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## Housing For The People: A Tenant Opportunity to Purchase Act for New York City

Faith Meixell

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# HOUSING FOR THE PEOPLE: A TENANT OPPORTUNITY TO PURCHASE ACT FOR NEW YORK CITY

*Faith Meixell\**

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## INTRODUCTION

Historic Manhattan middle-class housing development Stuyvesant Town was listed for sale in 2006 by its original developer, Metropolitan Life Insurance Company (MetLife).<sup>1</sup> Tenants, afraid that a new landlord would increase their rents, responded with an unlikely move: they put together financing for a bid to purchase the 11,250-unit development themselves.<sup>2</sup> Built in 1947, Stuyvesant Town persisted as a bastion of middle-class rental apartments on the East Side for decades<sup>3</sup> — even as much of the rest of

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1. See Charles V. Bagli, *More Than 12 Expected to Bid for Complexes*, N.Y. TIMES (Oct. 4, 2006), <https://www.nytimes.com/2006/10/04/nyregion/04stuyvesant.html> [<https://perma.cc/8A9M-5ZQ7>].

2. See *id.* Stuyvesant Town was originally constructed with 110 buildings with a total of 11,250 apartments. See *A History of StuyTown & Peter Cooper Village*, STUYTOWN (Jan. 12, 2019), <https://www.stuytown.com/guides/stuytown/history> [<https://perma.cc/EVN6-2UGE>].

3. See Kevin Sweeting, *How Stuy Town Got a Tourniquet While Blackstone Gets Billions*, GOTHAMIST (Mar. 31, 2016, 12:35 PM), <https://gothamist.com/news/how-stuy-town-got-a-tourniquet-while-blackstone-gets-billions> [<https://perma.cc/77KB-39X5>]; Adam Tanaka, *Fiduciary Landlords: Life Insurers and Large-Scale Housing in New York City* 50 (Joint Ctr. for Hous. Stud. of Harvard Univ., Working Paper, 2017),

Manhattan became unaffordable to all but wealthy New Yorkers.<sup>4</sup> In 2006, when MetLife announced the sale, Stuyvesant Town's rents reflected its middle-class reputation: three-quarters of apartments were regulated with rents well below market rate.<sup>5</sup> Because Stuyvesant Town's rents were lower than in surrounding neighborhoods, tenants feared that new ownership would increase rents.<sup>6</sup>

The tenants' unprecedented attempt to purchase the development was met with derision and a wide range of obstacles.<sup>7</sup> Their ultimate bid of \$4.5 billion lost to Tishman Speyer and BlackRock's bid of \$5.4 billion,<sup>8</sup> which ranked the acquisition as the biggest real estate deal in U.S. history.<sup>9</sup> Following the sale, as tenants had feared, landlord Tishman Speyer began trying to push out long-time tenants to increase rents on their apartments.<sup>10</sup>

[https://www.jchs.harvard.edu/sites/default/files/tanaka\\_fiduciary\\_landlords\\_final\\_4-18-17\\_0.pdf](https://www.jchs.harvard.edu/sites/default/files/tanaka_fiduciary_landlords_final_4-18-17_0.pdf) [<https://perma.cc/R2G8-XYAT>].

4. Stuyvesant Town's successes as an affordable housing development are deeply marred by its dismal history of racial segregation. MetLife explicitly built Stuyvesant Town for white residents and failed to integrate even after lawsuits to force it to. *See* Tanaka, *supra* note 3, at 46–47. So while the famed development has been an important asset for Lower Manhattan, the exact model also has deep flaws. *See* Brad Lander, *A Very High Stakes Deal*, SHELTERFORCE (Nov. 23, 2006), [https://shelterforce.org/2006/11/23/a\\_very\\_high\\_stakes\\_deal/](https://shelterforce.org/2006/11/23/a_very_high_stakes_deal/) [<https://perma.cc/R8GK-L7FJ>].

5. *See* Bagli, *supra* note 1.

6. *See id.* Stuyvesant Town's rental prices were below market because they had been locked in to rent regulation before the neighborhood's average rents increased so much. *See id.* The sale of Stuyvesant Town promised "potential windfall profits" for investors, who were able to take apartments out of regulation and increase rents to the much higher market-rate for the neighborhood. *See id.*

7. *See, e.g.,* Gerard Flynn, *MetLife: Tenants 'Not Qualified' to Buy Stuy Town*, AMNY (Sept. 26, 2006), <https://www.amny.com/news/metlife-tenants-not-qualified-to-buy-stuy-town/> [<https://perma.cc/3XX5-LB77>].

8. *See* Stephanie Gaskell, *Stuyvesant Town-Peter Cooper Village Tenants Association Seek Second Chance to Buy Building Complex*, N.Y. DAILY NEWS (Oct. 15, 2009, 1:21 AM), <https://www.nydailynews.com/life-style/real-estate/stuyvesant-town-peter-cooper-village-tenants-association-seeks-chance-buy-building-complex-article-1.384430> [<https://perma.cc/A7QV-P9NH>].

9. *See* Gabriel Sherman, *The Biggest, Baddest Real-Estate Loan*, N.Y. MAG. (Dec. 18, 2009), <https://nymag.com/realestate/features/62880/> [<https://perma.cc/C27L-69AK>]. Tishman Speyer turned out to have dramatically overpaid for Stuyvesant Town and defaulted on the loan shortly thereafter with the help of an unfavorable court case on rent deregulation. *See* Charles V. Bagli & Christine Haughney, *Wide Fallout in Failed Deal for Stuyvesant Town*, N.Y. TIMES (Jan. 25, 2010), <https://www.nytimes.com/2010/01/26/nyregion/26stuy.html> [<https://perma.cc/BW3R-9XAW>].

10. *See* Sweeting, *supra* note 3 ("In 2009, they rained down threats of eviction and distributed nonrenewal notices around the complex like takeout menus. Residents organized

Because the new owners had paid such an inflated price for Stuyvesant Town, they needed to rapidly raise rents to pay for the debt they took out to buy the property.<sup>11</sup> They were not able to increase rental income quickly enough, though: Tishman Speyer and BlackRock went into default and lost the development.<sup>12</sup> The damage was done, however. Although Stuyvesant Town's next owner promised some affordability in exchange for a City subsidy, less than half of the development's apartments currently have below-market rents, and they are not affordable for middle-class New Yorkers like those who lived there for so long.<sup>13</sup>

What if Stuyvesant Town tenants, like tenants in Washington, D.C.,<sup>14</sup> had the first right to purchase their home when their landlord put them up for sale? What kind of program or subsidy or technical assistance could have shifted the outcome in favor of the tenants?<sup>15</sup> Or does this example show that in overheated markets, tenants may never be able to compete with bids from predatory investment firms and massive developers?

This event illustrates many aspects of the broader housing affordability problem in New York City. Much of the City's affordable middle- and working-class housing stock, like Stuyvesant Town, was built over 50 years ago under a unique combination of economic, political, and legal conditions that do not exist anymore.<sup>16</sup> That housing stock, for a time,

to challenge the nonrenewals but, faced with intimidation and harassment, hundreds of tenants — both legal and not — vacated their apartments.”).

11. In order to obtain financing for such a high price, the buyer would have had to estimate that rental income would triple by 2011. See Gabriel Sherman, *Clash of the Utopias*, N.Y. MAG. (Jan. 30, 2009), <http://nymag.com/realestate/features/53797/> [<https://perma.cc/2MR6-EA7W>].

12. See Bagli & Haughney, *supra* note 9.

13. See Elizabeth Kim, *City Spent \$220 Million to Keep Stuy Town Apartments Affordable; Turns Out, It Didn't Have To*, GOTHAMIST (July 18, 2019, 10:00 AM), <https://gothamist.com/news/city-spent-220-million-to-keep-stuy-town-apartments-affordable-turns-out-it-didnt-have-to> [<https://perma.cc/67U8-8UTG>].

14. See *infra* Section II.B.i.

15. Then-Councilmember Dan Garodnick, lifelong Stuyvesant Town resident who helped negotiate the tenants' bid, later said such a right for tenants would have “added leverage to the tenants' position . . . and created an actual obligation to work with [them].” Georgia Kromrei, *Real Estate Pros Call Tenant Takeover Bill Flawed*, REAL DEAL (Feb. 4, 2020, 12:00 PM) [hereinafter Kromrei, *Real Estate Pros*], <https://therealdeal.com/2020/02/04/real-estate-pros-call-tenant-takeover-bill-flawed/> [<https://perma.cc/8SS5-9HEF>].

16. See ALEXANDRA BROMLEY ET AL., DEP'T OF URB. AFFS. & PLAN., HUNTER COLL., WHERE WILL NEW YORKERS LIVE?: OVERHAULING NEW YORK CITY'S HOUSING POLICY 23–24 (2012), [http://www.hunterurban.org/wp-content/uploads/2016/04/HunterUrban\\_Where-Will-New-Yorkers-Live.pdf](http://www.hunterurban.org/wp-content/uploads/2016/04/HunterUrban_Where-Will-New-Yorkers-Live.pdf) [<https://perma.cc/Y7SZ-28MU>]. Stuyvesant Town was developed amidst an unusually pressing need for middle-class housing, created by a flood of returning veterans looking for housing, an extremely low vacancy rate, and a large gap between market rate and public housing rents. See Tanaka, *supra* note 3, at 49. The development was supported

enabled average New Yorkers to afford rent comfortably.<sup>17</sup> But housing became progressively less affordable starting in the 1990s due to policies that permitted landlords to deregulate rent-stabilized units and increase rents more dramatically.<sup>18</sup>

The Stuyvesant Town example also illustrates the cost of predatory equity<sup>19</sup> winning the day: despite years of tenant organizing, and an influx of City subsidy and affordability requirements imposed in the 2015 sale to Blackstone, tenants have nonetheless undergone years of harassment,<sup>20</sup> and the development is substantially less affordable than it was 15 years ago.<sup>21</sup> Tenant ownership alone would not have resolved every issue, but an alternative history without the role of predatory investors would have resulted in a better outcome for affordability.

The failed bid of the Stuyvesant Town tenants also provides a preview of the challenges that a law like Washington, D.C.’s Tenant Opportunity to Purchase Act (TOPA) would face in New York City.<sup>22</sup> It illustrates that tenants, without the legal requirement that they get the first opportunity to purchase ahead of third parties, will rarely prevail in buying their building on the open market. That legal requirement, alone, however, is also unlikely to be sufficient to enable tenants to buy. In addition to a first right to purchase, the Stuyvesant Town tenants would have also needed additional financing to meet the top private bid; in an overheated market, the first bite at the apple is not enough to beat out predatory equity.

