IF YOU NEED ME, CALL ME: THE IMPORTANCE AND MEANS OF MATCHING OPPORTUNITY ZONE INVESTMENT WITH COMMUNITY WANTS AND NEEDS

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I. INTRODUCTION

The bill that eventually became the Tax Cuts and Jobs Act of 2017 (TCJA) was introduced in the House of Representatives on November 2, 2017.[1] In less than two months, on December 22, 2017, the bill became Public Law No. 115-97.[2] This Comment concerns Opportunity Zones, a concept created by the TCJA[3] and now formally encoded in Subtitle A, Chapter 1, Subchapter Z of the Internal Revenue Code.[4] The Opportunity Zone program, as set out in Subchapter Z, provides three avenues through which individuals who reinvest their capital gains in designated low-income (and some non-low-income) communities, called "qualified opportunity zones," throughout the United States may defer and reduce their capital gains tax liability.[5] Such incentives serve to spur efforts by the private sector to revitalize and develop economically distressed communities, thus creating jobs and giving hope to the individuals within them.[6] This Comment, in applying economic theory to stories of failed similar efforts in the past, urges state and local governments to augment the current incentives through additional incentives that would attract investors to specific types of businesses, thus increasing

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[1] H.R. 1, 115th Cong. (2017).

[2] An Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for the fiscal year 2018. Pub. L. No. 115-97, 131 Stat. 2054.

[3] The concept was derived from legislation called the Investing in Opportunity Act, which was introduced by Senator Tim Scott and former Representative Pat Tiberi. *The Promise of Opportunity Zones*, JOINT ECON. COMM. (Nov. 29, 2018), https://www.jec.senate.gov/public/index.cfm/republicans/2018/11/the-promise-of-opportunity-zones.

[4] *See* 26 U.S.C. § 1400Z–1 (2019); 131 Stat. 2054, 2183.

[5] *See id.* § 1400Z–2(b)–(c).

[6] *See, e.g.*, 165 CONG. REC. H116 (daily ed. July 11, 2019) (statement of Rep. Thompson); *Opportunity Zones Frequently Asked Questions*, IRS, https://www.irs.gov/newsroom/opportunity-zones-frequently-asked-questions (last visited Sept. 3, 2019).

the likelihood that communities will successfully realize the program's goals.

Part II of this Comment will describe the Opportunity Zone program and the three categories of tax incentives that it offers. It will briefly explain the criteria necessary for the incentives to operate, such as which communities qualify for the program and how communities were selected. It will then present some of the ways in which communities and investors have responded.

Part III will explore historical instances in which private investment has been utilized or justified as a means for economic development. In applying the economic theory of asymmetric information to such instances, it will demonstrate the attractiveness of having investors provide funds not for projects that they have chosen based on their own discretion but, rather, for specific types of projects that the communities themselves want or need.

Part IV will explain that, even if investors should tailor their investments to communities' wants and needs, the task is not so simple; there are many other risks that investors must consider when choosing where and in which projects to invest, such as the risk underlying the types of businesses a community seeks. It will show that, indeed, investors had initially flocked to seemingly lower-risk investments, such as to real estate projects and, geographically, to locations where redevelopment plans were initiated even before the Opportunity Zone program was created.

Thus, Part V will argue that governments, preferably those that are state or local, would be wise to augment the current program through additional incentives—such as those that increase the tax incentive based on business type, whether through allowing deferment or multi-year tax holidays or through a lower tax rate—so as to attract investors to projects that will benefit individuals within the opportunity zones. It will consider the issue from a policy standpoint, asking, for example, how far we are willing to go to incentivize investors and examining issues of equity, administrability, and efficiency.

Part VI will conclude that, in so augmenting the current program such that its benefits will accrue to the communities themselves, state and local governments should closely assess not just their communities' needs and wants but also the types and levels of risk that their communities impose.

II. OVERVIEW OF THE OPPORTUNITY ZONE PROGRAM

The Opportunity Zone program provides for special, favorable tax treatment of capital gains that are reinvested into qualified opportunity funds.[7] While the legislation contains many intricacies, the core of it is relatively straightforward. Specifically, a taxpayer who acquires a gain from the sale or exchange of property held by the taxpayer, where the other party to the sale or exchange is unrelated to the taxpayer, and within 180 days of the sale or exchange, reinvests that gain in a qualified opportunity fund may choose not to include the amount of that gain in their calculation of gross income for the taxable year.[8] Instead, the taxpayer may choose to defer recognition of the gain to the year in which the property acquired within the 180 days is sold or exchanged or to 2026, whichever is earlier.[9]

The benefit to such taxpayers is not only vis-à-vis deferment, as the legislation also provides for special treatment in the calculation of basis.[10] If a taxpayer reinvests their capital gains in a qualified opportunity fund and holds the latter investment for at least five years, the taxpayer shall increase the basis[11] of the investment, initially set to zero, by an amount equaling ten percent of the amount of gain deferred.[12] The ultimate effect of the provisions is that the taxpayer gets to both defer payment of taxes on the taxpayer's initial capital gains as well as decrease the amount of capital gain on which the taxpayer owes taxes (with respect to the initial investment) by ten percent.[13] If the taxpayer holds the opportunity fund investment for at least seven years, the taxpayer shall further increase the basis of the opportunity fund investment by an amount equaling five percent of the amount of gain deferred.[14] Lastly, if the taxpayer holds the opportunity fund investment for at least ten years, the taxpayer's basis upon sale or

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[7] *See generally* § 1400Z–2.

[8] § 1400Z–2(a)(1).

[9] § 1400Z–2(b)(1).

[10] *See* § 1400Z–2(b).

[11] Section 1012 of the Internal Revenue Code defines the basis of a property as the cost of the property unless otherwise provided. *Id.* § 1012(a). When a taxpayer sells or otherwise disposes of property, the taxpayer generally must recognize the entire amount of the resulting gain or loss as part of their gross income for the taxable year. Such gain or loss is calculated by subtracting the basis of the property, generally meaning the cost of the property when the taxpayer acquired it, from the amount realized, meaning the sum of any money received for the property plus the amount of fair market value of the property in excess of any money received upon sale or disposition. *Id.* § 1001(a)–(c).

[12] *Id.* § 1400Z–2(b)(2).

[13] *See id.*

[14] § 1400Z–2(b)(2)(B)(iv).

exchange of the opportunity fund investment shall equal the fair market value of the investment on the date of sale or exchange.[15] Assuming that the taxpayer sells or exchanges the property for fair market value, the effect of this provision is that the taxpayer need not recognize any gain on the sale or disposition of the taxpayer's opportunity fund investment. While taxpayers who take advantage of the five- or seven-year tax incentive may defer payment to as late as 2026, according to a proposed regulation, those who seek to benefit from the ten-year incentive may do so through December 31, 2047, so long as they dispose of their interest in the opportunity fund investment by the end of 2047.[16]

Section 1400Z-1 of the Internal Revenue Code defines qualified opportunity zone as "a population census tract that is a low-income community that is designated as a qualified opportunity zone."[17] A qualified opportunity fund, then, as referred to above, is a corporation or partnership that has the purpose of investing in qualified opportunity zone property.[18] Specifically, the fund must hold at least ninety percent of its assets in such property.[19] Qualified opportunity zones were

[15] § 1400Z–2(c).

[16] Investing in Qualified Opportunity Funds, 83 Fed. Reg. 54279, 54283 (proposed Oct. 29, 2018) (to be codified at 26 C.F.R. pt. 1). For example, assume that, in 2017, a taxpayer buys an investment property for $100,000. In 2019, the taxpayer sells the property for $200,000. Normally, the taxpayer would have to pay capital gains tax in 2019 on the resulting $100,000 gain. If instead the taxpayer reinvests the $100,000 by placing it in a qualified opportunity fund, the taxpayer need not pay capital gains tax on the $100,000 in 2019; rather, he may defer such payment until the earlier of when he sells his opportunity fund investment or 2026. Moreover, if the taxpayer holds the opportunity fund investment until 2024, and thus for at least five years, with respect to the original (non-opportunity fund) investment, the taxpayer will have to pay capital gains tax on only $90,000 (rather than the full $100,000) and will have to do so in 2024 (as opposed to doing so in 2019). If the taxpayer holds the opportunity fund investment until 2026, and thus for at least seven years, the taxpayer will have to pay capital gains tax on only $85,000 and will have to do so in 2026. Finally, if the taxpayer holds the opportunity fund investment for at least ten years, say until 2029, the taxpayer will pay capital gains tax on $85,000 in 2026 with respect to the original investment but will not pay any capital gains tax on his gain realized from the opportunity fund investment because his basis in the opportunity fund investment will be considered equal to the fair market value of the opportunity fund investment.

[17] *Id.* § 1400Z–1(a).

[18] *Id.* § 1400Z–2(d)(1).

[19] *Id.* § 1400Z–2(d)(1). Opportunity zone property is divided into three categories: qualified opportunity zone stock, qualified opportunity zone business property, and qualified opportunity zone partnership interest. *Id.* § 1400Z–2(d)(2). Qualified opportunity zone stock consists of stock in a corporation that qualifies as an opportunity zone business, which generally refers to a trade or business in which almost all of the tangible property owned or leased is qualified opportunity zone business property at the time of the stock issuance. *Id.* §§ 1400Z–2(d)(3), (d)(2)(B). Qualified opportunity zone business property consists of "tangible property used in a trade or business of the qualified opportunity fund if" the property was purchased by the qualified opportunity

designated in each state by the Secretary of the U.S. Treasury after being nominated by the states' respective governors, or "chief executive officer[s]."[20] Governors had to make their nominations within ninety days of the TCJA's enactment,[21] and each was allowed to nominate a number of population census tracts within their state not exceeding twenty-five percent of the number of low-income communities[22] within their state.[23] Governors were not limited to choosing from low-income tracts; rather, a population census tract that was not a low-income community could still qualify as an opportunity zone, so long as the tract bordered a low-income community designated as a qualified opportunity zone and the median family income did not exceed 125 percent of that of the bordering, low-income community.[24] Such tracts could constitute a maximum of five percent of the total designated tracts.[25] Designations remain in effect for ten years from the date of designation.[26]

Although not bound by legislative history, governors seeking guidance in choosing opportunity zones could look to House Committee Report 115-466, which would require them, in nominating tracts, to consider those that "(1) are currently the focus of . . . private economic development initiatives . . . (2) have demonstrated success in geographically targeted development programs . . . and (3) have recently experienced significant layoffs."[27] Governors could also turn to an IRS-developed, online Nomination Tool, which was specially created to help governors in the process.[28] Furthermore, some states created portals through which cities and counties could apply to be included in

fund after December 31, 2017; the original use of the property begins with the qualified opportunity fund, or the fund substantially improves the property; and during substantially all of the holding period for the property, substantially all of the property's use was in a qualified opportunity zone. *Id.* § 1400Z–2(d)(2)(D). Lastly, qualified opportunity zone partnership interest essentially refers to an interest in the capital or profits of a domestic partnership that qualifies as a qualified opportunity zone business. *Id.* § 1400Z–2(d)(2)(C).

[20] § 1400Z–1(b)(2)(C).

[21] § 1400Z–1(b)(1)(A); § 1400Z–1(c)(2)(B).

