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MADE IN AMERICA, MADE IN OPPORTUNITY ZONES

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MADE IN AMERICA, MADE IN OPPORTUNITY ZONES

*Marie Sapirie**

At its inception, the Opportunity Zone tax regime was advertised as a way to bring economic renewal to the residents of low-income communities around the country by giving taxpayers with capital gains an incentive to invest them in specific economically struggling areas in exchange for deferral of capital gains taxes. Its adoption in the Tax Cuts and Jobs Act of 2017¹ marked the beginning of a large-scale experiment in federal place-based tax initiatives that is now at a potential inflection point. The Biden administration's aspiration to "ensure the future is 'made in all of America' by all of America's workers"² provides an opening for making changes to the program that secure genuine benefits for existing residents of Opportunity Zones, as well as the taxpayers who utilize the tax incentive.

This Article will review the potential application of the "Made in All of America" plan to Opportunity Zones, with a focus on how the tax incentive can be reconfigured to support manufacturing efforts within Opportunity Zones, increased employment and business-ownership opportunities for current residents, and environmental preservation. Place-based tax programs, like Opportunity Zones, will be successful if they result in tangible improvement of the targeted locations for the current residents, and the design parameters for them should clearly reflect this objective, as well as give local residents pre-investment input into the development of their communities.

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¹ Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 13823, 131 Stat. 2054, 2183-88 (2017) (codified at I.R.C. §§ 1400Z-1, -2).

² *The Biden Plan to Ensure the Future is "Made in All of America" by All of America's Workers*, BIDEN HARRIS, <https://joebiden.com/made-in-america/> (last visited Dec. 8, 2021) [hereinafter BIDEN HARRIS].

Although the foundational statute and regulations of the Opportunity Zone regime are largely focused on the requirements for investors to reap the benefits of the tax incentives offered by the program, the dual—but more important—purpose is to support the residents of low-income areas around the country with increased opportunities for economic advancement and strengthened local communities. The twin purposes of the program are common to the types of place-based tax policies that the federal government has enacted to date,³ but the advent of the Opportunity Zone program in the Tax Cuts and Jobs Act marked the beginning of a large-scale experiment in federal place-based tax initiatives.⁴

That experiment is now at a potential inflection point. Following the completion of final regulations in January 2020⁵ the implementation piece of the Opportunity Zone program is now solidly in place. As investments in Qualified Opportunity Funds and Opportunity Zone-investment-backed projects have increased, the market is poised to potentially begin shifting from being overwhelmingly concentrated in real estate development into greater investments in operating businesses.⁶ Operating businesses are critical to the long-term success of the program because they are where increased economic development and job creation is most likely to occur,⁷ so this shift, to the extent that it happens, is essential to fulfilling the local community support purpose of the program.

³ See, e.g., CONG. RSCH. SERV., R41639, EMPOWERMENT ZONES, ENTERPRISE COMMUNITIES, AND RENEWAL COMMUNITIES: COMPARATIVE OVERVIEW AND ANALYSIS 6 (2011) [hereinafter CONG. RSCH. SERV., R41639].

⁴ *Opportunity Zones: A New National Community Investment Program That Connects Private Capital with Low-Income Communities Across America*, ECON. INNOVATION GRP., <https://eig.org/opportunityzones/facts-and-figures> (last updated Dec. 2020) (illustrating that Opportunity Zones include over 8,700 census tracts, totaling 31.5 million residents). See also STAFF OF JOINT COMM. ON TAX'N, 116TH CONG., JCX-23-20, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2020–2024, at 30 (2020) (illustrating that the revenue cost of the Opportunity Zone program between 2020 and 2024 is estimated to be \$8.2 billion).

⁵ See Investing in Qualified Opportunity Funds, 85 Fed. Reg. 1866 (Jan. 13, 2020) (promulgating final regulations of I.R.C. § 1400Z–2 to implement the Tax Cuts and Jobs Act).

⁶ See Mark O'Meara, *Market Expects Pipeline Growth, More Regulations in the Near Future for OZs*, 12 NOVGRADAC J. TAX CREDITS 1, 3 (2021), <https://www.novoco.com/periodicals/articles/market-expects-pipeline-growth-more-regulations-near-future-ozs>.

⁷ See, e.g., Marie Sapirie, *Just How Taxpayer-Friendly Are the New O-Zone Rules?*, 163 TAX NOTES 806 (May 6, 2019).

This inflection point in which investments move from furthering real estate development to furthering long-term job creation is specific to the Opportunity Zone program, and likely to most place-based tax policies. If the first stage of the policy's effects post-final regulations is dominated by real estate development, as has been observed so far,⁸ the second stage must come with an increasing number of new jobs and firms operating in the zones. This apparently biphasic post-regulatory process is an unusual feature. Unlike most tax incentives, the Opportunity Zone program provides a benefit for activities that will mostly happen sequentially—construction and then operating business formation and hiring. The nature of the program, and most place-based tax policies, is that the non-tax community benefits it is supposed to produce will necessarily unfold over time.⁹ The extent to which the second phase of the two-phase process happens is the experimental component of the Opportunity Zone program. The question now is whether and how the operating business development phase takes off and produces the hoped-for jobs and opportunities for zone residents.

Concurrent with the partial maturation of the Opportunity Zone program, there is a new presidential administration with a new agenda for providing economic support to low-income neighborhoods like the ones encompassed by the Opportunity Zone program.¹⁰ The Biden administration's aspiration to "ensure the future is 'made in all of America' by all of America's workers" provides an opening for making changes to the program that secure genuine benefits for existing residents of Opportunity Zones, as well as the taxpayers who utilize the tax incentive.¹¹ The confluence of these two periods of transition is a potentially fruitful juncture to reconfigure and refocus the objectives of the Opportunity Zone program.

⁸ STAFF OF JOINT COMM. ON TAX'N, 117TH CONG., JCX-25-21, SELECTED TOPICS RELATED TO TAX AND INFRASTRUCTURE 40–41 (2021).

⁹ BRETT THEODOS ET AL., URB. INST., WHAT ARE THE NMTC PROGRAM'S IMPACTS ON LOCAL ECONOMIC CONDITIONS? 4 (2021), https://www.urban.org/sites/default/files/publication/103959/what-are-the-nmtc-programs-impacts-on-local-economic-conditions_0.pdf (stating that the number of residents with jobs appears to begin to grow at a statistically significant level three years after a project is initiated).

¹⁰ *The Biden Plan to Build Back Better by Advancing Racial Equity Across the American Economy*, BIDEN HARRIS, <https://joebiden.com/racial-economic-equity/> (last visited Dec. 8, 2021) [hereinafter BIDEN HARRIS 2] (promising targeted investment to entrepreneurs who create jobs and growth in lower-income urban, tribal, and rural areas).

¹¹ *Id.*, BIDEN HARRIS, *supra* note 2.

