

Limited Authority, Big Impact: Chicago's Sustainability Policies and How Cities Can Push an Agenda Amidst Federal and State Inaction

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I. INTRODUCTION

Washington-bashing is a tried and true tonic for local elected officials looking to portray their work as prodigious when compared to federal sclerosis. Amidst bona fide dysfunction and partisan gridlock in the nation's capital, however, local governments have received more attention as laboratories of innovative policy making.¹ In recognition of the increasing national significance of urban policy making, President Barack Obama established a White House Office of Urban Affairs.² Following failures at the federal level to achieve progress on a host of issues, cities have launched vacant-land-use initiatives,³ rigorous gun control regimes,⁴ and public-private infrastructure banks.⁵ These successes should embolden local leaders to greet federal and state inaction on issues of local importance as opportunities to develop novel solutions that can serve as examples for other municipalities to follow.⁶

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¹ See, e.g., Richard Florida, *Obama, Build a Lasting Urban Legacy*, NY DAILY NEWS (Feb. 3, 2013, 4:10 AM), <http://www.nydailynews.com/opinion/obama-build-lasting-urban-legacy-article-1.1253555>; Bruce Katz & Judith Rodin, *States, Metro Areas Outdo Washington*, CNN.COM (Jan. 23, 2013, 9:27 AM), <http://www.cnn.com/2013/01/22/opinion/rodin-small-government/index.html>.

² Exec. Order No. 13,503, 74 Fed. Reg. 8139 (Feb. 19, 2009).

³ In early 2013, the City of Boston announced a plan to sell over one million square feet in city-owned property to developers who commit to build homes for middle-class families. Dave Wedge, *Mayor to Announce Housing Plan*, BOS. HERALD (Jan. 29, 2013), http://bostonherald.com/news_opinion/local_politics/2013/01/mayor_announce_housing_plan.

⁴ See, e.g., Colleen Long, *Experts Back NYC's Link of Gun Laws, Lower Crime*, AP (Jan. 23, 2013, 4:19 PM), <http://bigstory.ap.org/article/experts-back-nycs-link-gun-laws-lower-crime>.

⁵ See, e.g., Robert Puentes, *Transformative Investments, Chicago Style*, BROOKINGS (Mar. 1, 2012), <http://www.brookings.edu/research/opinions/2012/03/01-infrastructure-chicago-puentes>.

⁶ For a good summary of examples of economic dynamism and government innovation at the state and local level, see Edward McBride, *Cheer Up*, ECONOMIST (Mar. 16, 2013), <http://www.economist.com/news/special-report/21573229-political-gridlock-may-be-bad-americas-economy-says-edward-mcbride>.

The core challenge for cities that seek to achieve progress on issues that are stymied at the national or state level is one that is inherent to all cities: cities do not possess any authority not delegated to them from the state. John Dillon, author of the seminal treatise for local-government law, wrote that this reality is central to the foundation of this area of law.⁷ Of course, some areas of national inaction are more challenging than others to advance at the local level. Cities lack the authority and revenue to have the same direct impact on climate change and sustainability as the federal government and the states. Still, local governments have a range of options for advancing a sustainability agenda despite this lack of direct regulatory authority. These options vary from more traditional approaches (such as utilizing land-use and planning authorities or leveraging federal and state grants and regulatory authorities) to newer methods, including the strategic use of other formal and informal authorities (such as purchasing power or “convening power” to organize stakeholders around a common goal).

Improving the sustainability of cities is critical to reversing climate change. According to a 2011 United Nations report, cities are responsible for up to seventy percent of the world’s carbon emissions.⁸ The globe’s urban population is growing, and by 2030, approximately sixty percent of the world’s people will live in cities of at least 100,000.⁹ A growing body of literature attests to the negative impacts of climate change, including global temperature increases, rising sea levels, expansion of droughts and famines, increased weather volatility, and water shortages.¹⁰ Thus, any meaningful effort to reduce climate change must include a focus on cities.

At the same time, cities are exceptionally vulnerable to the effects of climate change. One example of this is the threat that changes in rainfall and seawater level poses to stormwater management. Stormwater is water that is generated by rain or other forms of precipitation events that does not soak into the ground and thus becomes excess surface water.¹¹ It poses a challenge to cities because stormwater can cause flooding or spread pollution. Of particular concern are combined sewage overflows, where the spread of sewage waste can contaminate drinking water, kill fish, and cause beach closures.¹²

⁷ 1 JOHN DILLON, MUNICIPAL CORPORATIONS 448 (5th ed. 1911).

⁸ U.N. HUMAN SETTLEMENTS PROGRAMME, GLOBAL REPORT ON HUMAN SETTLEMENTS 2011: CITIES AND CLIMATE CHANGE 52 (2011), available at http://www.unhabitat.org/downloads/docs/GRHS2011_Full.pdf.

⁹ *Urban Population Growth*, WORLD HEALTH ORG., http://www.who.int/gho/urban_health/situation_trends/urban_population_growth_text/en/index.html (last visited May 15, 2013).

¹⁰ See, e.g., *The Global Climate Change Regime*, COUNCIL FOREIGN REL., <http://www.cfr.org/climate-change/global-climate-change-regime/p21831> (last updated May 7, 2013).

¹¹ “*After the Storm*,” U.S. ENVTL. PROTECTION AGENCY (Jan. 2003), <http://water.epa.gov/action/weatherchannel/stormwater.cfm>.

¹² NOAH GARRISON & KAREN HOBBS, NATURAL RES. DEF. COUNCIL, ROOFTOP TO RIVERS II: GREEN STRATEGIES FOR CONTROLLING STORMWATER AND COMBINED SEWER OVERFLOWS

Another example of how climate change can have an outsized impact on cities is the urban-heat-island effect, which occurs when cities experience warmer temperatures than surrounding rural areas. The streets, sidewalks, and buildings of cities contain impermeable, dry surfaces that absorb more heat than soil and vegetative surfaces. The differences can be significant. Cities with over a million people have annual mean temperatures of 1.8 to 5.4°F warmer than their surrounding rural areas; on a clear, quiet evening, the difference can be as much as 22°F.¹³

Over the past decade, the City of Chicago has leveraged every tool available to reduce pollution and carbon emissions. Chicago has used traditional planning and land-use authorities to become the North American leader in green building practices. The city has also aggressively used its buying and convening powers to undertake path-breaking initiatives that can serve as models for other cities to adopt or expand upon. Most recently, Mayor Emanuel led a multipronged effort to shut down the last remaining coal plants in a major city. The lesson for cities is that leaders seeking to advance a sustainability agenda must be willing to pursue initiatives that may fall outside of their traditional authorities and stretch the authorities they do possess to the limit. Given the predominant role played by the federal government and the states in combating climate change, local governments will need to engage multiple levels of government and think creatively in developing strategies for having an impact.

This article will examine how the City of Chicago has sought to drive a sustainability agenda by making creative use of its authorities, buying power, and political capital. The initiatives outlined in the following sections demonstrate how a city can have an impact beyond its legal limitations.

In Section II, I will lay out the legal framework in which cities seeking to implement a sustainability agenda operate. While the authorities available to cities will vary by state, most cities will have at least some of the tools described in this section. This section includes several examples from Chicago and other cities of how these tools can be used.

Section III describes how Chicago has used its land-use authorities and financial-assistance programs to implement a mix of requirements and incentives to drive sustainable building practices. Most cities possess similar land-use authorities, making the examples outlined in this section among the more accessible options for cities looking to accelerate sustainable development practices.

In Section IV, I will illustrate how Chicago made use of its bulk buying power to advance a sustainability agenda. By making use of a state legal authority that allowed it to purchase electricity on behalf of over 2.5 million

9–10 (2011), available at <http://www.nrdc.org/water/pollution/rooftopsII/files/rooftopstoriversII.pdf>.

