarantees and grants from other foundations and state government economic development agencies. The Fund will make growth equity investments in small- to medium-sized enterprises involved in manufacturing, renewable energy, and telecom, as well as real estate infrastructure.”).

134. Interview with Jonathan Tower, *supra* note 130; *see* Press Release, The Kresge Found., *supra* note 123.

135. Press Release, The Kresge Found., *supra* note 123.

136. Interview with Jonathan Tower, *supra* note 130.

137. Press Release, The Kresge Found., *supra* note 123; *see also* Pollard, *supra* note 126.

138. Interview with Jonathan Tower, *supra* note 130.

One region which has followed the Kresge Foundation's lead is Cuyahoga County, Ohio, home to the city of Cleveland. Even before the Kresge Foundation named Arctaris a winner of its national OZ competition, the greater Cleveland area had already sought to market itself as an attractive destination for OZ investment and to channel that investment toward socially beneficial purposes, such as "jobs, training, education, quality affordable housing, increased access to broadband, public transportation and healthy-living environments."[139] In March 2019, the City of Cleveland and Cuyahoga County, in partnership with a collection of non-governmental organizations (NGOs), established an initiative called "Opportunity CLE" as the region's main vehicle for generating and funneling OZ investment toward the 64 OZs across the county.[140]

The initiative acknowledged in early press coverage that the OZ program is at risk of being abused — of becoming a "National Gentrification Fund."[141] In response, Opportunity CLE has taken a number of steps to restrict capital flows — first in the form of informal policymaking and networking. For instance, Opportunity CLE built and released a pitch deck similar to that of Louisville and seeks to connect investors with entrepreneurs eager for access to capital.[142] In partnership with the Urban Institute, the initiative is

139. Jordyn Grezelewski, *'The Floodgates Are about to Open': Cuyahoga County, Cleveland Leaders Unveil Opportunity-Zone Plan*, CLEVELAND.COM (Mar. 21, 2019), https://www.cleveland.com/news/2019/03/the-floodgates-are-about-to-open-cuyahoga-county-cleveland-leaders-unveil-opportunity-zone-plan.html [https://perma.cc/XK9X-SNKV].

140. *Id.*

141. *Id.*

142. *Id.*

> The first step is marketing the region, members said. The investment prospectus released Thursday pitches Greater Cleveland as a place where investment dollars can stretch further than they would elsewhere. The prospectus includes sections on each of the 11 districts and provides information about their assets, infrastructure, population and projects under development there, as well as a pitch for why investors should consider putting their money there. The 11 districts are: Downtown Cleveland, W. 25th-MetroHealth Corridor, Health-Tech Corridor, Opportunity Corridor, Glenville-Rockefeller Park Innovation District, Euclid/Collinwood Industrial Corridor, Outer Belt Development District, Aerozone Innovation Hub, Cuyahoga County Airport District, Transportation Boulevard Development District and Caledonia Park District.

Id. The selection of the zones themselves was not without controversy: "East Cleveland, the poorest city in Ohio, received no opportunity zones. County officials had recommended the tract containing General Electric's Nela Park campus, next door to Caledonia, but the state passed on it." Nick Castele, *Cuyahoga County Won Dozens of Opportunity Zones. Now What?*, IDEASTREAM (Dec. 10, 2018), also developing a "social impact scorecard," not yet rolled out, whose purpose is to identify those projects which are "the most socially positive" and to help those projects attract funding.[143]

Opportunity CLE received a boost in November of 2019 when the Ohio State Legislature passed, and Governor Mike DeWine signed, an additional state tax credit for OZs.[144] The "Ohio OZ Tax Credit" provides a nonrefundable, transferable credit equal to "10% of a taxpayer's qualifying investment in an Ohio qualified opportunity zone fund."[145] Similar to the federal OZ program, this additional incentive has very few restrictions: the credit tops out at $1 million per fiscal biennium per individual taxpayer, and the credit is capped at $50 million statewide per biennium.[146] Additionally, there is a geographic requirement: capital must be invested in "an Ohio QOF which is a qualified opportunity fund that holds 100 percent of its invested assets in qualified opportunity zone property situated in an Ohio opportunity zone."[147] However, the restrictions end there: the

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https://www.ideastream.org/news/cuyahoga-county-won-dozens-of-opportunity-zones-now-what [https://perma.cc/Y456-E4KC]. Although "out of the 320 census tracts nominated statewide, 213 did come from the poorest quarter of the state's census tracts, two thirds of them." *Id.*

143. *Opportunity CLE Must Follow through to Promote Socially Beneficial Investments in 64 Local Opportunity Zones: Editorial,* CLEVELAND.COM (Mar. 31, 2019), https://www.cleveland.com/opinion/2019/03/opportunity-cle-must-follow-through-to-promote-socially-beneficial-investments-in-64-local-opportunity-zones-editorial.html [https://perma.cc/5JR9-Z6SP]; *see also* Mark Opera, *Opportunity Zones Were Designed to Spur Investment in Poor Areas. Are They Doing the Job?*, FRESHWATER (Sept. 19, 2019), https://www.freshwatercleveland.com/features/oppzones091919.aspx [https://perma.cc/W8NY-VSF3] (noting that "[t]hough the so-called scorecard is still in its beta stage, [director of regional engagement at The Fund for Our Economic Future, Bradford] Davy is sure that if Opportunity CLE can make its usage necessary, it can curtail the building of projects clearly aiming to put more bucks in the investor's pocket. In fact, Davy says one of the heads of the Cleveland Rocks Climbing Gym, Kevin Wojton, was involved in interviews to shape the tool in the first place").