This Article argues that the Opportunity Zone program can be reconciled with the Made in All of America plan, particularly the focus on small domestic manufacturing firms and investment in small businesses. In addition, because the Opportunity Zone program is a place-based policy, the environmental interest of the locations where the investments are made must be taken into account. Designing tax rules with the dual purpose of encouraging construction of the physical environment and conservation of environmental resources is certainly not typical, and possibly sometimes in tension, but this approach is vitally important in the place-based context. Supporting neighborhoods that people consider their long-term homes and long-term business locations requires more than new buildings, new jobs, and new financing. It also requires a livable, sustainable place.

According to the “Implementation Plan for the White House Opportunity and Revitalization Council” released in April 2019, almost thirty-five million people live in qualified Opportunity Zones.¹² That means that over a tenth of the U.S. population lives in an Opportunity Zone.¹³ For comparison’s sake, thirty-five million is about four million fewer people than live in California and six million more than live in Texas.¹⁴ The number of people whose lives stand to be affected—either directly or indirectly—by the implementation of the Opportunity Zone program makes it critical to ensure that the experiment in place-based tax policy succeeds.

Although the federal government’s role in the creation and administration of the Opportunity Zone program is easy to identify, it is quite likely that the approach of local government to place-based policies will prove more important in whether or not objectives like an increase in domestic manufacturing, flourishing small local businesses, and environmental protection are ultimately met. Governments at the municipal

¹² WHITE HOUSE OPPORTUNITY & REVITALIZATION COUNCIL, IMPLEMENTATION PLAN FOR THE WHITE HOUSE OPPORTUNITY AND REVITALIZATION COUNCIL 4 (2019), <https://www.hud.gov/sites/dfiles/Main/documents/WHORC-Implementation-Plan.pdf>.

¹³ See *United States*, U.S. CENSUS BUREAU, <https://data.census.gov/cedsci/profile?q=United%20States&g=0100000US> (last visited Dec. 2021) (showing that the U.S. population, according to the Census Bureau as of December 2021 was 331,449,281).

¹⁴ *California*, U.S. CENSUS BUREAU, <https://data.census.gov/cedsci/profile?g=0400000US06> (last visited Dec. 2021) (showing that the population of California in December 2021 was 39,538,223); *Texas*, U.S. CENSUS BUREAU, <https://data.census.gov/cedsci/profile?g=0400000US48> (last visited Dec. 2021) (showing that the population of Texas in May 2021 was 29,145,505).

level in particular are likely to play an essential role in ensuring that place-based policies such as the Opportunity Zone program fulfill their promise of increasing and enriching the economic opportunities and overall welfare of the residents who live and work in the zones, because that level of government exercises primary control over land use. This level of government is also most likely to be responsive to specific community concerns and priorities. Local governments have shown interest in leveraging the Opportunity Zone program to enhance their communities,¹⁵ which is a promising development for the entire place-based tax policy experiment.

Narrowing the scope of the Opportunity Zone program or a similar tax incentive in favor of domestic manufacturing, small locally-owned firms that employ local residents, and local environmental interests would ensure that the projects benefitting from the program more clearly reflect national priorities even as they bolster local economies. This type of narrowing would be consistent with the Made in All of America proposal.¹⁶ It would also make it somewhat easier to measure the outcome of the policy and, from a budgetary perspective, render the program less expensive. More specifically, targeting place-based tax programs would further lessen the burden on municipal governments, because they would only need to decide whether or not they wanted to pursue specific types of redevelopment projects in their jurisdiction—in this example, manufacturing or small firms. In contrast, an open-ended program in terms of possible investments, like the Opportunity Zone program, results in local governments potentially facing many and varied redevelopment projects in a short period, which may make it particularly challenging for smaller municipalities to handle and to navigate in protecting local resident and environmental interests.

¹⁵ See WHITE HOUSE OPPORTUNITY AND REVITALIZATION COUNCIL, OPPORTUNITY ZONES BEST PRACTICES REPORT TO THE PRESIDENT 11–14 (May 2020), https://opportunityzones.hud.gov/sites/opportunityzones.hud.gov/files/documents/OZ_Best_Practices_Report.pdf (listing examples of local government strategies); see also 1 U.S. DEP'T OF HOUS. & URB. DEV., OPPORTUNITY ZONES TOOLKIT (2019), https://opportunityzones.hud.gov/sites/opportunityzones.hud.gov/files/documents/Opportunity_Zones_Toolkit_Roadmap_FINAL_Edited_092319.pdf (demonstrating that local jurisdiction can leverage public land assets and underutilized properties).

¹⁶ BIDEN HARRIS, *supra* note 2.

I. THE OPPORTUNITY ZONE STATUTE'S COMPATIBILITY WITH DOMESTIC MANUFACTURING, SMALL BUSINESS, AND ENVIRONMENTAL PRESERVATION

The basic structure of the Opportunity Zone program provides tax benefits to investors with long-term capital gains who reinvest those gains in Qualified Opportunity Funds (QOFs), which are investment vehicles organized to invest in Opportunity Zones.¹⁷ The benefits available to investors are 1) deferral of the capital gains tax that would otherwise be due on the realized gains, 2) forgiveness of up to fifteen percent of the tax on the original gain if the holding period is satisfied, and 3) tax-free accrual of any capital gains on investments in a QOF if the ten-year investment holding period is met.¹⁸ QOFs must invest at least ninety percent of their assets in Qualified Opportunity Zone Business (QOZB) property or in a partnership or corporation that is a QOZB that owns QOZB property.¹⁹

The zones are census tracts that were nominated by the governors of the states that contain the tracts and the mayor of the District of Columbia. The tracts were required to be either a low-income community, as defined in § 45D(e), or a tract contiguous with a low-income community.²⁰ The number of tracts designated as Opportunity Zones could not exceed one-fourth of the total number of low-income communities in the state.²¹ Treasury certified the nominations and designated the tracts as Opportunity Zones in Notice 2018-48.²² Zone designations remain in effect for ten years after the designation.²³

Using census tracts is not necessarily an optimal choice, but given the size of some municipalities, moving to the most local level of government might not be optimal either. The selection of census tracts as the basic unit

¹⁷ I.R.C. § 1400Z-2(a)(1)(A), (d)(1).

¹⁸ I.R.C. § 1400Z-2(b), (c).

¹⁹ I.R.C. § 1400Z-2(d)(2)(D).

²⁰ *Id.* § 1400Z-1(e).

²¹ *Id.* § 1400Z-1(d)(1).

²² I.R.S. Notice 18-48, 2018-28 I.R.B. 9 (amplified by I.R.S. Notice 19-42, 2019-29 I.R.B. 352 in which Treasury added two eligible tracts in Puerto Rico).