[22] Low-income communities are defined based on poverty rates and median family income, as per 26 U.S.C. § 45D(e). *See The Promise of Opportunity Zones*, JOINT ECON. COMM. (Nov. 29, 2018), https://www.jec.senate.gov/public/index.cfm/republicans/2018/11/the-promise-of-opportunity-zones.

[23] § 1400Z–1(d).

[24] § 1400Z–1(e)(1).

[25] § 1400Z–1(e)(2).

[26] § 1400Z–1(f).

[27] H.R. REP. NO. 115-466, at 538–39 (2017) (Conf. Rep.).

[28] *See* Rev. Proc. 18-16, 2018-09 I.R.B. 383.

their state's governor's nominations.[29] For example, in Mississippi, the Governor's office launched such a portal on the Mississippi Development Authority's website.[30] In New Jersey, tracts were chosen based on a formula using the Municipal Revitalization Index (MRI), which reflected economic indicators such as income, unemployment rate, and property values as well as geographic distribution, access to transit, and the value of existing investments such as those already encouraged by state incentives.[31] In addition, town mayors and the New Jersey Congressional delegation were able to provide input and feedback throughout the selection process.[32]

As of this writing, there are 8,764 opportunity zones throughout the United States and its territories.[33] There are as few as fourteen opportunity zones in the Virgin Islands and as many as 879 in California.[34] There are 514 opportunity zones in New York and 169 in New Jersey.[35] The median number of opportunity zones per state is approximately 109, with Mississippi falling just below the median at 100 and Oklahoma rising just above the median at 117.[36]

Once the designation process was complete, the baton passed to investors and the communities in which they could invest. In a 2018 interview, Treasury Secretary Steve Mnuchin stated his belief that the Opportunity Zone program would ring in $100 billion of private capital investment.[37] While the original legislation does not require information reporting such that the Department of the Treasury can track the program's progress and effectiveness,[38] and thus whether such belief has been validated, websites such as OpportunityDb, founded by internet entrepreneur Jimmy Atkinson, provide some information,

[29] Butler Snow LLP, *Nomination Portal for Opportunity Zone Designations Now Open*, JDSUPRA (Feb. 16, 2018), https://www.jdsupra.com/legalnews/nomination-portal-for-opportunity-zone-65437.

[30] *Id.*

[31] *Opportunity Zones*, DEP'T OF CMTY. AFFAIRS, STATE OF N.J., https://www.state.nj.us/dca/divisions/lps/opp_zones.html (last visited Jan. 2, 2020).

[32] *Id.*

[33] *See, e.g.*, Melissa Heelan Stanzione, *Opportunity Zones Give Big Law 'Pop-Up' Teams Plenty of Work*, BNA (May 28, 2019), https://news.bloomberglaw.com/us-law-week/opportunity-zones-give-big-law-pop-up-teams-plenty-of-work.

[34] *Opportunity Zones by Location*, OPPORTUNITYDB, https://opportunitydb.com/location (last visited Jan. 2, 2020).

[35] *Id.*

[36] *See id.*

[37] Interview by Bob Cusack with Steven Mnuchin, Secretary of the Treasury (Sept. 27, 2018), https://thehill.com/hilltv/rising/408980-mnuchin-predicts-100b-in-cap-investment-from-new-opportunity-zones.

[38] *See generally* Request for Information on Data Collection and Tracking for Qualified Opportunity Zones, 84 Fed. Reg. 18648 (May 1, 2019).

including total opportunity zone investment capacity; the number of existing funds so far; and details regarding listed funds' location, size, management, and asset class.[39] As of August 27, 2019, nearly a year and a half after the first set of opportunity zones were designated,[40] only 109 funds were listed on OpportunityDb.[41] Such funds pushed total investment *capacity* (i.e., not necessarily actual investment) to $37.4 billion.[42] The accuracy of this data is questionable; the NCSHA, for example, listed a total of 184 funds as of July 17, 2019.[43]

Despite this shortfall, an April 2019 article noted that the program had thus far caused a "frenzy" among private client groups across several industries, including banking, law, accounting, and real estate.[44] According to the article, a February 2019 IRS hearing about opportunity zones "had lines out the door."[45] Nevertheless, for what seemed to be a significant surge of interest in the program, funds had been slow in attracting capital.[46] Such "frenzy" and interest may have just been what one commentator called "irrational exuberance."[47] In explaining this lack of movement, some investors pointed to the need for further guidance from the Treasury;[48] others pointed to the risk and lack of momentum of funds.[49] Other factors that slowed down investment were the uncertainty over which funds to invest in; the need to commit to a ten-year lock-up to reap the program's full, tax-free benefit; and the fear

39 *Opportunity Zone Fund Directory*, OPPORTUNITYDB, https://opportunitydb.com/funds (last visited Jan. 2, 2020); *see also* NAT'L COUNCIL OF STATE HOUS. AGENCIES, NCSHA OPPORTUNITY ZONE FUND DIRECTORY (2019), https://www.ncsha.org/wp-content/uploads/NCSHA-Opportuntity-Zones-Fund-Directory-7.17.19.pdf.

40 *Opportunity Zones Frequently Asked Questions*, IRS, https://www.irs.gov/newsroom/opportunity-zones-frequently-asked-questions (last visited Jan. 2, 2020) ("The first set of opportunity zones, covering parts of 18 states, were designated on April 9, 2018.").

41 *Opportunity Zone Fund Directory*, OPPORTUNITYDB, https://opportunitydb.com/funds (last visited Dec. 28, 2019).

42 *Id.* As of December 28, 2019, the website listed 128 funds and total investment capacity of $41.3 billion. *Id.*

43 NAT'L COUNCIL OF STATE HOUS. AGENCIES, NCSHA OPPORTUNITY ZONE FUND DIRECTORY (2019), https://www.ncsha.org/wp-content/uploads/NCSHA-Opportuntity-Zones-Fund-Directory-7.17.19.pdf.

44 Lynnley Browning, *Opportunity Zones Knocking, but Few Answering the Call So Far*, BLOOMBERG (Apr. 10, 2019), https://www.bloomberg.com/news/articles/2019-04-10/opportunity-zones-knocking-but-few-answering-the-call-so-far.

45 *Id.*

46 *Id.*

47 *Id.*

48 Shortly after the article was written, on April 17, 2019, the Treasury released a second set of proposed regulations, providing further guidance for investors. *See* I.R.S. News Release IR-2019-75 (Apr. 17, 2019).

49 Browning, *supra* note 44.

that a fund becomes disqualified, thus depriving investors of the program's incentives.[50] One commentator pointed out that, indeed, not much capital had been raised so far.[51] Another noted that most of the available investment opportunities were simply not strategically appropriate for her firm's clients.[52] Another, further, pointed to the lack of IRS guidance as the cause of the program's slow start, noting that interest in the program, which offers unparalleled and highly generous tax incentives, "exploded" after the Treasury released its second set of guidance.[53] Still, numerous sources pointed to the excitement and buzz of the investment community surrounding the Opportunity Zone program, despite the program's slow beginnings.[54]

Many states and communities seem to mirror investors' excitement, as reflected in their early attempts to lure in investors.[55] Erie, Pennsylvania, like various other states and locales, has implemented free WiFi throughout its opportunity zones.[56] Erie has also launched what is, in essence, a marketing campaign to attract investors.[57] Calling Erie "Pennsylvania's Flagship Opportunity Zone,"[58] the city has created a website explaining why investors should choose Erie;[59] providing a set of guiding principles (in the form of a questionnaire) for investors, so as to promote diversity and sustainable

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50 *Id.*

51 *Id.*

52 *Id.*

53 Kathleen Pender, *Tax Questions Answered, Opportunity Zone Fund Rush Begins*, S.F. CHRON. (June 14, 2019), https://www.sfchronicle.com/business/networth/article/Tax-questions-answered-Opportunity-Zone-fund-13992079.php.

54 *See, e.g.*, Chris Dier-Scalise, *The Most Exciting Piece of Opportunity Zone Investing Is Still Being Defined*, BENZINGA (July 31, 2019), https://www.benzinga.com/general/crowdsourcing/19/07/14169709/the-most-exciting-piece-of-opportunity-zone-investing-is-still-being-defined; Jessica Guerin, *Opportunity Zones Have Investors Excited. So Why Aren't More Buying In?*, HOUSINGWIRE (Apr. 12, 2019), https://www.housingwire.com/articles/48785-opportunity-zones-have-investors-excited-so-why-arent-more-buying-in; Michael Van Someren, *Capitalizing on Opportunity Zones*, NAT'L L. REV. (June 8, 2019), https://www.natlawreview.com/article/capitalizing-opportunity-zones.

55 *See* Oscar Perry Abello, *What's the Latest on Opportunity Zones?*, NEXT CITY (Aug. 20, 2019), https://nextcity.org/daily/entry/whats-the-latest-on-opportunity-zones.

56 *Id.*

57 *See Why Invest in Erie, Pennsylvania?—Flagship Opportunity Zone*, FLAGSHIP OPPORTUNITY ZONE DEV. CO., https://www.flagshipopportunityzone.com/why-invest-in-erie-pennsylvania-duplicate (last visited Jan. 2, 2020).

58 *See Promoting Erie's Opportunity Zones—Flagship Opportunity Zone*, FLAGSHIP OPPORTUNITY ZONE DEV. CO., https://www.flagshipopportunityzone.com/about (last visited Jan. 2, 2020) ("The City of Erie . . . designated as Pennsylvania's Flagship Opportunity Zone.").

59 *See Why Invest in Erie, Pennsylvania?*, *supra* note 57.

growth;[60] and even displaying a project portfolio that colorfully presents projects in need of investment, such as startups, a motel, and an educational center.[61] The city also partnered with KPMG in hosting a two-day event, called "Erie Homecoming 2019," across all eight of its opportunity zones.[62] The event featured "provoking presentations on Erie's unprecedented market momentum" and on-site visits to potential projects.[63]

Similarly, Birmingham, Alabama has launched an initiative that brings together civic leaders, business leaders, and residents with the goal of facilitating the identification of projects and areas where improvement and funding are needed.[64] New Jersey, too, has created an online hub on the State's official website, featuring, for example, an interactive map that allows viewers to see the locations of opportunity zones; opportunity zone projects; and a plethora of other items, such as major power plants, Brownfield Development Areas, job density, commercial sales data, public transportation, and medical facilities.[65] The website also lists resources for investors and developers, such as IRS guidance and information regarding existing state incentives;[66] for

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[60] *See Guiding Principles—Flagship Opportunity Zone*, FLAGSHIP OPPORTUNITY ZONE DEV. CO., https://www.flagshipopportunityzone.com/guiding-principles (last visited Jan. 2, 2020).

[61] *See Project Portfolio—Flagship Opportunity Zone*, FLAGSHIP OPPORTUNITY ZONE DEV. CO., https://www.flagshipopportunityzone.com/projects (last visited Jan. 2, 2020).

[62] *See Erie Homecoming 2019*, ERIE REG'L CHAMBER AND GROWTH P'SHIP, https://homecoming.eriepa.com (last visited Sept. 14, 2019).

[63] *Id.*

[64] Press Release, City of Birmingham, Ala., Mayor Randall Woodfin Announces Innovative Public-Private Initiative to Help Develop Birmingham's 24 Opportunity Zones (Apr. 12, 2019), https://www.birminghamal.gov/2019/04/12/mayor-randall-woodfin-announces-innovative-public-private-initiative-to-help-develop-birminghams-24-opportunity-zones.