144. Jeremy Schirra & Dickinson Wright, *Ohio's 10% Investment Kicker: New Ohio Opportunity Zone Tax Credit Program*, JDSUPRA (Nov. 5, 2019), https://www.jdsupra.com/legalnews/ohio-s-10-investment-kicker-new-ohio-91298/ [https://perma.cc/5YMA-LDME].

145. *Id.*

146. *Id.*

147. *Id.* This should help ameliorate the loopholes created by the IRS's regulations.

> The legislation clarifies whether such fund investments are considered invested in the zone. For example, for qualified opportunity zone property that is qualified opportunity zone stock or partnership interest, the stock or interest is in the zone if during all the qualified opportunity fund's holding

tax credit imposes no additional geographic limitations and does not have community involvement, impact, or transparency requirements.

In the last year, both Cuyahoga County and the City of Cleveland — through the city's Chamber of Commerce and its development arm — have authorized substantial expenditures to partner with OZFunds, with the twin goals of bringing capital to the region and placing restrictions on that capital's use. In December 2019, the Cuyahoga County Council[148] approved $1.5 million in funding for Arctaris in the form of an Economic Development Loan, as part of an investment vehicle which will be partially guaranteed by the Kresge Foundation's award.[149] In return for favorable loan terms — a ten-year loan at 2% interest — the county has imposed a set of restrictions on the fund which layer on top of the Kresge Foundation's. According to the language of the resolution passed by the county, each proposed investment that Arctaris chooses is reviewable by the council "for social impact,"[150] which is defined as "creat[ing] well-paying jobs accessible to community residents," and "improve[ing] access to basic services."[151] The resolution obligates Arctaris to raise at least $8.5 million of investment on its own, for a total of $10 million in capital invested. Arctaris is also required to submit a report detailing "job creation and retention reporting" each quarter.[152] Finally, there are clear impact expectations written into the resolution's language: each project that receives an injection of

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> period for such stock or interest, the use of the corporation's or partnership's tangible personal property was in the designated zone.

Raquel M. Mazarin, *Ohio Governor Mike DeWine Signs FY 2020–21 Budget Bill*, 29 J. MULTISTATE TAX'N & INCENTIVES 27, 30 (2019).

148. CUYAHOGA COUNTY COUNCIL, http://council.cuyahogacounty.us/ [https://perma.cc/3R6F-VL6C] (last visited Apr. 4, 2020) (stating that "[t]he Cuyahoga County Council is the legislative body of Cuyahoga County government, made up of 11 elected representatives from across the County . . . . The Council makes policy decisions for the effective functioning of County government, and is a link between government agencies and citizens. It has legislative and taxing authority for the County, and is a co-equal branch of the County government with the executive branch. This form of government for Cuyahoga County was established in January 2011, replacing the three-member Board of County Commissioners, when the Charter form of government adopted by voters went into effect").

149. Courtney Astolfi, *Cuyahoga County Loans $1.5M to Support Manufacturing, Other Development in Low-Income Areas*, CLEVELAND.COM (Dec. 11, 2019), https://www.cleveland.com/news/2019/12/cuyahoga-county-loans-15m-to-support-manufacturing-other-development-in-low-income-areas.html [https://perma.cc/W35J-7NYG].

150. Cuyahoga Cty., Ohio, Res. R2019-0255 (2019).

151. *Id.*

152. *Id.*

capital from this new fund is expected to create "300 permanent jobs" within three years after its completion.[153] While these expectations are not explained in the resolution itself, the resolution is likely designed to prevent the county's investment from being used to finance projects which have only a short-term impact on job creation (generally in the form of construction jobs) and which are, as a result, considered socially undesirable.[154]

In addition to wanting to attract capital generally, part of the county's motivation for investing in Arctaris was the desire to revitalize its lagging manufacturing sector.[155] Manufacturing was once the lifeblood of the region's economy but declined precipitously during American deindustrialization in the second half of the twentieth century.[156]

There are encouraging signs of a manufacturing recovery, however, and regional officials are hopeful that OZs can help catalyze it. Northeast Ohio is home to 1200 manufacturing companies — 300 of which are located in OZs.[157] Ohio workers are employed in manufacturing at twice the national average and earn, on average,