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by the government through (1) legal changes to permit investment for financial institutions, (2) expansion of eminent domain for land assembly for private-public projects, and (3) tax exemptions for such projects. *See id.* at 41–42. That the tenements previously on that land had deteriorated conditions, had decreased in population in recent years, and were predominantly populated by working-class immigrants made it politically and economically feasible to raze and start over. *See id.* at 9.

17. *See* Elyzabeth Gaumer, *50+ Years of Housing in New York City*, TABLEAU PUB., [https://public.tableau.com/profile/elyzabeth.gaumer6154#!/vizhome/HVS\\_KeyTrends\\_Test\\_3-14/Story1](https://public.tableau.com/profile/elyzabeth.gaumer6154#!/vizhome/HVS_KeyTrends_Test_3-14/Story1) [<https://perma.cc/73BT-YQUW>] (last visited Oct. 26, 2020) (click “AFFORDABILITY”).

18. The City lost over 150,000 rent-stabilized units to deregulation between 1993 and 2018. *See* Kim Barker, *Behind New York’s Housing Crisis: Weakened Laws and Fragmented Regulation*, N.Y. TIMES (May 20, 2018), <https://www.nytimes.com/interactive/2018/05/20/nyregion/affordable-housing-nyc.html> [<https://perma.cc/627T-Y94T>].

19. *See* ASS’N FOR NEIGHBORHOOD & HOUS. DEV., PREDATORY EQUITY: EVOLUTION OF A CRISIS 5 (2009), [https://www.anhd.org/sites/default/files/predatory\\_equity\\_evolution\\_of\\_a\\_crisis.pdf](https://www.anhd.org/sites/default/files/predatory_equity_evolution_of_a_crisis.pdf) [<https://perma.cc/A34C-ZU8F>].

20. *See* Sweeting, *supra* note 3.

21. *See* Kim, *supra* note 13.

22. *See infra* Section II.B.i.

The Stuyvesant Town saga is just one of the innumerable battles waged on New York City's affordable housing<sup>23</sup> front, by tenants and policymakers alike. Despite its significant efforts to increase the number of affordable units in recent years,<sup>24</sup> however, New York City has not been successful by most measures.<sup>25</sup>

The major barrier to increasing the amount of affordable housing in New York City is strong market pressure, which is created by a combination of factors such as economic policies that incentivize speculative investment in real estate, and zoning policies that drive up the price of land.<sup>26</sup> Unless rent laws limit rent increases, strong market pressure drives rents upward. Increasing rents combined with a low vacancy rate leaves tenants with fewer choices and less power, leading to poor conditions and housing instability.<sup>27</sup>

A wide swath of New Yorkers struggle to pay rent, and unaffordable rents affect these New Yorkers by causing apartment overcrowding, long commutes, and strained finances. These effects do not fall equally, however: poor housing conditions and housing instability fall hardest on Latinx and Black tenants, and tenants who are single mothers, are disabled,

23. Although the phrase “affordable housing” dominates the issue of high-cost rents in New York City and across the country, the term has significant issues. See Michael E. Stone, *Housing Affordability: One-Third of a Nation Shelter-Poor*, in *A RIGHT TO HOUSING: FOUNDATION FOR A NEW SOCIAL AGENDA* 38, 41 (Rachel Bratt et al. eds., 2006). Stone calls the phrase “at best meaningless and at worst misleading,” and ties its use to “the retreat from public responsibility for the plight of the poor.” *Id.* Stone also argued that while the phrase’s typical use implies that affordability is a characteristic of the apartments, the word “affordable” more properly refers to a “relationship between housing and people,” and therefore only holds meaning if three questions are answered: “Affordable to whom? On what standard of affordability? For how long?” Stone offers “below-market housing” as a “more accurate and honest” alternative to “affordable housing” in many cases. *Id.* This Note strives to use “affordable housing” as informed by those three questions: to refer in a relative sense to housing affordability for those who need it at levels they can afford. “Below-market housing” is used for other housing that may have regulated rents or receive public subsidy but may not be “affordable” to its residents or those who would live there.

24. See generally OFF. OF THE MAYOR, CITY OF N.Y., *HOUSING NEW YORK: A FIVE-BOROUGH, TEN-YEAR PLAN* (2015) [hereinafter *HOUSING NEW YORK*], [https://www1.nyc.gov/assets/housing/downloads/pdf/housing\\_plan.pdf](https://www1.nyc.gov/assets/housing/downloads/pdf/housing_plan.pdf) [<https://perma.cc/BW5C-J58C>].

25. See also Oksana Mironova, *Race and Evictions in New York City*, CMTY. SERV. SOC’Y (June 22, 2020) [hereinafter Mironova, *Race and Evictions*], <https://www.cssny.org/news/entry/race-evictions-new-york-city> [<https://perma.cc/A4BK-22DP>]. The COVID-19 pandemic has deepened those disparities. See *id.* See generally OFF. OF N.Y.C. COMPTROLLER SCOTT M. STRINGER, *NYC FOR ALL: THE HOUSING WE NEED* (2018), [https://comptroller.nyc.gov/wp-content/uploads/documents/The\\_Housing\\_We\\_Need-1.pdf](https://comptroller.nyc.gov/wp-content/uploads/documents/The_Housing_We_Need-1.pdf) [<https://perma.cc/H2EW-H3EE>].

26. See *infra* Section I.E.

27. See *infra* Section I.E.

or are immigrants.<sup>28</sup> Many New Yorkers, including middle- and upper-income residents, struggle to find housing that costs less than 30% of their paycheck, but the harshest effects, such as eviction and homelessness, mostly affect Black and Latinx New Yorkers.<sup>29</sup>

Local and federal housing policies have not overcome housing insecurity in New York City because they do not address the problem's root causes.<sup>30</sup> Rather than structure housing to protect tenants from market pressure, housing policy often creates housing through profit-driven public-private partnerships.<sup>31</sup> In order to make use of the private investment on which these policies rely, the government in return offers subsidy sufficient to enable a profit for the developer, on top of already high development costs.<sup>32</sup> This model thus requires substantial subsidy to incentivize even modest affordability.<sup>33</sup> Because it is so expensive to subsidize any below-market housing development on this model, most buildings created do not serve the needs of low-income New Yorkers — “affordable” buildings have too few below-market apartments that are not affordable enough and cease to be affordable too quickly.<sup>34</sup>

While the current economic, legal, and political conditions in New York City pose challenges to turning the tide on the City's housing affordability crisis, these conditions also provide unique opportunities. This Note argues

28. See GISELLE ROUTHIER, COAL. FOR HOMELESS, STATE OF THE HOMELESS 2019, (2019), <https://www.coalitionforthehomeless.org/wp-content/uploads/2019/04/StateOfThe-Homeless2019.pdf> [<https://perma.cc/3RSU-SW5E>]; Mironova, *Race and Evictions*, *supra* note 25; Jack Mullan et al., *Amid Bright Signs for NYC Families, Challenges Remain for Single-Parent Households*, CITY LIMITS (Oct. 25, 2019), <https://citylimits.org/2019/10/25/amid-bright-signs-for-nyc-families-challenges-remain-for-single-parent-families/> [<https://perma.cc/H2WE-LF9W>].

29. Latinx tenants are the likeliest group to be threatened with eviction, and Black tenants the second most likely. See Mironova, *Race and Evictions*, *supra* note 25.

30. See *infra* Section I.B.

31. See Oksana Mironova & Thomas J. Waters, *Social Housing in the U.S.*, CMTY. SERV. SOC'Y (Feb. 18, 2020) [hereinafter Mironova & Waters, *Social Housing*], <https://www.cssny.org/news/entry/social-housing-in-the-us> [<https://perma.cc/QJ24-ZC5D>].

32. See STEPHANIE SOSA, ASS'N FOR NEIGHBORHOOD & HOUS. DEV., MAXIMIZING THE PUBLIC VALUE OF NEW YORK CITY-FINANCED AFFORDABLE HOUSING: A REPORT ON SELECTED TRENDS IN CITY-FINANCED AFFORDABLE HOUSING DEVELOPMENT 12, 18–19 (2019), [https://anhd.org/sites/default/files/2019\\_public\\_value\\_report\\_october2019.pdf](https://anhd.org/sites/default/files/2019_public_value_report_october2019.pdf) [<https://perma.cc/B8VD-H8B9>].

33. See ASS'N FOR NEIGHBORHOOD & HOUS. DEV., PERMANENT AFFORDABILITY: PRACTICAL SOLUTIONS 5, 7–8 (2015) [hereinafter PERMANENT AFFORDABILITY], <https://anhd.org/wp-content/uploads/2015/10/2015-Permanent-Affordability-Practical-Solutions.pdf> [<https://perma.cc/N69E-JEF2>].

34. See *id.*



that a Tenant Opportunity to Purchase Act (TOPA)<sup>35</sup> for New York City is uniquely poised to take advantage of those opportunities to address the City's housing affordability problem because it would create a broad-based mechanism for turning privately-owned apartment buildings on the speculative market into tenant-directed affordable housing at the point of ownership change. Recently put forth by a Brooklyn legislator, a TOPA law for New York City would give tenants the first right to purchase their apartment building, with City support, should it go up for sale.<sup>36</sup> Tenants could then choose to form a limited-equity cooperative<sup>37</sup> or assign their purchase right to a nonprofit organization to run the building as affordable rentals.<sup>38</sup> A TOPA law, with sufficient funding, would thus give residents meaningful control of their building, promote social equity, and provide a pipeline of permanent or long-term affordable housing across neighborhoods.

While funding this program sufficiently to operate meaningfully would be expensive, it would result in the kind of deep<sup>39</sup> and long-term affordable

35. The first TOPA was in Washington, D.C., but models around the country have borrowed the name. *See infra* Section II.A. This Note uses "TOPA law" to refer to any of the legislation modeled after the D.C. law.

36. *See also infra* Section III.B.

