Examining the Internal Revenue Code and reforming its influence on the built environment

PROMOTING LIVABLE COMMUNITIES

Prepared and Endorsed By:

Cover Photo: High Point Neighborhood. Seattle, WA. A 120 acre planned community designed by Mithun, Inc and SvR Design Company. Photo by Juan Hernandez

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Introduction

This document was developed by organizations and associations who collectively represent a broad portion of the design, construction, transportation and development sector of the economy. These coalition members support the livability principles espoused by the federal government's Partnership for Livable Communities and believe that for the United States to remain globally competitive, it must maintain cities and communities that are globally competitive as well. Our organizations are united by a common mission to improve the capacity of markets and governments to support real-estate products that embrace principles of complete neighborhoods and catalyze more livable communities.

Research indicates that residential and commercial real-estate in livable communities account for just five percent of the supply within the built environment. However, consumer data shows that as much as 30 percent of consumers demand such products; the percentage appears to be rising among younger consumers entering the market. The real-estate market is naturally slow to adjust its stock and respond to these changes in demand. However it has become increasingly clear that the current real-estate supply is not merely the result of market forces. Long-standing institutional forces within the government are aligned against the Partnership's stated goals. The current market supply is the result of a skewed regulatory and financial environment. The development community is confronted with a marketplace that passively prevents livable communities by limiting financing to a narrow set of project types and government zoning rules and building codes that actively prohibit livable growth patterns.

The purpose of this report is to review existing provisions in the federal tax code that explicitly or implicitly affect the design and development of communities. We have reached two conclusions. First, provisions that promote livable communities are extremely limited and fragmented. Even when viewed in totality, the sum of the tax credits, bond initiatives and grant programs favoring aspects of livability are insufficient to achieve the goals outlined by the Partnership for Livable Communities. Second, although tweaks to rebalance the tax code will be effective over time, the pervasive manner in which development patterns impact the environment, social equity, economic activity and public health has also led us to recommend new policies that directly engage these issues.

To address these concerns, this document proposes four recommendations that will enable the federal government to recalibrate the IRC and create models for livable communities that will hopefully define the next generation of American growth and development.

- Adopt a consistent, and consensus-based definition for livable communities and high-quality development projects
- Amend existing provisions in the Internal Revenue Code to promote livability
- Partner with States and Communities to develop special livability tax districts
- Adopt consensus-based standards to ensure housing affordability within livable communities

Livability Principles

Adopted by the Partnership for Livable Communities: Department of Transportation, Department of Housing and Urban Development and the Environmental Protection Agency

1. Provide more transportation choices. Develop safe, reliable and economical transportation choices to decrease household transportation costs, reduce our nation's dependence on foreign oil, improve air quality, reduce greenhouse gas emissions, and promote public health.

2. Promote equitable, affordable housing. Expand location- and energy-efficient housing choices for people of all ages, incomes, races and ethnicities to increase mobility, and lower the combined cost of housing and transportation.

3. Enhance economic competitiveness. Improve economic competitiveness through reliable and timely access to employment centers, educational opportunities, services, and other basic needs by workers as well as expanded business access to markets.

4. Support existing communities. Target Federal funding toward existing communities - through such strategies as transit-oriented, mixed-use development and land recycling - to increase community revitalization, improve the efficiency of public works investments, and safeguard rural landscapes.

5. Coordinate policies and leverage investment. Align Federal policies and funding to remove barriers to collaboration, leverage funding, and increase the accountability and effectiveness of all levels of government to plan for future growth, including making smart energy choices such as locally generated renewable energy.

6. Value communities and neighborhoods. Enhance the unique characteristics of all communities by investing in healthy, safe, and walkable neighborhoods—rural, urban, or suburban.

Current Policy

Currently, federal tax policy related to livable communities is inadequate and useful provisions are fragmented.

There are hosts of tax policies that impact real estate generally. However, because there was no overarching federal vision for livability at the time of their development, the incentives tend to address single pieces of the larger picture and have a strong focus on individual buildings, making it difficult for communities and developers to use the tax policies to create livable, sustainable patterns of development.

For instance, transit-oriented development (TOD) is one pattern that is consistent with livable communities within urban and suburban settings. TOD generally requires moderate to higher density development, a mixture of residential, employment, and civic uses, a transit station within walking distance and transportation infrastructure that allows people to choose to walk, bike, take transit, or drive to destinations.[1] The current patchwork of federal tax incentives does not address the financial complexities and many moving parts of a development concept like TOD that strives to make connections between land use and transportation, housing and employment, and livability.

Although there are almost no tax incentives explicitly aimed at livability, the Internal Revenue Code (IRC) currently contains a few limited provisions aimed at fostering development consistent with livability goals and objectives, including green building and energy conservation. These tax incentives may provide a foundation when considering ways to enhance federal tax policy to foster sustainable communities. Unfortunately, the tax credits and federal financing tools that affect the built environment do so in ways that frequently conflict with the livability principles. On balance, federal policy is much more consistent with single-use development that is characteristic of sprawl at the edges of our communities.

The following is a brief summary table of relevant incentives. For a more complete analysis of each provision, see Appendix A.

1 See, e.g., Transit Cooperative Research Program, "Transit-Oriented Development in the United States: Experiences, Challenges, and Prospects" pp 5 (2004); Transit Cooperative Research Program. "Transit Oriented Development and Joint Development in the United States: A Literature Review" pp. 5-7 (2002)

Incentive	Description
Provisions Fostering TOD Objectives	
Exempt Facility Bonds for Green Buildings and Sustainable Design Projects (§ 142)	• Exempt facility bonds to finance qualified green building and sustainable design projects • Competitive application through Treasury; subject to national $2.0B volume cap
Exempt Facility Bonds for Local Mass Commuting (§ 142)	• Exempt facility bonds to finance local mass commutingprojects • Allocation to states based on formula; subject to volume cap
Qualified Energy Conservation Bonds (§ 54D)	• Tax-credit bond to finance qualified conservation purposes • Allocation to states based on formula; subject to national $3.2B volume cap
Provisions for Owners of Commercial Property	
Energy-Efficient Commercial Buildings Deduction (§ 179D)	• Tax deduction for energy-efficient commercial building property expenditures, up to $1.80 per square foot • Upgrades in efficient HVAC systems, windows, and lighting are eligible for the deduction
Energy Investment Tax Credit (§ 48)	• Non-refundable credit for the cost of new energy property • Solar, fuel cells or small wind receive up to 30 percent of expenditures • Geothermal, microturbines and combined heat/power systems receive up to 10 percent of expenditures
Five-Year Cost Recovery for Energy Property (§ 168(e)(3)(B)(vi))	• Five-year cost recovery period for certain types of renewable energy property
Bonus Depreciation (§ 168(k))	• For 2008 and 2009, 50% bonus depreciation provision for eligible renewable energy systems
Provisions for Owners of Residential Property	
Credit for Non-Business Energy Property (§ 25C)	• Credit of 30% of amount incurred for nonbusiness energy property, up to $1,500
Credit for Residential Energy-Efficient Property (§ 25D)	• Credit of 30% of qualified expenditures for residential energy-efficient property
Energy Conservation Subsidies Provided by Public Utilities (§ 136)	• Income exclusion for public utility subsidy for energy conservation measure

Current Policy

Provisions for Builders and Manufacturers of Energy-Efficient Products	
New Energy-Efficient Home Credit (§ 45L)	• Credit of $1,000 (30% reduction in energy consumption) or $2,000 credit (50% reduction in energy consumption) for construction of qualified new energy-efficient homes
Energy-Efficient Appliance Credit (§ 45M)	• Per-unit credit for production of certain energy-efficient dishwashers, clothes washers and refrigerators, up to 2% of the average annual gross receipts of the taxpayer
Provisions to Promote Transportation Alternatives	
Qualified Transportation Fringe Benefits (§ 132(f))	• Capped income exclusion for transit passes, vanpool benefits, parking benefits and qualified bicycle commuting reimbursement • ARRA has temporarily increased transit and vanpool benefits to equal benefits for parking.
Provisions Affecting Development Objectives	
Low-Income Housing Tax Credit (§ 42)	• Credit for acquisition, development and rehabilitation of rental housing occupied by tenants having incomes below specified levels • Allocation to states based on formula; competitive application through state government
Expensing of Environmental Remediation Costs (§ 198)	• Election to expense or capitalize costs of qualified environmental remediation • State certification of qualified contaminated site
Rehabilitation Credit (§ 47)	• Credit of 20% of qualified rehabilitation expenditures for certified historic structures; 10% of qualified rehabilitation expenditures for other qualified rehabilitated structures • Certification by National Register of Historic Places or National Park Service
Qualified Redevelopment Bonds (§ 144(c))	• Private activity bonds to finance certain redevelopment purposes in designated blighted area • Allocation to states based on formula and subject to volume cap; local designation of blighted area

New Markets Tax Credit (§ 45D)	• Credit of 39% of cost of the qualified equity investment made by qualified investment groups, claimed over 7-year period • Competitive application through Community Development Financial Institutions Fund; subject to national volume cap

Downtown Savannah, GA. The original plan for an interconnected street grid and park squares is preserved in much of the historic district. Photo courtesy of Flikr user humbertomoreno. (Creative Commons License)

It is important to reemphasize the fact that the credits listed in the table are not unified by a vision or purposefully developed with livability in mind. Although an individual credit may support one building feature relating to livability, there is ample room to apply many of these credits to development projects that are more generally inconsistent with the overall goals and objectives of livability. For example, a credit may favor green building or livable features of a project but are neutral to the project's site, surroundings, affordability or the availability of multiple modes of transportation.