153. *Id.*

154. Perhaps the clearest example is self-storage facilities, which some critics have characterized as "the epitome of development activity that carries . . . little economic benefit for residents of a distressed community." *Economics in Brief: Chris Christie Enters Opportunity Zone Investing*, NEXT CITY (May 10, 2019), https://nextcity.org/daily/entry/economics-in-brief-chris-christie-enters-opportunity-zone-investing [https://perma.cc/8YS5-XQMX]. Proposed OZ reform legislation introduced jointly by Senator Ron Wyden (D-OR) and House Majority Whip Jim Clyburn (D-SC) agrees: it would "limit investors' ability to claim tax breaks for investments such as luxury apartment buildings, self-storage facilities, and sports stadiums, which wouldn't likely create significant benefits for low-income residents." Samantha Jacoby, *Bills Aim to Curb Opportunity Zone Abuses*, CTR. ON BUDGET & POL'Y PRIORITIES (Nov. 18, 2019, 3:00 PM), https://www.cbpp.org/blog/bills-aim-to-curb-opportunity-zone-abuses [https://perma.cc/6PNN-L6JJ].

155. *See* Astolfi, *supra* note 149.

156. MICHAEL SHIELDS, POLICY MATTERS OHIO, MANUFACTURING A HIGH-WAGE OHIO 1 (2018), https://www.policymattersohio.org/files/research/manufacturingohio.pdf [https://perma.cc/3UVE-EKND] (asserting that "Ohio's growth as a state is inextricable from the growth of the manufacturing industries that built its communities. Deindustrialization has left once-prosperous communities across the state poorer, weaker, and in some cases smaller. By 2016, Ohio had lost half its peak manufacturing jobs, and median household income trailed the nation's by $5,300").

157. Kim Palmer, *Arctaris Impact Investors Aims to Bolster Financing for Area Manufacturers*, CRAIN'S CLEVELAND BUS. (Nov. 24, 2019), https://www.crainscleveland.com/government/arctaris-impact-investors-aims-bolster-financing-area-manufacturers [https://perma.cc/NT72-ERL7].

$11,000 more than workers in other sectors.[158] The manufacturing industry contributed $106 billion to the local economy in 2016, which was almost 20% of the state's entire economic output.[159] However, structural problems threaten to stunt manufacturing revitalization: manufacturing firms are generally undercapitalized because they do not generate enough revenue to attract investment from banks and are often overly reliant on loans from the Small Business Administration.[160] Demographics compound this problem: "Over the next five years . . . 70% of those owners of small to midsize companies are looking to sell their business and are in need of buyers."[161] OZFunds could be a natural solution to this problem. On the investor side, they employ "patient capital," which is by design a longer-term investment; on the investment side, manufacturing is similar to real estate in that it is less mobile.[162] This potential is at the heart of Arctaris's partnership with Cuyahoga County; in an interview with *Cleveland.com*, a principal from the firm explained that manufacturing would be the focus of Arctaris's investment in the region.[163] This kind of relationship is one of the most exciting policy innovations in the OZ space: Arctaris has replicated this kind of model across the country — local collaboration, first loss capital protection, and a strict set of guidelines about where and how capital can be invested.

iii. Washington, D.C.

While Louisville represents an "informal policymaking/networking" approach to OZ investment and Cuyahoga County illustrates the power of the philanthropic sector to generate policy innovations in the OZ space, Washington, D.C. exemplifies how municipal governments can use already-existing tools to control OZ investment using a structured economic development process. The microeconomic climate in the District helps explain why — D.C. has gentrified at a dizzying pace, particularly over the course of the last decade. According to a 2019 report from the National

158. SHIELDS, *supra* note 156, at 1.
159. *Id.*
160. Palmer, *supra* note 157.
161. *Id.* (continuing that "[i]t is a baby boomer thing . . . . Obviously in Cleveland, you are dealing with a lot of third- and fourth-generation businesses, and the prospect that the family is going to step in to take over is unlikely" (internal quotations omitted)).
162. *Id.*
163. Astolfi, *supra* note 149.

Community Reinvestment Coalition using the most recent data available, 20,000 black D.C. residents were displaced between 2010 and 2013.[164] Of the major American cities analyzed in the study, "Washington, D.C., was the most gentrified city by percentage of eligible neighborhoods that experienced gentrification."[165] Investors' interest has not slowed since the TCJA was enacted. In the spring of 2019, the commercial real estate analytics company Yardi Matrix named the District the most attractive region for OZ investment on the East Coast.[166]

As a result of this context, and the sheer scale of development, local officials were less concerned about attracting investment dollars and more concerned about unintentionally accelerating the pace of displacement: "there was more of a sense in D.C. that the city could steer the ship and be more selective in terms of what zones it designated and tailoring those investments through public resources including land or subsidies."[167]

This started with OZ selection: the process of choosing the District's OZs, to begin with, was run through the Office of the Deputy Mayor for Planning and Economic Development (DMPED),

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164. JASON RICHARDSON ET AL., NAT'L CMTY. REINVESTMENT COAL., SHIFTING NEIGHBORHOODS: GENTRIFICATION AND CULTURAL DISPLACEMENT IN AMERICAN CITIES (2019), https://ncrc.org/gentrification/ [https://perma.cc/DPH5-MNUC]; *see also* Michael Quander, *Cost of Living Contributes to 'Intense' Level of Displacement in DC*, WUSA9 (Nov. 11, 2019), https://www.wusa9.com/article/features/producers-picks/gentrification-and-displacement-high-in-dc/65-4543c266-350b-456e-91ab-743b6a108c4d [https://perma.cc/LH7A-7BEF].