[65] *NJ Community Asset Map*, N.J. DEP'T OF CMTY. AFFAIRS, https://njdca.maps.arcgis.com/apps/webappviewer/index.html?id=96ec274c50a348 90b23263f101e4ad9b (last visited Jan. 2, 2020).

[66] Such as low-income housing tax credits; the New Jersey Redevelopment Investment Fund, which provides flexible financing for business and real estate ventures; the Neighborhood Revitalization Tax Credit Program (NRTC), which provides businesses with a tax credit for funds provided to nonprofit entities involved in revitalization efforts; and the Urban Enterprise Zone program, which provides businesses with incentives such as the ability to charge less sales tax and a tax credit for hiring full-time employees. *See About UEZ*, N.J. DEP'T OF CMTY. AFFAIRS, https://www.nj.gov/dca/affiliates/uez/about/ (last visited Jan. 2, 2020); *Low Income Housing Tax Credits*, N.J. HOUS. AND MORTG. FIN. AGENCY, https://njhousing.gov/dca/hmfa/developers/credits (last visited Jan. 2, 2020); *Neighborhood Revitalization Tax Credit Program (NRTC)*, N.J. DEP'T OF CMTY. AFFAIRS, https://www.state.nj.us/dca/divisions/dhcr/offices/nrtc.html (last visited Jan. 2, 2020); *New Jersey Redevelopment Investment Fund (RIF)*, N.J. REDEVELOPMENT AUTH., https://www.njra.us/new-jersey-redevelopment-investment-fund-rif (last visited Jan. 2, 2020).

opportunity zone residents;[67] and for local governments, such as strategies for success and a state grant program for municipality or county governments who sufficiently demonstrate a strategic opportunity zone plan for catalyzing and implementing investment.[68] While not as luring as Erie's website, the page nonetheless features many resources for individuals involved in or affected by the program. California offers a similar website.[69]

On the other hand, Boulder, Colorado does not seem to share in the zeal and excitement; specifically, the city told investors to wait while the city updated its land use and zoning regulations in opportunity zones.[70] As of December 28, 2019, the city listed only a few resources on its website, such as links to IRS regulations and a mere five links to existing development plans that may guide investors in choosing where to invest.[71] Similarly, the State of Georgia, which has 260 opportunity zones,[72] seems to barely make a buzz about the fact. The zones, sixty percent of which are found in rural areas, represent significant concentrations of poverty.[73] Nevertheless, it is difficult to find, through a Google search, much marketing material promulgated by many of the zones. The City of LaGrange, for example, merely provides on its webpage a short description of the Opportunity Zone program, a few links (such as to a rezoning application),[74] and a basic map indicating qualifying tracts.[75] As of September 2019, the Georgia Department of Community Affairs similarly only provided a bare minimum of

[67] *Resources for Opportunity Zone Residents and Stakeholders*, STATE OF N.J., https://nj.gov/governor/njopportunityzones/residents/index.shtml (last visited Jan. 2, 2020).

[68] *Opportunity Zone Challenge Program*, N.J. ECON. DEV. AUTH., https://www.njeda.com/financing_incentives/large_business/Opportunity-Zone-Challenge-Program (last visited Jan. 2, 2020); *Resources for Local Governments*, STATE OF N.J., https://nj.gov/governor/njopportunityzones/local/index.shtml (last visited Jan. 2, 2020).

[69] *See California Opportunity Zones*, STATE OF CAL., https://opzones.ca.gov (last visited Jan. 2, 2020).

[70] Abello, *supra* note 55.

[71] *See Opportunity Zone Program*, CITY OF BOULDER, https://bouldercolorado.gov/business/opportunity-zone-program (last visited Dec. 28, 2019).

[72] Press Release, Ga. Dep't of Cmty. Affairs, Federal Opportunity Zones Announced for Georgia (Apr. 18, 2018), https://www.dca.ga.gov/sites/default/files/federal_opportunity_zones_named_by_treasury_0.pdf.

[73] *See id.*

[74] *See Opportunity Zones*, CITY OF LAGRANGE, GA., http://www.lagrange-ga.org/CommunityDevelopment/Opportunity_Zones (last visited Jan. 2, 2020).

[75] *See* Ga. Dep't of Cmty. Affairs, *Official Opportunity Zone Map for—City of LaGrange*, http://www.lagrange-ga.org/Content/Templates/documents/community-development/lagrange-oz-map.pdf.

information, including a map of qualifying zones and FAQs.[76] Thus, not every city has been initially eager, like most, to jump on board the opportunity zone train.

III. LISTENING TO OUR COMMUNITIES: APPLYING THE THEORY OF ASYMMETRIC INFORMATION TO STORIES OF PRIVATE INVESTMENT IN THE NAME OF ECONOMIC DEVELOPMENT

While it seems that many investors and communities alike are excited about the Opportunity Zone program,[77] concerns remain about who, in the end, will benefit from such a program. In a *New York Times* op-ed, renowned economist Paul Krugman criticized the program as part of a rushed bill full of destructive loopholes; as a way out for Republicans who would rather bribe private investors to invest in infrastructure rather than do so themselves; and as targeting wealthy individuals (with sixty-one percent of the provision's benefits flowing to the top one percent of households).[78] Another *New York Times* article called the program "a windfall for the rich," stating that the tax break, meant to help low-income communities, was instead causing billions of investment profits to be funneled into projects such as high-end apartment buildings and hotels, student housing, and storage facilities.[79]

Indeed, the concept that the program seems to promote—that of private investment in the name of economic development—is not a new one. And the stories discussed below, which highlight how the concept has played out in past instances, reveal that concerns regarding who will benefit, and whose interests are truly being served, are not baseless. The stories suggest that, for the Opportunity Zone program to succeed in its mission of helping distressed communities, there must be an affirmative effort for investments to reflect the needs and wants of the residents within those communities. Furthermore, a view of these stories in light of the economic theory of asymmetric information suggests that the benefit of such efforts may accrue not only to communities but, mutually, to investors and the national economy as well.

[76] *See generally Federal Opportunity Zones*, GA. DEP'T OF CMTY. AFFAIRS, https://www.dca.ga.gov/community-economic-development/incentive-programs/federal-opportunity-zones (last visited Sept. 14, 2019).

[77] *See supra* Part II.

[78] Paul Krugman, Opinion, *The Great Tax Break Heist*, N.Y. TIMES (Sept. 2, 2019), https://www.nytimes.com/2019/09/02/opinion/trump-tax-opportunity-zones.html.

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

A. *Instances of Private Investment in the Name of Economic Development: Kelo, Poletown, and Amazon HQ2*

The Fifth Amendment of the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation."[80] In 1997, Susette Kelo purchased and restored a quaint, pink, waterfront house in the Fort Trumbull neighborhood of New London, Connecticut.[81] To Ms. Kelo's dismay, around the same time, city officials were in the works to revitalize the neighborhood, seeking to ameliorate the economic distress that plagued the city following the closure of a naval facility.[82] Accordingly, with the backing of then-Governor John Rowland's administration, New London Development Corporation (NLDC)—a private nonprofit organization created for city development planning—produced a development plan for Fort Trumbull.[83]

But the NLDC did not act with an unguided hand; rather, the housing, office space, and infrastructure that would be built to revitalize Fort Trumbull would, ultimately, support Pfizer, Inc., a major pharmaceutical firm, in its plan to build a new headquarters nearby.[84] To implement this plan—a plan driven by private investment in the name of economic development—the NLDC sought to acquire land from numerous property owners in the Fort Trumbull area.[85] With city officials' support, Pfizer would move in; in turn, draw in other businesses; and thus set the stage for New London's revitalization.[86] Despite the NLDC's authority to exercise New London's eminent domain power, and despite NLDC's harassment of homeowners, many homeowners—including Ms. Kelo—refused to sell their properties, to give up their homes, so as to make way for the new developments.[87]

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[80] U.S. CONST. amend. V.

[81] *Kelo Eminent Domain—Institute for Justice*, IJ.ORG, https://ij.org/case/kelo (last visited Jan. 2, 2020).

[82] Ilya Somin, *The Story Behind* Kelo v. City of New London*—How an Obscure Takings Case Got to the Supreme Court and Shocked the Nation*, WASH. POST: THE VOLOKH CONSPIRACY (May 29, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/29/the-story-behind-the-kelo-case-how-an-obscure-takings-case-came-to-shock-the-conscience-of-the-nation.

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] Jones Day, *The Supreme Court's Decision in* Kelo v. City of New London*: A Landmark Development Regarding the Governmental Power of Eminent Domain*, JONES DAY (July 2005), https://www.jonesday.com/en/insights/2005/07/the-supreme-courts-decision-in-ikelo-v-city-of-new-londoni—a-landmark-development-regarding-the-governmental-power-of-eminent-domain.

[87] Somin, *supra* note 82.

The dispute that arose between such homeowners and the city eventually made its way to the Supreme Court in a case known as *Kelo v. City of New London*.[88] In ruling for the city, the Court held that a city's exercise of its eminent domain power under the Fifth Amendment, or the power of a government to take property for public use,[89] is constitutional when done in pursuit of an economic development plan. Particularly, economic development satisfies the "public use" prong of the Fifth Amendment.[90] This is true even if the plan will benefit private parties, as it often will,[91] and even if the property being taken is itself not blighted, as in *Kelo*.[92] Notably, the Court refused to adopt a rule, as suggested by the petitioners, requiring a "reasonable certainty" that the economic benefits would actually accrue; such an inquiry lay beyond the role of federal courts.[93] Ms. Kelo and eight other petitioners would be forced to give up their homes.[94]

Just four years after *Kelo*, in 2009, the *New York Times* published an article titled, "Pfizer to Leave City That Won Land-Use Case," resurfacing harsh memories and critique from community members.[95] Four years later, barrens of empty acres lay where dozens of taken homes once stood.[96] No hotels, no condominiums, and no stores, for which the land was taken, were built.[97] Pfizer, and 1,400 jobs, would move out of New London to a cheaper location just a few miles away.[98] After almost twenty years since the start of the battle, Ms. Kelo noted, "[N]othing has been built."[99] "[W]e still have a building," said city councilman Robert M. Pero, but "I don't know who's going to be looking for a building like

[88] Kelo v. City of New London, 545 U.S. 469 (2005).

[89] *National Eminent Domain Power*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/constitution-conan/amendment-5/national-eminent-domain-power (last visited Oct. 30, 2019).

[90] *Id.* The Court reasoned that "[p]romoting economic development is a traditional and long-accepted function of government," and "[t]here is . . . no principled way of distinguishing economic development from the other public purposes that [the Court has] recognized." *Kelo*, 545 U.S. at 484.

[91] *See Kelo*, 545 U.S. at 485.

[92] *See id.*

[93] *Id.* at 487–88.

[94] *Id.* at 470. One of the petitioners, Wilhelmina Dery, had lived in her Fort Trumbull house, in which she was born in 1918, her entire life. *Id.* at 475.

[95] Patrick McGeehan, *Pfizer to Leave City That Won Land-Use Case*, N.Y. TIMES (Nov. 12, 2009), https://www.nytimes.com/2009/11/13/nyregion/13pfizer.html.