¹³ U.S. ENVTL. PROT. AGENCY, REDUCING URBAN HEAT ISLANDS: COMPENDIUM OF STRATEGIES 1 (2008), available at <http://www.epa.gov/hiri/resources/pdf/BasicCompendum.pdf>.

residents and small businesses on an opt-out basis, Chicago cut electricity costs for its customers while eliminating the city's reliance upon coal-fired sources.

Finally, in Section V, I will outline how Mayor Emanuel used the bully pulpit of his office to champion and accelerate the efforts of a decades-old campaign to shut down two coal-fired plants. In this section, I will illustrate how political leadership can allow a city to accomplish a goal that otherwise lies beyond its authority.

II. THE LEGAL FRAMEWORK

Like most cities, Chicago has limited authority to take direct regulatory action to combat climate change. The strongest steps governments can take include the regulation of emissions or industry energy-efficiency standards. Federal statutes have reserved considerable authority for the national government on a number of fronts, with state roles carved out against a backdrop of federal supremacy. These statutes leave little room for cities to fill the gap, though there are exceptions. This legal framework requires that cities wishing to take aggressive action to reverse climate change or promote sustainability think creatively in order to have an impact.

Direct regulation of industry is rarely an option for cities because the federal government and the states are typically the first regulator. In the realm of regulation of carbon emissions, for example, the federal government holds the leading role in setting standards and overseeing the states in attaining them. The Clean Air Act of 1970 (CAA) charged the Federal Environmental Protection Agency (U.S. EPA) with establishing standards for cleaner emissions and required states to develop plans for attaining these standards.¹⁴ While the CAA acknowledges a role for local government in its findings section,¹⁵ it is clear that the development of standards and planning for implementation occurs at the federal and state levels. Under the CAA, even the state role is subject to federal supervision, as the statute requires that state implementation plans receive approval from the U.S. EPA.¹⁶

Cities possess a host of other authorities that can and should be leveraged in support of sustainability goals. Chief among these authorities is land-use regulation. Generally, zoning and planning provide cities with powerful tools to shape physical and economic development and how the impact of that development is distributed among residents and businesses. Under the respective laws of their states, cities are typically afforded considerable leeway in regulating land use through zoning and planning.¹⁷

¹⁴ See Clean Air Act Amendments (CAA) of 1970, 42 U.S.C. §§ 7401–7671 (2006).

¹⁵ *Id.* § 7401.

¹⁶ *Id.* § 7410(k).

¹⁷ A 2006 Brookings Institution survey found that over ninety percent of municipalities in the fifty largest metropolitan areas have a zoning ordinance of one kind or another. To be sure, there are variations between these municipalities. For example, the survey found that Eastern

Through the use of zoning incentives like so-called “density bonuses,”¹⁸ which allow developers to maximize revenue potential by increasing the density of their projects, cities have used zoning and land-use authorities to create incentives for affordable housing,¹⁹ transit-friendly amenities like bike parking and shared car services,²⁰ and open space.²¹

Beyond zoning incentives, cities can also attach requirements to their zoning ordinances. One common example of this is the “inclusionary zoning ordinance,” which typically requires that developers of residential projects set aside a certain percentage of housing units for sale as affordable housing units.²² During the twentieth century, many cities attached parking mandates to their zoning codes in order to ensure that sufficient parking remained available to meet demand at peak times.²³ While zoning mandates are stronger tools for advancing a policy goal, they can also increase the cost of developing in a city.²⁴

and Midwestern municipalities tended to have exclusionary zoning ordinances while Western cities gravitated towards ordinances that sought to regulate the pace and nature of development. ROLF PENDALL, ROBERT PUENTES & JONATHAN MARTIN, THE BROOKINGS INST., FROM TRADITIONAL TO REFORMED: A REVIEW OF THE LAND USE REGULATIONS IN THE NATION'S 50 LARGEST METROPOLITAN AREAS (2006), available at http://www.brookings.edu/~media/research/files/reports/2006/8/metropolitanpolicy%20pendall/20060802_pendall.pdf.

¹⁸ The American Planning Association defines “density bonus” as “an increase in the number of residential units or nonresidential square footage on a parcel beyond what the zoning ordinance allows.” AM. PLANNING ASS'N, PAS QUICK NOTES NO. 12: DENSITY 1 (2006), available at <http://www.planning.org/pas/quicknotes/pdf/QN12.pdf>.

¹⁹ See, e.g., AM. PLANNING ASS'N, MODEL SMART LAND DEVELOPMENT REGULATIONS: SECTION 4.4 MODEL AFFORDABLE HOUSING DENSITY BONUS ORDINANCE (2006), available at <http://www.planning.org/research/smartgrowth/pdf/section44.pdf>.

²⁰ There is a host of transit-oriented development ordinances across the country designed to encourage the development of densely populated, mixed-use, walkable communities in the vicinity of public-transit stations. These ordinances further that goal through a variety of mechanisms, from zoning requirements to density bonuses to other forms of incentives. See, e.g., SAM ZIMBABWE, RECONNECTING AM., TRANSIT-ORIENTED DEVELOPMENT: NATIONAL EXAMPLES AND BEST PRACTICES (2009), available at http://c0133311.cdn.cloudfiles.rackspacecloud.com/Report_Reconnecting_America_TOD_Whats_Whys.pdf; *Transit Oriented Development Plan and Ordinance Examples*, MUN. RES. & SERVICES CENTER WASH., <http://www.mrsc.org/subjects/transpo/transitdev.aspx#examples> (last updated Apr. 2012) (containing examples of ordinances from across the country).

²¹ Zoning authority can also be used to create incentives for open space. This is sometimes referred to as cluster zoning, in which the allowed density is determined for an entire area rather than on a lot-by-lot basis. Cluster zoning allows for residential properties to be “clustered” together more closely, allowing for additional open spaces such as parks and playgrounds. See, e.g., Stuart Meck, *Cluster Development: Modern Application of an Old Town Form*, ZONING PRAC., Aug. 2007, at 2, 2, available at <http://www.planning.org/zoningpractice/2007/pdf/aug.pdf>.

²² See, e.g., CHI. METRO. AGENCY FOR PLANNING, INCLUSIONARY ZONING STRATEGY REPORT (2008), available at <http://www.cmap.illinois.gov/documents/20583/2712642c-de78-4a36-8f30-a99ca0807cca> (finding that inclusionary zoning ordinances are effective at driving the development of additional affordable housing units).

²³ See, e.g., Donald C. Shoup, *The Trouble With Minimum Parking Requirements*, 33 STRATEGY TRANSP. RES. PART A 549 (1999) (arguing that parking requirements are outdated and expensive).

²⁴ See, e.g., Robert C. Ellickson, *The Irony of “Inclusionary” Zoning*, 54 S. CAL. L. REV. 1167 (1981) (arguing that inclusionary zoning ordinances function as taxes on development and result in higher prices for residents). But see Andrew G. Dietderich, *An Egalitarian's*

Thus, while the true scope of these authorities varies by state,²⁵ cities can use these authorities to incentivize or require sustainable construction and development practices and the use of certain types of materials or equipment. Over time, the strategic and sustained use of these authorities can not only result in greener development but also help spur new markets and drive workforce development.

Transactions in which city funds are provided to non-governmental entities, such as financial-incentive programs or government procurements, offer another vehicle for advancing an agenda. I will cover financial incentives later in this article, but in the case of procurement, municipalities generally have considerable discretion to shape their procurement processes and can further policy goals through the use of incentives and penalties. Many cities have implemented policies that provide preferences to local produce,²⁶ clean vehicles,²⁷ and minority- and women-owned businesses.²⁸ Access to government procurements can provide nascent technologies, innovative services, or disadvantaged businesses with the significant, predictable revenue streams that can mean the difference between success and failure.