37. Limited-equity cooperatives (LECs) are a type of housing cooperative. Generally, housing cooperatives are "owned collectively by a corporation and controlled by residents. The corporation holds the title to the property while each resident owns an interest or shares in that corporation." *Limited-Equity Co-Ops*, URB. OMNIBUS (Jan. 10, 2018), <https://urbanomnibus.net/2018/01/limited-equity-co-ops/> [<https://perma.cc/2K6K-C69H>]. LECs, specifically,

are income-restricted, placing affordable homeownership in reach of low-income and middle-income households. In a limited-equity cooperative, members purchase shares at below-market costs in exchange for limits on resale prices . . . . When a cooperator in a limited-equity co-op decides to sell, she typically receives back the cost of her initial investment plus interest — but only a small profit (typically a percentage of the equity accrued), which puts the brakes on the speculative nature of the private real estate market.

*Id.*

38. *See infra* Section II.A.

39. The "depth" of affordability refers to how low the rents are set. For example, an apartment with a rent set to be affordable for someone making 20% of the area median income is more "deeply affordable" than a unit with a rent that is affordable to someone making 80% of the area median income. New York City has failed to produce enough deeply affordable units in recent years, as seen in the data on how many units are available versus needed for people who are very low income (VLI) and extremely low income (ELI). *See* OFF. OF N.Y.C. COMPTROLLER SCOTT M. STRINGER, *supra* note 25, at 10.

housing that current programs aim for<sup>40</sup> and spend a significant amount of money on, but do not achieve.<sup>41</sup> On the one hand, the COVID-19 health and economic crisis means that there is dramatically less room in the City’s budget for any new program.<sup>42</sup> On the other hand, both the 2019 rent law reforms<sup>43</sup> and the COVID-19 economic downturn are expected to decrease prices for some multifamily apartment buildings.<sup>44</sup> Decreased property values in New York City combined with political momentum around the value of secure housing — as seen in the recent success of the eviction moratorium<sup>45</sup> — may provide a rare opening for this type of law.

Part I of this Note lays out the general problem of housing affordability in New York City, including the link between market pressure and tenant disempowerment and the racial disparities in those harms. It also describes the current real estate market and why traditional, profit-based affordable housing programs have not succeeded. Part II describes what a first right of purchase is and how other jurisdictions around the country have used it. Part III proposes what a TOPA law<sup>46</sup> should look like in New York City, and Part IV discusses some challenges related to implementation of a New York City TOPA law.

## I. NEW YORK CITY’S AFFORDABLE HOUSING CRISIS

### A. What the Problem Looks Like

It is famously difficult to afford rent in New York City. Renters make up about two-thirds of New Yorkers,<sup>47</sup> and more than half of all renter

40. See Vincent J. Reina, *Affordable Housing, but for How Long? The Opportunity and Challenge of Mandating Permanently Affordable Housing*, 46 FORDHAM URB. L.J. 1267, 1277–78 (2019).

41. See OFF. OF N.Y.C. COMPTROLLER SCOTT M. STRINGER, *supra* note 25.

42. See Jeffery C. Mays, *Virus Forces a ‘Wartime’ Budget on N.Y.C., with \$2 Billion in Cuts*, N.Y. TIMES (Apr. 16, 2020), <https://www.nytimes.com/2020/04/16/nyregion/nyc-budget-coronavirus.html> [<https://perma.cc/P4GC-X9DW>].

43. See Housing Stability and Tenant Protection Act, 2019 Sess. Law News of N.Y. Legis. Memo. Ch. 36 (McKinney 2019).

44. See *infra* Section I.D.

45. See Rachel Vick, *Tenant Advocates Celebrate Temporary Eviction Moratorium*, QUEENS DAILY EAGLE (Mar. 17, 2020), <https://queenseagle.com/all/tenant-advocates-celebrate-temporary-eviction-moratorium> [<https://perma.cc/46DW-F4SX>].

46. “First right of purchase” (or “first right to purchase”) is the legal mechanism under discussion, and “TOPA laws” are the legislation that instate that right for tenants. This Note generally uses “first right of purchase” to refer to the legal right and “TOPA law” to refer to the legislation.

47. See NYU FURMAN CTR., STATE OF NEW YORK CITY’S HOUSING AND NEIGHBORHOODS IN 2018, at 21 (2019),

households in the City are moderately or severely rent burdened.<sup>48</sup> Severe rent burden falls unequally across racial groups: substantially more Latinx, Asian, and Black New Yorkers pay over 50% of their income on rent as compared to white New Yorkers.<sup>49</sup> Driven in part by the low vacancy rate,<sup>50</sup> the picture for renters seeking a new apartment is particularly bleak: the median gross rent in 2018 citywide was \$1,443,<sup>51</sup> but the median *asking* rent — or the median rent amount for available apartments — was \$2,650.<sup>52</sup> The high median asking rent makes it incredibly challenging for people to find a new, affordable apartment to move into.<sup>53</sup> Evictions have decreased since the enactment of a 2017 New York City law providing legal representation to low-income tenants, but there were still over 16,000 evictions in 2019.<sup>54</sup> In the past few years, the average monthly homeless shelter population has grown above 60,000.<sup>55</sup> Like rent burden, homelessness and eviction also disproportionately affect New Yorkers depending on their race: Latinx and Black New Yorkers experience evictions and homelessness at higher rates than other New Yorkers.<sup>56</sup>

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[https://furmancenter.org/files/sotc/2018\\_SOC\\_Full\\_2018-07-31.pdf](https://furmancenter.org/files/sotc/2018_SOC_Full_2018-07-31.pdf)  
[<https://perma.cc/H4CH-PT2W>].

48. *See id.* at 24 (“Renter households that spend between 30 and 50 percent of their pre-tax income on gross rent (including utilities) are considered moderately rent burdened while those spending more than 50 percent of their income on gross rent are considered severely rent burdened.”).

49. *See New York’s Rent Affordability Crisis Harshly Impacts Families of Color*, FISCAL POL’Y INST., <http://fiscalpolicy.org/wp-content/uploads/2018/04/April-2018.Final-Rent-Inequality-Brief.pdf> [<https://perma.cc/9Z67-UPVD>] (last visited Nov. 13, 2020) (finding that 31% of Latinx, 29% of Asian and all other, and 29% of Black families pay over 50% of their income on rent, while that is true of just 19% of white families).

50. *See* NYU FURMAN CTR., *supra* note 47, at 25 (finding a 3.5% vacancy rate).

51. *See Census ACS 1-Year Data Update*, NYU FURMAN CTR. BLOG: THE STOOP (Sept. 27, 2019), <https://furmancenter.org/thestoop/entry/census-acs-1-year-data-update> [<https://perma.cc/TQN5-VKU9>].

52. *See* NYU FURMAN CTR., *supra* note 47, at 23.

53. *See* Kim Barker et al., *The Eviction Machine Churning Through New York City*, N.Y. TIMES (May 20, 2018), <https://www.nytimes.com/interactive/2018/05/20/nyregion/nyc-affordable-housing.html> [<https://perma.cc/6P57-MUTG>].

54. In 2010, only 2% of tenants in eviction cases were represented. At the end of the fiscal year 2019, 32% of tenants citywide and 62% of people living in Right to Counsel (RTC) zip codes were represented. Oksana Mironova, *Right to Counsel and Stronger Rent Laws Helped Reduce Evictions in 2019*, CMTY. SERV. SOC’Y (Feb. 24, 2020), <https://www.cssny.org/news/entry/right-to-counsel-and-stronger-rent-laws-helped-reduce-evictions-in-2019> [<https://perma.cc/9U4W-YVHT>]. Evictions in RTC zip codes decreased by 29% between 2017 and 2019; evictions in non-RTC zip codes decreased by 16%. *Id.*

55. *See* NYU FURMAN CTR., *supra* note 47, at 9.

56. *See* Mironova, *Race and Evictions*, *supra* note 25; *Basic Facts About Homelessness: New York City*, COAL. FOR HOMELESS,

### B. Beyond Supply and Demand: Why Rents Are Too High

Policymakers often regard New York City's affordability crisis<sup>57</sup> simply as a matter of supply and demand,<sup>58</sup> but the incredible market pressure of New York City's real estate market is shaped by more than the total number of units and the number of New Yorkers seeking apartments. For example, City zoning decisions have often increased market pressure and made neighborhoods less affordable even as they have increased the supply of housing.<sup>59</sup> Mayor Bloomberg's rezonings largely upzoned<sup>60</sup> lower-income neighborhoods of color, causing an increase in property values and

<https://www.coalitionforthehomeless.org/basic-facts-about-homelessness-new-york-city/> [<https://perma.cc/6ASU-T9LR>] (last visited Sept. 7, 2020).

57. Madden and Marcuse warn against using the word "crisis" too lightly:

[W]e need to be careful with this usage of the concept of crisis. The idea of crisis implies that inadequate or unaffordable housing is abnormal, a temporary departure from a well-functioning standard. But for working-class and poor communities, housing crisis is the norm. . . . For the oppressed, housing is always in crisis.

DAVID MADDEN & PETER MARCUSE, IN DEFENSE OF HOUSING: THE POLITICS OF CRISIS 9–10 (2016).

58. In 2018, for example, Mayor de Blasio made the common argument that development of market-rate apartments drives down rent overall:

The scarcity of housing [in gentrifying neighborhoods like Bed Stuy and Bushwick] actually exacerbated the displacement . . . . If you're not adding to the supply, you have a pressured supply of housing, more and more people want to be there — of course that creates a massive displacement pressure. We've got to have an honest conversation in this city. If people think that no rezoning will just freeze paradise in place and everything is going to be wonderful, that is a fundamental misunderstanding of the last 20 years in this city.

Benjamin Dulchin, *Does Trickle-Down Affordability Justify the Mayor's Zoning Policy?*, ASS'N FOR NEIGHBORHOOD & HOUS. DEV. (Jan. 24, 2019), <https://www.anhd.org/blog/does-trickle-down-affordability-justify-mayors-zoning-policy> [<https://perma.cc/9X5Q-HW3A>].

59. See generally Tom Angotti, *Introduction*, in ZONED OUT!: RACE, DISPLACEMENT, AND CITY PLANNING IN NEW YORK CITY 10 (Tom Angotti & Sylvia Morse eds., 2016).