165. Quander, *supra* note 164.

166. Erika Morphy, *DC Is the Most Attractive Opportunity Zone on the East Coast*, GLOBEST.COM (Mar. 25, 2019), https://www.globest.com/2019/03/25/dc-is-the-most-attractive-opportunity-zone-on-the-east-coast/?slreturn=20200003153652 [https://perma.cc/F44T-KPED] (explaining that "[i]t used such indicators as GDP and population growth, number of eligible OZs, and poverty rates in each area, attributing points for each of these and calculating the total. The data for the indicators came from The US Census Bureau, the Bureau of Labor Statistics and the US Department of Treasury"). Perhaps not so surprisingly, the methodology underlying this ranking system completely ignored social impact. In actuality, it *penalized* OZs for having higher poverty rates: "[f]or the poverty rate indicator, between 0 and 15 points were awarded in inverse proportion, with a lower poverty rate leading to more points." Diana Sabau, *Study: Top Counties for Opportunity Zone Investment*, COMMERCIALCAFE (Mar. 18, 2019), https://www.commercialcafe.com/blog/top-counties-opportunity-zone-investment/ [https://perma.cc/3X9B-A2KT].

167. Oscar Perry Abello, *Now's the Opportunity for Cities to Work on Their Zone Defense*, NEXT CITY (July 25, 2019), https://nextcity.org/daily/entry/nows-the-opportunity-for-cities-to-work-on-their-zone-defense [https://perma.cc/92YR-YFTL].

which continues to house the District's OZ work. Since D.C. is not a state, the TCJA gave Mayor Muriel Bowser the ability to submit OZs to the IRS in the same way as governors; DMPED was highly intentional about selecting zones with "demonstrated need" that had "investment opportunities that could be paired with complementary incentives to benefit residents."[168] Ultimately, the IRS certified 25 zones total across the District, with the majority concentrated east of the Anacostia River in historically poorer Wards 7 and 8.[169]

The District also received a major boost from the philanthropic sector: in September 2019, the Rockefeller Foundation announced that D.C. had been chosen to participate in its "Opportunity Zone Community Capacity Building Initiative," which meant the Foundation would fund technical assistance through LISC to "build a pipeline of projects and small business investments that move beyond the early stages of planning and attract private investment in economically-distressed areas."[170] Mayor Bowser designated Sharon Carney, who was already working at DMPED, to coordinate Opportunity Zone efforts. Mayor Bowser's stated aim for implementing the OZ program locally is to maximize benefits to current residents; Carney explained that the District has approached this in several ways: one, by providing support and resources for community-based stakeholders (including projects and businesses) to learn about OZ and connect with potential investment opportunities; and two, by helping investors align with community priorities and

168. Solomon Greene, et al., *Opportunity Zoning: An Inside Look at How Three Cities Are Aligning a Tax Incentive with Land-Use Plans to Revitalize Neighborhoods*, URB. INST. (July 25, 2019), https://www.urban.org/features/opportunity-zoning [https://perma.cc/FU28-JJVD].

169. *Designated Opportunity Zones in DC*, OFF. DEPUTY MAYOR FOR PLAN. & ECON. DEV. (2018), https://dmped.dc.gov/sites/default/files/dc/sites/dmped/publication/attachments/OZ_Map%2BTable_for_Print_logo_0.pdf [https://perma.cc/L9MP-7QP8]; *see also* Martin Austermuhle, *Investors and Developers Can Benefit from Opportunity Zones in D.C., but Will Residents?*, WAMU (Sept. 18, 2019), https://wamu.org/story/19/09/18/investors-and-developers-can-benefit-from-opportunity-zones-in-d-c-but-will-residents/ [https://perma.cc/A364-WK3L].