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] Susette Kelo, Opinion, *I Still Feel the Pain of Losing My 'Little Pink House': Susette Kelo*, USA TODAY (Apr. 16, 2018), https://www.usatoday.com/story/opinion/2018/04/16/private-land-seizure-pfizer-new-london-little-pink-house-column/507608002.

that in this economy."[100] The city had once again "destroy[ed] neighborhoods and homes, without regard to the families who live in them."[101]

In *Kelo*, Justice O'Connor, joined by Chief Justice Rehnquist and Justices Scalia and Thomas, wrote a dissenting opinion, quoting the dissent in *Poletown Neighborhood Council v. City of Detroit*.[102] Particularly, Justice O'Connor quoted Justice Fitzgerald's assertion that, if local officials are authorized to decide that a particular commercial or industrial use of a property is more beneficial to the public than another, present use, then no property, regardless of its value to the current owner, is immune from being condemned for the benefit of private interests who will execute such higher use.[103]

Poletown,[104] since overruled by *County of Wayne v. Hathcock*,[105] also arose out of a situation in which a local government attempted to justify private investment as a means for economic development.[106] Specifically, the Detroit Economic Development Corporation had attempted to exercise its condemnation power to take a large tract of land from the plaintiffs in order to give that land to General Motors Corporation (GM) for a new assembly plant—a plant that would promote industry, commerce, and jobs and thus tax revenue.[107] In affirming the trial court's decision for the city, the Michigan Supreme Court found that the city's exercise of its eminent domain power to transfer property from one private user to another *did not* constitute the taking of such property for private use in violation of Michigan's eminent domain power under its constitution.[108] The court did not adopt the plaintiffs' argument that GM would, in the end, be the primary beneficiary, and thus that the taking was not for public use [or purpose].[109] Rather, the court reasoned that it is the state legislature's role, not the court's, to decide whether the taking serves a public

[100] McGeehan, *supra* note 95.

[101] Kelo, *supra* note 99.

[102] Kelo v. City of New London, 545 U.S. 469, 504–05 (2005) (O'Connor, J., dissenting).

[103] *Id.* (quoting Poletown Neighborhood Council v. Detroit, 304 N.W.2d 455, 464 (1981) (Fitzgerald, J., concurring)).

[104] *Poletown*, 304 N.W.2d 455.

[105] Cty. of Wayne v. Hathcock, 684 N.W.2d 765, 787 (2004).

[106] *See Poletown*, 304 N.W.2d at 455.

[107] *Id.* at 457.

[108] *Id.*

[109] *Id.* at 458–60.

purpose.[110] Furthermore, the legislature had delegated such decisions to municipalities in allowing them to exercise condemnation powers.[111]

The court also referred to the substantial amount of evidence that the city had presented in the case below to demonstrate the dire economic conditions facing city and state residents, the need for revitalization, and, in turn, the economic boost that the plant would provide.[112] According to the court, such evidence was sufficient to confirm that the city would execute its eminent domain power to address a public need.[113] Even if the takings would benefit private interests, subjecting the public purpose inquiry to greater scrutiny, any private benefit would merely be incidental.[114]

Perhaps the Michigan Supreme Court was correct in overturning the *Poletown* decision when it ruled in *Wayne* that the fact that a private entity might contribute to the health of the economy does not justify an exercise of eminent domain to transfer property to that private entity.[115] Specifically, in a story that closely mirrors that of New London, the result in Poletown has been one of broken promises.[116] Originally, while some such as Detroit's then-mayor Coleman A. Young Jr., auto unions, and even the Catholic Archdiocese supported GM's plans, much of Poletown—which was largely composed of working-class, multi-ethnic residents[117]—vehemently opposed it.[118] The opposition, ironically led by the Archdiocese's reverend, seemed to fight relentlessly, working day and night to save their cherished neighborhood.[119] The result, however, was a lost war—one culminating in failed holdouts (which required a

110 *Id.* at 459.

111 *Id.*

112 *Poletown*, 304 N.W.2d at 459.

113 *See id.* at 459–60.

114 *Id.*

115 Cty. of Wayne v. Hathcock, 684 N.W.2d 765, 786 (2004). Rather, consistent with Justice Ryan's dissent in *Poletown*, the court stated that it is justified as for public use in only the following contexts: (1) collective action is required due to extreme public necessity (such as for highways and roads); (2) the property remains subject to public oversight; or (3) the property is selected based on public concern and not based on interests of the private entity. *Id.* at 781–83.

116 *See, e.g.*, Kyle Swenson, *Thousands Lost Their Homes in Epic Fight to Build GM's Detroit Plant. Now It's Closing.*, WASH. POST: MORNING MIX (Nov. 27, 2018), https://www.washingtonpost.com/nation/2018/11/27/thousands-lost-their-homes-epic-fight-build-gms-detroit-plant-now-its-closing.

117 *See, e.g.*, Tommy Andres & Tracey Samuelson, *How the Closings of Two Auto Plants Changed Hamtramck and Detroit's Poletown*, MARKETPLACE (Aug. 14, 2019), https://www.marketplace.org/2019/08/14/how-the-closings-of-two-auto-plants-changed-hamtramck-and-detroits-poletown.

118 Swenson, *supra* note 116.

119 *Id.*

SWAT raid) and, ultimately, the destruction of the churches, homes, and local businesses they knew so well to "a skeletal wreck."[120]

Indeed, the result was a destruction for GM—for private investment in the name of economic development—as well.[121] Eventually, the plant was built.[122] Surely to the community's dismay, GM employed only half the number of people it had originally promised to employ.[123] Then, in 2018, GM announced plans to cease production at the plant[124] and lay off the plant's remaining staff.[125] Like Pfizer, GM got up and left, leaving a trail of ruins behind.[126] One resident, Tom Olechowski, who was named on the lawsuit filed to stop the plant's construction, attested to the "unique viability" that Poletown had, particularly due to its church-based community, contending that "rundown" is a subjective concept.[127] His statement that what used to be a "thriving [market]" is now a "wreck . . . . ruin . . . . fields"[128] suggests that the GM plant *had never been* a public necessity.

More recently, Amazon selected Newark, which is, in fact, a qualified opportunity zone,[129] as a potential location for the company's new headquarters.[130] In an attempt to secure a deal with the company, former Governor Chris Christie offered the company massive tax incentives totaling about $7 billion.[131] Furthermore, the city would redevelop its waterfront area for the headquarters site; redevelop 11.5 acres in the downtown area; and even demolish what used to be the New Jersey Bears stadium.[132] Without concluding that such developments would be completed particularly to serve and support Amazon, as when

120 *Id.*

121 *Id.*

122 *E.g.*, *id.*

123 Amy Crawford, *Can Poletown Come Back After a General Motors Shutdown?*, BLOOMBERG CITYLAB (Dec. 10, 2018), https://www.citylab.com/equity/2018/12/poletown-history-general-motors-hamtramck-shutdown/577678.

124 Swenson, *supra* note 116.

125 Michele Oberholtzer, Opinion, *GM's Poletown Closure Proves We Should Treat Corporations Like People*, DETROIT METRO TIMES (May 1, 2019), https://www.metrotimes.com/detroit/opinion-gms-poletown-closure-proves-we-must-regulate-public-subsidies-for-business-developments-that-wont-last-foreve/Content?oid=21552899.

126 Andres & Samuelson, *supra* note 117.

127 *Id.*

128 *Id.*

129 *E.g.*, *Opportunity Zones*, CHOOSE NEW JERSEY, https://www.choosenj.com/business-assistance/opportunity-zones (last visited Jan. 2, 2020).

130 *E.g.*, Leanna Garfield, *Amazon Just Visited New Jersey—and the State Is Offering a $7 Billion Incentive to Land HQ2*, BUS. INSIDER (Apr. 13, 2018), https://www.businessinsider.com/amazon-headquarters-hq2-new-jersey-economic-incentive-2017-10.

131 *Id.*

132 *Id.*

the City of New London attempted to support Pfizer, one may nevertheless find in the Amazon saga echoes of the cases discussed above. Indeed, Amazon projected that, with its new headquarters, the company would contribute an estimated 50,000 jobs on what would be a $5 billion campus.[133] Former Governor Christie even stated that the result would be "jet fuel" for Newark's revival.[134]

And, indeed, the plan was similarly met with criticism and concern.[135] Some said that the "win-at-all-costs" tax incentive would only worsen Newark's poor credit rating, which, as it stood, made Newark one of the worst business climates in the nation.[136] Another said that the incentive would yield a net loss for New Jersey taxpayers.[137] Even Seattle, home to Amazon's first headquarters, cautioned that while the first headquarters had led to Seattle's economic boom, the city simultaneously saw dramatic increases both in home values and in its homeless population.[138] The community, too, expressed concern, particularly regarding gentrification and whether the headquarters would actually create wealth for those who need it most.[139] In fact, although Newark has seen improvement, with new residential towers and even a Whole Foods springing up downtown, poverty is pervasive and persistent in the vicinity.[140] As Amazon did not end up choosing Newark as its headquarters location,[141] it is uncertain whether the corporation would have actually benefited Newark residents—particularly considering that it would be bringing white-collar jobs

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133 *Id.*

134 Jonathan O'Connell, *Will Amazon Pick Underdog Newark for Its HQ2? Experts Worry the City Cannot Afford to Win.*, WASH. POST (June 29, 2018), https://www.washingtonpost.com/business/economy/newark-is-a-long-shot-finalist-for-amazons-hq2-experts-worry-it-cannot-afford-its-all-in-bid/2018/06/29/173d3772-6e7c-11e8-bd50-b80389a4e569_story.html.

135 *See, e.g.*, *id.*

136 *Id.*

137 *Id.*

138 *Id.*

139 *Id.*

140 O'Connell, *supra* note 134.

141 Joan Verdon, *Newark Loses Bid to Land Amazon's New Headquarters*, NORTH JERSEY RECORD (Nov. 13, 2018), https://www.northjersey.com/story/money/2018/11/13/amazon-hq-2-newark-loses-bid-amazon-long-island-city-crystal-springs-va/1506922002. Amazon instead chose Arlington County, Virginia as the location for its new headquarters. Patricia Sullivan, *Amazon Gets Final Approval for Its New HQ in Arlington County, Despite Protest by Organized Labor*, WASH. POST (Dec. 14, 2019), https://www.washingtonpost.com/local/virginia-politics/amazon-gets-final-okay-for-its-new-hq-in-arlington-despite-organized-labor-protest/2019/12/14/40b37760-1c90-11ea-b4c1-fd0d91b60d9e_story.html.

suited for those who have a college education to an area home to a large working-class population.[142]

The Opportunity Zone program differs from the above stories in two major respects. First, investment in opportunity zones does not necessarily stem from large companies like Pfizer, GM, and Amazon because even individuals may choose to invest by placing their capital gains in qualified opportunity funds.[143] Second, the Opportunity Zone program is not reliant on the use of eminent domain, unlike the cases of *Kelo* and *Poletown*. Despite these differences, the stories above highlight the attitudes and concerns that communities may have when private investment is used as a means for economic development, as is the case in the Opportunity Zone program; and particularly that those attitudes, while they may differ from those of investors and of the governing officials who seemingly side with such investors, are not groundless.