²³ I.R.C. § 1400Z-1(f).

of place-based tax policy appears to be driven primarily by considerations of administrative ease of designating locations, and it is a choice that should be examined in future place-based tax policies. The Low-Income Housing Tax Credit, created in 1986, introduced the concept of “qualified census tracts” into the code to identify areas of particularly low household incomes in order to allow an increased tax credit for projects in those areas.²⁴

On the one hand, census tracts represent an average of 4,000 people, with a floor of 1,200 residents and a ceiling of 8,000.²⁵ This size is ideal for fostering meaningful community participation in decision-making. For example, a community of roughly 4,000 people could have regular, productive meetings in which residents may meaningfully participate; hold a community charrette to design the future plans for their physical environment that reflects the wishes of the residents; and be reasonably familiar with and insightful on the major issues facing their community. Size matters for local self-governance, and the average census tract is probably the ideal size for community-wide decision making. On the other hand—and critical to place-based tax policies—census tracts are not political jurisdictions, and what’s ideal for and desired by the residents of a census tract might not be what the local government with control over that tract will choose.²⁶ The Opportunity Zone program is stuck with these realities, but future place-based programs and perhaps refinements of the Opportunity Zone program could reconsider the desirability of defining “place” solely by reference to census tracts.

The combined effect of the zone nomination process and the limitation of zone designation to one-quarter of eligible tracts means that the likelihood of certain types of manufacturing occurring in Opportunity Zones has already been determined. Some areas are simply much less suitable for certain manufacturing facilities, so if the less-suitable or unsuitable areas were chosen to the exclusion of those that might have been more suitable, the

²⁴ *Id.* § 42(d)(5)(B)(ii)(I).

²⁵ U.S. CENSUS BUREAU, CENSUS TRACTS 3 (2015), <https://www2.census.gov/geo/pdfs/education/CensusTracts.pdf>.

²⁶ See BRETT THEODOS, URB. INST., EXAMINING THE ASSUMPTIONS BEHIND PLACE-BASED PROGRAMS 6 (2021), <https://www.urban.org/sites/default/files/publication/104334/examining-the-assumptions-behind-place-based-programs.pdf> (“The boundaries of place-based initiatives do not frequently map to local governments or accountability structures.”).

possibility of locating those particular types of manufacturing facilities within zones is already diminished. For example, if a state nominated exclusively densely populated tracts with little space for heavy industrial production facilities, then we should not expect to see those sorts of facilities in the zones. Because three-quarters of eligible low-income tracts were excluded statutorily,²⁷ the nomination process had the potential to shape the likely types of investments through tract selection.

However, there is a reasonably high degree of geographic diversity in the over 8,700 Opportunity Zones across the country and in five U.S. territories, with about forty percent in rural census tracts, “22 percent in suburban census tracts,” and “38 percent in urban census tracts.”²⁸ This suggests that there are likely to be locations conducive to even heavy manufacturing, because not all the zones are densely populated. The nomination process is probably much less consequential in incentivizing investments in small businesses, because the location of a firm does not necessarily correlate with its size.

Preserving the unique environmental interests of the selected tracts may be more challenging based on the investment incentives provided by the Opportunity Zone program. The longer-term investment horizon required to achieve tax-free accrual of capital gains is a reasonable starting point. But to ensure that economic development does not compromise environmental integrity and, consequently, community health and well-being, municipalities must take proactive measures to protect the environment as development and redevelopment occurs, and possibly Congress must also include measures of environmental impact in reporting requirements so that those impacts can be more readily monitored.

There is no fundamental conflict between the overall purpose and most of the statutory language of the Opportunity Zone regime and the goals of increasing domestic manufacturing, encouraging the development of small businesses, and environmental preservation.

²⁷ I.R.C. § 1400Z-1(d)(1).

²⁸ WHITE HOUSE OPPORTUNITY & REVITALIZATION COUNCIL, *supra* note 12, at 4.

II. THE “MADE IN ALL OF AMERICA” PLAN

As part of his presidential campaign, Joe Biden promised to “mobilize the talent, grit, and innovation of the American people and the full power of the federal government to bolster American industrial and technological strength and ensure the future is ‘made in all of America’ by all of America’s workers.”²⁹ The campaign also pointed to manufacturing in the U.S. as a key component in “helping fuel an economic recovery for working families,” as well as a strategic domestic priority.³⁰ These priorities, and particularly the focus on domestic manufacturing, fit neatly with the goal of the Opportunity Zone program of driving long-term investment into low-income communities and providing economic opportunities for residents.

The more specific details of Biden’s agenda for encouraging domestic manufacturing investments are also consistent with the Opportunity Zone program. The Made in All of America plan says that it will focus on investments in “smaller manufacturers and those owned by women and people of color.”³¹ The campaign promises did not specify which incentives it might use to help revitalize domestic manufacturing, but Opportunity Zones are one way to achieve this goal.

Place-based tax policies are well-suited to helping achieve the Biden proposal’s plans to ensure that investments reach “All of America,” and to “create millions of new manufacturing and innovation jobs throughout all of America,”³² because spatially-targeted economic policies are already oriented to addressing job creation in specific geographic areas. The Opportunity Zone program encompasses 8,766 zones that are sprinkled across the United States and its territories,³³ making it more likely than a non-

²⁹ BIDEN HARRIS, *supra* note 2.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ IRS Fact Sheet, FS-2020-13 (Aug. 2020), <https://www.irs.gov/newsroom/opportunity-zones> (explaining that 8,764 communities in all 50 states, the District of Columbia and five U.S. territories were certified as qualified opportunity zones and then two census tracts in Puerto Rico were designated in Notice 2019-42).

targeted approach to produce jobs and domestic manufacturing businesses in a wider variety of areas.³⁴

However, broadening the geographic scope of investments is a necessary next step in reconciling the Opportunity Zone program with the Made in All of America objectives. A study of electronically-filed tax records from tax year 2019 found that the \$18.9 billion in investments in Opportunity Zones was concentrated in only sixteen percent of zones and tended to be in neighborhoods where residents had completed higher levels of education and had higher incomes, and where there were higher home values, greater population density, and more general community services.³⁵

The Biden proposal further pledged to make “historic investments in communities of color and an emphasis on small businesses.”³⁶ These priorities are also consistent with the Opportunity Zone program, as zones are geographically scattered across the nation and fifty-seven percent of residents in zones are non-white minorities.³⁷ The particular emphasis on smaller manufacturers and small businesses as strategic national investments—the “Arsenal of American Prosperity,” in the words of the Made in All of America Plan³⁸—is consonant with the community building and economic improvement goals of the Opportunity Zone program.³⁹ The Opportunity Zone program could help finance and develop small businesses that are located in areas where the proprietors also live. And by targeting incentives to investments in small manufacturers and other small local

³⁴ *Map of Opportunity Zones*, OPPORTUNITY NOW, <https://opportunityzones.hud.gov/resources/map> (last visited Sept. 27, 2021).