60. Upzonings increase "the amount of square feet of building that can be developed," for example, by increasing the allowable height. Tom Angotti, *Land Use and Zoning Matter*, in ZONED OUT!: RACE, DISPLACEMENT, AND CITY PLANNING IN NEW YORK CITY 18, 21 (Tom Angotti & Sylvia Morse eds., 2016) [hereinafter Angotti, *Land Use and Zoning Matter*]. This automatically multiplies the number of housing units permitted to be developed, which multiplies the amount of rent a building produces and therefore increasing the value of the land it sits on. See *id.* at 21–23; see also *What is Zoning?: New York City Edition*, CTR. FOR URB. PEDAGOGY 42–57 (2013), [http://welcometocup.org/file\\_columns/0000/0530/cup-whatiszoning-guidebook.pdf](http://welcometocup.org/file_columns/0000/0530/cup-whatiszoning-guidebook.pdf) [<https://perma.cc/C555-U25A>].

rents.<sup>61</sup> Upzoning increases the supply of housing units which, under a traditional economic supply and demand analysis, should decrease rents.<sup>62</sup> But by increasing the development potential for individual lots and incentivizing higher-rent construction, upzoning in a hot market ultimately increases rents across the board.<sup>63</sup>

Another reason that increasing New York City's housing supply has not translated to lower rents is that the City's ever-increasing property values attract investors from around the world to use the City's real estate as an investment vehicle.<sup>64</sup> And policy changes such as deregulation of housing finance have further encouraged the commodification of New York City's housing stock.<sup>65</sup> Policymakers nonetheless continue to argue that increasing the City's supply of housing — regardless of how expensive the rents are set — will necessarily drive rents down overall.<sup>66</sup> To the contrary, rents have increased year over year, often dramatically.<sup>67</sup> And New York's historically weak rent regulation laws have meant that even rent-stabilized units have often been affected.<sup>68</sup>

While the real estate market in New York City largely comprises a web of complicated policies, supply and demand overlay that web and drive the market up further. At 8.3 million inhabitants and averaging 27,000 people per square mile,<sup>69</sup> New York City is the largest and densest city in the

61. See Angotti, *Land Use and Zoning Matter*, *supra* note 60, at 23. Increased property values raise rents for tenants (in the case of upzoned neighborhoods, most often tenants of color) as they increase profits for landlords, who are disproportionately white men. *See id.*

62. *See id.* at 27.

63. *See id.* at 29–30.

64. See SAMUEL STEIN, *CAPITAL CITY: GENTRIFICATION AND THE REAL ESTATE STATE* 2–3 (2019); John Whitlow, *Gentrification and Countermovement: The Right to Counsel and New York City's Affordable Housing Crisis*, 46 FORDHAM URB. L.J. 1081, 1099 (2019).

65. See MADDEN & MARCUSE, *supra* note 57, at 26–29.

66. See Angotti, *Land Use and Zoning Matter*, *supra* note 60, at 27 (recounting the comments of former New York City Department of Housing Preservation and Development Commissioner Vicki Been about the proposed rezoning of East New York); Dulchin, *supra* note 58.

67. Prior to June of 2019, the City's rent-stabilized units, home to 2.4 million people, faced decades of eroding protections and loss of units. See Luis Ferre-Sadurni et al., *Landmark Deal Reached on Rent Protections for Tenants in N.Y.*, N.Y. TIMES (June 11, 2019), <https://www.nytimes.com/2019/06/11/nyregion/rent-protection-regulation.html> [<https://perma.cc/7992-L74S>]. Since the 2019 law, rent-stabilized units are much more tightly controlled, but the 43% of units that are unregulated still are not. See *Housing Types*, N.Y.C. RENT GUIDELINES BD., <https://rentguidelinesboard.cityofnewyork.us/resources/apartment-hunting/housing-types/> [<https://perma.cc/9SP6-FAYN>] (last visited Aug. 30, 2020).

68. See Ferre-Sadurni et al., *supra* note 67.

69. *QuickFacts: New York City, New York*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/newyorkcitynewyork> [<https://perma.cc/RFE5-DEVN>] (last visited June 28, 2020).

United States.<sup>70</sup> The number of people who want to live in the City and the limited amount of land available for housing both add to market pressure as well. The above policies, however, go at least as far in ensuring that for most New Yorkers, the rent is too high.

### C. Recent Changes to New York State’s Rent Laws and Regulation

Market pressure on rents has disempowered tenants, and New York State’s longstanding system of inadequate protections for renters and rent regulation failed to stop it. Up until recent state rent reforms, tenant disempowerment — the lack of ability to choose where to live or whether to stay — worsened year after year in New York City. A new set of rent laws passed in 2019 dramatically improved the situation for tenants, but decades under the former system shaped the current landscape.<sup>71</sup>

Because the City’s and State’s former rent laws enabled landlords to squeeze more and more profit out of residential rental buildings, they did just that.<sup>72</sup> Unregulated rental units, which account for about 43% of the City’s rental units, have no limits on rent increases.<sup>73</sup> For these “market-rate” units, landlords may increase the rent by any amount whenever a new lease is signed.<sup>74</sup> Most of the City’s below-market rent apartments, however, are rent-regulated,<sup>75</sup> and these account for 46% of the City’s rentals.<sup>76</sup> Because rent-stabilized units form the backbone of affordable units in New York City, the decline in rent stabilization in recent decades was especially devastating to low-income New Yorkers.

The amount by which landlords of rent-stabilized apartments may increase the rent in each lease is set by the New York City Rent Guidelines

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70. See Mike Maciag, *Mapping the Nation’s Most Densely Populated Cities*, GOVERNING (Oct. 2, 2013), <https://www.governing.com/blogs/by-the-numbers/most-densely-populated-cities-data-map.html> [https://perma.cc/QVH6-PXHA].

71. See *infra* Section I.E.

72. See Barker, *supra* note 18.

73. See *Housing Types*, *supra* note 67.

74. See *id.*

75. A few are rent controlled, but almost all are rent stabilized. See JESSICA YAGER, NYU FURMAN CTR., *THE CHALLENGE OF RISING RENTS: EXPLORING WHETHER A NEW TAX BENEFIT COULD HELP KEEP UNSUBSIDIZED RENTAL UNITS AFFORDABLE* 7 (2015), [https://furmancenter.org/files/fact-sheets/NYUFurmanCenter\\_ChallengeofRisingRents\\_10JUN2015.pdf](https://furmancenter.org/files/fact-sheets/NYUFurmanCenter_ChallengeofRisingRents_10JUN2015.pdf) [https://perma.cc/QLH8-L9CC] (finding that over two-thirds of units affordable to families making 80% of the area median income or less are in multifamily buildings with at least five units, and over 90% of those are rent controlled or stabilized).

76. See *Housing Types*, *supra* note 67 (one million units are rent stabilized, while 27,000 are rent controlled).

Board (RGB) every year.<sup>77</sup> The rents for rent-stabilized apartments are thus intended to increase only incrementally over time. However, prior to the recent rent reforms, several mechanisms in the law allowed landlords to raise rent by much larger amounts than the RGB increment. These mechanisms included a 20% “vacancy bonus” the landlord could add to the prior rent whenever a tenant moved out,<sup>78</sup> and additional rent increases on top of that for claimed renovations.<sup>79</sup> Further, landlords could deregulate rent-stabilized units that reached a certain rent threshold, thus taking them out of regulation completely.<sup>80</sup>

Because market-rate rents increased so much faster than the RGB rent increase amounts in the last 30 years, landlords were especially motivated to deregulate rent-stabilized units in order to raise rents without limit and maximize income.<sup>81</sup> And because the primary mechanisms for increasing regulated rents beyond the RGB amount required a change in tenants, landlords had a strong economic motivation to push tenants out.<sup>82</sup> The lack of a right to counsel for tenants until 2017<sup>83</sup> and the precarious economic position of many rent-stabilized tenants — specifically Black and Latinx tenants<sup>84</sup> — created a large power difference between landlords and tenants. All of these factors led to scores of evictions.<sup>85</sup> In addition to using the

77. Each year, the NYC Rent Guidelines Board establishes the percentage by which the rent in rent-stabilized units may be increased. See *Explanation of the Rent Guidelines Process*, N.Y.C. RENT GUIDELINES BD., <https://rentguidelinesboard.cityofnewyork.us/rent-guidelines/explanation-of-the-rent-guidelines-process/> [https://perma.cc/UQ64-DNUV] (last visited Aug. 30, 2020). The Board considers factors such as building maintenance costs and cost of living indices. See *id.* The increases for one-year leases for the past ten years have been between 0%–4%. See *Rent Guidelines Board Apartment Orders #1 Through #51 (1969 to 2020)*, N.Y.C. RENT GUIDELINES BD., <https://rentguidelinesboard.cityofnewyork.us/wp-content/uploads/2019/08/aptorders.pdf> [https://perma.cc/67VU-S4NQ] (last visited Nov. 13, 2020).

78. See *Strengthening New York State Rent Regulations: The Housing Stability and Tenant Protection Act of 2019*, N.Y. ST. HOMES & CMTY. RENEWAL 8 (2020), <https://hcr.ny.gov/system/files/documents/2020/02/rent-regulation-hstpa-presentation.pdf> [https://perma.cc/SD8Q-D8U8].

79. See *id.* at 10–11.

80. See *id.* at 7.

81. See Barker, *supra* note 18.

82. See Barker et al., *supra* note 53.

83. See Oksana Mironova, *NYC Right to Counsel: First Year Results and Potential for Expansion*, CMTY. SERV. SOC’Y (Mar. 25, 2019), <https://www.cssny.org/news/entry/nyc-right-to-counsel>. [https://perma.cc/DL75-AXB8].

84. Because of the racial disparities in rent burden, eviction, and homelessness (which are related processes, but each imposes additional layers of systemic racism), the loss in affordability directly leads to the displacement of Black and Latinx New Yorkers from their neighborhoods.

85. See Barker et al., *supra* note 53.

courts, landlords also used illegal tactics like harassment, intimidation, and fraud to push tenants out.<sup>86</sup>

The ensuing crisis in evictions and displacement led to several substantial reforms in recent years. These reforms have included a right to counsel for low-income New Yorkers facing eviction<sup>87</sup> and a slew of strengthened New York State rent regulations that passed in June 2019.<sup>88</sup> However, rents have long since exceeded what average New Yorkers can afford to pay, and the new laws are not designed to scale back the affordability crisis.<sup>89</sup> Until more housing is created that can shield tenants from market pressures, tenant disempowerment will continue.

#### D. Projected Impacts of Rent Reform and COVID-19

The rental housing landscape in New York City is in the midst of major changes. The real estate market effects of two events — the 2019 rent reforms and the COVID-19 economic downturn — are still emerging. New York State passed new rent laws<sup>90</sup> in 2019 that increased protections for tenants and limited rent increases.<sup>91</sup> These changes mean that rent-stabilized multifamily building owners have less potential for profit than they did before the law. And the economic downturn in New York City during the COVID-19 pandemic<sup>92</sup> may even further depress real estate prices. While the exact effects are still becoming clear, the preliminary evidence points to a softer real estate market in coming years.