Kelo and *Poletown* especially evidence that, consistent with residents' concern, an investment that is purportedly made to improve the lives of those in its vicinity may well end up instead hurting those lives and benefiting others. The efficacy of private investment, when done in the name of economic development, may well depend on investors' ability to listen to the communities in which they invest, pay

[142] *See* O'Connell, *supra* note 134. Such tension among residents, private individuals, and governing officials again resurfaced in Newark in August 2019, when the city hosted MTV's Video Music Awards amidst a drinking water crisis (a lead contamination) affecting residents' water supply for over two years. Josiah Bates, *Several Arrested Outside MTV VMAs in Newark After Protests Over Lead in City's Water*, TIME (Aug. 26, 2019), https://time.com/5662239/newark-vmas-lead-water-protests. Dozens of protesters, several of whom were arrested, protested outside of the Prudential Center, where the awards ceremony was taking place, as celebrities made their way on the red carpet. *Id.* The protesters' chants that "[w]e don't want no MTV, we want our water lead free," *id.*, highlights precisely the aforementioned tension. While the event was expected to serve as a boost to Newark's economy, especially for its restaurant and hospitality industries, *MTV Video Music Awards Bring Entertainers, Fans and Protesters to Newark*, CBS N.Y. (Aug. 26, 2019), https://newyork.cbslocal.com/2019/08/26/mtv-vmas-at-prudential-center-in-newark, and to create 1,000 jobs, Chris Jordan, *MTV VMAs in NJ 2019 at the Prudential Center in Newark: It's a Jersey Thing*, ASBURY PARK PRESS (Aug. 21, 2019), https://www.app.com/story/entertainment/music/2019/08/21/mtv-video-music-awards-2019-prudential-center-newark-its-jersey-thing/2062592001, it is reasonable to conclude that not all residents, and particularly not those protesting, were on board. Thus, the priorities of governing officials are not necessarily in line with those of residents; and, as the aftermaths of *Kelo* and *Poletown* have revealed, there is wisdom in listening to our communities, in addressing what residents believe to be their needs, rather than following *at seemingly all cost*, as many governing officials have, the promise of private investment as a means for economic development.

[143] *See generally* 26 U.S.C. § 1400Z–2 (2019), which consistently refers to "the taxpayer." § 7701(a)(14) defines "taxpayer" as "any person subject to any internal revenue tax," *id.*, and, in turn, § 7701(a)(1) defines "person" as including "an *individual*, a trust, estate, partnership, association, company or corporation." *Id.* (emphasis added).

heed to their particular needs and wants, and match their investments to those needs and wants. As a final and arguably more similar story, which also points to the desirability of listening to communities, consider that of enterprise zones.

B. *Enterprise Zones*

The concept of enterprise zones originated in England and made its way to the United States Congress in a bi-partisan bill—the Urban Jobs and Enterprise Zones Bill—in 1980.[144] During the 1980s, as Congress did not actually pass federal legislation, many states adopted the idea by developing, instead, state enterprise zone programs.[145] Like the Opportunity Zone program, enterprise zone programs seek to encourage business activity and job growth in economically distressed areas through the use of tax incentives.[146]

The concept of enterprise zones arose from the "spatial mismatch" theory[147] which, initially proposed by economist John Kain in 1968, argues that African Americans' lack of access to employment is caused by the tendency for jobs to be located in areas distant from their residences.[148] But evidence reveals that the enterprise zone concept fails to address such lack of access.[149] Furthermore, according to several studies completed by the U.S. Government Accountability Office, it fails to generate jobs and produce the economic growth that it purports to generate.[150] Academic studies conclude similarly, indicating, for example, that enterprise zones do not affect the employment of residents of enterprise zones.[151]

Many different reasons can explain the failure of enterprise zones. One is that businesses have found ways of benefiting from tax incentives without actually helping those within the enterprise zones.[152] For example, a business may merely relocate to an enterprise zone from an

144 Marilyn Marks Rubin & Edward J. Trawinski, *New Jersey's Urban Enterprise Zones: A Program That Works*, 23 URB. L. 461, 462–63 (1991).

145 *Id.* at 463.

146 *See id.* at 462.

147 Jan Rosenberg & Philip Kasinitz, *Why Enterprise Zones Will Not Work: Lessons from a Brooklyn Neighborhood*, CITY J. (Autumn 1993), https://www.city-journal.org/html/why-enterprise-zones-will-not-work-12612.html.

148 Samuel Cohn & Mark Fossett, *What Spatial Mismatch? The Proximity of Blacks to Employment in Boston and Houston,* 75 SOC. FORCES 557, 557 (1996).

149 *See* Rosenberg & Kasinitz, *supra* note 147.

150 Bruce Bartlett, *Enterprise Zones: A Bipartisan Failure*, FISCAL TIMES (Jan. 10, 2014), https://www.thefiscaltimes.com/Columns/2014/01/10/Enterprise-Zones-Bipartisan-Failure.

151 *Id.*

152 *Id.*

area just outside it, bringing itself but not bringing new jobs along with it.[153] In fact, one study of New Jersey enterprise zones confirms this by revealing increased economic activity in enterprise zones *but at the expense of surrounding areas*.[154] A second explanation is that tax cuts are not sufficient to incentivize businesses to invest in inner cities, as their decision not to invest in such cities is not due to high taxes.[155] A third explanation, particularly relevant to the federal Urban Jobs and Enterprise Zone Act, is the failure to address the unique needs of the individual communities, serving instead as a "one-size-fits-all," complex solution that, ultimately, benefits the wealthy rather than the people within the communities.[156] Notably, it is upon reflecting on this failure of the Urban Jobs and Enterprise Zone Act that one commentator urged, "it's important to keep in mind there are real people in each opportunity zone and the benefits of any investment should primarily seek to meet their needs."[157]

C. *Applying the Theory of Asymmetric Information*

In *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*,[158] George Akerlof introduced the concept of asymmetric information to explain why, in many markets, bad quality drives out good quality—in other words, the problem of adverse selection.[159] To demonstrate his theory, he introduced a four-part framework for the automobile market; in any such market, there are both new cars and used cars, and within those two categories, there are subcategories of good quality and bad quality cars.[160] Thus, the market consists of good quality new cars, bad quality new cars, good quality used cars, and bad quality used cars.[161] When purchasing a new car, a buyer is not certain

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153 *Id.*

154 Timothy Weaver, *Tax Law's 'Opportunity Zones' Won't Create Opportunities for the People Who Need It Most*, THE CONVERSATION (May 15, 2018) (citing Marilyn Rubin, *Urban Enterprise Zones: Do They Work? Evidence From New Jersey*, PUB. BUDGETING & FIN., Winter 1990), https://theconversation.com/tax-laws-opportunity-zones-wont-create-opportunities-for-the-people-who-need-it-most-94955?utm_source=twitter&utm_medium=twitterbutton.

155 Bartlett, *supra* note 150.

156 Buzz Brockway, *Georgia's Struggling Areas Could Benefit from Smart Use of Federal Opportunity Zones*, SAPORTAREPORT (Feb. 17, 2019), https://saportareport.com/georgias-struggling-areas-could-benefit-from-smart-use-of-federal-opportunity-zones.

157 *Id.*

158 George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECONOMICS 488 (1970).

159 *See id.*

160 *Id.* at 489.

161 *Id.*

about the quality of the car; it can be a good one or a bad one (a "lemon").[162] The buyer instead assigns probabilities to the two possible scenarios.[163] For example, there may be a thirty percent chance that the car is of good quality and a seventy percent chance that it is of bad quality.[164]

Suppose, then, that the buyer purchases the car, uses it, and subsequently decides to sell it to a second buyer.[165] Now that the first buyer has used the car, the buyer has more information about its true quality.[166] Still, the second buyer purchasing the now-used car does not have such information.[167] The transaction is one of asymmetric information, where the parties to the transaction possess different levels of information.[168] The second buyer, too, must assign probabilities to the two possible scenarios.[169] Because the second buyer cannot know the true quality of the car, and because the second buyer, as an outsider, cannot tell the difference between good and bad quality (lemon) cars, both good quality cars and lemons will sell at the same price, K.[170] Assuming that K is based on the probabilities that the buyer assigns to the two possibilities, K must be lower than the value of a good car.[171] Why, then, would the owner of a good quality car sell in a market where the price the owner will receive will be less than the value of the car?[172] Asymmetric information leads to a problem of adverse selection.[173] What is worse, noted Akerlof, is if the actual market is not categorized as simply bad vs. good.[174] Thus, it may be that the bad drives out the not-so-bad; the not-so-bad drives out the medium; the medium

[162] *Id.*
[163] *Id.*
[164] *See* Akerlof, *supra* note 158, at 489.
[165] *See id.*
[166] *See id.*
[167] *See id.*
[168] *Id.*
[169] *Id.*
[170] *See* Akerlof, *supra* note 158, at 489.
[171] *See id.* For example, assume that a good car's true value is $200, a bad car's true value is $100, and the buyer assigns probabilities of thirty percent and seventy percent, respectively, to the two scenarios. The maximum price, K, that the buyer would be willing to pay will equal $130 (=.3x$200 + .7x$100). The same would be true if the probabilities were reversed (.7x$200 + .3x$100 = $170), or if they were equal (.5x$200 + .5x$100 = $150). In all cases, the price is necessarily lower than the true value of a good car. *Id.*
[172] *See id.*
[173] *See id.* at 489, 492–93.
[174] *See id.* at 490.

drives out the not-so-good; and the not-so-good drives out the good, such that there is no market left whatsoever.[175]

Akerlof supported his theory by presenting evidence of the adverse selection problem, existing as a result of asymmetric information, in the markets for insurance; for the employment of minorities; and for credit in underdeveloped countries.[176] He then presented various "institutions," or societal customs, that counteract the negative impact of asymmetric information, "of quality uncertainty."[177] One institution, brand names, serves both as an indicator of quality and an assurance for consumers to be able to retaliate, by not making future purchases, if the quality is below expectation.[178] Other institutions include hotel and restaurant chains as well as the licensing practices of professions, such as for lawyers.[179]

Michael Spence, then, took the theory further by exploring the concept of "market signaling," particularly within the job market, where employers are not certain, even after hiring employees, about their employees' productive capabilities.[180] Here, a prospective employee may "signal" his quality to a potential employer through various indicators, such as education,[181] and the employee will indeed invest in education if its benefit, vis-à-vis the wage that the employer is willing to pay the employee, exceeds the cost of attaining that education.[182]

Finally, Joseph Stiglitz explored the idea of screening, or identifying the qualities of individuals or commodities.[183] For example, if the cost of screening is sufficiently low, an employer will benefit from screening potential employees, thus being able to identify which of them are of higher productivity and which are of lower productivity, and hiring the high-productivity type.[184] If, suddenly, all employers know of the

175 *Id.*

176 Akerlof, *supra* note 158, at 492–99.

177 *Id.* at 499–500.

178 *Id.*

179 *Id.* at 500.

180 *See* Michael Spence, *Job Market Signaling*, 87 Q.J. ECONOMICS 355, 355–56 (1973).

181 *Id.* at 357.