Another avenue for cities lies in licensing and permitting processes. Through relaxing or expediting processes for certain types of activities, the city can incentivize green development and other desired activities. Examples of this approach include Chicago's "Green Permit" program²⁹ and New York City's recently launched Broadband Express.³⁰ Both offer a stream-

Market: The Economics of Inclusionary Zoning, 24 FORDHAM URB. L.J. 23 (1996) (arguing that inclusionary zoning increases supply of affordable housing without pricing low-income renters out of the market).

²⁵ See GERALD E. FRUG & DAVID J. BARRON, *CITY BOUND: HOW STATES STIFLE URBAN INNOVATION* 99–108 (2008) (highlighting how states limit the land-use authorities of municipalities).

²⁶ The City of Cleveland provides a two to four percent bid preference for companies that source local products or are certified as a sustainable business. CLEVELAND, OHIO, CODE OF ORDINANCES § 187A.02 (2010).

²⁷ Seattle's Green Purchasing Program is an interagency effort to drive fleet purchasing and management decisions across city government. *Green Purchasing Overview*, SEATTLE.GOV, <http://www.seattle.gov/purchasing/GrnPurchOverview.htm> (last visited May 16, 2013).

²⁸ Minority- and woman-owned business programs are very common. In Chicago, the city establishes participation goals for procurement contracts, and vendors are required to make "best efforts" to achieve the goal using city-certified firms.

²⁹ Chicago's Green Permit program offers two tiers of expedited permit review if the project includes features like solar installations and green roofs or if it attains certain energy-efficiency certifications. *Overview of the Green Permit Program*, CITY CHI., http://www.city-ofchicago.org/city/en/depts/bldgs/supp_info/overview_of_the_greenpermitprogram.html (last visited May 16, 2013).

³⁰ The idea behind New York City's Broadband Express is to provide Internet Service Providers (ISPs) seeking to lay fiber with a dedicated point person within city government who can provide the ISPs with end-to-end services, ideally resulting in an expedited process. It is unclear whether this initiative has proven successful, but it is an excellent demonstration of how a city can seek to further a policy priority without a financial investment or new legislation. Press Release, N.Y.C. Office of the Mayor, Mayor Bloomberg and Speaker Quinn Announce New Initiatives to Expand New York City's Broadband Connectivity, Bolstering the Growing Tech Sector and Allowing Businesses and Residents to Access High-Speed Internet

lined process for private entities interested in pursuing development that aligns with the cities' policy objectives. Carving out an easier or expedited process for one category of activity entails tradeoffs; with limited staff time available, such carve outs, if offered too liberally, can result in longer wait times for those activities that access a "regular" process.

The preceding section provided a brief overview of the range of options available to cities that seek to advance a policy agenda on matters where authority to regulate or impose mandates lies at the federal or state levels. In the sections that follow, I provide several concrete examples of how Chicago has achieved progress on its sustainability goals.

III. USING TRADITIONAL LOCAL AUTHORITIES TO DRIVE GREEN BUILDING PRACTICES

Chicago has used traditional local authorities over land use and building codes to establish requirements for green construction and building-management practices. The end result: Chicago leads the country in green roofs³¹ and Leadership in Energy and Environmental Design (LEED) certified buildings, featuring over 350 buildings with green roofs and over 250 LEED-certified buildings.³² The city's sustainable development policy has been the key driver behind both success stories. By imposing these requirements on large developments, the city also created market incentives that accelerated adoption of green development services by architects and construction firms in Chicago, reducing the costs of such development.

The city first implemented its sustainable development policy in 2004 under Mayor Richard M. Daley. City Hall sought to accelerate the incorporation of sustainable building practices by building developers by requiring commercial real-estate companies that receive financial incentives from the city or tax credits from other levels of government or undertake large

(June 21, 2012), available at http://www.nyc.gov/portal/site/nycgov/menuitem.c0935b9a57bb4ef3daf2f1c701c789a0/index.jsp?pageID=mayor_press_release&catID=1194&doc_name=http%3A%2F%2Fwww.nyc.gov%2Fhtml%2Fom%2Fhtml%2F2012a%2Fpr236-12.html&cc=unused1978&rc=1194&ndi=1.

³¹ Chicago is home to significantly more square footage of green roofs than other North American cities. *Green Roofs*, GREEN DASHBOARD, <http://greendashboard.dc.gov/Energy/GreenRoofs> (last updated Jan. 7, 2013) [hereinafter *Green Roofs Survey*]. While there is no formal definition contained in ordinance, the city's website defines "green roofs" as

layers of living vegetation installed on top of buildings, from small garages to large industrial structures. They help manage stormwater and contribute to improved water quality by retaining and filtering rainwater through the plant's soil and root uptake zone. The water that does leave the roof is slowed, kept cooler and is filtered to be cleaner. Green roofs can also further insulate the building, reducing cooling and heating costs.

Green Roofs: Best Management Practices, CITY CHL., http://www.cityofchicago.org/city/en/depts/water/supp_info/conservation/green_design/green_roofs_bestmanagementpractices.html (last visited May 16, 2013).

³² *LEED Buildings*, GREEN DASHBOARD, <http://greendashboard.dc.gov/Energy/LEED-Buildings> (last updated Apr. 29, 2013).

projects to incorporate green roofs, LEED certification, and other stormwater-management best practices in their plans.³³ The city has implemented this sustainable development policy by relying on traditional local-government authorities and powers delegated by the state.

Chicago, like other local governments, possesses considerable planning and zoning authority. Our sustainable development policy is itself not codified in statute. Instead, the city embeds specific sustainability requirements on a project-by-project basis in legislation for approval by Chicago's City Council. These requirements are divided by development type—residential, industrial, institutional, commercial, existing buildings, and landmark buildings—and increase in stringency based on the degree of taxpayer subsidy. Requirements include fifty percent or 100% green roofs, LEED certification, and exceeding compliance with the city's stormwater requirements by certain percentages.³⁴ Chicago's sustainable development policy is an example of how a city might leverage an existing authority, in this case the city's land-use regulatory authority, to advance a policy goal.

The planned development process provides another avenue for Chicago to drive sustainable building practices. Similar to mechanisms for zoning large projects in other cities,³⁵ Chicago's planned developments allow the city to carve out special zoning districts for specific projects based on size, use, location, or complexity. The criteria for mandatory participation in the planning-development process are contained in the Chicago Zoning Ordinance,³⁶ which also allows for voluntary participation for projects that meet certain thresholds. Planned developments allow Chicago to oversee a coordinated and cohesive planning and development of projects that will have an impact on the surrounding properties. These projects ultimately must receive City Council approval.

One of Chicago's strongest tools for driving economic development, its expansive use of Tax Increment Financing (TIF), has also become a tool for requiring developers to implement green construction practices. TIF is a tool, available in Washington, D.C., and every state except for Arizona, that allows governments to subsidize current projects using anticipated future property-tax revenue. In Illinois, TIF is authorized under state law to encourage investment in targeted areas that meet certain conditions of blight,

³³ That same year, Chicago also committed to building only LEED-certified municipal buildings and, when its own buildings undergo renovation, retrofitting them to attain certification as well.

³⁴ CITY OF CHI., SUSTAINABLE DEVELOPMENT POLICY (2011), available at http://www.cityofchicago.org/dam/city/depts/zlup/Sustainable_Development/Publications/GreenMatrix2011DHEd.pdf.