170. Press Release, The Rockefeller Found., The Rockefeller Foundation Awards Grants to Fuel Plans for Equitable Investment in Opportunity Zones in Washington, DC, Oakland, Dallas, and St. Louis (Sept. 6, 2019), https://www.rockefellerfoundation.org/about-us/news-media/rockefeller-foundation-awards-washington-dc-oakland-dallas-st-louis-grants-fuel-plans-equitable-investment-opportunity-zones/ [https://perma.cc/6ACV-TX6J]. This also includes two AmeriCorps VISTA staff, who will serve as community engagement specialists. *Id.*

discover resources that can help generate benefits for communities.[171] In addition, the District works to align OZ investment with the structures that the city already has in place for managing development.[172]

The first of these structures pre-dates the OZ program by four decades: D.C.’s Advisory Neighborhood Commission (ANC) system enacted in 1976. The ANC system is a feature of D.C.’s Home Rule Charter: locally elected commissioners serve two-year terms as the “official voice in advising District government . . . on things that affect their neighborhoods.”[173] While not obligated to follow the recommendations of ANCs, agencies are required by law to assign them “great weight” and are statutorily barred from taking “any action that will significantly affect a neighborhood” without “giving the affected ANCs 30 days advance notice.”[174] In effect, the ANC system can act as a check against socially undesirable or net-negative OZ investment and, at minimum, provides local stakeholders — who are the closest to the ground — a voice in the development process.

The second is zoning-related. In late 2019, the D.C. government completed an update of the city’s Comprehensive Plan, since, “in its current form, which was approved in 2006, the Comp Plan does not sufficiently address the District’s long-term needs around housing, equity, resilience, and public resources.”[175] Carney noted the importance of such structures – including District plans and formalized community input mechanisms – in guiding OZ investments.[176] In recent years, the District has been amending its Comprehensive Plan in consultation with tens of thousands of District residents through community engagement.[177] The District’s Comprehensive Plan serves as the guide for long-term development and land use in the District and, as such, influences zoning and all

171. Interview with Sharon Carney, Chief Opportunity Zone Officer, Office of the D.C. Deputy Mayor for Planning and Econ. Dev. (Nov. 14, 2019).

172. *Id.*

173. *Advisory Neighborhood Commissions: About ANCs*, DC.GOV, https://anc.dc.gov/page/about-ancs (last visited Mar. 17, 2020).

174. *Id.* (“[D]etailing that [t]his includes zoning, streets, recreation, education, social services, sanitation, planning, safety, budget, and health services.”).

175. Press Release, Office of the Mayor of Wash., D.C., Bowser Administration Extends Public Review Period for Comprehensive Plan (Dec. 16, 2019), https://plandc.dc.gov/sites/default/files/dc/sites/Comprehensiveplan/page_content/attachments/PRESS%20RELEASE%20Comp%20Plan%20Extension_Dec2019_0.pdf [https://perma.cc/2DUM-HUM9].

176. Interview with Sharon Carney, *supra* note 171.

177. *Id.*

projects, regardless of source of financing.[178] As OZ investment continues to flow into the District, "the city is tracking and reviewing proposals for discretionary development and map amendments in Opportunity Zones to ensure that proposed projects align with existing plans and provide benefits to the surrounding community."[179]

Mayor Bowser has been clear that one of the highest priorities for her second term in office is the development of more affordable housing in the District; the city government is working to use the OZ program to achieve that goal. This past spring, Mayor Bowser announced a $24 million commitment to fund projects in D.C.'s OZs, which "support affordable housing, workforce development, and the growth of small businesses."[180] This coincided with an announcement earlier the same month, that the Mayor was proposing an additional tax on commercial property sales[181] to increase the city's affordable housing trust fund substantially; in May, the D.C. City Council enacted a modified version of that tax into law.[182]

In addition to using tax revenue to incentivize affordable housing development in OZs, D.C. has another tool at its disposal: the large amount of publicly-owned land in the District, which the government can use as an incentive for investors.[183] Essential to catalyzing any OZ deal is the concept of "de-risking" it for the OZFund contributing the capital — which looks different depending on whether the investment is a piece of real estate to be developed or a

178. *Id.*

179. Greene et al., *supra* note 168.

180. *Opportunity Zones in Washington, DC*, DC.GOV, https://dmped.dc.gov/page/opportunity-zones-washington-dc (last visited Mar. 17, 2020) [https://perma.cc/X7UP-EXVN].

181. Jon Banister, *Bowser Unveils New CRE Tax Plan to Build Affordable Housing*, BISNOW (Mar. 19, 2019), https://www.bisnow.com/washington-dc/news/affordable-housing/bowser-aims-to-grow-affordable-housing-fund-with-tax-on-commercial-property-sales-98056 [https://perma.cc/RJ2K-PACX].

182. Alex Koma, *D.C. Council Signs off on New Budget Full of Tax Changes, More Funding for Housing Programs*, WASH. BUS. J. (May 28, 2019), https://www.bizjournals.com/washington/news/2019/05/28/d-c-council-signs-off-on-new-budget-full-of-tax.html [https://perma.cc/3EDZ-NXK7].