182 *See id.* at 358. Moreover, for the signal to be effective as a distinguishing factor between good and bad quality, the cost of the signal must be negatively correlated with employee capability. *See id.* For example, it must be more costly (perhaps mentally and not necessarily in financial terms) for an employee of lower capability to attain an education than it is for an employee of higher capability. *See id.* If the cost is the same, even those with lower capabilities will get an education as the benefit will outweigh the cost, and an education will no longer serve its signaling purpose. *See id.*

183 *See* Joseph E. Stiglitz, *The Theory of "Screening," Education, and the Distribution of Income*, 65 AM. ECON. REV. 283 (1975).

184 *Id.* at 286.

information revealed by the screening, employers will engage in a sort of competitive bidding to attract the high-productivity employees, thus driving up their wages to reflect the true quality of their work.[185] Note that this will hurt the low-productivity employees, who will simultaneously see a drop in their wages to reflect the true, lower quality of their work.[186] Nevertheless, argues Stiglitz, even the low-productivity employees could be better off, particularly due to the social benefits of screening; one such social benefit is better "matching."[187] Stiglitz gives the example of a typist and plumber, explaining that an economy is better off if those who are good at typing become typists, while those who are good at plumbing become plumbers.[188] If workers are matched to occupations based on their unique capabilities, and thus, based on what they are more efficient in completing, all tasks will be completed more efficiently; the broader economy will end up with more typing *and* more plumbing.[189]

Unfortunately, *Kelo*, *Poletown*, enterprise zones, and opportunity zones all feature information asymmetries, particularly between residents of the target communities on the one hand and investors (whether individuals, funds, or companies, and the governing officials that support them) on the other. Consider, for example, a company (one might say Amazon) looking to establish a new headquarters. The company searches for a target location, unaware of whether that location is a "good" one, meaning well-suited for such a headquarters, or a "bad" one, meaning ill-suited for such a headquarters. Communities, on the other hand, know (more so than does the company, an outsider) whether they are well-suited or ill-suited—good or bad. They know whether they have the resources, the labor force, and, generally, the business environment that would sustain a corporate headquarters. They know their wants and needs. The company is willing to pay more—and, perhaps, to receive less of a tax incentive—for a good location; conversely, it is willing to pay less for a bad location. Unsure of whether the location is a good or bad one, the company settles for a price in between. Communities, however, knowing their own value, will not accept a price lower than that value. Why sell a good car for a price more akin to that of a lemon? The result, then, is that ill-suited locations are the ones that try to "sell" themselves to the company, that try to attract investment. In such a world, where no

[185] *Id.*
[186] *Id.* at 286–87.
[187] *Id.* at 287–88.
[188] *See id.* at 288.
[189] Stiglitz, *supra* note 183, at 288.

information regarding the quality or suitability of a location is exchanged between communities and investors—between sellers and buyers—the market may, as Akerlof postulated, be driven out completely.

Fortunately for both investors and communities, this market also has institutions in place such as those described by Akerlof, particularly that of brand names. As the saying among realtors goes, "location, location, location!" For some companies, that location may be the "brand" of Silicon Valley. For others, it may be that of Fifth Avenue in Manhattan. Moreover, as suggested by Spence, communities may engage in "market signaling." For example, a company or investors may have a better idea of whether a location would be well-suited based on demographic or socioeconomic data of the location's residents. Lastly, consistent with the ideas put forth by Stiglitz, "screening" for such suitability would ultimately benefit a variety of locations. Those that are well-suited would attract fair prices, consistent with their respective values, and, what is more, the broader economy would benefit from better matching.

What the issues of asymmetric information and adverse selection, as mollified by the concepts of "signaling" and "screening," may teach us is that, underlying the stories considered above—beneath the failed attempts at private investment in the name of economic development—is the lack of communication between investors and the communities they have sought to invest in, particularly regarding suitability. And greater information regarding suitability, about what communities actually want and need, whether provided by the communities (via signaling) or affirmatively searched for by investors (via screening), leads to greater matching and thus greater productivity and development. Perhaps, then, it was a lack of communication and, ultimately, of matching, that caused so much criticism from the communities in *Kelo* and *Poletown*—that drove the failure of Pfizer's, GM's, and enterprise zone investors' attempts for economic development. Indeed, it does not take economic theory to understand this issue; one need only hear the echoes of mismatch in the voices of those who expressed concern about Amazon's potential move, of those who protested outside the VMAs during Newark's water crisis.[190]

For an active, well-functioning market for investment, where locations are properly targeted based on suitability, and thus, one in which private investment *does* actually lead to economic development (from which residents benefit), there must be communication, signaling,

[190] *Supra* note 142.

and screening between investors and communities. As demonstrated by the failed attempts for economic development in *Kelo* and *Poletown* and in enterprise zones, as understood by the opposition to Amazon's potential presence in Newark and those protesting outside of the VMAs, as suggested by commentators, and as confirmed by economists alike, there may be a great benefit to ensuring that investments are matched to the particular communities in which they manifest. The benefit is not just to the communities. Rather, through better "matching," the benefit should accrue to investors, communities, and the national economy at large. We must listen to the communities in which we invest.

IV. NOT AS SIMPLE AS LISTENING—CONSIDERING RISK

While listening to our communities can further the purpose of the Opportunity Zone program, the road to success is not that easy. Inevitably, any prudent investor will take into account many other considerations, including the various risks that the investor faces, when deciding where and in which projects to place their capital proceeds. After all, the choice is an *investment* decision, from which investors arguably expect to see a pecuniary return, rather than a mere donation. And the risks can be many.

A. *Possible Sources of Risk*

Risks may arise from other investors. For example, there may be high demand for a particular opportunity zone location. Thus, the first investor to reach the location may not be facing very high prices to acquire property. Prices may, however, increase, even if only incrementally, by the time that the second investor reaches the location. Of course, this is a simplified image of reality. Still, the idea is that as more investors flock to a location, the forces of supply and demand will push up prices, making it more expensive for an investor to acquire property.[191] Furthermore, there is a risk of market bubbles; sellers of property in opportunity zones, anticipating increased demand for their property, may inflate prices to values greater than those reflecting reality.[192]

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[191] *See* Lydia O'Neal, *Opportunity Zones Boost Real Estate Prices as Investors Rush In*, BLOOMBERG TAX (June 27, 2019), https://news.bloombergtax.com/daily-tax-report/opportunity-zones-boost-real-estate-prices-as-investors-rush-in.

[192] *See* Miriam Hall, *Property Values, Investment Appetite Surge In New York's Many Opportunity Zones*, BISNOW N.Y. (Nov. 29, 2018), https://www.bisnow.com/new-york/news/capital-markets/2019-forecast-event-95431.

Risks may also arise from local governments.[193] Especially for an investor who is new to the location in which he seeks to invest, there can be political uncertainties and hurdles that need to be dealt with.[194] Whether in obtaining permits and zoning allowances or in something more basic such as the ability to get involved and feel welcome in the community, there may be political favoritism, resistance, games, and the like at play.[195] Moreover, risks may arise from communities themselves. As the stories above teach us, it may be difficult to appease every individual in a community, resulting in backlash to the investor and, ultimately, to the investor's project and return on investment. Even if communities are welcoming of the investor and the project initially, there may be a risk that the excitement fades, or that, despite the excitement, the project just does not click.

There may be risks inherent in the geographic location as well. These may be environmental (for example, higher risk of earthquakes) or man-made, such as when an area is historically industrial or located near an airport, thus lacking clean air. Some locations, moreover, may simply be less favorable than others, considering proximity to amenities such as schools, highways, public transportation, and beaches. Note, however, that the latter factors may suggest a lack of suitability—an impossibility of listening—for some projects in the first instance.

Finally, and perhaps most importantly, there may be risks inherent in the type of business itself; every type may have a different risk profile.[196] And while suitability to a location (vis-à-vis consistency with community wants and needs) may increase the chance that a given type of business will be successful—in other words, generate sufficient return—in the location, as noted above, suitability may not be the magic key to success. It may not be enough to completely get rid of the risk

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[193] *See, e.g.*, Adam Michel & Joel Griffith, *The Big Fib About "Opportunity Zones" and Your Tax Dollars*, HERITAGE FOUND. (July 12, 2019), https://www.heritage.org/taxes/commentary/the-big-fib-about-opportunity-zones-and-your-tax-dollars ("[T]hese programs tend to breed cronyism. Often, these decisions benefit politically connected developers and investors who have rigged the system in their favor.").

[194] *See, e.g.*, *id.* ("Commendably, the new program contains far less red tape . . . . However, these programs, by their very nature, can't resolve the complicated institutional barriers to economic opportunity.").

[195] *See, e.g.*, Scott Beyer, *Zoning: America's Local Version of Crony Capitalism*, FORBES (Aug. 30, 2016), https://www.forbes.com/sites/scottbeyer/2016/08/30/zoning-americas-local-version-of-crony-capitalism/#28097dc037f0; Adam Millsap, *How Political Capitalism Helps Explain Zoning*, FORBES (Mar. 19, 2019), https://www.forbes.com/sites/adammillsap/2019/03/19/how-political-capitalism-helps-explain-zoning/#1d09762826ef.

[196] *See, e.g.*, Maureen Farrell, *The 10 Riskiest Businesses To Start*, FORBES (Jan. 18, 2007), https://www.forbes.com/2007/01/18/fairisaac-nordstrom-verizon-ent-fin-cx_mf_0118risky.html#555168e13370.

inherent in the type of business. Furthermore, it may be the case that several different types of businesses are suitable to a location, yet one is still riskier than the other simply because the business belongs to an industry that has a high turnover rate; is prone to cyclical pressures;[197] requires greater upfront investment;[198] is new, leaving a lot of room for mistakes and learning; faces fluctuating levels of demand; is dependent on foreign suppliers in a country with a lot of political risk; is trendy but not sustainable;[199] or is more likely to be subject to tort liability. It may even be that the business only has a short lifecycle in the location, that the location could outgrow the business.[200]

B. *Evidence of Lower-Risk Opportunity Zone Investment*

Investors' risk aversion is evident from the categories of businesses and places to which investment funds initially began to flow. In Louisville, Kentucky, for example, several areas were designated as opportunity zones even though those places were already being developed—even though major capital investments were already made in those areas in recent years.[201] At the same time, seven of the eighteen poorest tracts in Louisville were not designated as opportunity zones.[202] While this may reflect the governor's understanding, or intent, that the effect of development in those areas will spill over into the poorer tracts, such intent or effect is not certainly clear.

What is worse, and what undermines the probability of such intent, is the existence of further, similar instances. One study, which assesses states' selections of their opportunity zones, indicated that less than a third of opportunity zones are located in tracts with low levels of investment.[203] Of the eligible tracts, those that had already experienced

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[197] *See, e.g.*, *Cyclical Industry*, INVESTOPEDIA, https://www.investopedia.com/terms/c/cyclical_industry.asp (last visited Jan. 1, 2020).

[198] *See, e.g.*, *Which Types of Industries Have the Largest Capital Expenditures?*, INVESTOPEDIA, https://www.investopedia.com/ask/answers/020915/which-types-industries-have-largest-capital-expenditures.asp (last visited Jan. 1, 2020).

[199] *Cf.* Ki Mae Heussner, *7 Fads You Won't Forget*, ABC NEWS (May 11, 2009), https://abcnews.go.com/Technology/Business/story?id=7554508&page=1 (discussing business trends and fads such as plastic shoes).