³⁵ PATRICK KENNEDY & HARRISON WHEELER, NEIGHBORHOOD-LEVEL INVESTMENT FROM THE U.S. OPPORTUNITY ZONE PROGRAM: EARLY EVIDENCE 1, 3–4 (2021), https://static1.squarespace.com/static/57a3c0fcd482e9189b09e101/t/607893b915858d7bd0d198ba/1618514881004/oz_kennedy_wheeler.pdf.

³⁶ BIDEN HARRIS, *supra* note 2 (emphasis omitted).

³⁷ ECON. INNOVATION GRP., *supra* note 4.

³⁸ BIDEN HARRIS, *supra* note 2.

³⁹ 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/?sh=350e6e981485> (quoting Senators Tim Scott and Cory Booker about their goals for the program).

businesses, Opportunity Zone investments need not be at odds with strengthening the human communities or the environmental interests in those locations.

Focusing place-based tax policy, at least temporarily, on small-scale domestic manufacturing would also finally represent a serious attempt at addressing the issue that drove the development of place-based tax policies in the U.S. in the first place. As Helen Ladd, one of the early academic commenters on U.S. place-based policies, explained in 1994, “A major contributor to the distress in many U.S. cities is the decline in manufacturing activity.”⁴⁰

The Biden administration and the 117th Congress have made improving the quality of life for individuals and families with the lowest incomes a top priority, as demonstrated by the American Rescue Plan Act’s increase in the child tax credit and in the earned income tax credit for workers without children.⁴¹ The Opportunity Zone program and other place-based tax policies are sufficiently flexible to fit within that priority. As the White House Council of Economic Advisers pointed out in August 2020, the potential for the program to help move Opportunity Zone residents out of poverty is substantial: “[T]he CEA projects that the capital already raised by Qualified Opportunity Funds could lift 1 million people out of poverty and into self-sufficiency, decreasing poverty in OZs by 11 percent.”⁴² Achieving these objectives of decreased poverty and increased employment and entrepreneurship in the context of the Opportunity Zone program depends on a more focused approach to operating businesses.

⁴⁰ Helen F. Ladd, *Spatially Targeted Economic Development Strategies: Do They Work?*, 1 CITYSCAPE: J. POL’Y DEV. & RSCH. 193, 193 (1994).

⁴¹ American Rescue Plan Act, Pub. L. No. 117-2, §§ 9611, 9621–26, 135 Stat. 4, 144–50, 152–58 (codified at I.R.C. §§ 24 (Child Tax Credit) and 32 (Earned Income Tax Credit)).

⁴² COUNCIL OF ECON. ADVISERS, THE IMPACT OF OPPORTUNITY ZONES: AN INITIAL ASSESSMENT 2 (2020), https://www.novoco.com/sites/default/files/atoms/files/white_house_the_impact_of_opportunity_zones_an_initial_assessment_report_082220.pdf.

III. INCREASING EMPLOYMENT AND ENTREPRENEURSHIP THROUGH OPERATING BUSINESSES

A. The Difficulty of Real Estate First

The unfolding of the Opportunity Zone program so far has distinguished it fundamentally from many other tax incentives, and the process is worth noting because it is probably a unique feature of place-based tax programs. Like other incentives, the Opportunity Zone program was established in legislation and then implemented through a series of regulations and guidance released by the IRS and Treasury. But unlike many other tax incentives, the intended results of the program only begin to occur well after many of the incentives have been claimed and once zone residents start to benefit from the projects the investments brought into their communities through increased economic opportunities and, as established above, a healthier environment. Furthermore, those results appear to follow a general pattern beginning with real estate projects and ending, hopefully, with coherent neighborhoods where existing residents can live and work. There is an inherent risk in this strategy, however, because the coherence of a geographic area and the flourishing of the people that live and work there is not the only possible outcome of a tax incentive that promotes construction projects. New real estate development on its own is not necessarily sufficient to ensure that the non-tax, resident-oriented purposes of the Opportunity Zone program are met.

However, this rolling process of achieving the community-oriented objectives of the Opportunity Zone program that starts with real estate development and moves into operating businesses was part of the plan. Shay Hawkins, a former Senate staff member who worked for Senator Tim Scott, R-S.C., and was influential in drafting the Opportunity Zone legislation, said that the real estate focus of the early investing was expected, but “[t]he clear Congressional intent behind the policy was that operating businesses thrive as well as real estate projects.”⁴³ He explained that “operating businesses are

⁴³ *Why Operating Businesses are Key to the Long-Term Success of Opportunity Zones*, JTC AMERICAS (Dec. 18, 2020), <https://nesfinancial.com/why-operating-businesses-are-key-to-the-long-term-success-of-opportunity-zones/>.

the key to the long-term success of the policy because operating business is where the long-term job creation will occur.”⁴⁴

B. Job Creation

The long-term viability of the OZ program requires that it drive investments into the zones and into operating businesses that create new jobs and new firms, rather than relocate existing jobs and existing firms.⁴⁵ New firm and job creation, as opposed to relocation, will always be a necessary component of successful resident-oriented place-based tax policy, because without new firms and jobs, no program will achieve the implicit goal of helping individuals increase their financial stability and improve their overall quality of life.

In contrast to the Opportunity Zone program, the origins of other place-based tax policies were not as supplements to the achievement of multi-faceted objectives including community support and renewal. The United Kingdom began experimenting with place-based tax policy before the idea caught on in the United States.⁴⁶ Ladd explained that the original English zones were by design both small and mostly uninhabited.⁴⁷ The intent was to promote physical development of blighted areas and employment in those areas in order to create an industrial park that would support employment in the wider geographic region.⁴⁸ Accordingly, residential areas were largely excluded.⁴⁹

The early U.S. applications of place-based tax policies were not confined to particularly small geographic locations, and they did not intentionally exclude residential areas. Instead, they provided employment or investment incentives, particularly investments in tangible personal property

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Ladd, *supra* note 40, at 193 (“The English model involved deep tax breaks and regulatory relief to small geographic areas within a city.”).

⁴⁷ *Id.* at 198.

⁴⁸ *Id.*

⁴⁹ *Id.*

such as machinery and equipment. In 1993 the Empowerment Zones and Enterprise Communities programs were established with a twenty percent tax “credit for the first \$15,000 of wages” for each employee who lives and works in the zone, an added \$20,000 of expensing under § 179 for qualifying zone property, and “tax-exempt financing for . . . qualifying zone facilities.”⁵⁰ The increased expensing for qualified assets placed in service in an Empowerment Zone meant that the § 179 deduction was more than twice as valuable within a zone as it was without.⁵¹ The “qualified active low-income community business” category in the New Markets Tax Credit (NMTC) is an attempt to direct investments into businesses that operate in the target communities by providing goods and services to those communities.⁵² To meet the requirements, a business must earn “at least 50 percent of its total gross income . . . from the active conduct of a qualified business within any low-income community,” use a “substantial portion of the . . . tangible property” it owns or leases within any low-income community, and have its employees perform a substantial portion of their work in any low-income community, among other conditions.⁵³

The empirical evidence so far seems to suggest that the success of place-based policies in improving economic opportunities for residents could be limited. One recurring theme is that place-based policies are effective at substantially increasing local economic activity.⁵⁴ But the impact on job creation is much more muted.⁵⁵ The solution is therefore likely to be to add tax benefits for job creation, similar to the incentives in the Empowerment Zones and Enterprise Communities program.