Secondly, a majority of these various provisions have an extremely limited impact on the real-estate market compared to the much larger pool of credits and benefits available from the federal government that are targeted more generally. Stated differently, this analysis of the tax code has confirmed what many industry experts already knew: that the federal government's real-estate policy encourages less development of livable communities and location-efficiency and more development of green-fields and sprawling construction patterns. Examples of such incentives include:

Depreciation Deduction (Section 168)

Under the current law of the modified accelerated cost recovery system ("MACRS"), the cost recovery allowance for tangible property, including depreciable real estate, is determined by using the applicable depreciation method, the applicable recovery period and the applicable convention. Most depreciable real property falls within the categories of residential rental property or nonresidential real property.[1] The applicable appreciation method for both of these types of property is the straight-line method.[2] The applicable recovery periods are 27.5 years for residential rental property and 39 years for nonresidential real property.[3] The tax code, however, provides for significantly shorter recovery periods for a host of other types of property.

The depreciation deduction has been regulatory modified over the past fifty years. For many periods during that time frame, depreciation has been accelerated. Since the credit applies only to new construction, many commentators have observed that this created incentives which directed development away from mixed-use buildings in existing city centers, and, instead, toward sprawling, single-use structures in less-developed areas.[4]

Real Estate Investment Trust ("REIT"; Sections 856-857)

A REIT is a business entity created to invest in real estate. REITs allow average investors with the opportunity to pool their capital for investment in real estate in a manner that gives them the ability to easily sell or transfer ownership interests. REITs have several income tax advantages. First, the IRC allows REITs a tax deduction for dividends paid to shareholders, avoiding tax normally assessed at the corporate level on distributions.[5] Second, a REIT may elect to pass through long-term capital gains to its shareholders.[6] In order to obtain these tax benefits, a REIT must meet several requirements.[7]

While REITs have been successful tools for investing in and managing real-estate, some

1 26 U.S.C. § 168
2 26 U.S.C. § 168(b).
3 26 U.S.C. § 168(c).
4 See, e.g., Chad Emerson, All Sprawled Out: How the Federal Regulatory System Has Driven Unsustainable Growth, 75 TENN. L. REV. 411 (2008).
5 26 U.S.C. § 857(b).
6 Id.
7 26 U.S.C. § 856(c).

observers have found that the emergence of REITs has contributed to development that is inconsistent with livability. Specifically, REITs tend to invest in modular, stand-alone real estate, which tends to further low-density, sprawling development.[8]

Mortgage Loan Interest Deduction (Section 163(h)) and State and Local Property Tax Deduction (Section 164)

IRC Section 163(h) allows a deduction for home mortgage loan interest, with several restrictions.[9] The interest is deductible on up to: (1) $1 million of debt used to acquire, construct, or substantially improve a qualified residence; or (2) $100,000 of home equity debt regardless of the purpose or use of the loan.[10] IRC Section 164 allows a deduction for state and local property taxes.[11] In order to benefit from either or both the mortgage loan interest deduction and the state and local property tax deduction, the taxpayer must elect to itemize deductions, the total of which exceeds the standard deduction.

The Mortgage Interest Tax Deduction is the costliest of any tax break, forfeiting nearly $100 billion in annual tax revenues to the federal government. Commentators have argued that both deductions have incentivized development that is not consistent with livable communities.[12] Specifically, for a taxpayer to maximize the benefit of these deductions, the taxpayer has an incentive to purchase higher-cost new construction. Although housing around transit carries a price premium, much of it is rental property and the overwhelming majority of applicable housing stock typically does not occur in compact, moderate- to high-density areas.[13]

To be clear, this report does not specifically recommend eliminating or modifying these duductions. Rather, we simply want to demonstrate their relative value. The economic impact of each provision or group of provisions listed in the table above cannot compare to the vast sums of money implicitly detering the development of livable communities. The federal government has its thumb on the wrong side of the scale.

8 See, e.g., Christopher Leinberger, The Need for Alternatives to the Nineteen Standard Real Estate Product Types, PLACES MAGAZINE (2005).

9 26 U.S.C. § 163(h)(2)(D).

10 26 U.S.C. § 163(h)(3).

11 26 U.S.C. § 164.

12 See, e.g., Emerson, supra note 4.

13 Id. at 427-430.

Recommendations

Recommendation One: Adopt Consensus-Based Definitions for use in Federal Legislation

As policy-makers develop legislation that addresses and incentivizes livability, it is important to maintain a clear and comprehensive definition, or set of definitions, pertaining to the types of places and communities they seek to promote. No development project will be perfect, and no two walkable communities will be identical, but the following menu of consensus definitions should be utilized in legislation to appropriately capture the most important qualities of livable communities in both urban and rural settings, frame the political debate and identify a clear set of goals.

Our organizations propose a broad-based definition of place-based location efficiency for use in federal legislation that seeks to encourage investment in places that provide multimodal mobility options, preserve open space and undeveloped land, and support a broad mix of land uses within walking distance. The definition has two components: a definition of a location efficient place, at the neighborhood level, and a definition of a project at the building or facility level within a location efficient place.

A. *Definition of Location Efficient Places*

I. Urban/Suburban Location Efficient Places are transit-oriented places or infill places as defined below:

Transit-Oriented Places

a. Located within a half-mile of a location where there is planned or existing access to a fixed guideway transit system with regular levels of service; and

b. Not located on land currently enrolled in a farmland preservation program, or within 100 feet of floodways, wetlands, protected park lands, critical slope areas or land identified as habitat for a threatened or endangered species.

Infill Places

a. Located on land currently or previously occupied by residential, commercial or industrial uses, OR on a site with at least 75 percent of the site's perimeter bordering existing development, or roadways with existing development directly opposite the proposed development site; and

b. Located within 1/4 mile of five community services, such as retail, service businesses, health care providers, schools and other public facilities, as defined by the HUD Office of Sustainable Housing and Communities, in each case with a continuous pathway or sidewalks to the facility; and

c. With a minimum street connectivity that averages no fewer than 22 intersections per 100 acres in the surrounding roadway network;** and

d. With a continuous sidewalk along no less than 75 percent of non-limited access roadways;** and

e. Served by existing infrastructure that may or may not require capacity improvements to accommodate development, defined as:[1]

i. a surface transportation facility (such as a road, bridge, highway, public transportation facility or passenger rail);
ii. a water supply and distribution system;
iii. a centralized wastewater collection, treatment and related facility; and
iv. an electricity substation.

f. Not located on land currently enrolled in a farmland preservation program, or within 100 feet of floodways, wetlands, protected park lands, critical slope areas or land identified as habitat for a threatened or endangered species.

II. Small Town/Rural Location Efficient Places must be located outside of a Census defined Metropolitan Statistical Area and meet the following criteria:

a. Located within a Census defined place with a population of at least 5,000 and at least 1,000 jobs; and

b. Located on land currently or previously occupied by residential, commercial, or industrial uses; and

c. Located within 1/2 mile of five community services, such as retail, service businesses, health care providers, schools and other public facilities, as defined by HUD's Office of Sustainable Housing and Communities, in each case with a continuous pathway or sidewalks to the facility; and

d. The surrounding street and road network within ¼ mile of the development boundary must have minimum street connectivity such that it averages no fewer than 14 intersections per 100 acres;[2]** and

e. Not located on land currently enrolled in a farmland preservation program, or within 100 feet of floodways, wetlands, protected park lands, critical slope areas or land identified as habitat for a threatened or endangered species.

III. Preexisting Priority Investment Places must be previously designated by a state, regional or local governments as priority areas for investment and approved by HUD's Office of Sustainable Housing and Communities as meeting requirements for location efficiency based on the criteria under I and II. Preexisting priority investment areas include:

a. Main Street revitalization zones; and

b. HUD-designated Empowerment Zones;

c. HUD-designated Renewal Communities;

d. HUD-designated Choice Neighborhoods;

e. HUD-designated Promise Neighborhoods; and

f. Small Business Administration HUBZones

1 Defined in S. 775 from 110th Congress "National Commission on Infrastructure Act of the United States"
2 Equivalent to street connectivity standards for adjacent sites from LEED-ND of 90 intersections per square mile.

**In the case of an infrastructure investment program, certain criteria might not need to be met. For example, the sidewalk criteria would not need to be met because a community could be requesting funding to increase their location efficiency by adding sidewalks.