³⁵ A number of cities have special zoning processes for large developments. For example, New York City allows for the modification of the underlying zoning rules for "large-scale developments." N.Y.C. Dep't of City Planning, *Zoning Tools: Large-Scale Development*, NYC.GOV, http://www.nyc.gov/html/dcp/html/zone/zh_ztools_largescale.shtml (last visited May 16, 2013).

³⁶ See CHI., ILL., CHI. ZONING ORDINANCE § 17-8-0500 (2012).

decay, or underperformance. When the city creates a TIF district, it locks the property-tax rate at present value and redirects into a separate fund for the next twenty-three years any incremental property tax increase associated with a rise in the assessed value of property within the TIF district. TIF is a major tool for Chicago in its economic-development strategy. The city contains 163 active TIF districts that generate a total of \$500 million in revenue each year.³⁷ The city has used TIF funds to support economic development and school and public-infrastructure construction.

In Illinois, home-rule municipalities possess broad authority to oversee TIF programs, and can attach a variety of requirements to this financial assistance that further policy goals. Other cities face additional constraints on their ability to make aggressive use of TIF. In *City Bound*, Frug and Barron highlight the different restraints, both direct and indirect, that limit the abilities of cities to use TIF. For example, while Boston is similar to Chicago in its expansive authority to establish TIF districts, it faces another constraint in the law's requirement that bonds issued for TIF be counted against its overall municipal-bond limit. By comparison, Chicago has no debt limit and thus possesses significantly more leeway in making use of TIF.³⁸ Nevertheless, even where limitations exist on a city's ability to use TIF, there are still opportunities to link green building requirements to the receipt of such assistance. In recent years, cities like Pittsburgh³⁹ and St. Paul⁴⁰ have incorporated green building requirements into their TIF programs.

In addition to implementing its sustainable development policy for TIF deals, the city has also attached sustainable development goals to projects that receive other forms of assistance such as county tax credits for certain kinds of real-estate developments, local housing assistance, and sales of city-owned land parcels at a reduced price. As with TIF projects, the sustainable requirements are not codified in statute, and the requirements are thus incorporated on a project-by-project basis via City Council ordinance.

In addition to the mandates embedded in Chicago's sustainable development policy, the city also utilized a few incentive programs for green-roof development. The Green Roof Improvement Fund was a TIF program established in 2006 that provided a fifty percent grant match not to exceed \$100,000 for the cost of placing a green roof on an existing building located

³⁷ TIF REFORM PANEL, CITY OF CHI., FINDINGS AND RECOMMENDATIONS FOR REFORMING THE USE OF TAX INCREMENT FINANCING IN CHICAGO: CREATING GREATER EFFICIENCY, TRANSPARENCY, AND ACCOUNTABILITY 6 (2011), available at <http://www.ccachicago.org/sites/default/files/8.29.11TIFReport.pdf>.

³⁸ See FRUG & BARRON, *supra* note 25, at 108–10.

³⁹ Press Release, Pittsburgh Green Bldg. Alliance, City of Pittsburgh Shows Green Building Leadership Again (July 21, 2009), available at <http://www.gbapgh.org/upload/news/Press-Release-SustainableDevelopmentforPubliclyFinancedBuildings.pdf>.

⁴⁰ *Saint Paul Sustainable Building Policy for Private Development*, CITY ST. PAUL MN (Jan. 4, 2011, 9:57 AM), <http://www.stpaul.gov/DocumentCenter/Home/View/16691>.

in downtown Chicago.⁴¹ Similarly, Chicago also offered a since expired Green Roof Grant Program that provided \$5000 grants for green roof projects on residential and small commercial buildings.⁴² Both programs have since expired, but they contributed, along with the requirements of the city's sustainable development policy, to the acceleration of green-roof adoption in Chicago. According to one account, the price per square foot of green roofs has dropped by forty percent since 2001.⁴³

Finally, the City of Chicago and its sister agencies have sought to grow the number of LEED-certified public buildings. At the beginning of the Emanuel Administration, there were forty-one LEED-certified public buildings in Chicago. Mayor Emanuel committed to doubling this number by the end of his first term in 2015,⁴⁴ and since taking office, the city has increased that number to sixty-seven and is on pace to exceed the Mayor's goal ahead of schedule.⁴⁵

Chicago's success at using these authorities has helped it become a leader in sustainable development as compared to other cities.⁴⁶ For example, Chicago is home to nearly twice the green-roof square footage as New York City,⁴⁷ and the Second City is first when it comes to LEED-certified buildings.⁴⁸ One key difference between the two cities is the expansive application of its sustainable development policy. While Chicago's policy applies to all projects that receive any kind of tax subsidy or financial assistance, regardless of the amount, as well as projects large enough to reach the planned-development threshold, New York City's LEED requirements apply only to buildings that receive substantial city funding.⁴⁹ Similarly, New York City does not include project mandates for green roofs

⁴¹ Chi., Ill., Green Roof Improvement Fund Ordinance (May 24, 2006), available at http://www.cityofchicago.org/content/dam/mayor/ordinances/ordinances_pdfs__by/2006/may_24_2006/93325.res.

⁴² Press Release, City of Chi., City Launches Green Roof Grants Program (Nov. 2, 2005), available at http://www.waterboards.ca.gov/sanfranciscobay/water_issues/programs/storm_water/muni/nrdc/city%20green%20roof%20grants%20prg.pdf.

⁴³ Kim Hawkins, *Chicago Green Roofs: Seven Million Square Feet and Growing*, GREEN INFRASTRUCTURE DIG. (Nov. 13, 2009), <http://hpgreen.com/2009/11/13/chicago-green-roofs-seven-million-square-feet-and-growing/> (finding that the average installation price of green roofs in Chicago has fallen from twenty-five dollars to fifteen dollars per square foot).

⁴⁴ Press Release, Office of the Mayor, City of Chi., Mayor Emanuel Announces Commitment to Double the Number of LEED Certified Buildings in Four Years (June 14, 2011), available at <http://www.cityofchicago.org/dam/city/depts/mayor/Press%20Room/Press%20Releases/2011/June/PBCRelease.pdf>.

⁴⁵ Support for these claims comes from internal documents in the Mayor's Office.

⁴⁶ See, e.g., Tony C. Dreibus, *Chicago Out-Greens New York, L.A., Growing Gardens in the Clouds*, BLOOMBERG (Oct. 8, 2008), <http://www.bloomberg.com/apps/news?sid=aM3lvM EUrurs&pid=newsarchive>.

⁴⁷ *Green Roofs Survey*, *supra* note 31.

⁴⁸ *LEED Buildings*, *supra* note 32.

⁴⁹ New York City's Local Law 86 requires LEED Silver Certification for projects that receive \$10 million in city funding or, where a project receives less than \$10 million in city funding, the city funding share is greater than or equal to fifty percent of the project cost. N.Y.C. Mayor's Office of Envtl. Coordination, *Green Building (Local Law 86 of 2005)*, NYC.gov, <http://www.nyc.gov/html/oc/html/green/green.shtml> (last visited May 16, 2013).

similar to those contained in Chicago's sustainable development policy. Instead, New York City relies upon an incentive approach through a tax-abatement program that offers \$4.50 per square foot of green roof space.⁵⁰ Similarly, in 2010, the Bloomberg Administration announced a green infrastructure plan that will invest \$1.5 billion in public funds over twenty years to promote improved stormwater-management practices, including green roofs.⁵¹ While this incentive approach may ultimately prove effective, Chicago's incorporation of green-roof requirements into its sustainable development policy has helped make the city the national leader in green roofs.