⁵⁰ CONG. RSCH. SERV., R41639, *supra* note 3, at 6.

⁵¹ CONG. RSCH. SERV., RL31852, THE SECTION 179 AND SECTION 168(K) EXPENSING ALLOWANCES: CURRENT LAW AND ECONOMIC EFFECTS 6 (2018).

⁵² See I.R.C. § 45D(d)(2).

⁵³ *Id.* at § 45D(d)(2)(a)(i).

⁵⁴ THEODOS ET AL., *supra* note 9, at 3 (documenting an increase in firms entering neighborhoods where NMTC projects were located, faster job growth, and a rise in the number of residents with jobs).

⁵⁵ CONG. RSCH. SERV., R41639, *supra* note 3, at 15 (“Government-sponsored studies by the Government Accountability Office (GAO) and the Department of Housing and Urban Development (HUD) have failed to link EZ and EC designation with improvement in community outcomes.”).

Some relocation of firms and jobs is tolerable in a place-based tax policy, and early on in the lifespan of the Opportunity Zone program, migration of firms and jobs into tax-preferred geographic areas is to be expected because it is likely easier for smaller or newer enterprises to relocate an existing or nascent business than to start one. This type of migration was observed in the first few years of the Opportunity Zone program, for example, Galen Robotics moving into Pigtown in Baltimore.⁵⁶ Galen Robotics actually moved across the country, which could not have been a particularly “easy” move, but the company at that point seems to have had relatively few employees who needed to move, and the founders were hoping to gain by the move additional employees from the student pool at Johns Hopkins University and other universities in the region.⁵⁷ The early migration patterns therefore are likely to be driven by a combination of factors, such as, in this instance, the proximity of various other types of institutions or pools of potential employees. Galen Robotics’ president also explained that the added tax incentives for investments in biotechnology firms offered at the state level made the move worthwhile.⁵⁸

C. Education

Operating businesses that create positions predominantly for highly-skilled individuals might help increase the tax base in the zone or generate some secondary effects within the zone such as the highly-skilled employees eating at neighborhood restaurants for lunch, shopping at local stores on their way to or from work, or moving into the zone. But to increase employment for zone residents who are not new, operating businesses may have to provide some degree of on-the-job education. According to the White House Opportunity and Revitalization Council’s 2019 report, “Approximately 22 percent of Opportunity Zone adult residents have not attained a high school diploma, compared to 13 percent nationally.”⁵⁹ Targeted incentives could

⁵⁶ Stephen Babcock, *Galen Robotics Investment Shows How the Opportunity Zone Program Can Fund Startups*, TECHNICAL.LY (Nov. 11, 2019, 6:16 PM), <https://technical.ly/baltimore/2019/11/11/galen-robotics-verte-investment-opportunity-zone-fund-startups/> [hereinafter *Galen Robotics*].

⁵⁷ *See id.*

⁵⁸ *Id.*

⁵⁹ WHITE HOUSE OPPORTUNITY & REVITALIZATION COUNCIL, *supra* note 12, at 4.

help boost investments in operating businesses so that these businesses can employ local residents and help them acquire needed skills.

The White House Opportunity and Revitalization Council report acknowledged that directing the capital of private investors into Opportunity Zones through the tax incentive is insufficient, and noted the need for additional public investment (beyond the foregone revenues under § 1400Z-2) to ensure that fundamental prerequisites like education and workforce training, as well as safe neighborhoods, were established in the zones.⁶⁰ This type of public investment is commensurate with the Made in All of America proposal's plan to ensure that investments in training and education "reach all Americans across all states and regions."⁶¹

D. Increasing Local Ownership

One of the chief goals of place-based tax policy should be to increase local ownership of businesses and homes. Accordingly, preferential tax treatment for small, locally-owned firms would be consistent with the specific intent of the Opportunity Zone program drafters, the goals of the Made in All of America plan, and the general intent of place-based tax programs in the U.S. The early discussions about place-based tax policies in the U.S. included express considerations of how to assist small firms with difficulties obtaining capital.⁶² Therefore, adding tax benefits directed to small firms owned and operated by zone residents should be a priority in reconciling the Made in All of America plan with the Opportunity Zone program.

⁶⁰ *Id.* at 5 ("Many of these communities are in need of public sector investment and guidance to ensure they develop the foundations and investment connections necessary to support a thriving private sector. Public investment in economic development, entrepreneurship, education and workforce training, and safe neighborhoods—along with guidance for engaging with investors and entrepreneurs—will help communities unlock private capital to create sustainable growth. This public sector commitment serves as a means by which to attract and continue the flow of private capital investment into Opportunity Zones.").

⁶¹ See BIDEN HARRIS, *supra* note 2.

⁶² Ladd, *supra* note 40, at 199.

E. Information Reporting and Community-Oriented Metrics

One of the obvious difficulties that the Opportunity Zone program faces in terms of its long-term viability is public and political support, and the only benefits of the program expressly provided for by the statute—the tax benefits—are a potentially major stumbling block in that regard. The fact that the tax benefit is designed to flow to investors, and evidently to the highest-income investors,⁶³ is a problem if the intended benefits of increased economic opportunities and community stability do not materialize, or do not occur quickly enough to be clearly linked to the program's effects. Community preservation, like restoration and preservation of the natural environment, requires two principal factors: stability and time.

Place-based tax initiatives ought to be measured first and foremost on how well they take into account the places that they mean to influence: places where people make their homes, do their work, and build businesses, and places with unique environmental and ecological interests. Success in the context of a place-based initiative therefore cannot be measured strictly in dollars, because the correct, comprehensive understanding of an improvement to human lives encompasses many other elements. This is a challenge for a tax benefit program, and it is especially difficult to establish without information reporting from taxpayers receiving the tax benefits from the program.

Measuring the impact of prior place-based initiatives on community stability and endogenous growth has proven challenging. For example, in 2001, the Department of Housing and Urban Development (HUD) issued an interim report on the impact of Empowerment Zones and Enterprise Communities showing accelerated job growth in the zones that in four of six of them was greater than in comparison areas; an increase in the number of resident-owned businesses; and job creation within the zones.⁶⁴ But the

⁶³ Critics point out data such as, “the average income of investors benefitting from Opportunity Zone tax breaks in 2019 was \$1,083,766.” Adam Looney, *Funding Our Nation's Priorities: Reforming the Tax Code's Advantageous Treatment of the Wealthy*, BROOKINGS (May 12, 2021), <https://www.brookings.edu/testimonies/funding-our-nations-priorities-reforming-the-tax-codes-advantageous-treatment-of-the-wealthy/>.