Recommendations

B. *Project Definition*

If Part A is applied to legislation that provides grants, loans or other types of incentives for project development on a site(s) within an Urban/Suburban Location Efficient Place, a Small Town/Rural Location Efficient Place or a Preexisting Priority Investment Place, the following project-specific criteria shall apply:

a. Meet the certification for the LEED for Neighborhood Development rating system or comparable requirements. The Secretary of Housing and Urban Development may identify and adopt by regulation such requirements not later than the expiration of the 180-day period beginning upon the date of receipt of any written request, made in such form as the Secretary shall provide, for such adoption and application.[3]

b. In Small Town/Rural Location Efficient Places, the site must be zoned in such a way as to achieve a floor-area-ratio (FAR) of at least 1.0, net of streets and public spaces.

c. In Transit-Oriented Places, Infill Places, and Pre-existing Priority Investment Places, the site must be zoned in such a way to achieve an FAR of at least 2.0, net of streets and public spaces.

Additionally, there is broad consensus that such places should meet an affordable housing requirement (see Recommendation Four). The level of affordability required should vary based on the type of policy proposal and size of the incentive being provided.

State Street in Santa Barbara, CA. Photo courtesy of Dan Burden, Walkable.org and Transportation for America

3 Language adapted from Perlmutter GREEN Act (HR 2336)

Recommendation Two: Amend the Internal Revenue Code to Promote Livability

As alluded to above, the goal of this project was to identify existing incentives that could be modified or expanded to better reflect the Livability Principles. Although only a few of the IRC's current provisions incentivize development consistent with livability objectives, the Code's existing tax policies do provide a foundation for improvement. The Code could be modified in important ways.

Expanding and Enhancing Tax Incentives

We propose to expand the related tax incentives for energy efficiency of buildings and development objectives to be consistent with livability. This approach would require adding special rules to the current tax incentives that would enhance the amount of the tax incentive if the triggering action occurred in an area designated as a livable community, which would need to be defined in the Code. Our organizations have provided consensus definitions for such communities in Recommendation Three.

For example, with respect to the energy investment, non-business energy property or residential energy-efficient property, the tax credit amount could be increased or could be monetized by making it refundable if the property was within an area that met specific criteria. The energy-efficient commercial buildings deduction could be restructured as a credit, which could be made even more beneficial by making it refundable. Additionally, bonus depreciation for energy property could be made permanent in the case where the property is within a targeted area. Such modifications would coordinate livability principles with related incentives in the Code; however, they would only marginally incentivize an increased supply of livable communities.

As noted previously, a number of other, non-related tax incentives drive development decisions. Similar to the previous strategy, legislation could enhance the tax incentives if the project is consistent with principles of livability. This approach would require adding special rules to the current tax incentives that would enhance the amount of the tax incentive if the triggering action occurred in an area designated as a livable community, which would need to be defined in the Code. Possibilities include:

- Modifying the treatment of ordinary income attributable to certain livability-related development to capital gains, or excluding ordinary income or capital gains attributable to certain development;
- Extending the net operating loss carryback period; or
- Shortening the depreciation schedule for tangible property, allowing bonus depreciation, or increasing expensing thresholds.

This policy option could incentivize livability projects by enhancing the tax provisions on which real estate developers typically rely when making investment decisions.

Create a Livable Community Bond Facility

An additional approach would be to create a new or modify the existing green bond facility to finance expenditures, including infrastructure expenses, associated with compact, mixed-use, pedestrian-friendly development, including affordable housing. The bond could be structured similar to a Build America Bond (which provide issuers a direct payment from the Treasury) or a tax-credit bond (which provide the bond holder a federal tax credit in lieu of interest) and should allow for private activity. The bond facility would likely be subject to a volume cap. Al-

location could occur either by delegating authority to a federal agency, which would oversee a competitive application process, or by allocating to States based on a formula. One approach is the QEC bond model, as described above. Such a tax policy would alleviate the dearth of financing for compact, mixed-use, pedestrian-friendly development.

Make Permanent the Qualified Transportation Fringe Benefits (§ 132(F))

Although the benefit is usually greater for parking than other transportation modes, the American Recovery and Reinvestment Act (ARRA) temporarily established parity between parking and transit by increasing the transit and vanpool portion of the benefit to $230/month, equal to the parking benefit. However, unless Congress acts, the transit and vanpool portion of the benefit will revert back to $120/month at the end of this year. Inaction to make parity permanent would penalize employers who utilize public transit as well as incentivizing employees to drive alone to and from work, contributing to greater congestion and greenhouse gas emissions.

Downtown Wallace, Idaho. The total population is just under 1000 and its land area is less than one square mile. When original plans for I-90 took the highway straight through downtown, the citizens banded together to get much of the area listed on the national historic register. I-90 can be seen running along an elevated viaduct at the edge of town. Photo courtesy of Flikr user brotherxii (Creative Commons License)

Recommendation Three: Partner with States and Communities to Develop Special Tax Zones for Livability

Proponents of livable communities are confronted with a paradox when leveraging tax policy as a development tool. The tax code applies to tax paying entities. Deductions, credits, etc. are claimed by individual and corporate owners as they develop building sites or individual lots. But livable communities are places. They are a summation of complex relationships between transportation, housing, retail space, office space, civic areas and other amenities. They cannot jointly file for a 'livable place' deduction and tax policy is, generally, ill-suited to encourage their growth and development one provision at a time.

To support this kind of proximate, location-efficient development, the Federal government should establish a program to allow the designation of special tax districts and coordinate several incentives to enhance livability. The federal government should not be in the business of local land-use planning. However, it can support local governments as they attempt to make their own land-use planning decisions to be consistent with public policy objectives. Programs such as Urban Enterprise Zones have attempted to perform similar functions in the past. Proposed zones will meet minimum requirements that are designed to isolate districts that have "good bones," or a good foundation for location-efficient development. Each zone will receive benefits that will serve as a catalytic signal to the real-estate market that high-quality, livable development should cluster in and around them.

It is reasonable to believe that such a program will have positive spillover effects as well. These zones will serve as powerful models for other communities—in how they live, in how they perform, in how they are financed and entitled. They will provide other communities with templates that can be codified and extrapolated to build a new 21st century America.

The following proposal for Priority Expansion Zones provides an example of criteria that could be used to establish transit oriented development and walkable town center zones.

A. *Program Outline*

The Federal Government will foster the creation of a limited number of Priority Expansion Zones (PEZ).

Counties, cities, towns and metropolitan planning organizations (MPOs) will be eligible to submit proposals for the designation of PEZs within their jurisdiction. These proposals will be evaluated by the HUD/DOT/EPA Partnership for Sustainable Communities. PEZ can be divided into two sub-categories: (1) Transit Oriented and (2) Walkable Town Center. Each category will be entitled to a minimum number of PEZ and the remaining balance will be allocated on a competitive basis.

B. *Definitions*

1) Transit Oriented Development Zones shall:

(a) Be served by existing infrastructure that may or may not require capacity improvements to accommodate development, defined as:

i. a surface transportation facility (such as a road, bridge, highway, public transportation facility or passenger rail);

ii. a water supply and distribution system;

iii. a centralized wastewater collection, treatment and related facility; and

iv. an electricity substation.

(b) Not be located on land currently enrolled in a farmland preservation program, or within 100 feet of floodways, wetlands, protected park lands, critical slope areas or land identified as habitat for a threatened or endangered species.

(c) Have boundaries that extend no more than one-half mile from a location in which there is planned or existing direct access to major transit infrastructure investments, including multimodal center, dedicated bus, rail, light rail, street-car or ferry service

(d) Not exceed 400 acres in size.

(e) Have continuous sidewalk along no less than 75 percent of non-limited access roadways.

(f) Be zoned in such a way as to permit more than one type of use in a building or set of buildings.

(g) Be zoned in such a way as to permit a gross Floor-Area Ratio of at least 2.0, net of streets and public spaces.

2) Walkable Town Center Zones shall:

(a) Be served by existing infrastructure that may or may not require capacity improvements to accommodate development, defined as:

i. a surface transportation facility (such as a road, bridge, highway, public transportation facility or passenger rail);
ii. a water supply and distribution system;
iii. a centralized wastewater collection, treatment and related facility; and
iv. an electricity substation.

(b) Have at least 75% of its perimeter bordering existing development or roadways with

Pullman Square in Huntington, WV. Photo Credit to Flikr user Sarah.WV (Creative Commons License)

existing development directly opposite the proposed zone

(c) Not be located on land currently enrolled in a farmland preservation program, or within 100 feet of floodways, wetlands, protected park lands, critical slope areas or land identified as habitat for a threatened or endangered species.

(d) Have continuous sidewalk along no less than 75 percent of non-limited access roadways.

(e) Not exceed 75 acres in size.

(f) Be zoned in such a way as to permit more than one type of use in a building or set of buildings.

(g) Be zoned in such a way as to permit development with a gross Floor-Area Ratio of at least 1.0, net of streets and public spaces.

C. *Evaluation*

Proposals for PEZ should be evaluated on the following criteria:

(a) Planning for Sustainable and Livable Growth: The Department will give priority to proposals that have planned to develop the district in a manner that is consistent with the Partnership's Livability Principles. This can include:

i. planning for complete streets that enables all travelers, particularly public transit users, bicyclists, pedestrians (including individuals of all ages and individuals with disabilities) and motorists, to use the street safely and efficiently.

ii. a comprehensive plan that identifies housing, transportation land use, environmental, energy, green or civic space and water infrastructure priorities and goals.