[200] *Cf. Industry Life Cycle*, INC., https://www.inc.com/encyclopedia/industry-life-cycle.html (last visited Jan. 1, 2020).

[201] Timothy Weaver, *Tax Law's 'Opportunity Zones' Won't Create Opportunities for the People Who Need It Most*, THE CONVERSATION (May 15, 2018), https://theconversation.com/tax-laws-opportunity-zones-wont-create-opportunities-for-the-people-who-need-it-most-94955?utm_source=twitter&utm_medium=twitterbutton.

[202] *Id.*

[203] BRETT THEODOS, BRADY MEIXELL & CARL HEDMAN, DID STATES MAXIMIZE THEIR OPPORTUNITY ZONE SELECTIONS? ANALYSIS OF THE OPPORTUNITY ZONE DESIGNATIONS 3 (2018),

sizable socioeconomic change more frequently ended up being designated.[204] In New York, for example, thirteen percent of opportunity zones had already seen high levels of socioeconomic change.[205] As a further example, the website that Erie, Pennsylvania has put in place to attract opportunity zone investors itself points to the significant amount ($750 million) of investment that anchor institutions, including Fortune 500 companies, have made "[o]ver the last few years."[206] By marketing itself to more investors by pointing to past investments,[207] Erie purports to be an attractive place for investment, regardless of the Opportunity Zone program. It invites opportunity zone investors to join the team and support not necessarily new, but instead, pre-existing development efforts.[208] In Oakland, California, too, one developer sought to take advantage of the Opportunity Zone program by raising an $85 million fund to support its efforts to build a mixed-use complex, but the project existed well before the Opportunity Zone program was even enacted; the developer bought the land for the project in 2016.[209]

Indeed, Howard Gleckman, a senior fellow at Tax Policy Center, noted that, due to the structure of the program, the best investments for developers consist of places that are already gentrifying.[210] Gleckman gave the example of a Hilton Hotel, stating that it "just doesn't make sense" to build one in a "dying rural city," *regardless of the tax incentive*.[211] This is not to say that there will never be overlap between opportunity zone investment and investment prior; however, it is the prevalence of overlap which makes one wary—which suggests that money is flocking to areas that were already being developed and thus less risky. A place that is already being developed arguably poses fewer hurdles and less risk to opportunity zone investors. It may not require so much legwork, such as research, navigating the political landscape, obtaining permits, and other risk-laden barriers to entry inherent in

https://www.urban.org/sites/default/files/publication/98445/did_states_maximize_their_opportunity_zone_selections_1.pdf.

204 *Id.* at 6.

205 *Id.*

206 *See Why Invest in Erie, Pennsylvania?—Flagship Opportunity Zone*, FLAGSHIP OPPORTUNITY ZONE DEV. CO., https://www.flagshipopportunityzone.com/why-invest-in-erie-pennsylvania-duplicate (last visited Jan. 2, 2020).

207 *Id.*

208 *See id.*

209 Kathleen Pender, *Tax Questions Answered, Opportunity Zone Fund Rush Begins*, S.F. CHRON. (June 14, 2019), https://www.sfchronicle.com/business/networth/article/Tax-questions-answered-Opportunity-Zone-fund-13992079.php?psid=maqd0.

210 *Id.*

211 *Id.*

such activities. As the owner of the Oakland, California project's development company stated about the Bay Area, an opportunity zone "could miss out on some Opportunity Zone investments because of its notoriously long entitlement process."[212] Especially for inexperienced investors, he states, this can be a "heavy lift."[213] Another California investor, who seems to be starting from scratch, has decided to build residential property *in an area where he knows that developers have been buying property*.[214]

It may be argued that it is irrelevant that opportunity zone investments are taking place in areas that were already being developed; that, if anything, the added funds only enhance and strengthen existing projects. But why, then, did the government choose to forego tax revenue by way of the opportunity zone incentives? Why incentivize investors if no such incentive is necessary? And how, then, will funds reach those communities that continue to be ignored? How will funds reach those communities despite the hurdles and risks of starting anew?

The categories of initial investments, too, reveal investors' risk aversion. A May 2019 article pointed out that most opportunity zone investments had been in real estate, particularly because such investments are safer.[215] For the tax incentives to operate, the legislation requires that fifty percent of the income generated is done so within the opportunity zone; and it is simply more reassuring that a real estate investment will meet this standard.[216] Even after the IRS provided clarification as to how the standard can be met, and while some investors expressed interest in other projects such as technology startups, the focus continued to largely be on real estate.[217] Many investors and tax professionals who have been involved in opportunity zone deals estimated that eighty to ninety percent of such deals were so focused.[218] What is more, they concerned urban, as opposed to rural, areas,[219] which may be a further indicator of investors' risk aversion. As

212 *Id.* (quoting Patrick Kennedy, owner of Panoramic Interests).
213 *Id.* (quoting Patrick Kennedy, owner of Panoramic Interests).
214 *Id.*
215 *Opportunity Zones Aren't Just for Real Estate*, CRAIN'S N.Y. BUS. (May 24, 2019, 1:45 PM), https://www.crainsnewyork.com/sponsored-opportunity-zones/opportunity-zones-arent-just-real-estate.
216 *Id.*
217 *Id.*
218 Lydia O'Neal, *Opportunity Zones Boost Real Estate Prices as Investors Rush In*, BLOOMBERG TAX (June 27, 2019), https://news.bloombergtax.com/daily-tax-report/opportunity-zones-boost-real-estate-prices-as-investors-rush-in.
219 *See id.*

one commentator who similarly pointed to the trend toward real estate stated, "[t]he math is easier"; one simply has to buy property, make improvements, and then sell it for a higher price.[220] In fact, according to the CEO of one investment firm, strong real estate performance in recent years is particularly what drove interest in opportunity zone funds.[221] Many overlooked the fact that funds can be devoted to other industries and businesses, such as manufacturing, daycare centers, and grocery stores, as well.[222] Thus, the tendency of funds to invest in real estate has been noticeable. In addition, this tendency has been seemingly driven by investors' risk aversion—whether arising from uncertainties in the legislation or in the traditional risk and return profile of such investments, as compared to other types that are allowed under the legislation.

V. MORE RISK, MORE INCENTIVE

The possibilities and sources of risk are seemingly endless, and early instances of opportunity zone investment reveal that investors are indeed conscious of such risk. And where there is greater risk, investors want greater return.[223] This is the basic idea of "required rate of return," or the minimum return that an investor will accept for holding an investment based on the level of risk associated with holding that investment.[224] The greater the risk, the greater the minimum return or compensation required.[225]

The current opportunity zone legislation ignores such differences and instead provides a one-size-fits-all, widely applicable tax incentive; it does not discriminate based on location, type of investment, or other factors, such as whether an investor is the first to "arrive" or choose to

220 Oscar Perry Abello, *The Long Odds of Getting Opportunity Zone Capital to Opportunity Zone Businesses*, NEXT CITY (June 25, 2019), https://nextcity.org/daily/entry/long-odds-getting-opportunity-zone-capital-to-opportunity-zone-businesses.

221 Alicia McElhaney, *Is Anyone Actually Investing in Opportunity Zone Funds?*, INSTITUTIONAL INV'R: PORTFOLIO (May 23, 2019) (quoting Taylor Lembi, CEO of M31 Capital), https://www.institutionalinvestor.com/article/b1fjptxryzv07y/Is-Anyone-Actually-Investing-in-Opportunity-Zone-Funds.

222 Mary Burke Baker, *Opportunity Zones Aren't Just for Real Estate Development*, NAIOP: COM. REAL ESTATE DEV. ASS'N (Spring 2019), https://www.naiop.org/Research%20and%20Publications/Magazine/2019/Spring%202019/Business%20Trends/Opportunity%20Zones%20Arent%20Just%20for%20Real%20Estate%20Development.

223 *See, e.g.*, *Risk Definition*, INVESTOPEDIA, https://www.investopedia.com/terms/r/risk.asp (last visited Jan. 1, 2020).

224 *See, e.g.*, *Required Rate of Return—RRR Definition*, INVESTOPEDIA, https://www.investopedia.com/terms/r/requiredrateofreturn.asp (last visited Sept. 8, 2019).

225 *See id.*

invest in an opportunity zone.[226] In fact, this has been a point of criticism, as not all opportunity zones are created equally.[227] Specifically, some opportunity zones, such as South Norwalk in Connecticut, may be more enticing than others.[228] South Norwalk already has a booming real estate market, driven by young professionals' attraction to the neighborhood's nightlife and restaurant scene; however, neighborhoods just a short trip away, in Bridgeport, do not measure up as investment opportunities, regardless of the tax incentive.[229] By the same token, rural areas may not be as attractive as urban areas;[230] zones with no prior investment may not be as attractive as those with development already in the works; and regardless of suitability, some types of investments, like educational centers, may not capture investors to the same extent as others, such as residential buildings.

Thus, it is not enough that an investment will help the community. It is not enough that the community and governing officials are excited about the legislation. While Congress's primary goal may be to accelerate economic development, investors may not share in Congress's vision, instead seeking primarily to attain a profit. First and foremost, the investment must make sense, and then, the tax incentive can serve as a bonus, albeit maybe a significant one.[231] As the chief executive of one opportunity zone fund stated, "The deals should be the same deals you'd be doing if they weren't in an opportunity zone."[232] Investors will consider the potential for return on their investment, and such potential necessarily implicates considerations of risk. But if the

[226] *See* 26 U.S.C. § 1400Z–2 (2019) (applying the tax incentives for the 5-, 7- and 10-year timelines regardless of project type or location).

[227] Paul Sullivan, *Is an Opportunity Zone the Right Investment for You?*, N.Y. TIMES: WEALTH MATTERS (May 17, 2019) (quoting Michael Tillman, chief executive of PTM Partners), https://www.nytimes.com/2019/05/17/your-money/opportunity-zone-investment.html.

[228] *See id.*

[229] *See id.* (quoting Frazer Rice, senior wealth strategist at Calamos Wealth Management).

[230] *See supra* Part IV.

[231] A partner with a leading law firm stated, "If you don't have a fundamentally sound investment to begin with, I would not rely on this tax treatment to get you over the tipping point." Kathleen Pender, *Tax Questions Answered, Opportunity Zone Fund Rush Begins*, S.F. CHRON. (June 14, 2019) (quoting Jeff Diener, partner with DLA Piper), https://www.sfchronicle.com/business/networth/article/Tax-questions-answered-Opportunity-Zone-fund-13992079.php?psid=maqd0. Similarly, a managing director in the national tax office of a leading accounting firm stated, "If the project does not stand on its own and the fundamentals aren't there, it's not a good deal." Sullivan, *supra* note 227 (quoting Marla Miller, managing director with BDO).

[232] Sullivan, *supra* note 227.

Opportunity Zone program is to be successful in promoting and enhancing the economic well-being of the zone communities; if the road to success consists of matching investors to specific zones and specific projects—reflecting communities' wants and needs—within those zones; and if not all zones and projects are created equally, investors must be enticed—pulled in—where enticement is lacking.