By removing most legal mechanisms for deregulating rent-stabilized units, the Housing Stability and Tenant Protection Act of 2019 (HSTPA)

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86. *See id.*

87. *See Providing Legal Services for Tenants Who Are Subject to Eviction Proceedings*, N.Y. CITY COUNCIL (Aug. 11, 2017), <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1687978&GUID=29A4594B-9E8A-4C5E-A797-96BDC4F64F80> [<https://perma.cc/5MTG-VZPU>].

88. *See* Housing Stability and Tenant Protection Act, 2019 Sess. Law News of N.Y. Legis. Memo. Ch. 36 (McKinney 2019).

89. While the 2019 laws brought “an end to big rent increases,” they did not decrease existing rents. *See* Sharon Otterman & Matthew Haag, *Rent Regulations in New York: How They’ll Affect Tenants and Landlords*, N.Y. TIMES (June 12, 2019), <https://www.nytimes.com/2019/06/12/nyregion/rent-regulation-laws-new-york.html> [<https://perma.cc/3BRC-5Q47>].

90. *See* Housing Stability and Tenant Protection Act Ch. 36.

91. *See* Georgia Kromrei & Kathryn Brenzel, *The Rent Law, One Year Later: “No Upside, No Opportunity,”* REAL DEAL (June 12, 2020, 12:47 PM), <https://therealdeal.com/2020/06/12/the-rent-law-one-year-later-no-upside-no-opportunity/> [<https://perma.cc/VSG5-CNC3>].

92. *See N.Y.C. Economic Summary*, BUREAU LAB. STAT. (Sept. 18, 2020), [https://www.bls.gov/regions/new-york-new-jersey/summary/blssummary\\_newyorkcity.pdf](https://www.bls.gov/regions/new-york-new-jersey/summary/blssummary_newyorkcity.pdf) [<https://perma.cc/ALG5-R3MH>].



almost entirely put an end to the rampant loss of rent-stabilized units.<sup>93</sup> New York law previously permitted several ways for landlords to increase the rent of a rent-stabilized unit.<sup>94</sup> And upon raising the rent to a certain threshold level, the landlord was permitted to take the unit out of rent stabilization altogether.<sup>95</sup> By allowing landlords to hike rents on rent-stabilized units this way, the previous system not only led to an overall loss in affordable units in New York City, but it also drove up the price of rent-stabilized multifamily buildings.<sup>96</sup> By eliminating most of those mechanisms for increasing rent, and thus decreasing landlords' profit potential, the 2019 law will likely affect the market for rent-stabilized multifamily buildings.

Prior to the 2019 reforms, some banks further encouraged rent deregulation through their lending practices. In order to profit on the additional loan interest, banks provided loans to landlords to buy rent-stabilized multifamily rental buildings at inflated prices, based on their *potential* rental value, rather than their *actual* existing rental value.<sup>97</sup> For example, if the rents in a rent-stabilized building at the time of sale brought in \$10,000 each month, the bank would nonetheless issue a mortgage that would require rents of \$15,000 per month. The landlord would then have to use the eviction and deregulation process described above to increase rental income to pay the debt. Banks had the incentive to profit on the extra interest from the inflated loan, and landlords believed that they would be able to sell the building at an even higher price after deregulating the rents. Now that deregulation is no longer legal even when tenants cycle through, landlords who speculatively purchased these buildings intending to increase rents dramatically by pushing low-paying tenants out will no longer be able to do so. These overleveraged landlords are now likelier than their peers — who did not purchase at inflated prices — to find themselves in a financially precarious position.

So far, the clearest measurable effect of HSTPA<sup>98</sup> on the rent-stabilized, multifamily real estate market is that sales have slowed dramatically.<sup>99</sup>

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93. See Barker, *supra* note 18 (documenting the extensive loss of rent stabilized units leading up to the 2019 rent reform laws); Ferre-Sadurni et al., *supra* note 67 (outlining the changes brought by HSTPA).

94. See *supra* Section I.C.

95. See *Strengthening New York State Rent Regulations*, *supra* note 78, at 7.

96. See Barker, *supra* note 18.

97. Housing's exchange value as a vehicle for capital accumulation overcame its use value as a home. See Whitlow, *supra* note 64, at 1099.

98. Housing Stability and Tenant Protection Act, 2019 Sess. Law News of N.Y. Legis. Memo. Ch. 36 (McKinney 2019).

99. Multifamily building sales dramatically slowed down in the last year, either because owners were waiting to see if the laws would stay, or because they were unwilling to sell at

Uninterested in selling during a market slowdown, or possibly waiting to see if the 2019 law will persist, fewer apartment building owners have tried to sell in the past year.<sup>100</sup> The relative lack of sales means that the data on whether and to what extent multifamily — especially rent stabilized — building prices in New York City have decreased is not yet conclusive.<sup>101</sup> However, the data has started to show a decrease in building prices and an increase in capitalization rates.<sup>102</sup> But overall, although over a year has passed since HSTPA passed, the ultimate impact is not clear yet.

Likewise, there has not been enough data to see how the COVID-19 pandemic will additionally affect the market for apartment buildings in New York City. Even though the real estate business in New York City almost completely stopped at the beginning of the pandemic,<sup>103</sup> many predicted that the residential rental market might recover quickly from the

a price much lower than what they had paid. See Eliza Theiss, *NYC Multifamily Sales Volume Surges in Q1*, PROPERTYSHARK (Apr. 15, 2020), <https://www.propertyshark.com/Real-Estate-Reports/ NYC-multifamily-sales> [<https://perma.cc/9AUA-2GB4>]; see also Akiko Matsuda, *New York's Multifamily Sales Improve in Q3*, REAL DEAL (Oct. 23, 2020, 6:30 PM), <https://therealdeal.com/2020/10/23/new-yorks-multifamily-sales-improve-in-q3/> [<https://perma.cc/W2W2-B2FE>]

100. See Theiss, *supra* note 99.

101. There have not been enough sales to gauge market-level changes in the current values of multifamily buildings, but there are indicators that for rent-regulated buildings that have sold, prices may be down. One very large sale in Queens in late 2019 showed a 38% decrease in price. See Georgia Kromrei & Rich Bockman, *A&E Real Estate Buys Huge Rent-Stabilized Portfolio at Deep Discount*, REAL DEAL (Nov. 19, 2019, 4:11 PM), <https://therealdeal.com/2019/11/19/ae-real-estate-buys-massive-rent-stabilized-portfolio-at-s-teep-discount/> [<https://perma.cc/BS59-55NU>]; see also Kromrei & Brenzel, *supra* note 91 (“One of the few quantifiable impacts so far has been a decline in deal volume. Since the law eliminated nearly all pathways to raising rents, large transactions have been rare.”).

102. A commercial real estate company that creates quarterly reports on multifamily real estate sales in New York City shows that average price per unit and price per square foot decreased in 2020 over 2019. See ARIEL PROP. ADVISORS, *MULTIFAMILY QUARTER IN REVIEW: NEW YORK CITY Q3 2020*, at 4 (2020), <http://arielpa.com/report/report-MFQIR-Q3-2020> [<https://perma.cc/ME9F-S5TZ>]. The capitalization rate is a ratio that measures a building’s purchase price relative to its current net income — lower “cap rates” indicate aggressive investments, where the purchaser is banking on a higher return in the future. The capitalization rate is the net operating income divided by the purchase price. An increase in the cap rate of recent multifamily property sales indicates that the price at which buyers are willing to purchase these buildings has decreased. See Georgia Kromrei, *Managing the Rent Law Aftershocks*, REAL DEAL (Jan. 2, 2020, 10:00 AM), [https://therealdeal.com/issues\\_articles/managing-the-rent-law-aftershocks/](https://therealdeal.com/issues_articles/managing-the-rent-law-aftershocks/) [<https://perma.cc/A66M-RSA4>]. The Ariel Property Advisors report also shows that cap rates were up in 2020 over 2019. See ARIEL PROP. ADVISORS, *supra* note 102, at 4.

103. Construction workers, brokers, appraisers, and inspectors were all affected by the stay at home order. See *How the Coronavirus Crisis Is Gutting Real Estate*, REAL DEAL (Apr. 1, 2020, 1:00 PM), [https://therealdeal.com/issues\\_articles/an-era-of-pestilence/](https://therealdeal.com/issues_articles/an-era-of-pestilence/) [<https://perma.cc/E9DX-J372>].

acute crisis.<sup>104</sup> The magnitude of this hit to the economy, however, may challenge conventional wisdom.<sup>105</sup> Irrespective of the overall effect, overleveraged landlords will be at risk the most for loan defaults.<sup>106</sup> Not only were their plans to legally hike rents halted by HSPTA, but rental income for these landlords decreased due to widespread unemployment, especially after the CARES Act supplemental federal unemployment checks stopped at the end of July.<sup>107</sup> Federal and state mortgage relief plans for certain buildings have likely masked this effect, but the coming months may show clearer signs of distress.<sup>108</sup>

While the effects of the HSTPA and the COVID-19 pandemic on the rental building market are not clear yet, decreased apartment building prices and an increase in overleveraged loan defaults are both expected in the coming months and years.<sup>109</sup>

### E. What We Have Already Tried: Traditional Affordable Housing Development Policy

Housing policy at all levels of government aims to expand supply and increase affordability and quality of housing.<sup>110</sup> Housing policy targeting affordability can take several forms, including vouchers to help tenants pay rent, subsidies for developers to build and renovate, and tax incentives for investors in new housing.<sup>111</sup> Since the early 1980s, federal housing expenditures have been cut back sharply.<sup>112</sup> Meanwhile, remaining federal resources have increasingly benefited a particular subset of the housing

104. The residential rental market may fare better than commercial, office, and hotel real estate markets, all of which are likely to be more affected by the COVID-19 pandemic and economic downturn. See Kathryn Brenzel, *Not So Fast, Vultures: Multifamily Among Better "Food Groups" Poised to Weather Pandemic*, REAL DEAL (Apr. 8, 2020, 5:00 PM), <https://therealdeal.com/2020/04/08/not-so-fast-vultures-multifamily-among-better-food-groups-poised-to-weather-pandemic/> [https://perma.cc/4QGL-JP3C].