(b) Long-Term Outcomes: The Department will give priority to projects that have a significant impact on desirable long-term outcomes for the nation, a metropolitan area or a region. The following types of long-term outcomes will be given priority:

i. Economic Competitiveness: Contributing to the economic competitiveness of the United States over the medium- to long-term.

ii. Livability: Improving the quality of living and working environments and the experience for people in communities across the United States.

iii. Sustainability: Improving energy efficiency, reducing dependence on oil, reducing greenhouse gas emissions and benefitting the environment.

(c) Job Creation and Economic Stimulus: Priority will be given to zone proposals that are expected to quickly create and preserve jobs and stimulate rapid increases in economic activity, particularly jobs and activity that benefit economically distressed areas.

(d) Partnership: Priority will be given to zone proposals that demonstrate strong collaboration among a broad range of participants and/or integration of development with other public service efforts and public involvement.

(e) Other considerations: In all cases, if it is clear that the total benefits of a proposed zone are not reasonably likely to exceed the costs of tax breaks and other incentives, the proposal will not be designated as a PEZ. Consistent with the broader goals of this proposal, the Department can consider some factors that do not readily lend themselves to monetization, including equity, and distributional, geographic and other considerations.

Recommendations

D. *Incentives*

Development projects and construction sites within a designated PEZ will be eligible for specific bonus tax deductions, priority grant consideration and other benefits that are conferred by the federal government. Suggested benefits include:

(a) Bonus deductions under the Energy Efficiency Commercial Buildings Tax Deduction (Section 179D)

(b) Bonus deductions under the Low-Income Housing Tax Credit (Section 42) or other incentives to ensuring the community remains affordable for residents with diverse incomes

(c) Priority consideration for proposals under the Department of Housing and Urban Development "Community Development Block Grant"

(d) Bonus deductions under the Energy Investment Tax Credit (Section 48)

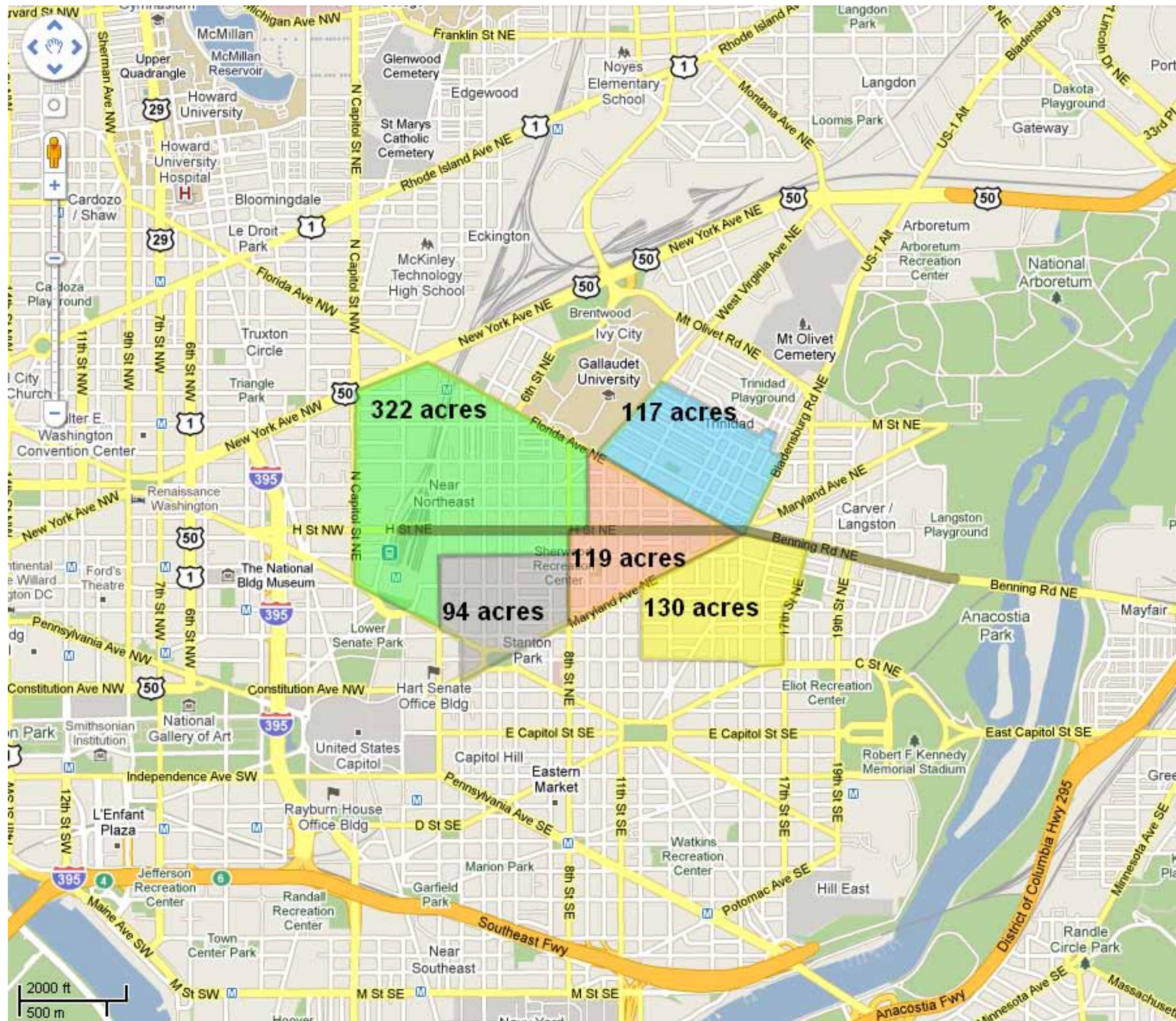
(e) Multi-modal and active transportation incentives

E. *Hypothetical Proposals*

Many people have difficulty picturing neighborhoods, communities or districts that would be created by a plan such as this, especially when measured in acreage. What follows are hypothetical zones that can serve as points of reference when considering how these zones may appear. These maps are only intended to provide a sense of scale. They are based on existing political boundaries and are not necessarily the boundaries, or even the neighborhoods, that local planners would submit.