Thus, the current, federal legislation should be augmented by additional tax incentives that compensate investors for the comparatively additional risk they would have to take on in placing their capital gains in zones and projects that impose it. Investors can be compensated based on the type of project (for example, housing; commercial real estate; education center; technology start-up; grocery store); type of locale (urban or rural); proximity to amenities that are suitable to the type of project needed (for example, public transportation, if the type of project that a community needs would be best served by proximity to public transportation); or even based on the sequential order in which investors choose the locale.[233] But as past instances of private investment in the name of economic development suggest, it is not enough to simply attract funds; rather, funds must be appropriated to projects within communities based on communities' specific wants and needs. Thus, such incentives should be based on the first category—type of project.

Ideally, the additional incentives should be provided by local (state or municipal) governments rather than the federal government. In fact, this is seemingly necessary for the additional incentive program (let us call the additional incentive program 'OZ2' and the current Opportunity Zone program 'OZ1') to function successfully, as every state, and every locale, is unique—geographically, socioeconomically, in its history—and thus, each warrants its own consideration. Such uniqueness has two implications: first, each community may differ in its wants and needs; and second, each community may pose different levels of risk for different types of projects. Moreover, as discussed above, risk can encompass many different factors. For example, if an investor seeks to build a hotel, risk can stem from the difficulty of getting land-use permits in the locale in which the investor seeks to build. It may also stem from the inherent risk of the hotel industry. And it may be that the

[233] This, however, may beckon an analysis of whether it is riskier, or less risky, to be among the first to invest in a locale. One might think that the first investor faces more risk than the last, but it may well be that the last investor, facing increased costs to acquire zone property, needs to be incentivized even more. In fact, it is possible that, as the number of investors in a zone increases, the attractiveness of the zone increases at a decreasing rate, hits a peak, and then decreases at an increasing rate—like a big roller coaster drop.

inherent risk of the hotel industry is itself affected by legal hurdles, such as the need to get land-use permits and engage with the relevant locale or municipality.

For example, assume that risk can be measured on a one-to-ten scale (of relativity), with one constituting the lowest possible level of risk and ten constituting the highest possible level of risk. Consider, then, an opportunity zone fund that seeks to build a high-end restaurant. Imagine the fund is choosing between Zone A, which is an up-and-coming neighborhood home to a lot of young professionals who work in high-paying industries; Zone B, which is an economically down-trodden city with high rates of homelessness and crime, but home to many commercial towers (say—for a thriving legal industry); and Zone C, which is a small town located about thirty miles away from a major city but only five miles away from several corporate headquarters. All three zones have expressed interest in bringing in an opportunity zone fund to build a high-end restaurant. Zone A wants it for entertainment; Zone B wants it for hospitality jobs; and Zone C wants it as an alternative to the local pizzeria. If you, the reader, represented the fund, which would you choose as the least risky? Zone A is home to a crowd of young professionals and thus potential eager-to-spend customers. A high-end restaurant in Zone A has a risk level of four. Zone B might get a big lunch crowd, but who would want to spend a night on the town in an area known for high rates of homelessness and crime? What would be a risk level of two for Zone B is now a risk level of seven. Zone C, too, might get a big lunch crowd, and while it will not be as busy as Zone A at night, it certainly will not be as empty as Zone B. Instead, it may nonetheless see *some* evening customers, such as local families and couples. What would be a risk level of three for Zone C is now a risk level of five. This largely simplified version of reality demonstrates the unique package that each zone represents to investors, to opportunity zone funds. What may be a low-risk project in one zone may be a high-risk project in another, and it may well be that the same project matches the wants and/or needs of both communities.

Thus, if OZ2 offers additional incentives for additional risk, and if such risk can stem from so many factors, all of which vary by locality, local governments are arguably best suited to provide the right incentives for the right needs and wants of their communities. The more local the government, the stronger should be the ability of the government to understand the community; to adopt a micro view so as to identify and measure the various sources and levels of risk within their locales; to identify the projects that the community wants or needs; to assess what level of risk a given project would possess in the pertinent community; and thus to provide appropriately measured incentives. OZ1 is a one-size-fits-all federal legislation, blind to the unique wants and needs of communities and blind to the unique risks imposed by those communities. OZ2 would be the formal, custom-tailored solution that would augment and ensure the success of OZ1—the success for which many communities now hope.[234]

In fact, early on, some states and cities began to augment federal incentives so as to attract investors,[235] but not necessarily to attract them to specific types of needed projects. In West Virginia, lawmakers created an income tax exemption for opportunity zone investment.[236] Florida attempted to align opportunity zones with enterprise zones, allowing investors to benefit from both programs.[237] The incentives, or proposals for incentives, moreover, have not been merely pecuniary. In Connecticut, for example, lawmakers considered exempting historic preservation requirements.[238] On the other hand, Maryland considered providing historic preservation tax credits for opportunity zone businesses and even providing tax credits for opportunity zone businesses hiring formerly imprisoned individuals.[239] But rather than merely providing such additional incentives (including those that may be available to non-opportunity zone investors as well), local governments should provide incentives compensating for risk to attract funds specifically to those projects that their constituent communities need, that match their communities' wants. As our country's experience teaches us, this is the key to ensuring the success of OZ1—of ensuring economic development to those for whom it was intended.

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[234] *See supra* Part II.

[235] *See* J. Brian Charles, *States, Cities Add Sweeteners to Attract 'Opportunity Zone' Investors*, GOVERNING (Apr. 17, 2019, 3:23 PM), https://www.governing.com/topics/finance/gov-opportunity-zones-extra-incentives.html. *See also* JOB OPPORTUNITIES TASK FORCE, HIRING EX-OFFENDERS IS GOOD BUSINESS: A GUIDE TO TAX CREDITS AND FEDERAL BONDING BENEFITS FOR MARYLAND BUSINESSES, http://www.pastforwardmd.org/pdf/jotf_guide_to_business_incentive.pdf; *Maryland Bill to Establish OZ Incentives, Extend State HTC Awaits Governor's Signature*, NOVOGRADAC (Apr. 10, 2019, 11:00 AM), https://www.novoco.com/news/maryland-bill-establish-oz-incentives-extend-state-htc-awaits-governors-signature.

[236] Joshua L. Jarrell & James Conlan Lynch, *West Virginia Opportunity Zone Incentives Available*, NAT'L L. REV. (July 24, 2019), https://www.natlawreview.com/article/west-virginia-opportunity-zone-incentives-available.

[237] Charles, *supra* note 235.

[238] Comm. on Planning and Dev. 6552, 2019 Gen. Assemb., Jan. Sess. (Conn. 2019), https://www.novoco.com/sites/default/files/atoms/files/connecticut_6552_032719.pdf.

[239] Charles, *supra* note 235.

The incentives may take on various forms. They may be in the form of deductions, credits, deferment, reduced rates, or multi-year tax holidays.[240] Governments may find it especially attractive to offer types of incentives, such as deferment, that do not exactly match risk increases with rate reductions, as this may weaken the need to measure risk specifically. An alternative to specific measures of risk, however, would be to rank project types (perhaps on a scale similar to, but more sophisticated than, the one above) based on the risk they pose. For example, a government that seeks to provide lower (capital gains) tax rates for higher-risk projects may set a minimum agreed upon rate based on its budget and fiscal capacity; apply that rate to the highest-risk project (in other words, the project that is ranked as such on the risk scale); and then increase that rate incrementally based on the rank that a project holds on the risk scale—the lower the rank, the higher the tax rate. Furthermore, a rank-based system is versatile; it could apply to deductions, credits, deferments, and tax holidays as well.

Nevertheless, the best measure, as the most accurate one, would be one that matches the amount of compensation to the amount of risk—for example, by reducing the tax rate for a given type of project in direct proportion to the return foregone by investors for taking on additional risk—but this would most definitely require significant quantitative analysis and modeling and thus, presumably, financial resources. The analysis may include looking at the historical performance of similar projects within a given community and comparing it to risk-free or lower-risk assets, or even asking whether there are any new risks or risks that no longer exist so as to affect reliance on past returns. If no such projects exist within a community, one may look at returns on similar projects beyond that community and assess how risk factors existing within, or absent from, that community may lower, or increase, such returns. One may argue that an alternative to such complex quantification is for the government to just subsidize projects or, perhaps, even act as an investor alongside private investors for a project, achieving similar results without having to quantify risk. Indeed, a government may even choose to offer a conditional subsidy, where the subsidy would be provided only if the project yielded a return on investment lower than a given threshold. The issues with these methods are that first, a government may not have the financial resources to subsidize a project directly, and second, the alternative of acting as an investor alongside private investors may well raise conflicts of interest and criticism from both residents and investors.

[240] *See, e.g.*, David Holland & Richard J. Vann, *Income Tax Incentives for Investment*, *in* 2 TAX LAW DESIGN AND DRAFTING 986 (Victor Thuronyi, ed., 1998).

Governments should be aware of their resources and abilities when deciding how to implement OZ2. Moreover, they should consider that taking a more complicated route, such as measuring risk specifically, may be more costly at first but, in the long run, yield a lower cost. This would be the case if, in sacrificing specificity, a government were to implement a rank-based program or turn to a non-pecuniary alternative, such as deferment, that would end up overcompensating investors. Also, the less complicated routes, if they yield inaccurate results, would raise issues of fairness and equity. Governments should also be careful not to distort economic incentives to the extent that investors end up over-investing in opportunity zones to the exclusion of communities that do not qualify as opportunity zones but nonetheless need additional or continued investment. This, however, seems unlikely unless a particular government has a budget sufficient to support such incentives.

Further difficulties may arise in defining types of projects or businesses clearly enough so as to avoid investor confusion. For example, is a "wine and paint" business considered an arts center, an entertainment center, a bar, or something else?[241] Such difficulties may be avoided by creating a profile of available projects, assigning incentives to each project (rather than type of project), and letting funds choose from the profile, but this would encroach on investors' autonomy.

Note that compensating for risk will not normalize the playing field so as to make every project equally attractive. This is because, first, it is likely difficult to measure risk accurately and correspondingly compensate for it. Second, there are other things not necessarily stemming from communities, such as value added by business managers, that affect a business's success. Governments should also take care to structure such incentives in a manner that does not facially or otherwise discriminate against interstate commerce, which would open the door to Dormant Commerce Clause challenges.[242] Lastly, governments must consider how far they are willing to go to incentivize investors, and at which point incentives and compensation begin to erode the purpose of the program in reallocating (or sacrificing) taxpayer funds to private entities.

[241] One webpage calls it "a niche of the entertainment franchise category." *Paint and Wine Franchise Industry*, PINOT'S PALETTE, https://franchise.pinotspalette.com/paint-and-sip-business-opportunity (last visited Jan. 1, 2020).

[242] *See, e.g.*, *Commerce Clause*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/commerce_clause (last visited Jan. 1, 2020).

VI. CONCLUSION

Stories of private investment in the name of economic development, especially as viewed in light of economic theory, highlight the importance of matching community needs and wants to the success of programs that undertake it. But in any attempt to attract investors to specific needs and wants, governments and communities must bear in mind that listening is not all there is to it—that investors have considered and will continue to consider, as with near any other investment, what may be a broad concept of risk. And where there is more risk, investors will ask for more return. Thus, for the Opportunity Zone program to be successful, state and local governments should assess not just their needs and wants but also their unique imposition of risk. Upon doing so, they should augment the current legislation with their own incentives—with those that compensate for risk—so that benefits of the Opportunity Zone program also accrue to the communities and to the residents for whom they were intended.