105. See Patrick Sisson, *What Your Landlord Thinks About Rent Right Now*, CURBED (Apr. 10, 2020), <https://www.curbed.com/2020/3/31/21197368/coronavirus-rent-mortgage-landlord-apartment> [https://perma.cc/VAK2-T8G5].

106. See Brenzel, *supra* note 104.

107. See Samantha Fields, *U.S. Looking at "a Tsunami of Evictions" as Moratoriums Expire*, MARKETPLACE (May 29, 2020), <https://www.marketplace.org/2020/05/29/u-s-looking-at-a-tsunami-of-evictions-as-moratoriums-expire/> [https://perma.cc/M2QZ-ZMXJ].

108. See Kromrei, *Managing the Rent Law Aftershocks*, *supra* note 102.

109. See *id.*

110. See ALEX F. SCHWARTZ, *HOUSING POLICY IN THE UNITED STATES* 6 (3d ed. 2015).

111. See *id.* at 7.

112. See *id.* at 265.

ecosystem: homeowners<sup>113</sup> and rental housing developers.<sup>114</sup> Where federal subsidy previously directly funded new affordable housing construction, remaining federal funds for new construction of low-income housing are now largely directed through tax incentives to investors.<sup>115</sup> By prioritizing funding for property owners, the benefit for renters is indirect and only reaches them after profit is siphoned off.

As direct federal subsidies for new housing have receded,<sup>116</sup> city and state governments have had to fill the gap, and housing programs are now even more reliant on private development with public incentives.<sup>117</sup> For the last several decades, housing programs in New York City have focused primarily on partnerships that seek to leverage private investment to create *some* affordable units in privately owned buildings.<sup>118</sup> Critics have pointed out that this strategy leads to too few “affordable” units, with rents that are often not affordable enough for those who need them,<sup>119</sup> and that are affordable only temporarily.<sup>120</sup>

New York City cobbles together funding from city, state, and federal sources to incentivize developers to build affordable housing. Developers who agree to set rents below the market rate are also forgoing income, so the government offers a subsidy to incentivize the developer to create more

113. For example, the largest federal housing subsidy, the mortgage interest deduction, is dedicated to homeowners. See Jenny Schuetz, *Under U.S. Housing Policies, Homeowners Mostly Win, While Renters Mostly Lose*, BROOKINGS INST. (July 10, 2018), <https://www.brookings.edu/research/under-us-housing-policies-homeowners-mostly-win-while-renters-mostly-lose/> [https://perma.cc/6WPH-P6W9]. Due to the 2017 federal tax reforms, the cost of the mortgage interest deduction has now fallen to about \$27 billion. See JOINT COMM. ON TAX’N, JCX-55-19, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2019–2023, at 23 (2019), <https://www.jct.gov/CMSPages/GetFile.aspx?guid=71b5ac20-f36a-46fb-9def-f7194212e849> [https://perma.cc/34CB-F8U8].

114. See SCHWARTZ, *supra* note 110, at 7.

115. See Schuetz, *supra* note 113.

116. See SCHWARTZ, *supra* note 110, at 54–56, 265. While U.S. Department of Housing and Urban Development (HUD) outlays have steadily increased since the 1970s, budget authority was cut dramatically by the Reagan Administration in the 1980s. See *id.* at 55. The major result of that cut was that HUD funding has increasingly gone to renewals of existing subsidized housing contracts rather than to subsidies for additional households. See *id.* at 56. Some federal funding was directed to block grants for states and localities, but a significant gap developed, which cities and states have had to fill by finding new funding sources for low-income housing. See *id.*

117. See *id.* at 265–66; Reina, *supra* note 40, at 1268.

118. See Mironova & Waters, *Social Housing*, *supra* note 31.

119. See OFF. OF N.Y.C. COMPTROLLER SCOTT M. STRINGER, *supra* note 25, at 11–12.

120. See OKSANA MIRONOVA, CMTY. SERV. SOC’Y, CLOSING THE DOOR: SUBSIDIZED HOUSING AT A TIME OF FEDERAL INSTABILITY 2 (2018) [hereinafter CLOSING THE DOOR], [https://smhttp-ssl-58547.nexcesscdn.net/nycss/images/uploads/pubs/Closing\\_the\\_Door\\_FIN\\_AL\\_WEB.pdf](https://smhttp-ssl-58547.nexcesscdn.net/nycss/images/uploads/pubs/Closing_the_Door_FIN_AL_WEB.pdf) [https://perma.cc/T7FU-FBKP].

affordability. The affordability side of the equation has three dimensions that can trade-off of one another: how far below the market rate the rents are set, how long they are guaranteed at that level, and the overall number of affordable units in a building.<sup>121</sup>

For example, by offering a certain amount of subsidy, the government may be able to incentivize a developer to construct a building with rents set in 100% of its 30 units to be affordable to middle-income New Yorkers for 30 years. In order to make those units affordable for more than 30 years and still finance the building with the same amount of subsidy, the developer may have to cut back on the number of affordable units — perhaps resulting in only 24 of the units being affordable to middle-income New Yorkers for 40 years. Likewise, to make the rents affordable to low-income or very low-income New Yorkers with the same subsidy, the developer may decrease the number of affordable units or shorten the length of time the rents would be affordable. In order to lower the rent for those units from \$2,400 to \$1,600, for example, the developer would have to decrease the number of affordable units even more or cut the amount of time they would be affordable.

To incentivize developers to increase affordability by any of these metrics, the government offers more subsidy, often in the form of tax incentives.<sup>122</sup> To push developers to offer more units, lower rents, or affordability for longer time periods would require that the City offer even more subsidy.<sup>123</sup> Subsidized units for the lowest-income New Yorkers are thus especially scarce.<sup>124</sup> And because “affordable” rents are determined by a federal metric<sup>125</sup> that does not reflect most New York City

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121. See generally Mironova & Waters, *Social Housing*, *supra* note 31; see also Sosa, *supra* note 32, at 6–11.

122. The Low-Income Housing Tax Credit program, for example, makes up the biggest segment of privately owned subsidized housing in New York City. See CLOSING THE DOOR, *supra* note 120, at 3–4.

123. Arguably, achieving deeper affordability would require that the City offer ongoing operating subsidies in addition to the initial capital subsidies most housing programs rely on at present. See Mironova & Waters, *Social Housing*, *supra* note 31.

124. See OFF. OF N.Y.C. COMPTROLLER SCOTT M. STRINGER, *supra* note 25, at 2–3.

125. Depth of affordability is designated in terms of area median income (AMI), which is a metric set at the federal level by HUD. See *Affordable Housing: Area Median Income*, N.Y.C. DEP'T HOUS. PRES. & DEV., <https://www1.nyc.gov/site/hpd/services-and-information/area-median-income.page> [<https://perma.cc/XY32-QSH8>] (last visited Sept. 19, 2020). A family of three that meets the median income for NYC's area makes \$102,400, so a unit considered affordable for that family would be set at 100% AMI. See *id.* A two-bedroom rent at 100% AMI is \$2,467, which is determined by assuming that families spent 30% of their income on rent. See *id.* Families whose income is at 51%–80% AMI are considered low income; 31%–50% is considered very low income, and 0%–30% is considered extremely low income. See *id.* A two-bedroom apartment set at 50% AMI would have a rent of \$1,110, and at 30% it would

neighborhoods, much of subsidized “affordable housing” in the City ends up targeting renters who can afford market-rate rents — that is, not the renters who need it.<sup>126</sup>

Most government-supported affordable housing developments in New York City for the last several decades have used the profit-seeking, public-private partnership model.<sup>127</sup> Programs such as Mitchell-Lama rentals and cooperatives,<sup>128</sup> Housing Development Finance Corporation (HDFC) cooperatives,<sup>129</sup> and community land trusts (CLTs), however, have prioritized other goals such as permanent affordability, democratic resident control, and social equity.<sup>130</sup>

These models have each reduced or removed the owner’s profit motive by lessening the effect of market pressure; that is, they are “decommodified.”<sup>131</sup> In each case, the market’s influence is limited by restrictions on owner profit, unit resale price, or rent levels. The “Limited-Profit Housing Companies” section of New York’s Private Housing Finance Law<sup>132</sup> permits private companies to develop and own Mitchell-Lama rentals, but the private companies are limited in the amount of profit

be \$598. *See id.* Many have harshly criticized that the City’s incentives and subsidies are set using the AMI system because HUD sets AMI based on New York City’s metropolitan area, which includes wealthy suburbs. *See* Jarrett Murphy, *The Secret History of AMI*, CITY LIMITS (Feb. 17, 2016), <https://citylimits.org/2016/02/17/the-secret-history-of-ami/> [<https://perma.cc/4NKE-WSPZ>]. The majority of neighborhoods in New York City thus have average incomes well below the citywide AMI, so even “affordable” units set for renters who make 60%–80% of the AMI are not helpful for struggling renters in those neighborhoods. *See id.*

126. *See* OFF. OF N.Y.C. COMPTROLLER SCOTT M. STRINGER, *supra* note 25, at 2–3.

127. *See* BROMLEY ET AL., *supra* note 16, at 89.

128. *See* Oksana Mironova & Thomas J. Waters, *How Social Is That Housing?*, CMTY. SERV. SOC’Y (Feb. 18, 2020), <https://www.cssny.org/news/entry/how-social-is-that-housing> [<https://perma.cc/M638-7VGP>]. Active from 1955–1974, the Mitchell-Lama program incentivized development of cooperatives and rentals for moderate-income people in New York State. *See id.* Mitchell-Lama cooperatives cannot be sold on the open market. *See id.* However, the affordability requirements are temporary, so some Mitchell-Lama cooperative buildings have opted to privatize after those requirements end. *See id.*

129. *See id.* The HDFC cooperative program, named for the Housing Development Fund Corporation article in New York State’s Private Housing Finance Law, is the City’s primary tenant ownership program. While few new HDFC cooperatives are still created, historically it has given tenants in buildings with tax-delinquent landlords the opportunity to form an affordable cooperative and take ownership. *See* New York City Housing Development Finance Corporation Act, N.Y. PRIV. HOUS. FIN. LAW ch. 44B, art. XII (McKinney 2020); *HDFC Cooperatives*, N.Y.C. DEP’T HOUS. PRES. & DEV., <https://www1.nyc.gov/site/hpd/services-and-information/hdfc.page> [<https://perma.cc/8G7L-87EZ>] (last visited Oct. 28, 2020).

130. *See* Mironova & Waters, *Social Housing*, *supra* note 31. These programs draw on elements of “social housing,” which this Notes discusses in Part III.