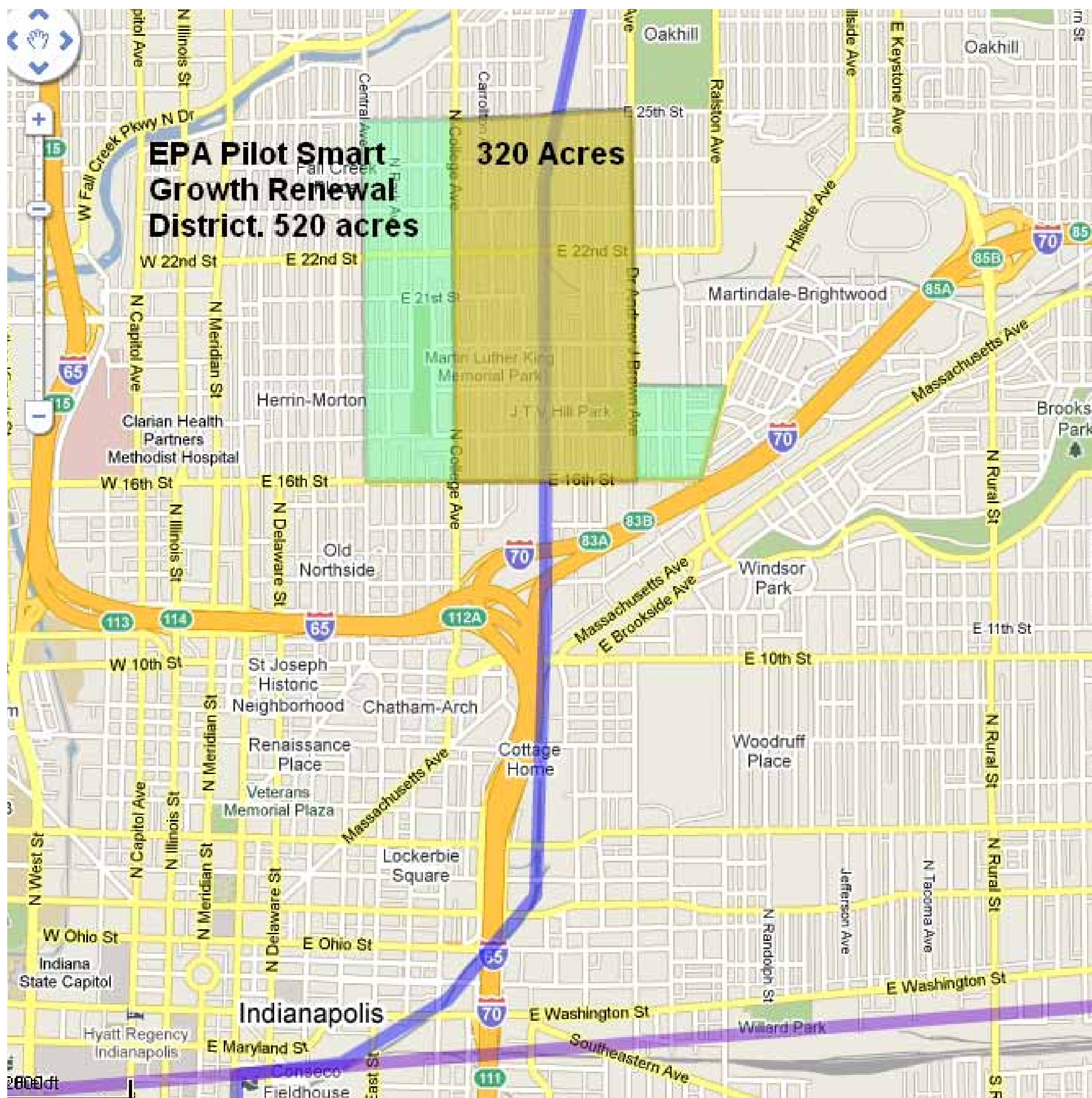
H Street Corridor: Washington DC

This map shows the proposed street car development along the H Street corridor and Benning Road in Northeast Washington, DC, as well as the shape and size of five of the local government voting precincts as reference points. H Street is a historically significant business corridor and the street car is part of a city initiated revitalization effort. Because of the planned fixed-guideway transit, a PEZ zone in this neighborhood could be expanded to reach a total of 400 acres. Coordination between local efforts and a federal Priority Expansion Zone would not only be a dramatic boost to investor confidence, but would provide incentives to focus on energy efficiency, low-income housing and other aspects of livability as the neighborhood continues to evolve.



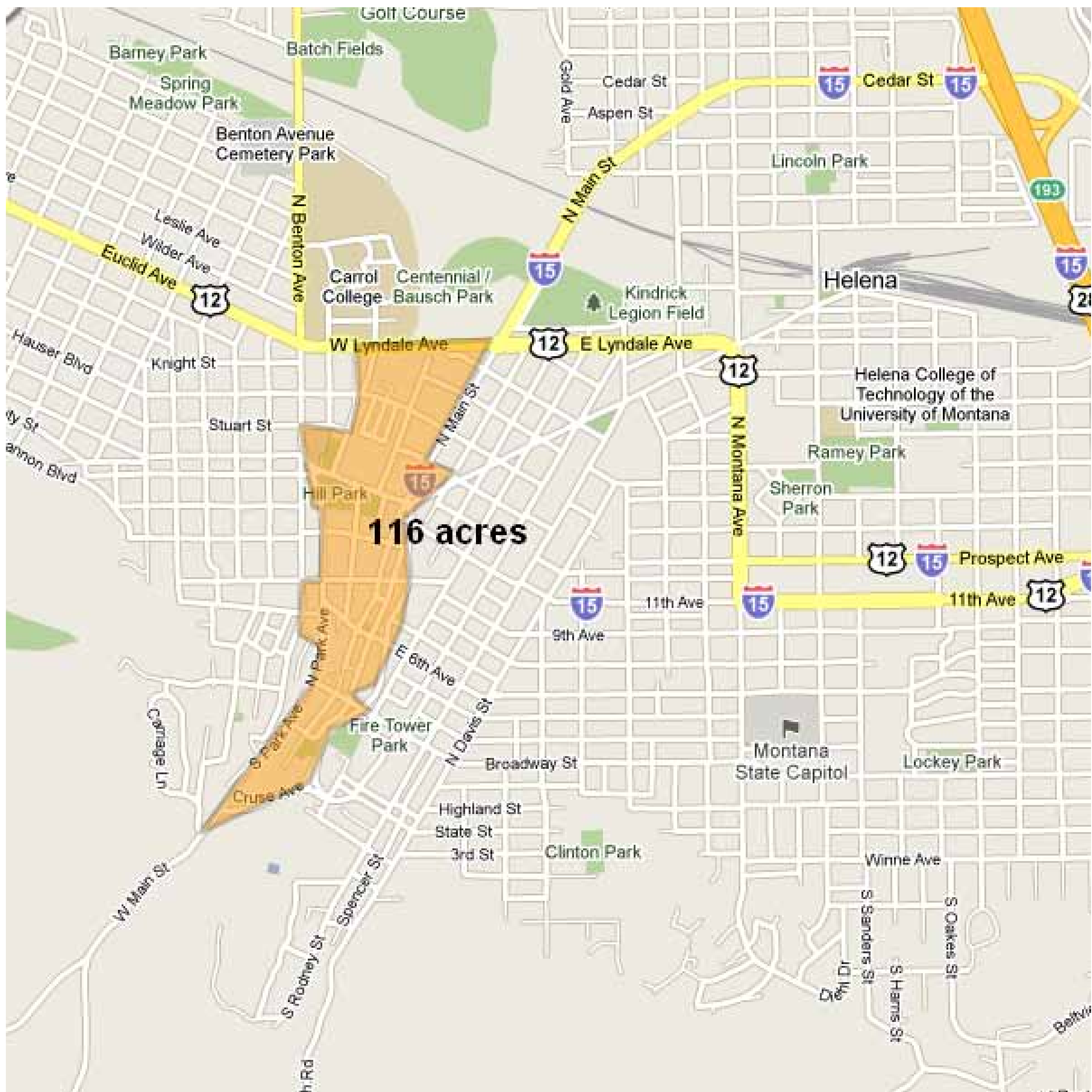
North Downtown: Indianapolis, IN

This map depicts a fairly large Smart Growth Renewal District that was originally designated by the city of Indianapolis. The blue and purple lines represent light and commuter rail lines that are currently in the planning stages. Recently, the community was selected to participate in a pilot program initiated by the EPA to coordinate federal investment in brownfields. It is one of six sites around the country that will receive federal funding to clean up environmentally contaminated sites in conjunction with developing transit lines and affordable housing. Although the planned commuter rail faces an uncertain timeline, shifting the boundaries by a few streets to a slightly smaller district would likely meet the criteria for consideration as a Priority Expansion Zone.



Downtown: Helena, MT

The zone depicted here outlines the core Business Improvement District (BID) within downtown Helena, Montana. Without a planned transit line, the BID zone would be oversized at approximately 116 acres, but a Priority Expansion Zone could roughly conform to this community effort and coordination of local and federal programs can magnify the impact.



Recommendation Four: Ensure Housing Affordability Within Livable Communities

Affordability is clearly a priority for the current administration and it is explicitly referenced by the Partnership for Livable Communities. In order to ensure that housing built in livable communities is affordable to families with a range of incomes, we recommend that future policies, grant opportunities and legislation aimed at creating livable communities include an affordable housing requirement adhering to the following principles:

I. All residential developments that are supported in significant part by federal funding should include units affordable to low- and moderate-income families.

When a supported development is built in an area of high poverty concentration, this requirement can be satisfied by making a comparable financial investment in the rehabilitation of existing housing units within the location-efficient area to preserve them as high-quality permanently affordable housing opportunities.

II. The level of affordability that is required should be commensurate with the level of funding provided. Higher levels of federal support should carry larger affordability mandates and smaller levels of support should carry fewer mandates.

III. There are three main ways to achieve affordability within the development, and all three should be pursued, whenever possible:

a. Minimum percentages of units in developments receiving federal funding should be required to be affordable to and occupied by households in two groups: (a) renter households with incomes below 60 percent of area median income (AMI) and (b) homeowners with incomes below 100 percent of AMI. This will ensure the developments provide both low-income and workforce housing.

b. A substantial financial bonus should be provided to developments that exceed these minimums and deliver specified higher percentages of low-income and workforce units.

c. In addition, developments should be encouraged or required to seek out funds allocated at the state or local levels (such as Low-Income Housing Tax Credits, HOME, CDBG, project-based vouchers, tax-increment financing, etc.) in order to expand both the number of assisted units and the depth of affordability. Rental developments should also be prohibited from refusing to accept Section 8 housing vouchers. These provisions are essential to ensure that some of the units are affordable to very low-income and extremely low-income families.

IV. To qualify, all affordable units must be accompanied by covenants requiring permanent affordability. Without such requirements, the affordable units will be lost well before the transit lines and other infrastructure wear out, leading to the eventual displacement and exclusion of low- and moderate-income families.

An example of how such criteria could be applied to a tax credit for transit-oriented development is provided in Appendix B.