Conversely, a number of cities have mimicked Chicago's approach with success. For example, Washington, D.C., has rapidly caught up to New York City in number of LEED-certified buildings thanks to its Green Building Act of 2006.⁵² This legislation not only required municipal and city-financed buildings to obtain LEED certification, it mandated that private, nonresidential buildings above fifty thousand square feet obtain LEED certification as well.⁵³ The private-building requirement took effect in 2012, but by providing developers with six years to prepare for the requirements, it created incentives for early compliance. Finally, the federal government's commitment to seeking certification in both new construction projects and rehabilitations of existing buildings is a major contributor to the growth of LEED-certified buildings in Washington, D.C.⁵⁴

IV. USING BULK BUYING POWER TO OBTAIN CLEANER ENERGY

Another significant advantage that cities possess is buying power. The primary mechanism for cities to use buying power to promote sustainability is through mass purchases of items such as green city vehicles, recycled building materials, and local renewable power generation, among others. An additional path for bulk purchasing is provided by the growing field of community choice aggregation (CCA), an authority under state law that allows cities to buy electricity in bulk for residential customers on an opt-out ba-

⁵⁰ N.Y.C. Dep't of Fin., *Green Roof Tax Abatement*, NYC.GOV, http://www.nyc.gov/html/dof/html/property/green_roof.shtml (last visited May 16, 2013).

⁵¹ Mireya Navarro, *\$1.5 Billion Plan Would Cut Sewage Flow Into City Waters*, N.Y. Times, Sept. 28, 2010, at A28; *see also* PLANYC & N.Y.C. DEP'T OF ENVTL. PROT., NYC GREEN INFRASTRUCTURE PLAN: A SUSTAINABLE STRATEGY FOR CLEAN WATERWAYS (2010), available at http://www.nyc.gov/html/dep/pdf/green_infrastructure/NYCGreenInfrastructurePlan_LowRes.pdf.

⁵² *See* Green Building Act of 2006, D.C. Law No. 6-216 (codified as amended at D.C. CODE § 6-1410 (Supp. 2007)).

⁵³ *See id.* § 4(a).

⁵⁴ *See* Ashley Katz, *Top 10 States for LEED Green Buildings*, SUSTAINABLE CITIES COLLECTIVE (Jan. 19, 2012), <http://sustainablecitiescollective.com/usgbc/34073/top-10-states-leed-green-buildings> (noting that federal government buildings are overall responsible for nearly one-third of LEED-certified buildings).

sis.⁵⁵ By requiring that customers opt out of the agreement, CCA laws provide cities with greater bargaining power because individuals are less likely to reject participation in a program when they are required to affirmatively opt out.⁵⁶ Although Chicago has an active green procurement program, I will focus on the latter of these two courses by examining the city's recent experience with CCA.

The state of Illinois authorized opt-out CCA by amending section 1-92 of the Illinois Power Agency Act in 2009,⁵⁷ and since that time, over 340 municipalities have pursued CCA. In Illinois, CCA represented an additional step down the path of deregulation, which began in 1997. Deregulation began in Illinois that year with the Illinois Electric Service Customer Choice and Rate Relief Law of 1997 (Deregulation Act),⁵⁸ which allowed large commercial purchasers of electricity to obtain power from alternative retail electric suppliers (ARES) while the two Illinois utility monopolies—Ameren Illinois Utilities and Commonwealth Edison Co. (ComEd)—remained responsible for distribution of electricity. As part of this transition to deregulation, the two utilities were required to sell their electricity-generation assets to other energy companies to eliminate their economic interest in electricity supply. Residential and small commercial customers were later allowed in 2002 to obtain electricity from ARES. Significantly, residential and small commercial customers who enter into agreements with ARES are allowed to continue to receive a single bill from their utility that includes payments due from both the supplier and the utility.

A scarce few residential and small commercial customers sought service from ARES until recent years when, because of a temporary but significant gap in electricity prices between the rate offered by the utilities and the market, these customers increasingly responded to the marketing of a growing number of ARES. The sources of this gap were legacy contracts from 2007 that locked in prices at rates the market began undercutting in 2010 as the supply of natural gas increased.⁵⁹ The result was electricity supply prices that ranged from twenty-five to fifty percent above the market rate over the past twelve months.⁶⁰ The number of residential and small commercial cus-

⁵⁵ See LEAN ENERGY U.S., <http://www.leanenergyus.org/> (last visited May 16, 2013) (“Established by law in six states so far, CCA allows cities and counties to pool the electricity demand of their residential, business, and municipal accounts in order to purchase or develop power on their behalf.”).

⁵⁶ See, e.g., Cass R. Sunstein, *Empirically Informed Regulation*, 78 U. CHI. L. REV. 1349, 1350–51 (2011) (arguing that the power of inertia leads individuals to stick with the “default” choices assigned to them). In the case of Illinois municipal aggregation, we have observed that opt-out rates have tended to fall below ten percent.

⁵⁷ 20 ILL. COMP. STAT. 3855/1-92 (2012).

⁵⁸ 220 ILL. COMP. STAT. 5/16-101 (1997).

⁵⁹ See CUB's Guide to: Municipal Electricity Aggregation, CITIZENS UTIL. BOARD <http://www.citizensutilityboard.org/cubsGuideToMunicipalElectricityAggregation.html> (last visited May 16, 2013).

⁶⁰ A list of the rates secured by all Illinois CCA municipalities is listed on the Plug In Illinois website. The rates range from 6.23 cents per kilowatt-hour at the high end to 3.909

tomers that obtain their supply from ARES skyrocketed following the authorization of CCA, as Illinois municipalities rushed to take advantage of the gap in rates between utilities in the market.

In Illinois, CCA operates in a similar fashion as in other states. Municipalities must first pass a resolution that places a referendum question on the ballot that would authorize the municipality to establish an opt-out CCA program. If the referendum question receives a majority of votes cast, the municipality must establish a plan for governing the program and hold two public hearings about that plan. Once the municipality approves of the plan, a step that typically requires authorization by the municipality's city council or similar body, a supplier can be selected. Eligible customers must receive a letter from the municipality or supplier that informs them of the program rate and their opportunity to opt out of the program.

Following a positive vote on November 6, 2012, Chicago entered into a CCA agreement, the largest agreement of its kind in the country,⁶¹ that provided the city's customers with electricity sourced from non-coal generation sources while reducing customer bills by an average of ten percent over the course of the twenty-seven month contract.⁶² Chicago secured a rate of 5.42 cents per kilowatt-hour, a rate on par with that obtained by other CCA communities in Illinois that locked down rates at around that time.⁶³ This means that the premium for securing electricity from non-coal sources was negligible. Though the primary goal for the Emanuel Administration was saving money for Chicago customers, the city also staked out a new course for other municipalities and larger purchasers of electricity to follow by focusing on cleaner generation sources.

Thanks to the size of the city's customer base, Chicago focused on specifying a particular power mix for its portfolio. The result was a power mix that consisted of approximately ninety-five percent natural gas, and five percent wind energy sources from Illinois wind farms. The burning of natural

cents per kilowatt-hour at the low end. These bookend rates represent savings of twenty-five and fifty-three percent off of the ComEd rate of 8.32 cents per kilowatt-hour, respectively. *Municipal Aggregation List*, PLUG IN ILL., <http://www.pluginillinois.org/MunicipalAggregationList.aspx> (last updated May 2, 2013).

⁶¹ See, e.g., Julie Wernau, *Chicago Asks Voters to Let It Negotiate Electricity Prices: Would Be Largest Such Deal in Country*, CHI. TRIB. (Oct. 21, 2012), http://articles.chicagotribune.com/2012-10-21/business/ct-biz-1021-power-chicago—20121021_1_integritys-energy-services-electricity-prices-electricity-suppliers.