183. Greene et al., *supra* note 168. "The city is also contributing public land and financing in these areas, which can help ensure that new projects will provide job opportunities for local residents and businesses through DC's first source hiring and small business contracting requirements." *Id. See also* Cheryl Cort, *Public Land Deals Give Hot Neighborhoods Affordable Housing*, GREATER GREATER WASH. (June 4, 2012), https://ggwash.org/view/27915/public-land-deals-give-hot-neighborhoods-affordable-housing [https://perma.cc/SCP8-RHMQ].

business-seeking venture capital funding.[184] While this tool is still in its early stages, the use of public land for OZ development holds tremendous promise: if the city already owns a piece of property and can contribute it to an OZ transaction, that both lowers the risk inherent in the deal (by removing the need to purchase the property in the first place) and gives the city enormous leverage in dictating what kind of project will be built.[185]

Finally, the District has created a number of policy initiatives that fall into the "informal policymaking" category: it created a network of professionals (like lawyers and accountants) called the "OZ Community Corps" that has agreed to provide pro bono services to District residents, small businesses, and nonprofits seeking to start projects — or attract investment — in OZs.[186] Also, in July 2019, it launched an "Opportunity Zone Marketplace," a platform for investors to use to find OZ-eligible projects; projects on the marketplace site must meet one of the criteria established by the city for projects that are socially beneficial.[187]

IV. ANALYSIS AND EVALUATION OF OPPORTUNITY ZONE PROGRAMS

The case studies discussed in Part III represent a range of different policy responses to the OZ Program across a spectrum, from informal government policy to formal policymaking.[188] The ultimate yardstick for judging the utility of any of these methods will be their effect: do they attract OZ investment? And even more crucially, does that

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184. *See* Telephone Interview with Stephanie Copeland, *supra* note 98.

185. For an analogous, though not OZ-related, project illustrating this principle, see Elena Knopp, *As Bayfront Master Developer, Jersey City Can Call Shots*, NJBIZ (July 9, 2018), https://njbiz.com/as-bayfront-master-developer-jersey-city-can-call-shots/ [https://perma.cc/4RK3-57DA].

186. *Become a Service Provider: OZ Community Corps*, GOV'T D.C., https://ozmarketplace.dc.gov/pages/community-corps-service-providers [https://perma.cc/W28U-T8XW] (last visited Apr. 4, 2020).

187. Press Release, Office of the Deputy Mayor for Planning & Econ. Dev., Mayor Bowser Hosts Fifth Annual March Madness Featuring Senator Scott and Congresswoman Norton to Highlight Opportunities for All (Mar. 26, 2019), https://dmped.dc.gov/release/mayor-bowser-hosts-fifth-annual-march-madness-featuring-senator-scott-and-congresswoman [https://perma.cc/39DN-62LL].

188. Of course, one possible response not considered here is to ban OZ investment entirely, or to place a moratorium on their use, which Boulder, CO adopted and then reversed. *See* Sam Lounsberry, *Boulder Council Lifts Opportunity Zone Development Moratorium*, DAILY CAMERA (Oct. 16, 2019), https://www.dailycamera.com/2019/10/16/boulder-council-lifts-opportunity-zone-development-moratorium/ [https://perma.cc/KKQ6-B2AJ].

investment catalyze the kind of economic development that lifts low-income communities out of poverty, or does it simply act as a tax giveaway for the rich on the investor side while simultaneously accelerating gentrification and displacement on the community side?

It will be years before those questions are answered or are even answerable. However, since the OZ program is now two years old, the IRS regulations have been finalized, and OZFunds have raised and deployed several billions of dollars in capital, we can draw some preliminary conclusions about state and local action. Accordingly, this Part evaluates the policies articulated above and suggests a course of action for state and local governments, based on the findings in Part III and also on a set of tools traditionally in the local government toolkit.

A. Evaluation

In the spring of 2019, the trade publication *Institutional Investor* published an extremely well-sourced article titled, "Is Anyone Actually Investing in Opportunity Zone Funds?" Its answer, in short, was "not really," or at least, "not to the extent the investment community thought they would."[189] One challenge the article highlights is the extended lock-up period: it quoted one fund manager who said that OZs are "a longer-term investment that takes more consideration before pulling the trigger."[190]

But perhaps a more fundamental challenge to using OZs for impact is the uphill battle of changing "operating norms": since capital tends to follow pre-set channels, the default position of investors looking at OZs is to do what they have always done — find the safest possible investment, whether or not it is going to improve outcomes for poor neighborhoods and their residents; if no safe investments are readily apparent, investors will stay away.[191] And so a crucial role that state and local governments can play in the OZ space is to help solve this coordination problem: to help bureaucrats and investors speak the

189. *See* Alicia McElhaney, *Is Anyone Actually Investing in Opportunity Zone Funds?*, INSTITUTIONAL INV. (May 23, 2019), https://www.institutionalinvestor.com/article/b1fjptxryzv07y/Is-Anyone-Actually-Investing-in-Opportunity-Zone-Funds [https://perma.cc/M4WJ-CBW4]. Though it is worth noting that there was a huge influx of capital to OZFunds in the closing weeks of 2019. *See* Michael Novogradac, *Opportunity Zone Resource Center*, NOVOGRADAC (Jan. 8, 2020), https://www.novoco.com/notes-from-novogradac/opportunity-funds-listing-shows-strong-increase-investment [https://perma.cc/5AD8-TLC8].