Appendix A

EXISTING TAX INCENTIVES THAT IMPACT COMMUNITY DEVELOPMENT

Exempt Facility Bonds (Section 142)

As discussed above, a private activity bond is one that primarily benefits or is used by a private entity. Generally, interest on these bonds is taxable. However, the Code enumerates several "qualified private activity" exceptions, which allow tax-exempt financing for private activities.[1] Section 142 contains a number of these exceptions. Under the provision, state or local governments may issue tax-exempt facility bonds to finance property for certain private activities.[2] To qualify as an exempt facility bond, at least 95 percent of the bond's net proceeds must be used to finance an eligible facility.[3]

There are two categories of exempt facility bonds available that are consistent with TOD objectives. First, the American Jobs Creation Act of 2004 authorized a new category of exempt facility bonds under Section 142(l) for qualified green building and sustainable design projects ("green bonds").[4] Green bonds are bonds issued for projects designated by the Department of Treasury ("Treasury") secretary, in consultation with the Environmental Protection Agency ("EPA") administrator, as green building and sustainable design projects that meet the following criteria: (1) at least 75 percent of the square footage of the commercial buildings that are part of the project will be LEED certified; (2) the project includes a brownfield site; (3) the project receives at least $5 million in specific State or local resources; and (4) the project includes at least one million square feet of building or at least 20 acres of land.[5]

There is a $2 billion national volume limit on green bonds.[6] Interested parties must submit an application and meet certain requirements before the Treasury Secretary designates the project for green bond financing.[7] The tax-exempt financing must be used for (1) purchasing, construction, integration or other use of energy efficiency, renewable energy and sustainable design features; (2) compliance with LEED certification standards; and/or (3) brownfield remediation.[8] The Treasury secretary is authorized to designate projects for green bond financing until September 30, 2012.[9]

Second, Section 142(c) authorizes exempt facility bonds to be used to finance local mass commuting.[10] These bonds, along with 12 of 22 other private activity bonds, are subject to an annual state volume cap of the greater of $90 per capita or $273.27 million in 2009 (indexed for inflation).[11]

Qualified Energy Conservation Bonds ("QEC bonds"; Section 54D)

1 See 26 U.S.C. § 141.
2 26 U.S.C. § 142.
3 26 U.S.C. § 142(a).
4 American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 701.
5 26 U.S.C. § 142(l)(4)(A).
6 26 U.S.C. § 142(l)(7).
7 See 26 U.S.C. § 142(l)(2) to § 141(l)(4).
8 26 U.S.C. § 142(l)(4)(A).
9 26 U.S.C. § 142(l)(9), as amended by EESA, Pub. L. No. 110-343, Tit. III, § 307.
10 26 U.S.C. § 142(c).
11 26 U.S.C. § 146.

In 2008, Congress created a new category of tax-credit bond, QEC bonds, contained in Section 54D of the Code.[12] QEC bonds were created to encourage energy conservation, including through TOD-related objectives like the use of mass transit, at the state and local government level.[13]

Section 54D of the Code creates QEC bonds, which may be used to finance qualified conservation purposes. Section 54D(f) defines the term "qualified conservation purpose" to include a broad range of: capital expenditures for the purpose of energy efficiency and renewable energy production; expenditures for facilities or grants that support research in renewable energy production and energy efficiency; mass commuting facilities that reduce energy consumption; demonstration projects designed to promote the commercialization of renewable energy production and energy efficiency; and public energy efficiency education campaigns. With respect to TOD, QEC bonds can be used to finance capital expenditures incurred to implement green community programs and expenditures incurred for mass commuting facilities.[14]

Unlike traditional tax-exempt bonds, under QEC bonds, the borrower pays back only the principal of the bond, and the bondholder receives federal tax credits in lieu of the traditional bond interest. The annual credit with respect to a QEC bond is equal to 70 percent of the credit that the Treasury secretary determines would allow the QEC bond to be issued at par and without interest.[15] The national volume cap on QEC bonds is $3.2 billion.[16] Allocations of QEC bonds are made to the states and large local governments based on population. States and large local governments can then suballocate the QEC bonds to issuers within their jurisdiction; however, less than 30 percent may be designated as qualified private activity bonds.[17]

INCENTIVES THAT IMPACT THE ENERGY EFFICIENCY OF BUILDINGS

The Code contains a number of provisions aimed at increasing energy efficiency, an issue related to TOD objectives. These tax incentives can be categorized into three categories – incentives for commercial property, for owners of residential property, and for builders and manufacturers of energy-efficient products. This section considers each of these categories of incentives.

12 Emergency Economic Stabilization Act of 2008 ("EESA"), Pub. L. No. 110-343, Tit. III, § 301.

13 "Congress believes that State and local governments often are in the best position to assess community needs and recognizes there are a number of approaches to energy conservation that State and local governments may wish to encourage. For example, the Congress recognizes that State and local governments may wish to encourage the development of combined heat and power systems, facilities that use thermal energy produced from renewable resources, smart electrical grids, the use of solar panels, mass transit, bicycle paths, or residential property that reduces peak-use of energy." JOINT COMMITTEE ON TAXATION, GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN THE 110TH CONGRESS 338 (2009).

14 26 U.S.C. § 54D(f).

15 26 U.S.C. § 54D(b); 26 U.S.C. § 54A(b).

16 26 U.S.C. § 54D(d). The American Recovery and Reinvestment Act of 2009 ("ARRA") increased the national volume cap to $3.2 billion from $800 million. ARRA, Pub. L. No. 111-5, Div. B., § 1112.

17 26 U.S.C. § 54D(e). A private activity bond is one that primarily benefits or is used by a private entity. Under 26 U.S.C. § 141(b), bonds are private activity bonds if:

a. More than ten percent of the proceeds of the issue are to be used for any private business; and

b. Either (A) the payment on the principal of, or the interest on, more than ten percent of the proceeds is secured by an interest in (1) property used for a private business use, or (2) payments in respect to such property; or (B) if the payment is to be derived from payments in respect of property, or borrowed money, used or to be used for a private business use.

Commercial Property

Energy-Efficient Commercial Buildings Tax Deduction (Section 179D)

The Energy Policy Act of 2009 created IRC Section 179D, which provides a deduction equal to energy-efficient commercial building property expenditures made by a taxpayer.[18] The deduction shall not exceed $1.80 per square foot of the property.[19] The deduction is effective for property placed in service prior to January 1, 2014.[20]

Energy-efficient commercial building property expenditures are defined as property which is:

- Installed on or in any U.S. building that is within the scope of Standard 90.1-2001 of the American Society of Heating, Refrigerating, and Air Conditioning Engineers and the Illuminating Engineering Society of North America ("ASHRAE/IESNA");
- Installed as part of the interior lighting systems, the heating, cooling, ventilation and hot water systems, or the building envelope; and
- Certified as being installed as part of a plan designed to reduce the total annual energy and power costs with respect to the interior lighting systems, heating, cooling, ventilation and hot water systems of the building by 50 percent or more.[21]

Certain certification requirements must be met in order to qualify for the deduction.[22]

In the case that a building does not meet the overall 50 percent energy savings requirement, a partial deduction is allowed for each separate building system that comprises energy-efficient property and that is certified as meeting required savings targets. Eligible building systems are interior lighting systems; the heating, cooling, ventilation, and hot water systems; and the building envelope. The maximum allowable deduction is $0.60 per square foot for each separate system.[23]

Energy Investment Tax Credit (Section 48)

IRC Section 48 provides a non-refundable business energy credit for the cost of new energy property.[24] Systems eligible for the credit are:

- Solar: The credit is equal to 30 percent of expenditures. Eligible solar energy property includes equipment that uses solar energy to generate electricity, to heat or cool (or provide hot water for use in) a structure or to provide solar process heat.
- Fuel Cells: The credit is equal to 30 percent of expenditures, but is limited to $1,500 per one-half kilowatt of capacity. Eligible property includes fuel cells with a minimum capacity of one-half kilowatt that have an electricity-only generation efficiency of at least 30 percent.
- Small Wind Turbines: The credit is equal to 30 percent of expenditures. Eligible small wind property includes wind turbines up to 100 kilowatt in capacity.
- Geothermal Systems: The credit is equal to 10 percent of expenditures. Eligible geothermal energy property includes geothermal heat pumps and equipment used to produce, distribute or use energy derived from a geothermal deposit.

18 Energy Policy Act of 2005, Pub. L. No. 109-58, Tit. XIII, § 1331(a); 26 U.S.C. § 179D.
19 26 U.S.C. § 179D(b).
20 26 U.S.C. § 179D(h).
21 26 U.S.C. § 179D(c).
22 26 U.S.C. § 179D(d)(6).
23 26 U.S.C. § 179D(d)(1).
24 26 U.S.C. § 48.