⁶² Press Release, Office of the Mayor, City of Chi., Program Notification Letters for Electrical Aggregation Program Mailed to Over Two Million Chicago Residents and Small Business Owners (Dec. 27, 2012), available at <http://www.cityofchicago.org/content/dam/city/depts/mayor/Press%20Room/Press%20Releases/2012/December/12.27.12muniagg.pdf>.

⁶³ A review of the rates secured by other municipalities that, like Chicago, also approved their CCA programs in referendum votes in November 2012 shows that the Chicago rate was similar to the rates obtained by other municipalities. See *Municipal Aggregation List*, *supra* note 60; see also Steve Daniels, *City Locks in Price Under New Electricity Contract*, CRAIN'S CHI. BUS. (Dec. 14, 2012), <http://www.chicagobusiness.com/article/20121214/NEWS11/121219839/city-locks-in-price-under-new-electricity-contract> ("Residents in Chicago will pay a price for their electricity under the city's new supply contract with Integrys Energy Services that's roughly in line with the deals far smaller suburbs have been getting in recent weeks.").

gas produces less in the way of pollutants and carbon emissions than the burning of coal does.⁶⁴ This power mix provided additional income for underutilized Illinois wind farms and reduced demand for coal-generated electricity. While the Chicago deal alone will not have a game-changing impact on coal plants in Illinois, the city provided other larger purchasers of electricity in the state with a roadmap for eliminating coal from their own portfolios. Should a large number of such entities follow suit, the market impact on coal plants could become significant.

By focusing on a particular power mix, Chicago departed from the course taken by CCA municipalities in Illinois and across the country, which focused on purchasing the standard, coal-intensive power mix from the grid and then supplementing it with the purchase of renewable-energy credits (RECs).⁶⁵ RECs are offsets that electricity buyers can purchase to provide an additional revenue stream for renewable-energy generators.⁶⁶ While RECs are an important revenue stream for the operators of renewable-energy plants, they do not make the underlying power mix any cleaner. By comparison, Chicago focused on the actual sources of electricity and required that interested bidders demonstrate their ability to meet the electricity demand of roughly 2.5 million residents and small businesses with non-coal generation sources.⁶⁷

Chicago's aggregation will enable other cities and electricity buyers to become more discerning purchasers of electricity. By embedding these requirements into the procurement process and requiring interested bidders to attest to their ability to fulfill Chicago's requirement that individual sources be identified, many large electricity suppliers have verified their capacity to offer a la carte supply portfolios to bulk purchasers.

⁶⁴ *Natural Gas*, U.S. ENVTL. PROTECTION AGENCY, www.epa.gov/cleanenergy/energy-and-you/affect/natural-gas.html (last updated Apr. 30, 2013) ("Compared to the average air emissions from coal-fired generation, natural gas produces half as much carbon dioxide, less than a third as much nitrogen oxides, and one percent as much sulfur oxides at the power plant.").

⁶⁵ Some smaller communities have undertaken innovative approaches that have focused on spurring the development of new renewable generation sources through the use of long-term contracts, while San Francisco's recent CCA has focused on offering residents a higher-priced option for increasing the percentage of renewable energy in their generation portfolio.

⁶⁶ Renewable generation sources produce RECs when they generate electricity for distribution into the grid and offer these RECs for sale to purchasers seeking to obtain the environmental attributes of that electricity for public disclosure purposes or in order to meet regulatory green-energy requirements.

⁶⁷ The elimination of coal from the city's portfolio is a substantial reduction from the current mix; the electricity supply portfolio offered by ComEd was generated by forty-three percent coal sources. John Byrne & Hal Dardick, *Emanuel Says Price Motivated Electricity Pick*, CHI. TRIB. (Dec. 11, 2012), http://articles.chicagotribune.com/2012-12-11/news/ct-met-emanuel-electrical-aggregation-1211-20121211_1_integritys-energy-services-city-colleges-coal-fired-power-plants.

V. USING CONVENING AUTHORITY TO ALTER PRIVATE DECISION MAKING

The Emanuel Administration has also aggressively used the Mayor's bully pulpit and convening power to advance a cutting-edge sustainability agenda. One prime example of this is the recent closure of the Fisk and Crawford coal plants. While a coalition of activists had sought the coal plants' closure for a decade, its efforts did not come to fruition until the Mayor threw his support behind the campaign. The Emanuel Administration joined the effort on multiple levels, engaging in serious negotiations with the plant owners while establishing its leverage by signaling support for an ordinance that would impose severe new mandates on the plants and likely spark a drawn-out legal battle. Although the strongest direct authorities over the plants existed at the state and federal levels, Mayor Emanuel greatly accelerated the shutdown of the two plants by making use of the formal and informal authorities of his office.

The Fisk and Crawford plants, which had operated within Chicago city limits since 1903 and 1924, respectively, were the last two coal plants operating within the city limits of any major U.S. city.⁶⁸ The two plants were grandfathered out of compliance with the requirements of the CAA. Many coal-plant owners took advantage of the grandfather exception of the CAA: nearly sixty percent of the coal-fired generating units in the United States were built before 1970, and the median generating plant was established in 1966.⁶⁹ Grandfathered plants are not completely exempt from CAA requirements; if a plant undergoes a "modification,"⁷⁰ it is required to comply with the New Source Review (NSR) permitting process, which consists of a preconstruction review for environmental controls. ComEd sold the plants to Midwest Generation in 1999 as part of its compliance with the 1997 Derogulation Act. By the time Midwest Generation had acquired the plants, the federal Environmental Protection Agency (U.S. EPA) had started cracking down on companies that had made modifications to grandfathered plants without installing modernized pollution controls as required by the NSR process.

Community groups in the predominantly Latino Pilsen and Little Village neighborhoods heightened their organizing activities in response to reports linking the plants to poor health outcomes. The Harvard School of

⁶⁸ Julie Wernau, *Closure of Chicago's Crawford, Fisk Electric Plants Ends Coal Era*, CHI. TRIB. (Aug. 30, 2012), http://articles.chicagotribune.com/2012-08-30/business/chi-closure-of-chicagos-crawford-fisk-electric-plants-ends-coal-era-20120830_1_fisk-and-crawford-midwest-generation-coal-plants.

⁶⁹ The Ctr. for Media & Democracy, *Existing U.S. Coal Plants*, SOURCEWATCH, http://www.sourcewatch.org/index.php?title=Existing_U.S._Coal_Plants (last modified May 16, 2013).

⁷⁰ Clean Air Act, 42 U.S.C. § 7411(a)(4) (2006) (defining "modification" as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted").

Public Health issued the first of these reports, linking plant emissions to premature deaths and other negative health effects.⁷¹ A September 2010 study by the nonprofit Clean Air Task Force built upon this foundation by attributing to coal-plant pollution an annual impact of forty-two deaths, sixty-six heart attacks, and over seven hundred asthma attacks.⁷²

In 2006, the Illinois state government sought to mitigate the pollution produced by the plants and entered into an agreement with Midwest Generation that required it to install pollution-reduction equipment at the Fisk station by 2015 and Crawford station by 2018 or shut them down.⁷³ In the years that followed, Midwest Generation invested millions in modernizing the two plants, reducing sulfur dioxide by thirty percent, nitrogen oxide by sixty percent, and mercury by more than ninety percent.⁷⁴ Despite this agreement between the state and Midwest Generation, the community activists in the neighborhoods most affected by the coal plants, along with environmental groups and members of the Chicago City Council, continued to push for closure of the plants.

A number of environmental and community groups, along with the Illinois State Attorney General, filed multiple lawsuits over the past decade seeking to force a more rapid reduction in emissions by the two plants. This coalition challenged a series of regulatory decisions made at both the state and federal levels, demonstrating how local activists can fill gaps left by higher levels of government. At issue was whether Midwest Generation and ComEd had complied with NSR requirements following modifications made to the Fisk and Crawford plants and decisions by the federal and state EPAs to allow these modifications without requiring the installation of pollution controls.⁷⁵ The coal plants' opponents found no satisfaction in the courtroom, but the lawsuits proved burdensome for Midwest Generation.