190. McElhaney, *supra* note 189.

191. *See* Telephone Interview with Stephanie Copeland, *supra* note 98.

same language, to identify worthwhile investments by engaging with communities, and to stop unproductive investments. Some OZFunds will seek out socially beneficial projects and invest in them on their own, motivated simply by a desire to create impact.[192] But without strong participation from government, most funds likely will not.

Knowing what we know now — that the scale of OZ investment is significant, though far short of initial predictions[193] — a central challenge has emerged: state and local actors need to walk a fine line between attracting investment on the one hand while simultaneously setting up guardrails to direct capital toward worthwhile projects and discourage investment in projects that are either net-negative or which will push out longtime residents (especially residents from historically marginalized communities). These goals are not diametrically opposed, but they are in tension with one another: advertise OZ-eligible investments too heavily (and layer on too much public money in incentives) and governments risk accelerating displacement and gentrification. However, if state and local actors create too many guardrails — in a way that is perceived as anti-investment — they will scare away investors altogether and lose out on the opportunity to inject capital into places that need it badly.

Overall, state and local governments should take three affirmative steps to attract and direct OZ funding for impact in order to walk the fine line described above. First, they should use informal policymaking power to identify and then advertise socially impactful projects. Next, they should craft a package of incentives or capital unique to their local context, though with extensive strings attached. Finally, they should reserve the power to ward off damaging investments. These three policy prescriptions are designed to help government officials — largely in the community economic development space — strike an appropriate balance.

The first step that state and local governments should take is to create marketing materials and pitchbooks similar to the one the City of Louisville built with help from Bruce Katz and Accelerator for America.[194] That process ought to begin by actively engaging community stakeholders in a conversation about where investment would be most impactful. Cities like Washington, D.C. (or New York

192. *See id.*

193. As of summer 2020, when this Note went to press, the most recent data available from Novogradac showed that roughly $4.46 billion had been invested in OZFunds, far short of initial expectations. *See* Novogradac, *Opportunity Funds Listing*, *supra* note 22.

194. *See supra* Section III.C.

with its Community Board system) which already have a mechanism in place to "encourage and facilitate the participation of citizens within City government," are at a natural advantage, though lacking such a system is by no means an insurmountable roadblock.[195] Lining up projects for investors provides a starting point for a conversation about where investment can do the most good as well as generate the most return. Governments should also pay very close attention to the Governance Project's "Plug-and-Play" tool when it is released, since it can go a long way toward making deals more attractive.[196]

Another trend which has emerged from the constellation of state and local OZ early adopters is that many of the most successful regions, which are generating investment and placing meaningful restrictions on it, have adopted a "carrot and stick" approach, under which they offer capital or an additional incentive in exchange for restrictions. And so, the second step that state and local governments should take is to follow this lead.

In doing so, they should seek to craft a package of incentives that is reflective of the local economic context. For instance, there is a crucial distinction between the types of incentives that are appealing to funds that invest in real estate projects and funds that invest venture capital dollars at the seed or the growth stages — in other words, in operating businesses. Much of the OZ coverage in the national press, particularly the most controversial coverage, has focused on real estate projects. In reality, many of the OZ program's creators, and its highest-profile advocates, now argue that operating businesses should be the real focus of investment moving forward since they can be more impactful and since the abuse potential may be lower.[197]

For OZFunds investing in real estate, the package of tax incentives that many states have proposed — and some have enacted — might

195. *Community Boards Explained*, NYC.GOV, http://www.nyc.gov/html/qnscb1/html/explained/explained.shtml [https://perma.cc/M4FV-S2S6] (last visited Apr. 4, 2020).

196. *See* Telephone Interview with Stephanie Copeland, *supra* note 98.

197. *See* Matthew Rothstein, *Real Estate Is Not the Heart of the Opportunity Zone Program*, BISNOW (June 30, 2019), https://www.bisnow.com/national/news/opportunity-zones/opportunity-zones-operating-business-investment-focus-treasury-99674 [https://perma.cc/K9WZ-4VVX].

> Please remember that we're all dealing with real estate, while the regulations were meant for businesses and jobs, jobs, jobs," Friedman said. "If everyone [just] builds real estate, we're going to have all kinds of stranded real estate in this country . . . . The corporations have to go to OZs, which they will because the advantages [for them] are unbelievable.

Id. (internal quotations omitted).

be impactful.[198] One tool which could help incentivize targeted real estate development in OZs is for states and municipalities to help lower the cost basis of development: first, by providing access to cheap debt, and also by de-risking the development cycle.[199] Washington, D.C.'s commitment to provide $24 million in funding for affordable housing in OZs is a great example of the former — more states and cities should follow its lead. To de-risk development, state and local governments should also offer expedited zoning approval for OZ investments that are determined to offer meaningful community benefits.[200]

However, expedited zoning approval, or additional tax incentives, are unlikely to be effective for OZFunds investing in operating businesses. On those kinds of deals, operating businesses may present higher risks if they lack collateralized real estate assets.[201] The most impactful step that state and local governments can take to attract and direct these investment dollars is likely to offer catalytic first-loss capital. Since venture capital as an asset class is risky, a priority for OZFund managers is to minimize or eliminate downside risk.[202] States and municipalities who want to use OZs for impact can maximize their influence and also scale up investment dollars by providing this sort of protection for investors.