131. *See* Mironova & Waters, *How Social Is That Housing?*, *supra* note 128.

132. N.Y. PRIV. HOUS. FIN. LAW § 10 (McKinney 2020).

they can make, and rents are regulated as well.<sup>133</sup> HDFC cooperatives are resident-owned, but there are restrictions on resales designed to keep the units affordable, and to limit the ability of residents to make more than a modest profit on a sale.<sup>134</sup> And CLTs both put the land into a trust that removes it from the speculative market and impose permanent affordability restrictions (through rent restrictions or profit caps, if for cooperatives).<sup>135</sup> While these models respond to the shortcomings of the more typical public-private partnership programs described above, they are also difficult to expand given current limitations: Mitchell-Lama and HDFC cooperatives are rarely created,<sup>136</sup> and New York City has only a handful of CLTs, with new developments only slowly gaining ground.<sup>137</sup>

While nonprofit-owned rentals are relatively sheltered from market pressure because nonprofit organizations are structurally prohibited from turning a profit for directors as for-profit companies do,<sup>138</sup> they frequently still have the affordability shortcomings described above. At the same time, nonprofit developers who receive city financial assistance to develop affordable rental housing create more public benefit than for-profit developers.<sup>139</sup>

133. See Mironova & Waters, *How Social Is That Housing?*, *supra* note 128.

134. Under the Private Housing Finance Law, all HDFC cooperatives have a limit on resale buyers' incomes. See *Fact Sheet for Cooperative HDFC Shareholders*, N.Y.C. DEP'T HOUS. PRES. & DEV. (Sept. 2019), <https://www1.nyc.gov/assets/hpd/downloads/pdfs/services/hdfc-coop-fact-sheet.pdf> [<https://perma.cc/52FF-KVRS>]. Most HDFC cooperatives sales, additionally, are subject to a flip tax, which divides the profit between the shareholder and the HDFC board (and sometimes the City). See *id.* Certain HDFC cooperatives also cap resale price. See *id.* Despite these restrictions explicitly designed to prevent the incentive to use HDFC cooperatives as investment vehicles, a small number of HDFC cooperatives have been sold for very high prices. See *infra* Section II.C.i.

135. CLTs are "nonprofit, democratically governed organizations that steward land to meet community needs." Mironova & Waters, *How Social Is That Housing?*, *supra* note 128. They are among the least commodified of New York City housing models, due to a land ownership structure that minimizes market pressure on land costs, nonprofit ownership that ensures affordability, and democratic control by residents, whether individually or collectively as cooperative owners. See *id.*

136. See TOM WATERS & VICTOR BACH, COMMUNITY SERV. SOC'Y OF N.Y., REINVENTING THE MITCHELL-LAMA HOUSING PROGRAM 3 (2015), [https://smhttp-ssl-58547.nexcesscdn.net/nycss/images/uploads/pubs/CSS\\_MLPB%20%20Final.pdf](https://smhttp-ssl-58547.nexcesscdn.net/nycss/images/uploads/pubs/CSS_MLPB%20%20Final.pdf) [<https://perma.cc/7DRC-69VD>].

137. Two CLTs currently exist in New York City (with about 12 more in development). See Mironova & Waters, *How Social Is That Housing?*, *supra* note 128.

138. Nonprofit rentals have a requirement to distribute any profit back into the purpose of the organization. See N.Y. NOT-FOR-PROFIT CORP. LAW § 515(a) (McKinney 2015).

139. See Stephanie Sosa, *The For-Profitization of Affordable Housing Development and the de Blasio Plan*, ASS'N FOR NEIGHBORHOOD & HOUS. DEV. 9–12 (Oct. 17, 2017), <https://anhd.org/report/profitization-affordable-housing-development-and-de-blasio-plan> [<https://perma.cc/87ZE-3BJ3>].

New York City therefore faces this problem: while some New York City housing programs have addressed major shortcomings of the prevailing housing plan for the City, these are precisely the models that are most difficult to expand given current land, funding, and policy constraints.

## II. SOURCES FOR A POSSIBLE SOLUTION

This Part explains the right of first purchase and its potential contribution to improving housing affordability in New York City, given the current legal, political, and economic conditions. Then it will lay out how other jurisdictions use purchase opportunity laws and how they can serve as possible bases for a similar law in New York City. This Part will then discuss other New York City housing programs relevant to the possible development of a purchase opportunity law.

### A. TOPA Laws: Background

By providing tenants a first right to purchase their building, a tenant opportunity to purchase law holds promise to create a much-needed pipeline of deeply affordable housing in New York City. As a broad-based, passive mechanism for turning rental apartment buildings on the speculative market into tenant-directed, affordable housing at the point of ownership change, it is unusually well-positioned to address New York City's current challenges, opportunities, and risks.

TOPA laws impart a first right of purchase to tenants.<sup>140</sup> A first right of purchase, generally, “gives a potential purchaser the opportunity to purchase before a property is sold to another.”<sup>141</sup> If a landlord decides to sell their building, whoever holds the first right of purchase has the first chance to buy it. That first chance may include a right of first refusal or a right of first offer.<sup>142</sup> A right of first offer requires the seller to offer the right holder to buy the building before publicly listing it,<sup>143</sup> and the right of first refusal requires that the seller allow the right holder to match any offer

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140. See Julie Gilgoff, *Giving Tenants the First Opportunity to Purchase Their Homes*, SHELTERFORCE (July 24, 2020), <https://shelterforce.org/2020/07/24/giving-tenants-the-first-opportunity-to-purchase-their-homes/> [https://perma.cc/XR4H-SJ2W].

141. *Rights of First Purchase (Offer, Negotiation and Refusal)*, WECONSERVEPA: CONSERVATIONTOOLS, <https://conservationtools.org/guides/24-rights-of-first-purchase-offer-negotiation-and-refusal> [https://perma.cc/C5A6-6E4X] (last visited Sept. 28, 2020).

142. See *id.*

143. See 92 C.J.S. Vendor and Purchaser § 180 (1955).



from a third party, and take precedence over it.<sup>144</sup> These rights can apply to any kind of property but are most frequently used with real property.<sup>145</sup>

This Note examines a first right of purchase as a *statutory*<sup>146</sup> provision specifically related to rental apartment buildings. While many state and local governments use this type of “purchase opportunity” law to intervene when government-subsidized housing reaches the end of its regulatory period,<sup>147</sup> or where rentals are to be converted to condominiums,<sup>148</sup> it is less often used in a broad-based way to pull rental housing into tenant or nonprofit ownership.<sup>149</sup> The most prominent example of the latter type of purchase opportunity law is Washington, D.C.’s TOPA,<sup>150</sup> which gives a first right of purchase to the tenants when landlords put their building up for sale.<sup>151</sup> Under D.C.’s TOPA law, tenants also gain the right to assign their purchase right to another party, such as a nonprofit developer.<sup>152</sup>

Used as an affordable housing preservation tool, as in Washington, D.C., the TOPA law can both prevent immediate displacement and keep the rents for the units themselves low.<sup>153</sup> By empowering tenants instead of new landlords to take ownership, this policy can avert rent increases and evictions.<sup>154</sup> Because buying and rehabilitating existing apartment

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144. *See id.*

145. *See* 3 ARTHUR LINCOLN CORBIN & ERIC MILLS HOLMES, CORBIN ON CONTRACTS § 11.3 (Joseph Perillo ed., rev. ed. 1993).

146. Rights of first refusal, for example, are more commonly negotiated within individual real estate transactions and not imposed by legislation across a span of properties. *See id.*

147. New York City has had a right of first refusal law for apartment buildings that are leaving government-subsidized housing programs, including Mitchell-Lama and Project-Based Section 8. *See id.* § 26-801.

148. *See Rights of First Refusal*, LOC. HOUS. SOLS., <https://www.localhousingsolutions.org/act/housing-policy-library/act-housing-policy-library-rights-of-first-refusal-overview/act-housing-policy-library-rights-to-first-refusal-overview-rights-to-first-refusal/> [<https://perma.cc/FNC3-S23E>] (last visited Oct. 18, 2020).

149. *See* Peter Damrosch, *Public Rights of First Refusal*, 129 YALE L.J. 812, 819 (2020).

150. *See* D.C. CODE ANN. §§ 42-3404.01–.12 (West 2018).

151. “TOPA stipulates that owners of residential properties must ‘give the tenant an opportunity to purchase the accommodation at a price and terms which represent a bona fide offer of sale’ before they may transfer the property to a third party.” MICHAEL DIAMOND, HARRISON INST. FOR PUB. LAW, AN ANALYSIS OF THE STRENGTHS AND DEFICIENCIES OF WASHINGTON, D.C.’S TENANT OPPORTUNITY TO PURCHASE ACT 3 (2006), [https://docplayer.net/storage/39/19377974/1604527861/P7hwgEyWhKEb\\_Je0C3LP6A/19377974.pdf](https://docplayer.net/storage/39/19377974/1604527861/P7hwgEyWhKEb_Je0C3LP6A/19377974.pdf) [<https://perma.cc/CVZ9-AL4V>]. Right of first refusals can also be created for governments. These public right of first refusals present a third option between eminent domain and buying on the market. *See* Damrosch, *supra* note 149, at 816.

152. *See* DIAMOND, *supra* note 151, at 6.

153. *See id.* at 9.

154. *See* Jenny Reed, *DC’s First Right Purchase Program Helps to Preserve Affordable Housing and Is One of DC’s Key Anti-Displacement Tools*, D.C. FISCAL POL’Y INST. 1 (2013),

buildings is 25%–40% less expensive than new construction,<sup>155</sup> this approach can also achieve deeper affordability than many traditional housing subsidy programs.<sup>156</sup> The right to assign their purchase right to another party, or to negotiate for payment in lieu of purchase, gives tenants a considerable amount of leverage at a juncture where they would otherwise have little.<sup>157</sup>

However, from some angles, a statutory first right of purchase for tenants also has downsides. From a current owner's perspective, it imposes the burden of regulatory costs and delays and a diminished ability to attract buyers.<sup>158</sup> And from the tenant's or city's perspective, TOPA as a housing policy tool does not operate on the same timeline as eminent domain or other acquisition or new development programs.<sup>159</sup> Because TOPA laws leave the timing of a sale completely in the hands of the property owner, they are most effective as a policy tool only over long-term horizons.<sup>160</sup>

TOPA laws also bring different legal concerns than other housing policy tools. When they apply broadly to residential real estate (as D.C.'s law does), TOPA laws run the risk of takings clause challenges.<sup>161</sup> TOPA laws enacted at the city or state level may also create preemption issues.<sup>162</sup> However, a state-level TOPA law is likely to prevail over either of these challenges; so long as the pricing mechanism is set properly, it is not likely to face a successful constitutional challenge.<sup>163</sup>

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[https://www.dcfpi.org/wp-content/uploads/2013/09/9-24-13-First\\_Right\\_Purchase\\_Paper-Final.pdf](https://www.dcfpi.org/wp-content/uploads/2013/09/9-24-13-First_Right_Purchase_Paper-Final.pdf) [<https://perma.cc/8R6V-GDGU>].