⁷¹ Julie Wernau, *Fisk, Crawford Coal Plants Had Long History, as Did Battle to Close Them*, CHI. TRIB. (Sept. 2, 2012), http://articles.chicagotribune.com/2012-09-02/business/ct-biz-0902-crawford-fisk-20120902_1_fisk-and-crawford-coal-plants-bruce-nilles. The report in question is JOHN SPENGLER & JONATHAN LEVY, ESTIMATED PUBLIC HEALTH IMPACTS OF CRITERIA POLLUTANT AIR EMISSIONS FROM NINE FOSSIL-FUELED POWER PLANTS IN ILLINOIS (2001). See also *Summary of Results from Harvard School of Public Health Illinois Power Plant Study*, PILSEN ENVTL. RTS. & REFORM ORG. (Feb. 18, 2002), http://www.pilsenperro.org/coal/Harvard_impacts_and_benefits.pdf (summarizing findings that two plants were responsible for 41 deaths, 550 emergency room visits, and 2800 asthma attacks each year).

⁷² *Death and Disease From Power Plants*, CLEAN AIR TASK FORCE, http://www.catf.us/fossil/problems/power_plants/existing/ (last visited May 16, 2013).

⁷³ Press Release, Office of the Governor of Ill., Gov. Blagojevich Announces Historic Agreement With Midwest Generation to Reduce Power Plant Pollutants and Deliver Dramatic Clean Air Benefits (Dec. 12, 2006), available at <http://www3.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=1&RecNum=5591>.

⁷⁴ Wernau, *supra* note 71.

⁷⁵ The key players in the legal battle shifted over time as the Bush Administration's EPA initially did not hold ComEd or Midwest Generation accountable for past CAA violations or failures to comply with the NSR process. Starting in 2007, the Illinois Attorney General and a number of environmental groups sued the U.S. EPA, alleging that it should have objected to operating permits granted to Midwest Generation's six coal-fired plants by the Illinois EPA that the plaintiffs claimed violated the CAA. In 2008, the Seventh Circuit ruled against them,

As these suits went forward, the community activists worked with national and regional environmental organizations, including the Sierra Club, the Natural Resource Defense Council, and the Environmental Law and Policy Center, in 2009 to establish the Clean Power Coalition and advocate for a new ordinance that would require the acceleration of emission reductions at the two plants. A north side alderman representing a neighborhood far from the sites of the two plants introduced the Clean Power Ordinance in 2010. This ordinance would have required the two plants to undertake significant reductions of particulate-matter and carbon-dioxide emissions over the course of four years. Invoking the considerable authority granted to home-rule municipalities in Illinois, the ordinance identified local action as necessary because "state and federal air pollution regulations do not adequately address local impacts on human health of air pollution from the local sources."⁷⁶ Despite these assertions, considerable doubt existed as to whether the city possessed the authority to regulate plant emissions.⁷⁷ It was clear that even if the City Council were to pass the Clean Power Ordinance, the city should anticipate legal action by Midwest Generation that would slow its enforcement. Nevertheless, the ordinance served as a threat to entwine Midwest Generation in costly litigation while it continued to make the expensive modifications required under its 2006 agreement with the state.

Thus, while the community effort had succeeded at drawing attention to the plants and developing a legislative vehicle for threatening Midwest Generation with litigation, the plants seemed no closer to closure as Mayor

finding that the Attorney General of the State of Illinois did not have standing to pursue the action, and the U.S. EPA's decision was not arbitrary. *Citizens Against Ruining the Env't v. EPA*, 535 F.3d 670, 679 (7th Cir. 2008). The U.S. EPA changed course in mid-2007 and issued a notice of violation against Midwest Generation's six Illinois plants, alleging that the plants frequently violated air emissions standards. *Complaint at 4, United States v. Midwest Generation*, 694 F. Supp. 2d 999 (N.D. Ill. 2010) (No. 1:09-cv-05277).

In October 2009, the Obama Justice Department and Illinois Attorney General brought another suit against Midwest Generation and ComEd for alleged violations of the CAA. Several months later, in January 2010, a number of environmental groups joined the suit. The complaint sought both civil penalties and injunctive relief. *See United States v. Midwest Generation*, 694 F. Supp. 2d 999, 1000 (N.D. Ill. 2010); *United States v. Midwest Generation*, 781 F. Supp. 2d 677, 679 (N.D. Ill. 2011). More recently, in January 2012, residents of the Little Village and Pilsen neighborhoods filed class action lawsuits in Cook County Circuit Court against Midwest Generation, claiming that the sulfur dioxide emitted from the plants is harmful to residents. *Plaintiff's Class Action Complaint at 9, Paraday v. Midwest Generation*, No. 2012-CH-01575 (Ill. Cir. filed Jan. 17, 2012).

⁷⁶ Chi., Ill., *Clean Power Ordinance 1* (Draft Nov. 10, 2010), available at <http://cleanpowerchicago.org/wp-content/uploads/2010/04/Clean-Power-Ordinance-Nov-2010.pdf>.

⁷⁷ *See, e.g.,* Kari Lydersen, *Chicago Without Coal*, CHI. READER (Oct. 14, 2010), <http://www.chicagoreader.com/chicago/chicago-coal-pollution-fisk-state-line-plants/Content?oid=2558655> (quoting spokesman for Alderman Solis, who initially opposed but later became a strong supporter of the ordinance, as stating that it was "very questionable whether the city of Chicago has the authority to regulate carbon dioxide when this is something that the federal government is currently looking at"); Kari Lydersen, *Days May Be Numbered for Chicago Coal Plants*, MIDWEST ENERGY NEWS (Apr. 19, 2011), <http://www.midwestenergynews.com/2011/04/19/days-may-be-numbered-for-chicago-coal-plants/> (discussing high likelihood of legal challenge and belief by one of ordinance's leading sponsors that ordinance could end up being "largely symbolic").

Daley served out his remaining days in office. Even though support for the ordinance grew to include a majority of Chicago's fifty City Council members, the Council did not hold a hearing until April 21, 2011, only weeks before Mayor Emanuel took office.⁷⁸ The audience for the hearing featured hundreds of supporters and opponents of the ordinance, and the two committees of jurisdiction ultimately decided to postpone a vote on the issue and allow the incoming administration and Council to attempt to resolve the matter.⁷⁹ The Emanuel Administration, along with eighteen new members of the City Council, took office in May 2011 as the public battle over the coal plants picked up speed.

As the new administration staffed up, the coal plant fight had reached an impasse. While the Clean Power Coalition succeeded at raising the temperature and applying pressure to the coal plants and elected officials, it could not induce the City Council to pass the ordinance or bring Midwest Generation to the table. The efforts to close the plants would not be able to go further without the involvement of the Mayor.

Prior to his election, Mayor Emanuel had expressed support for efforts to speed up the modernization of the Fisk and Crawford plants or close them altogether. Upon taking office, Mayor Emanuel publicly pushed for Midwest Generation to either accelerate the installation of pollution-reducing equipment at the two plants or convert both to cleaner natural-gas generation. While the Mayor did not immediately endorse the Clean Power Ordinance, his silence on the proposal ensured that it remained available as leverage to spur Midwest Generation and the Illinois State General Assembly to take faster action. By the fall of 2011, the list of the ordinance's backers grew to thirty-five of the fifty members of the Chicago City Council, yet the ordinance's supporters could not move it forward to a full Council vote without the Mayor's support.