⁶⁴ CONG. RSCH. SERV., R41639, *supra* note 3, at 16.

Congressional Research Service noted that the selection of comparison areas is critical to these results.⁶⁵

There is a real risk that current residents of Opportunity Zones will be priced out of the market, because either rents increase beyond their ability to afford them or, for the almost half of residents who are homeowners, the cost of living increases become too great. The Council of Economic Advisers estimated in an August 2020 report that the mere designation of an area as an Opportunity Zone “caused a 1.1 percent increase in housing values.”⁶⁶ Exacerbating resident displacement is contrary to the goal of achieving community stability.

New residents who move into Opportunity Zones due to firm migration could make the economic measurements look rosier than they really are, at least in the short run and for longer-term residents. In a recent study of the New Markets Tax Credit program, researchers at the Urban Institute found “a small increase in the number of adults with college degrees, an increase large enough to account for the modest estimated increases in residents with jobs and wages and for much of the estimated decline in poverty.”⁶⁷

Major displacement of existing residents by new residents moving into a neighborhood that has been targeted for tax-incentivized investments should of course not be an acceptable consequence of place-based policies, but there are some indications that the worst fears on this score have not materialized. The Urban Institute study suggests that the displacement effect may be small.⁶⁸ However, the report cautioned that the findings suggest that at least some market-rate residential NMTC projects resulted in displacement.⁶⁹

⁶⁵ *Id.*

⁶⁶ COUNCIL OF ECON. ADVISERS, *supra* note 42, at 1–2.

⁶⁷ THEODOS ET AL., *supra* note 9, at 1 (“Therefore, it is possible that the gains following an NMTC project may accrue to new residents rather than preexisting residents, though further research is needed.”).

⁶⁸ *Id.* at 7 (“We do not know whether new residents are displacing preexisting residents. The increase in population and increase in population with a bachelor’s degree are essentially identical.” Also, “[i]f displacement is occurring, the modest gain in number of residents with jobs, the modest decline in poverty rate, and the slight increase in turnover all imply that any displacement is affecting less than 1 percent of the population.”).

⁶⁹ *Id.* at 8.

The importance of time in achieving the community-oriented goals is also demonstrated by the recent Urban Institute study, which found that an increase in jobs in an NMTC neighborhood takes time to appear.⁷⁰ The study found that a statistically significant increase in the number of residents with jobs occurred five years after the beginning of the project.⁷¹

Information reporting alone will not prevent any of the potential negative impacts to the existing communities in Opportunity Zones, it will only allow scholars and legislators to assess the effects of the program after the fact. In order to ensure that the non-tax benefits actually accrue to existing zone residents, the program should be altered to prioritize the community interest that it seeks to serve.

IV. ENVIRONMENTAL PRESERVATION

Improving the quality of life for the residents of Opportunity Zones, and indeed of everyone living near a zone, necessarily entails protecting and rehabilitating the unique natural environments of the zones. The ten-year investment horizon of the program may be insufficient to protect some of the critical environmental interests at stake. The solution to this potential problem lies in large part in careful municipal planning and governance directed to preserving or restoring the unique ecosystems and habitats of the zone to ensure a healthy environment for the long-term. But it would also be helpful for the federal government to at least add reporting requirements to the statute highlighting any environmental preservation or restoration measures undertaken as part of the Opportunity Zone-backed projects to serve as a reminder to the outside investors that their investments are being made in neighborhoods and those neighborhoods need to be livable spaces well into the future. This type of reporting is especially critical for real estate development projects.

Place-based programs like the Opportunity Zones regime that are directed at development and redevelopment projects on individual lots, and are therefore not comprehensive at the neighborhood level and certainly not at the level of an entire census tract, could be a countervailing force against

⁷⁰ *Id.* at 4.

⁷¹ *Id.*

municipal efforts to secure both economic prosperity and a healthy natural environment for residents, but they do not have to result in the environmental interests being sacrificed. These challenges are not new,⁷² and they are not especially heightened by the Opportunity Zones program. But place-based tax policies do add to the pressure on municipalities to think carefully through the legal protections in place—or that should be in place—for preservation of the local natural environment. Especially in places where many residents have low incomes, it is imperative to prioritize the health of their communities by ensuring that tax-incentivized developments do not compound existing or create new environmental problems. The most obvious way to do this is through zoning requirements for natural green space and the use of appropriate native plants in those green spaces. But municipalities need time to adapt their codes, and that process may be much slower than the timeline of most Opportunity Zone projects.

Environmental preservation and rehabilitation is an interest shared by residents of every Opportunity Zone, in every type of location, including densely-populated urban areas, so it should be prioritized in any place-based policy. Long-term economic productivity requires a healthy community over the long term, so it is also ultimately in the interest of investors who hope to have long-term investment gains, although because the broader environmental health impacts are generally diffuse, project developers may insufficiently prioritize them.

A. Environmental Considerations and Manufacturing

Promoting manufacturing and a reasonable concern for the long-term environmental interests of the residents of zones do not have to be irreconcilable goals. We can accept that industrial facilities will have some degree of negative environmental impact in large part because they present an offsetting benefit to the community in the form of employment and useful products. Certainly, industrial pollution should be reduced and should be

⁷² EPA, ESSENTIAL SMART GROWTH FIXES FOR URBAN AND SUBURBAN ZONING CODES 2 (2009), https://www.epa.gov/sites/production/files/2014-01/documents/2009_essential_fixes_0.pdf (Local governments have always faced challenges in balancing the interests of current residents, the local natural environment, and proposed development. There is a growing emphasis on using local codes and ordinances to promote development and redevelopment that “will focus on creating complete neighborhoods—places where residents can walk to jobs and services, where choices exist for housing and transportation, where open space is preserved, and where climate change mitigation goals can be realized.”).

managed so that it does not impose new, harmful impacts on the health of the local community and natural environment. But there is a difference between, for example, a manufacturing facility that is producing useful items for sale and other social goods such as a significant increase in local employment, and a condominium building that provides second homes for non-residents and a handful of associated part-time service roles for local residents. A community should not accept larger-than-typical negative environmental impacts from the condominium building in that case. It is this type of risk to the environment and the existing community that the Opportunity Zone program must be refined to guard against.

Under the current configuration of place-based tax policies, all the consideration of the local environment must happen at the local government level. This does not have to be the case. After jettisoning the information reporting requirements from the Tax Cuts and Jobs Act of 2017,⁷³ Congress has not yet passed information reporting requirements for Opportunity Zone investments or community impacts. Senators Cory A. Booker, D-N.J., and Tim Scott, R-S.C., the lead architects and proponents of the bill, have emphasized the importance of ensuring that the program has a positive impact on the communities it is meant to enhance.⁷⁴ As part of the reporting, Congress could require a statement of how the project has contributed to preservation of the natural environment, habitat restoration, and the health of the local community generally. This would not have to mean that every project would directly involve environmental preservation, but spotlighting the priority would at least help advance this important interest for residents.