- Microturbines: The credit is equal to 10 percent of expenditures, but is limited to $200 per kilowatt of capacity. Eligible property includes microturbines up to two megawatts in capacity that have an electricity-only generation efficiency of at least 26 percent.
- Combined Heat and Power: The credit is equal to 10 percent of expenditures. Eligible CHP property generally includes systems up to 50 megawatt in capacity that exceeds 60 percent energy efficiency, subject to certain limitations.[25]

Generally, the eligible systems must be placed in service on or before December 31, 2016.[26]

ARRA modified the credit to allow eligible taxpayers to receive a grant from the Treasury Department in lieu of the Section 48 tax credit.[27]

Five-Year Cost Recovery for Energy Property (Section 168(e)(3)(B)(vi)) and Bonus Depreciation (Section 168(k))

By way of background, the amount of the depreciation deduction allowed with respect to tangible property for a taxable year is determined under the modified accelerated cost recovery system ("MACRS"). Under MACRS, different types of personal property are generally assigned recovery periods ranging from three to 25 years. IRC Section 168(e)(3)(B)(vi) provides a relatively short five-year cost recovery period for certain types of renewable energy property.[28] Eligible property includes: (1) equipment which uses solar and wind energy to generate electricity or to heat or cool a structure; (2) equipment which uses solar energy to illuminate the inside of a structure using fiber-optic distributed sunlight; (3) equipment used to produce, distribute or use energy derived from a geothermal deposit; and (4) qualified fuel cell property or qualified microturbine property.[29]

In addition, the Economic Stimulus Act of 2008 included a 50 percent bonus depreciation provision for eligible renewable energy systems, which was extended through 2009 by the American Recovery and Reinvestment Act of 2009.[30] In order to have qualified, a project: (1) must have had a recovery period of 20 years or less; (2) the original use must have commenced with the taxpayer; (3) the property generally must have been acquired in 2008 or 2009; and (4) the property must have been placed in service during 2008 and 2009.[31] Property meeting such requirements was entitled to deduct 50 percent of the adjusted basis of the property when it was placed in service in 2008 or 2009. The balance of the adjusted basis would have been depreciated over the remaining recovery period.[32]

Residential Property

Credit for Non-Business Energy Property (Section 25C)

The Energy Policy Act of 2005 created IRC Section 25C, which provides a credit equal to 30 percent of the sum of the amount incurred by the taxpayer for non-business energy property,

25 26 U.S.C. § 48(c).
26 *Id*
27 26 U.S.C. § 48(d).
28 26 U.S.C. § 168(e)(3)(B)(vi).
29 Id. (referencing 26 U.S.C. § 48 for definitions of energy property).
30 Economic Stimulus Act of 2008, Pub. L. No. 110-185, § 103, as amended by ARRA, Pub. L. No. 111-5, Div. B, § 1201; 26 U.S.C. § 168(k).
31 26 U.S.C. § 168(k)(2).
32 26 U.S.C. § 168(k)(1).

up to $1,500.[33] The credit is available for property placed in service in 2009 and 2010.[34]

Eligible non-business energy property includes the following types of property that are installed in or on a dwelling that is used by the taxpayer as his principal residence:

- Qualified energy efficiency improvement, which is any energy efficiency building envelope component that: (1) meets criteria for such a component established by the 2000 International Energy Conservation Code; (2) the original use of which commences with the taxpayer; and (3) reasonably can be expected to remain in use for at least five years. Building envelope components are insulation, exterior windows, and metal or asphalt roofs meeting certain requirements.[35]
- (1) Qualified natural gas, propane or oil furnace or hot water boilers; (2) qualified energy-efficient property; and (3) advanced main air circulating fans, subject to meeting certain efficiency standards.[36]

Credit for Residential Energy-Efficient Property (Section 25D)

- The Energy Policy Act of 2005 created IRC Section 25D, which provides a personal tax credit equal to 30 percent of qualified expenditures.[37] Qualified expenditures must be for the following types of property for use in a dwelling that is used as a residence by the taxpayer:
- Qualified solar water heating property, defined as property to heat water (other than the purposes of heating a swimming pool or hot tub) if at least half of the energy used by such property for such purpose is derived from the sun;
- Qualified solar electric property, defined as property which uses solar energy to generate electricity;
- Qualified fuel cell property, which is an integrated system comprised of a fuel cell stack assembly and associated balance of plant components that (1) converts a fuel into electricity using electrochemical means, (2) has an electricity-only generation efficiency of greater than 30 percent, and (3) has a nameplate capacity of at least one-half kilowatt;
- Qualified small wind energy property, defined as property which uses a wind turbine to generate electricity; and
- Qualified geothermal heat pump property, which is any equipment which (1) uses the ground or ground water as a thermal energy source or sink and (2) meets the requirements of the Energy Star program.[38]

The credit may be claimed against the alternative minimum tax, but is not refundable.[39] The credit applies to property placed in service prior to January 1, 2017.[40]

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33 Energy Policy Act of 2005, Pub. L. No. 109-58, Tit. XIII, § 1333(a), as amended by ARRA, Pub. L. No. 111-5, Div. B, § 1103(b); 26 U.S.C. § 25C.
34 26 U.S.C. § 25C(g).
35 26 U.S.C. § 25C(c).
36 26 U.S.C. § 25C(d).
37 Energy Policy Act of 2005, Pub. L. No. 109-58, Tit. XIII, § 1335(a); 26 U.S.C. § 25D. The credit amount for fuel cell property is limited to $500 for each one-half kilowatt of capacity.
38 26 U.S.C. § 25D(d).
39 26 U.S.C. § 25D(c).
40 26 U.S.C. § 25D(g).

Energy Conservation Subsidies Provided by Public Utilities (Section 136)

The Energy Policy Act of 1992 created Section 136, which provides an exclusion from gross income for the value of any subsidy provided by a public utility to a customer for the purchase or installation of any energy conservation measure. The term "energy conservation measure" means any installation or modification primarily designed to reduce consumption of electricity or natural gas or to improve the management of energy demand with respect to a dwelling unit.[41] Qualified recipients include owners of residential property and multi-family residential property. Qualifying technologies are not identified, but include solar water heat, solar space heat, and photovoltaics.[42]

INCENTIVES THAT IMPACT THE BUILDERS AND MANUFACTURERS OF ENERGY-EFFICIENT PRODUCTS

New Energy-Efficient Home Credit (Section 45L)

The Energy Policy Act of 2005 created IRC Section 45L, which provided a credit to eligible contractors for the construction of qualified new energy-efficient homes.[43] A new energy-efficient home was a dwelling that was certified in accordance with guidance prescribed by the Treasury secretary to achieve either a 30 percent or 50 percent reduction in heating and cooling energy consumption (of which one-third or one-fifth of the savings, respectively, must come from the building envelope).[44] The credit was in the amount of $1,000 for a new home that meets the 30 percent standard and in the amount of $2,000 for a new home that meets the 50 percent standard. The credit, which was part of the general business credit,[45] applied to homes acquired before January 1, 2010.[46] The credit has been extended previously and may be extended again in future legislation.

Energy-Efficient Appliance Credit (Section 45M)

The Energy Policy Act of 2005 created IRC Section 45M, a credit for the eligible production of certain energy-efficient dishwashers, clothes washers and refrigerators.[47] Appliances eligible for the credit are those produced in the U.S. and that exceed the average amount of U.S. production from the two prior calendar years.[48]

The credit amounts range based on the level of energy efficiency from: $45 to $75 for dishwashers; $75 to $250 for clothes washers; and $50 to $200 for refrigerators.[49] The aggregate credit amount may not exceed $75 million, with the exception that the $200 refrigerator credit and the $250 clothes washer credit are not limited. Additionally, the credit allowed in a taxable year for all appliances may not exceed two percent of the average annual gross receipts of the taxpayer for the three taxable years.[50] The credit is part of the general business credit.[51]

41 Energy Policy Act of 1992, Pub. L. No. 102-486, Tit. XIX, § 1912(a); 26 U.S.C. § 136.
42 Internal Revenue Service, Publication 525 (2008), at http://www.irs.gov/publications/p525/index.html
43 Energy Policy Act of 2005, Pub. L. No. 109-58, Tit. XIII, § 1332(a); 26 U.S.C. § 45L.
44 26 U.S.C. §§ 45L(b) to 45L(c).
45 26 U.S.C. § 45L(a).
46 26 U.S.C. § 45L(g).
47 Energy Policy Act of 2005, Pub. L. No. 109-58, Tit. XIII, § 1334(a); 26 U.S.C. § 45M.
48 26 U.S.C. § 45M(a).
49 26 U.S.C. § 45M(b).
50 26 U.S.C. § 45M(e).
51 26 U.S.C. § 45M(a).

INCENTIVES THAT IMPACT EFFICIENT TRANSPORTATION

Qualified Transportation Fringe Benefits (Section 132(f))

Under IRC Section 132(f), qualified transportation fringe benefits provided by an employer are excluded from an employee's gross income for income tax purposes and from an employee's wages for payroll purposes.[52] On the one hand, qualified transportation fringe benefits are consistent with the focus of TOD away from single-occupancy vehicles, including transit passes, qualified bicycle commuting reimbursements and vanpool benefits; however, qualified transportation fringe benefits also include parking benefits. Qualified transportation fringe benefits are consistent with the focus of TOD away from single-occupancy vehicles, including transit passes, qualified bicycle commuting reimbursements and vanpool benefits; qualified transportation fringe benefits also include parking benefits.

The exclusion is subject to a monthly limitation that is indexed annually for inflation. For 2009, the limit is $230 per month for transit passes, vanpool benefits and parking benefits.[53] "Qualified bicycle commuting reimbursement" means, with respect to any calendar year, any employer reimbursement during the 15-month period beginning with the first day of such calendar year for reasonable expenses incurred by the employee during such calendar year for the purchase of a bicycle and bicycle improvements, repair and storage, if such bicycle is regularly used for travel between the employee's residence and place of employment. The applicable annual limitation on such reimbursements is, with respect to any employee for any calendar year, the product of $20 multiplied by the number of qualified bicycle commuting months during such year.[54]

INCENTIVES THAT IMPACT DEVELOPMENT OBJECTIVES

The IRC has several tax incentives aimed at incentivizing certain types of development. Not only may these incentives provide a foundation to foster TOD through their modification, but their objectives may inform additional considerations with respect to TOD-related tax policy.