Whether they offer incentives in the form of tax benefits, accelerated zoning approval, or catalytic first-loss capital, state and local governments should attach significant restrictions — in the form of legally binding covenants — that require community engagement, transparency, scale, and impact. The Kresge Foundation's work is a terrific model; the only logical criticism that can be leveled against it is that its scale is simply too small to keep pace with net-negative investment from OZFunds who are not concerned with social impact at all. The philanthropic sector — and state and local governments — should invest more dollars in the sort of first-loss capital that Kresge allocated and which localities like Cuyahoga County then turbocharged with additional capital. The good news is that many of

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198. *See, e.g.*, Novogradac, *State, Local Governments*, *supra* note 23.

199. *See* Telephone Interview with Stephanie Copeland, *supra* note 98.

200. *See, e.g.*, *Opportunity Zones 101*, LOC. INITIATIVES SUPPORT CORP., https://www.lisc.org/our-resources/resource/opportunity-zones-101 [https://perma.cc/GSQ7-8Z7U] (last visited Apr. 4, 2020). "Finally, to the extent these are going to be large scale investments, local zoning and approval processes would probably be triggered, which hopefully will offer an opportunity for community engagement." *Id.*

201. Interview with Jonathan Tower, *supra* note 130.

202. *Id.*

the brightest minds in the community economic development space[203] have already done the hard work of clarifying what kinds of additional restrictions on OZ investment would be impactful, and that those restrictions are being implemented around the country. In other words, the investment and philanthropic communities have found an idea that works — catalytic first loss capital paired with robust restrictions; the next step is to expand that model before it is too late.

Finally, state and local governments should enact policies to blunt the impact of damaging OZ investment. Washington, D.C. is a terrific example of the ways localities that already have strong laws regulating development can enmesh OZs within that statutory framework.[204] Regions without a similar framework to Washington, D.C.'s should enact one, and should aim to deploy the wide range of policy tools available to restrict or encourage development, up to and including enacting a short-term ban on the construction of self-storage facilities, or re-zone neighborhoods where developers have proposed multifamily condo construction. Even if the overall impact of OZs ends up being significantly smaller than expected, governments can and should use local regulatory power to push capital toward social impact.

CONCLUSION

When asked what he thought of the French Revolution, Chinese Premier Zhou Enlai is reported to have said that it was "too early to say."[205] The same can certainly be said of the OZ program and of the policy moves that governments have engineered to respond to it.

Some commentators have argued that state and local action to mold the OZ initiative is unwarranted.[206] It does seem as though the program will be smaller in scope than originally envisioned. But still, the threat of unchecked capital is very real, especially in rapidly developing and gentrifying communities. And there is also a very real

203. *See Community Partners*, *supra* note 77; *see also Toolkit for Maximizing the Impact of Opportunity Zones*, *supra* note 92.

204. *See supra* Section III.C.iii.

205. *Not Letting the Facts Ruin a Good Story*, S. CHINA MORNING POST, https://www.scmp.com/article/970657/not-letting-facts-ruin-good-story (last visited Apr. 4, 2020). Although he was likely referring to the 1968 civil unrest in France. *Id.*

206. Michael Mazerov, *Too Soon for States to Consider "Opportunity Zone" Tax Breaks*, CTR. ON BUDGET & POL'Y PRIORITIES (May 1, 2019, 12:45 PM), https://www.cbpp.org/blog/too-soon-for-states-to-consider-opportunity-zone-tax-breaks [https://perma.cc/9GQ9-X85Y].

possibility that, in the wake of the coronavirus pandemic and the recession that will almost certainly ensue,[207] policymakers will consider enacting a variant of the OZ program as part of a package of long-term relief or might even simply expand the original program. Furthermore, there are reasons to believe that partnerships between government and OZFunds can create scale, impact, transparency, and community input. More state and local governments should follow suit. Or as Warren Buffett once observed, "Big opportunities come infrequently. When it's raining gold, reach for a bucket, not a thimble."[208]

207. Peter S. Goodman, *Why the Global Recession Could Last a Long Time*, N.Y. TIMES (Apr. 1, 2020), https://www.nytimes.com/2020/04/01/business/economy/coronavirus-recession.html [https://perma.cc/B9V9-C34V].

208. Letter from Warren Buffet, CEO, Berkshire Hathaway, Inc., to the Shareholders of Berkshire Hathaway, Inc. 15 (Feb. 26, 2010), http://www.berkshirehathaway.com/letters/2009ltr.pdf [https://perma.cc/JN5R-UE97].