⁷³ Compare S. 293, Investing in Opportunity Act (Feb. 2, 2017), <https://www.congress.gov/115/bills/s293/BILLS-115s293is.pdf>, with Cong. Rec. S7727-29 (Dec. 1, 2017), <https://www.congress.gov/115/crec/2017/12/01/CREC-2017-12-01-pt1-PgS7721.pdf>; Letter from Senator Corey Booker et al. to Steven Mnuchin, Sec’y Dep’t of the Treasury (Jan. 23, 2019), <https://www.taxnotes.com/tax-notes-today-federal/basis/lawmakers-ask-mnuchin-opportunity-zones-regs-clarification/2019/01/25/292t9> (requesting “reasonable reporting requirements, including of Fund- and transaction-level information, in order to prevent against waste, fraud, and abuse, and to ensure that the incentive is delivering impact for communities”).

⁷⁴ Letter from Booker et al., *supra* note 73.

B. Local Government Involvement

Municipalities, perhaps especially smaller ones, could be at a disadvantage in protecting community and environmental interests when those interests are in tension with private developers' interests. Recognizing this, impact funds,⁷⁵ and even some traditional funds are investing with an intent to support the local community. But investments designed to preserve the local identity of a zone are not required by the statute. The role of local government in planning is therefore critical to the potential impact on community-oriented outcomes.

There is already a blueprint for encouraging local government planning in place-based tax policy.⁷⁶ A compelling aspect of the Empowerment Zones and Enterprise Communities program was the nature of the nomination process.⁷⁷ As in the Opportunity Zone regime, states nominated localities, but unlike the Opportunity Zone program, as part of the selection process, the nominated tracts had to submit a strategic plan, and the plan requirements were not trivial.⁷⁸ The quality of the strategic plan was evaluated in the selection process.⁷⁹

The statutorily-required strategic plan in the Empowerment Zones and Enterprise Communities program had to describe the “coordinated economic, human, community, and physical development plan and related activities

⁷⁵ See, e.g., *Kresge Foundation Commits \$22M to Back Arctaris, Community Capital Management Opportunity Zone Funds*, THE KRESGE FOUND. (Mar. 16, 2019), <https://kresge.org/news-views/kresge-foundation-commits-22m-to-back-arctaris-community-capital-management-opportunity-zone-funds/> (announcing that the Kresge Foundation will commit \$22 million “to anchor their emerging Opportunity Zone Funds,” reflecting the stated social and community goals of the Opportunity Zone program).

⁷⁶ I.R.C. § 1391(f)(2).

⁷⁷ *Id.* § 1391(f).

⁷⁸ U.S. GOV'T ACCOUNTABILITY OFF., GAO-04-306, FEDERAL REVITALIZATION PROGRAMS ARE BEING IMPLEMENTED, BUT DATA ON THE USE OF TAX BENEFITS ARE LIMITED 2, 11–12 (2004), <https://www.gao.gov/assets/gao-04-306.pdf>.

⁷⁹ See *Empowerment Zones*, U.S. DEP'T OF HOUS. & URB. DEV., https://www.hud.gov/hudprograms/empowerment_zones (last visited Oct. 9, 2021) (“EZs and ECs were competitively selected based on the quality of a comprehensive, bottom-up strategic plan which included input from all community stakeholders and described the community’s vision for economic revitalization and job creation.”).

proposed for the nominated area.”⁸⁰ Moreover, it required a description of how to ensure that the “affected community is a full partner in the process of developing and implementing the plan and the extent to which local institutions and organizations have contributed to the planning process,”⁸¹ as well as identification of “the amount of State, local, and private resources that will be available in the nominated area and the private/public partnerships to be used, which may include participation by, and cooperation with, universities, medical centers, and other private and public entities.”⁸² The plan had to identify “the funding requested under any Federal program in support of the proposed economic, human, community, and physical development and related activities,”⁸³ and “baselines, methods, and benchmarks for measuring the success of carrying out the strategic plan, including the extent to which poor persons and families will be empowered to become economically self-sufficient.”⁸⁴ Finally, the plan was prohibited from including “any action to assist any establishment in relocating from one area outside the nominated area to the nominated area, except that assistance for the expansion of an existing business entity through the establishment of a new branch, affiliate, or subsidiary is permitted” under certain circumstances.⁸⁵

Requiring—and assisting—the communities where investments are proposed to be directed via tax benefits to go through a pre-investment visioning process to ensure that the existing residents are included in decisions about the development of their hometowns is an aspect of the Empowerment Zone and Enterprise Community program that should be revived in place-based policymaking. In order to increase the opportunity for meaningful consideration at the local government level, probably through a process such as a charrette that is designed to be open to and involve all

⁸⁰ I.R.C. § 1391(f)(2)(A).

⁸¹ *Id.* § 1391(f)(B).

⁸² *Id.* § 1391(f)(2)(C).

⁸³ *Id.* § 1391(f)(2)(D).

⁸⁴ *Id.* § 1391(f)(2)(E).

⁸⁵ I.R.C. § 1391(f)(2)(F). *Id.* § 1391(f)(2)(F)(i)–(ii) (stating that the circumstances were that “the new branch, affiliate, or subsidiary [would] not result in the decrease in employment” in another place where the existing business conducts operations, and there is “no reason to believe” that the new location is being established with the plan to close down a different location).

residents, ideally Congress or the states would offer local governments funding so that the community-visioning process could occur before the application process began. This would add to the total costs of the place-based policy to which the new requirement was appended, but it is a worthwhile expenditure if the goal of a place-based policy is to improve opportunities for the existing residents, because it is likely the best way to provide communities with an opening for serious, pre-investment input into how their physical environment and local economy should develop over the long term. Furthermore, an inclusive community visioning process would not only serve the critical interest of community self-determination, but it would also enhance community cohesion and cooperation, because well-run charrettes are, by their nature, designed to foster collaboration and neighborly interactions.⁸⁶ By offering residents an organized, dedicated venue for giving input into the development of their neighborhoods, the result also has a greater chance of protecting environmental interests, because residents are unlikely to promote or agree to concepts that would adversely impact their physical environments. Any place-based tax policy should seek to actively foster the intangible community goods of collaboration and personal connections among residents, because these intangibles are a vital source of community resilience and prosperity.

Although communities are always able to engage in a charrette or another type of community-wide visioning process at the local level, and some designated Opportunity Zones had master plans in place prior to the TCJA, the transformative potential of the Opportunity Zone program heightens the need for active local involvement in the pre-investment planning process.⁸⁷ Therefore, reviving requirements along the lines of the ones in the application process for the Empowerment Zones and Enterprise Communities programs—and assisting communities financially in making a

⁸⁶ See, e.g., *Inside the Charrette Process*, LAKEWOOD NEIGHBORS (Feb. 21, 2019), <https://lakewoodneighbors.org/2019/02/inside-the-charrette-process/> (explaining that, “[t]he most rewarding part of a charrette for us is seeing a diverse community unite and come together to create what they designed. The charrette at its best is a community building event”).