Low-Income Housing Tax Credit ("LIHTC"; Section 42)

Created by the Tax Reform Act of 1986, the LIHTC provides an incentive for the acquisition and development or rehabilitation of rental housing occupied by tenants having incomes below specified levels.[55] States receive an annual LIHTC allocation; in 2009, the allocation was $2.30 per resident, with a minimum annual cap of $2,665,000.[56] ARRA provided the Treasury secretary the authority to make grants to states in lieu of a portion of their 2009 LIHTC allocation.[57]

In order to obtain a LIHTC allocation, real estate developers apply to the state housing finance authority. Developers can either use the credits or sell them to investors. The LIHTC may be claimed over a 10-year period. The amount of the credit is the applicable percentage of the qualified basis of each qualified low-income building, which equals the applicable fraction of the eligible basis of the building. [58]

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52 26 U.S.C. § 132(f)(1).
53 26 U.S.C. § 132(f)(2).
54 26 U.S.C. § 132(f)(5)(F).
55 Tax Reform Act of 1986, Pub. L. No. 99-514, Tit. II, § 252(a); 26 U.S.C. § 42.
56 26 U.S.C. § 42(h).
57 ARRA, Pub. L. No. 111-5, Div. B, §§ 1404 and 1602.
58 26 U.S.C. §§ 42(b) to 42(d).

Expensing of Environmental Remediation Costs (Section 198)

IRC Section 198 allowed a taxpayer to elect to deduct the costs of qualified environmental remediation in the year the costs were incurred ("expensing"), rather than spreading the costs over a period of years ("capitalizing").[59] Costs incurred in qualified environmental remediation were those in connection with the abatement or control of hazardous substances at a qualified contaminated site and otherwise chargeable to a capital account.[60] A state environmental protection agency was required to certify that a site was a qualified contaminated site.[61] Although the tax incentive expired in 2009, it is likely that it will be extended.

Rehabilitation Credit (Section 47)

IRC Section 47 provides a tax credit for certain types of rehabilitation. The rehabilitation credit for any taxable year is the sum of: (1) ten percent of the qualified rehabilitation expenditures with respect to any qualified rehabilitated building other than a certified historic structure and (2) 20 percent of the qualified rehabilitation expenditures with respect to any certified historic structure.[62] A certified historic structure is a building that is listed individually in the National Register of Historic Places or a building that is located in a registered historic district and certified by the National Park Service as contributing to the historic significance of that district.[63]

Qualified Redevelopment Bonds (Section 144(c))

IRC Section 144(c) contains another category of qualified private activity bonds known as qualified redevelopment bonds. To qualify as an exempt facility bond, at least 95 percent of the bond's net proceeds must be used to finance one or more redevelopment purposes in any designated blighted area. Redevelopment purposes means, with respect to any designated blighted area: (1) the acquisition (by a governmental unit having the power to exercise eminent domain) of real property; (2) the clearing and preparation for redevelopment of land acquired by such governmental unit; (3) the rehabilitation of real property acquired by such governmental unit; and (4) the relocation of occupants of such real property.[64]

New Markets Tax Credit ("NMTC"; Section 45D)

The NMTC, contained in IRC Section 45D, was enacted by the Community Renewal Tax Relief Act of 2000 to provide an incentive to stimulate investment in low-income communities.[65] The initial allocation for the NMTC program was $15 billion from 2001 to 2007. The program expired at the end of 2009, but is likely to be extended.

Generally under the program, qualified investment groups (a "Community Development Entity" or "CDE") apply to the Treasury Department's Community Development Financial Institutions Fund ("CDFI") for a NMTC allocation. The CDE seeks taxpayers to make qualifying equity investments in the CDE. The CDE then makes equity investments in low-income communities and low-income community businesses, all of which must be qualified. After the

59 26 U.S.C. § 198(a).
60 26 U.S.C. § 198(b).
61 26 U.S.C. § 198(c).
62 26 U.S.C. § 47(a).
63 26 U.S.C. § 47(c).
64 26 U.S.C. § 144(c).
65 Community Renewal Tax Relief Act of 2000, Pub. L. No. 106-554; 26 U.S.C. § 45D.

CDE is awarded a tax credit allocation, the CDE is authorized to offer the tax credits to private equity investors in the CDE.[66]

The tax credit value is 39 percent of the cost of the qualified equity investment and is claimed over a seven-year credit allowance period. In each of the first three years of the investment, the investor receives a credit equal to five percent of the total amount paid for the stock or capital interest at the time of purchase. For the final four years, the value of the credit is six percent annually.[67] Investors must retain their interest in a qualified equity investment throughout the seven-year period.

As of December 2009, CDFI made 396 awards totaling $26 billion through its NMTC allocation authority.[68] A 2007 Government Accountability Office ("GAO") report stated:

"The results of GAO's survey and statistical analysis indicate that the NMTC may be increasing investment in low-income communities by participating investors. Investors indicated that they have increased their investment budgets in low-income communities as a result of the credit, and GAO's analysis indicates that businesses may be shifting investment funds from other types of assets to invest in the NMTC, while individual investors may be using at least some new funds to invest in the NMTC." [69]

66 26 U.S.C. §§ 45D(b) to § 45D(e).

67 26 U.S.C. § 45D(a)

68 CONGRESSIONAL RESEARCH SERVICE, NEW MARKETS TAX CREDIT: AN INTRODUCTION, RL34402, 5 (2009).

69 GOVERNMENT ACCOUNTABILITY OFFICE, NEW MARKETS TAX CREDIT APPEARS TO INCREASE INVESTMENT BY INVESTORS IN LOW-INCOME COMMUNITIES, BUT OPPORTUNITIES EXIST TO BETTER MONITOR COMPLIANCE, GAO-070296, 1 (2007).

Appendix B

SAMPLE LEGISLATIVE PROVISIONS TO IMPLEMENT AFFORDABLE HOUSING GUIDELINES IN RECOMMENDATION FOUR

As indicated in Recommendation Four, all residential developments that are supported in significant part by federal funding should include units affordable to low- and moderate-income families. However, the precise affordability requirements to be applied to any specific legislation will depend on the nature and extent of the federal tax credit or subsidy provided.

The language below illustrates how the affordable housing guidelines in Recommendation Four could be applied to a tax credit provision providing substantial financial support for transit-oriented development (the TOD tax credit):

I. Certification of Compliance with Affordable Housing Requirements

As a condition for receiving the TOD tax credit, the taxpayer shall certify that:

a. At least 15 percent of the residential units will be permanently affordable to and occupied by households with incomes (at time of initial occupancy) at or below 60 percent of the area median income (for rental units) and/or 100 percent of the area median income (for homeownership units) and

b. The taxpayer will use his or her best efforts to secure federal, state and/or local subsidies sufficient to allow an additional 15 percent of the units to be permanently affordable and to expand the depth of affordability to meet Target Affordability Levels.

Affirmation of compliance from the local government body in which the residential units will be located shall be deemed sufficient to verify the accuracy of the taxpayer's certification.

II. Bonus Credit for Exceeding Affordable Housing Requirements

Taxpayers that achieve 150 percent or more of the Target Affordability Levels shall be eligible to receive the bonus TOD credit.

III. Exception for High Poverty Areas

In areas of high poverty concentration, the affordable housing requirements specified above in paragraph A may be made by making a comparable financial investment in the rehabilitation of existing housing units within the location-efficient area to preserve them as high-quality permanently affordable housing opportunities. The Department of Housing and Urban Development shall promulgate regulations specifying how to determine compliance with this exception.

IV. Definitions

a. Housing units are "permanently affordable" when they come with covenants or other legal protections designed to ensure the housing remains affordable to and occupied by members of the target income group for the lesser of: (a) at least 99 years or (b) the longest period permissible under state law.

b. The term "Target Affordability Levels" shall mean that a total of at least 30 percent of the units in a residential development are permanently affordable, allocated as follows:

- For rental developments, at least 15 percent of the units in the development are permanently affordable to and occupied by families in each of the following income categories (at time of initial occupancy): (a) 0 to 30 percent of the Area Median Income and (b) 31 to 60 percent of the Area Median Income.
- For homeownership developments, at least 15 percent of the units in the development are permanently affordable to and occupied by families in each of the following income categories (at time of initial occupancy): (a) Below 80 percent of the Area Median Income and (b) 81 to 100 percent of the Area Median Income.
- For developments with a mix of rental and ownership units, at least 10 percent of the units in the development are permanently affordable to and occupied by families in each of the following income categories (at time of initial occupancy): (a) 0 to 30 percent of the Area Median Income; (b) 31 to 60 percent of the Area Median Income; and (c) 61 to 100 percent of the Area Median Income.