While the Mayor remained silent on the ordinance even as its support on the Council grew, the administration began to engage directly with Midwest Generation. The discussions revolved around a shut down of the two plants in exchange for a long-term agreement for wind power with the State.⁸⁰ Pursuit of an agreement with Midwest Generation not only offered the prospects of an amicable solution to the problem, but it allowed the city

⁷⁸ The two City Council members who represented the wards surrounding the Fisk and Crawford plants were late supporters of the Clean Power Ordinance. This tardiness became an election issue for one of the aldermen, Danny Solis, who was forced into a runoff election by community activists in April 2011. After the Emanuel Administration took office, Solis took on a greater leadership role in pushing the Clean Power Ordinance forward.

⁷⁹ Hal Dardick, *Chicago City Council Puts off Vote on Clean Power Ordinance*, CHI. TRIB. (Apr. 21, 2011, 11:13 AM), http://newsblogs.chicagotribune.com/clout_st/2011/04/chicago-city-council-puts-off-vote-on-clean-power-ordinance.html.

⁸⁰ See, e.g., Steve Daniels, *Emanuel Brokers Deal to Shutter Coal-Fired Power Plants*, CRAIN'S CHI. BUS. (Oct. 17, 2011), <http://www.chicagobusiness.com/article/20111015/ISSUE01/310159978/emanuel-brokers-deal-to-shutter-coal-fired-power-plants>.

to demonstrate publicly that it sought an accommodation with the plant owners.

This agreement would have required state legislation, but the leadership of the Illinois House was reported to oppose the deal and instead favor state legislation similar to the Clean Power Ordinance that would require Midwest Generation to upgrade or close the two plants.⁸¹ The state version of the ordinance, however, failed to pass the Illinois House by the end of 2011, returning the focus of the campaign to the city.

After making numerous public efforts to negotiate with Midwest Generation, Mayor Emanuel threatened to support the Clean Power Ordinance and called upon Midwest Generation to decide upon its plans for upgrading the plants within a week.⁸² One week later, the Emanuel Administration and Midwest Generation announced an agreement to close the Fisk and Crawford plants by the end of 2012 and 2014, respectively.⁸³ As part of the agreement, the community and environmental groups agreed to withdraw from the Justice Department's lawsuits against the company and to support a one-year extension of the company's deadline to retrofit or shut down one of its coal-fired operating units at a plant forty miles north of the city.⁸⁴ Finally in May, Midwest Generation announced that it would be closing the plants earlier than anticipated in September 2012.⁸⁵

The plants closed in September 2012, bringing to fruition over a decade of dedicated activism against Midwest Generation. While it is possible that tightening U.S. EPA regulations and the market pressures created by the natural-gas boom would have led Midwest Generation to close the two plants at some point over the coming decade, Mayor Emanuel clearly accelerated their closure through a multipronged strategy that combined informal influence with the specter of local legislation that would require costly litigation to resist.

The Emanuel Administration's successful shutdown of the Fisk and Crawford plants makes clear the critical role that mayors can play in leveraging their formal and informal powers as elected officials. Mayors are uniquely situated to convene public and private actors around a table, pressure lawmakers at multiple levels of government to pass legislation, and command local media attention. These advantages are considerable and can

⁸¹ *Id.*

⁸² Hal Dardick & Michael Hawthorne, *Emanuel Gives Coal Plant Operator an Ultimatum to Clean Up*, CHI. TRIB., Feb. 22, 2012, at A10.

⁸³ Press Release, Office of the Mayor, City of Chi., Mayor Emanuel Announces Agreement With Midwest Generation to Retire Two Coal-Fired Power Plants in Chicago (Feb. 29, 2012), available at <http://www.cityofchicago.org/dam/city/depts/mayor/Press%20Room/Press%20Releases/2012/February/2.29.12Plants.pdf>.

⁸⁴ Tammy Webber, *Deal to Close Chicago's 2 Coal-Fired Plants Early*, ASSOCIATED PRESS, Feb. 29, 2012.

⁸⁵ Jeremy P. Jacobs, *Air Pollution: Utility Accelerates Schedule for Closing 2 Chicago Power Plants*, GREENWIRE (May 3, 2012), <http://www.eenews.net/Greenwire/2012/05/03/22>.

be wielded even where the city has limited authority to directly influence the matter at hand.

VI. CONCLUSION

Although large cities like Chicago, New York, Los Angeles, and Houston dominate their regions and are responsible for gross domestic products on par with nations,⁸⁶ they are, like all U.S. cities, “creatures of the state.”⁸⁷ Cities cannot exercise any authority that has not previously been granted to them under state law. The result is that cities often lack the authority to directly and authoritatively address critical urban challenges, from pensions to crime to climate change. Instead, authority to take decisive action rests with states, counties, and the federal government. This arrangement threatens the vibrancy of local government and leads to much frustration in city halls across the country. Cities that seek to have a voice on issues that affect them but lie outside of their legal authority must employ alternative approaches in order to move a policy agenda forward.

Despite the constraints placed upon cities, mayors have a real opportunity to achieve local progress on issues that are deadlocked nationally. Cities with policy agendas that touch topics under the jurisdiction of other levels of government will need to be adept at running on parallel tracks at the same time. Such efforts should begin by wielding the authorities that are unquestionably local—zoning, planning, licensing and permitting, and financial-incentive programs. But cities also possess other points of leverage, such as buying power, the bully pulpit, and the threat of litigation. Active lobbying efforts at the federal and state levels are critical, as is a willingness to use the mayor’s bully pulpit.

Chicago earned its reputation as one of the greenest cities in the United States by adopting this multilayered approach, leveraging both legal and nonlegal tools. The city’s sustainable development policy has utilized its planning authorities and financial-incentive programs to make Chicago a global leader in green roofs and LEED-certified buildings. More recently, Chicago took advantage of Illinois’s CCA law to use the bulk buying power of over 2.5 million residents to complete the largest CCA agreement to date and pioneer a new approach to electricity purchasing that focuses on the individual sources of electricity in the buyer’s portfolio. Chicago pursued a coal-free agreement with its supplier, and future CCA cities or other large institutional purchasers of electricity like universities and hospitals will be

⁸⁶ IHS GLOBAL INSIGHT, U.S. METRO ECONOMIES: GMP AND EMPLOYMENT FORECASTS 3 (2011) (“The economies of Chicago, New York, and Los Angeles produce more than such countries as Switzerland, Poland, Belgium, Sweden, and Saudi Arabia, to name a few. Among international countries and U.S. metropolitan areas, New York ranks as the 13th largest economy (ahead of India and Mexico, which have GDPs in excess of \$1 trillion), with Los Angeles 18th and Chicago 21st.”).

⁸⁷ DILLON, *supra* note 7, at 209.

able to follow suit and dictate to suppliers the precise mix of electricity-generation sources in their portfolios. Lastly, a coalition of community and environmental activists were able to achieve the hard-fought goal of shutting down the last two coal plants within the limits of a major U.S. city when Mayor Emanuel became personally involved by wielding legislative action as a threat while engaging in direct negotiations with the coal-plant owners.

Although there is no “one size fits all” approach, Chicago’s success at pursuing its sustainability strategy is an example of how local governments can effect policy changes in areas where their authority is limited and policy making at other levels of government is stymied. In an age of fiscal austerity, more and more cities will need to adopt similar approaches in order to fix broken pension systems, modernize infrastructure, and reduce gun violence, among other challenges. With no relief at the federal and state levels in sight, cities are increasingly on their own in tackling these critical challenges. Achieving progress on behalf of their residents will require cities to aggressively leverage all available tools. Cities should not wait. Local leaders will be surprised at what they can accomplish if they are willing to push.