⁸⁷ See Lindsey Gardner & Mohammad Yusri Jamaluddin, *Preparing Your Community for Opportunity Zones*, MICH. STATE UNIV. (Apr. 10, 2019), <https://www.canr.msu.edu/news/preparing-your-community-for-opportunity-zones> (recommending that local leaders learn about OZs: “[e]ngage local stakeholders in developing a vision for OZ properties and [s]treamline policies, plans, and ordinances [before] promot[ing] the[ir] O[ppportunity] Z[one] to potential investors”).

charrette or other inclusive visioning process happen—should be an integral component of place-based tax policymaking in the future.

But there is no need for Congress to merely hope that communities will choose to organize and finance a community-wide visioning process with respect to the Opportunity Zone program. The zone designation process is long over, but Congress could still make it possible for the communities in Opportunity Zones to set up a charrette or similar process now by offering funding for that purpose. State or county level governments could do the same. While there are already development projects that will have an impact on Opportunity Zone residents underway, these projects are heavily concentrated in a smaller number of zones, and there is still time for many zones to benefit from a comprehensive visioning process, as the investment window of the Opportunity Zone program runs through 2026.⁸⁸ Even the zones that already have projects that are using the Opportunity Zone incentives to raise capital could benefit from a comprehensive process because of the likelihood that current redevelopment projects will attract additional projects to the zone. Moreover, such an expenditure of federal or state and local tax dollars would be worthwhile even if a zone that undertakes an inclusive community charrette and prepares a master plan for redevelopment never has any investments that utilize the Opportunity Zone tax benefits, because the benefits of a community visioning process and resulting plan and appropriate legal changes to municipal codes and ordinances extend well beyond the temporal limits of the Opportunity Zone program. Moreover, the size of most census tracts, at an average of 4,000 residents per tract,⁸⁹ is likely to be quite conducive to a process that will result in residents having a considerable say in the charrette process, and consequently the future development of their hometowns.

Reporting requirements for Opportunity Zone investments are certainly worthwhile and should be added to the regime, but a pre-investment forum where the ideas of residents are heard, put into an actionable form, and then enacted by local government in the form of new zoning laws and

⁸⁸ KENNEDY & WHEELER, *supra* note 35, at 3 (“OZ investment is highly spatially concentrated. The vast majority of designated Opportunity Zone tracts in our sample, 84%, received zero OZ capital.”); I.R.C. § 1400Z-2(b)(1)(B) (stating investment period terminates at the end of 2026).

⁸⁹ U.S. CENSUS BUREAU, *supra* note 25.

requirements, is a better way to give residents control over the development of their neighborhoods. The stated goal of the Made in All of America plan to ensure that federal investments “reach all Americans across all states and regions” and, in particular, small manufacturers and women- and minority-owned businesses, necessarily begins locally.⁹⁰ In order to draw on the talents of all communities in securing national economic success, as the plan indicates, it is appropriate to introduce a process that has the best chance of giving local residents greater influence over the development of their neighborhoods.

C. A Supplemental Manufacturing Tax Credit

Other proposed tax incentives may also be adjusted to help revitalize small-scale manufacturing in Opportunity Zones. Because Opportunity Zone investments are typically just one piece of the capital “stack” for projects, the Biden administration could direct its efforts into the Opportunity Zone program and provide an added incentive to invest in those locations. For example, the administration has proposed a Manufacturing Tax Credit with the aim of “revitalizing, renovating, and modernizing existing—or recently closed down—facilities.”⁹¹ According to the proposal, qualifying projects will need to benefit local workers and communities.⁹² The amount of the credit could be increased for investments in Opportunity Zone operating businesses, which would further focus the tax benefit.

Being specific about prioritizing manufacturing may be required to boost the development of manufacturing facilities in Opportunity Zones. The Community Development Financial Institutions Fund of the Treasury Department, which allocates tax credit authority under the NMTC to community development entities, reported that “since its inception, the NMTC Program has supported the construction of 57 million square feet of manufacturing space, 94 million square feet of office space, and 67 million

⁹⁰ BIDEN HARRIS, *supra* note 2.

⁹¹ *Id.*

⁹² *Id.* (noting that projects will have to meet “strong labor standards, including paying workers a prevailing wage, employing workers trained in registered apprenticeship programs, and aiming to utilize Project Labor and Community Workforce Agreements”).

square feet of retail space.”⁹³ The relatively smaller outcome for manufacturing space may be in part explained by more space-efficient technologies that allow manufacturing facilities to have a smaller footprint (whereas technological advances may have had a smaller impact on the sizes of office and retail spaces). But the more likely explanation is that manufacturing facilities garner only around twenty-six percent of the total commercial construction under the NMTC program because there is no emphasis on building up domestic manufacturing capabilities. In order to reconcile the priority of bolstering domestic manufacturing with the Opportunity Zone program, there should be an explicit emphasis on that activity through a supplemental manufacturing tax credit.

Displacement of residents due to the entry of manufacturing facilities into a neighborhood is clearly an outcome that needs to be avoided, but at the same time, it is important to locate facilities where residents can work near enough to residential areas to allow prospective employees to reach them without imposing major travel or time burdens. A recent report found that among completed NMTC projects, “health care services[,] manufacturing[,] and food processing [projects] are associated with” a decline in population.⁹⁴ The report’s authors indicated that they had expected people to prefer not to live near manufacturing businesses, a reasonable expectation for heavy industry facilities and perhaps certain types of food processing.⁹⁵ But living next to the local bakery or brewery or coffee roaster does not have to be an unpleasant arrangement, nor does living near the neighborhood printer or tailor. And it is these types of lower-impact and smaller enterprises that place-based tax policy should encourage.

V. CONCLUSION

The focus on domestic manufacturing in the Made in All of America plan and the maturation of the Opportunity Zone program’s regulatory and investment environment provides an opening for bringing the promised

⁹³ CMTY. DEV. FIN. INST. FUND, U.S. DEP’T OF THE TREASURY, NMTC PROGRAM AWARD BOOK: CY 19, at 2 (2020), <https://www.cdfifund.gov/sites/cdfi/files/documents/2019-nmtc-award-book-finalforwebsite-13july2020.pdf>.

⁹⁴ THEODOS ET AL., *supra* note 9, at 8 (“We expected that people might not want to live near manufacturing facilities. The same may be true of hospitals and other health care services providers.”).

⁹⁵ *Id.*

economic renewal to the residents of low-income communities. With the addition of tax incentives targeted to small manufacturers and local resident-owned firms, and the introduction of a collaborative, inclusive, and productive process to give zone residents a meaningful opportunity to influence the physical development of their neighborhoods, the program can support the long-term economic, environmental, and overall community welfare interests that it was originally intended to protect.