155. See Reina, *supra* note 40, at 1282 n.85.

156. See Reed, *supra* note 154, at 5–6.

157. See DIAMOND, *supra* note 151, at 3; see also Carey L. Biron, *How Washington, D.C. Residents Are Tackling Rising Rents*, CHRISTIAN SCI. MONITOR (Aug. 22, 2018), <https://www.csmonitor.com/USA/Society/2018/0822/How-Washington-D.C.-residents-are-tackling-rising-rents> [<https://perma.cc/G4D8-LGHP>].

158. See Damrosch, *supra* note 149, at 847; see also David I. Walker, *Rethinking Rights of First Refusal*, 5 STAN. J.L. BUS. & FIN. 1, 5 (1999). The additional requirement on the owner to present this right to the tenants typically results in lower prices because potential third-party buyers know that any offer they make could be matched by tenants (whose bid automatically wins); they will bid less than they would otherwise, because of the time, labor, and uncertainty. Damrosch suggests that cities could reimburse landlords for unsuccessful bids. See Damrosch, *supra* note 149, at 846.

159. See Damrosch, *supra* note 149, at 840.

160. See *id.*

161. See *A Brief Review of State and Local Preservation Purchase Laws*, 36 HOUS. L. BULL. 217, 224 (2006) (noting that although challenges may be raised, such laws “should pass constitutional standards because they assure just compensation to owners”).

162. See Paula A. Franzese, *Solutions to the Crisis in Affordable Housing: A Proposed Model for New York City*, 3 RUTGERS J.L. & URB. POL'Y 84, 90 (2006).

163. See *infra* Section IV.B.

## B. TOPA Models from Other Jurisdictions

### *i. Washington, D.C.'s Tenant Opportunity to Purchase Act*

Washington, D.C.'s TOPA is the most prominent example of a broad statutory first right of purchase for tenants. TOPA, passed by the D.C. Council in the early 1980s, requires that owners of residential properties “give the tenants an opportunity to purchase the accommodation at a price and terms which represent a bona fide offer of sale.”<sup>164</sup> Tenants can exercise this right in several ways. They may buy the building and create limited-equity cooperatives (LECs), for example, or assign or sell their right to a third party.<sup>165</sup> If tenants choose to assign their right to a nonprofit developer, they can co-develop the property to create, for example, subsidized low-income rental housing.<sup>166</sup> Tenants in D.C. may also opt to partner with for-profit developers who may develop the building into market-rate rentals or condominiums, offering current residents a discount in rent or an option to buy in.<sup>167</sup> Under the D.C. law, tenants may also opt to take a cash payment from the landlord in exchange for choosing not to exercise their right at all.<sup>168</sup> The common thread among these options is that by giving this purchase right to tenants, who have a variety of ways to exercise it, the law fundamentally strengthens tenants’ bargaining power at the point of sale — where tenants frequently have the least power.<sup>169</sup> And in a city with even more racially unequal housing and economic indicators than New York City, that re-balancing of power is strikingly important.<sup>170</sup>

D.C.’s TOPA is triggered when the owner takes steps to sell or issues notice of intent to recover possession of units from tenants or to vacate to

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164. D.C. CODE ANN. § 42-3404.02(a) (West 2016).

165. *See id.* § 42-3404.06; DIAMOND, *supra* note 151, at 6.

166. *See* DIAMOND, *supra* note 151, at 13. The federal LIHTC program, for example, which costs the federal government about \$8 billion a year, is the “primary program that encourages new development of below market apartments.” It allows investors to purchase federal income tax credits, the proceeds of which are used for affordable housing development. *See* Schuetz, *supra* note 113.

167. *See* DIAMOND, *supra* note 151, at 13 (noting that not all such developers are “legitimate and trustworthy,” with practices sometimes “border[ing] on the predatory”).

168. *See* D.C. CODE ANN. § 42-3404.07; DIAMOND, *supra* note 151, at 3. In the case where tenants take a payment instead of exercising their purchase right, the landlord will be unlimited in their ability to sell the building on the open market.

169. *See* Biron, *supra* note 157.

170. *See generally* Claire Zippel, *Building the Foundation: A Blueprint for Creating Affordable Housing for DC’s Lowest-Income Residents*, D.C. FISCAL POL’Y INST. (Apr. 4, 2018), [https://www.dcfpi.org/all/building-the-foundation-a-blueprint-for-creating-affordable-housing-for-dcs-lowest-income-residents/#\\_ednref7](https://www.dcfpi.org/all/building-the-foundation-a-blueprint-for-creating-affordable-housing-for-dcs-lowest-income-residents/#_ednref7) [<https://perma.cc/FF9X-25VN>].

demolish.<sup>171</sup> The owner must provide notice to each tenant and post the notice conspicuously in the building.<sup>172</sup> If tenants want to respond, they must form a tenant association (if the building has more than five units).<sup>173</sup> The tenants, as a group, can then decide to buy, exercise their purchase rights in conjunction with third parties, or sell or assign their right.<sup>174</sup> After tenants express interest, the owner must give at least 120 days to negotiate a contract of sale.<sup>175</sup>

A majority of tenant groups that purchase their building directly and receive city funding develop their buildings as LECs.<sup>176</sup> The City program that funds this development imposes affordability requirements for 40 years.<sup>177</sup> A recent policy development in D.C. — the implementation of the District Opportunity to Purchase Act (DOPA) — will enable the City, in addition to tenants, to purchase buildings when tenants do not.<sup>178</sup>

As is always true for affordable housing development policies, funding for D.C.'s TOPA is a big challenge.<sup>179</sup> Even on the expanded timeline TOPA put in place, tenants in Washington, D.C., have found it difficult to access sufficient financing (both for acquisition and any needed renovations) for a wide variety of reasons.<sup>180</sup> The City's First Right Purchase Program provides some funding for low- and moderate-income residents looking to purchase their building through TOPA, but those funds vary by year and are limited.<sup>181</sup> Tenants face a different set of issues with

171. See D.C. CODE ANN. § 42-3404.02(a) (West 2017); DIAMOND, *supra* note 151, at 3.

172. See D.C. CODE ANN. § 42-3402.03; DIAMOND, *supra* note 151, at 4.

173. See D.C. CODE ANN. § 42-3404.11(1); DIAMOND, *supra* note 151, at 4. Tenants have 45 days to form a tenant association and register their intent to purchase the building (or 30 days if they have already formed a tenant association). See Reed, *supra* note 154, at 3.

174. See DIAMOND, *supra* note 151, at 3, 6.

175. See D.C. CODE ANN. § 42-3402.03; DIAMOND, *supra* note 151, at 5.

176. See Reed, *supra* note 154, at 3–4. D.C. offers funding for tenants who opt for the limited-equity cooperative model. See *id.* at 4.

177. See *id.*

178. See Martin Austeruhle, *After a Decade of Waiting, D.C. Implements Law Allowing It to Buy Buildings to Keep Them Affordable*, WAMU (Nov. 15, 2018), <https://wamu.org/story/18/11/15/after-a-decade-of-waiting-d-c-implements-law-allowing-it-to-buy-buildings-to-keep-them-affordable/> [<https://perma.cc/Y479-T5DX>]; see also Noah Telerski, *Prior to Implementing a Decade-Old Law with New Powers to Preserve Affordable Housing, DC Government Is Still Finalizing a List of Qualified Developers*, D.C. LINE (Apr. 5, 2019), <https://thedcline.org/2019/04/05/prior-to-implementing-a-decade-old-law-with-new-powers-to-preserve-affordable-housing-dc-government-is-still-finalizing-a-list-of-qualified-developers/> [<https://perma.cc/BG75-HBSL>].

179. A tenant first right of purchase may not be enough to allow tenants to realistically buy at current or recent real estate prices. See *supra* Introduction (discussing Stuyvesant Town).

180. See DIAMOND, *supra* note 151, at 16–21.

181. See Reed, *supra* note 154, at 1, 11.

private lenders, whose concerns include leadership and group dynamics among tenants, tenants' ability to repay, low loan-to-value ratio, and lack of credit history of the tenant association.<sup>182</sup> Even when they can secure private financing, tenants struggle to align the timing of the financing with each point in the acquisition process: down payment, acquisition loan, construction loan if needed, and the eventual permanent loan.<sup>183</sup> Community lenders are often more flexible,<sup>184</sup> for example, taking junior positions to other private lenders.<sup>185</sup> Still, financing remains an insurmountable obstacle in many cases. For more buildings in D.C. to fully take advantage of TOPA, the City would have to dedicate substantially more public funding to the program.

Another major challenge for D.C.'s TOPA, which has echoes in New York City's experience with HDFC cooperatives,<sup>186</sup> is technical assistance. A report on the strengths and deficiencies of D.C.'s TOPA found that adequate technical assistance from organizers, lawyers, development consultants, and others was integral to the success of TOPA buildings.<sup>187</sup> In endeavoring to buy a property, let alone buy, renovate, and convert to a cooperative or redevelop as affordable rentals, the expertise of each of these professionals comes to bear — and predictably, tenant associations that try to navigate the process on their own struggle.<sup>188</sup>

While relatively few buildings complete the TOPA process each year, they have extremely positive outcomes in preventing displacement and preserving affordability.<sup>189</sup> D.C. does not keep comprehensive data on TOPA projects, but a study from 2013 found that \$130 million from the City and other government sources had supported 49 LEC projects over the previous decade, preserving nearly 1,400 units of affordable housing.<sup>190</sup> Housing costs for residents in TOPA cooperatives are dramatically lower

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182. See DIAMOND, *supra* note 151, at 16.

183. See *id.* at 17, 19–21.

184. See *id.* at 18–19.

185. See *id.* at 19.

186. See *infra* Section II.C.i.

187. See DIAMOND, *supra* note 151, at 10.

188. See *id.* at 10–14.

189. A 2004 study found that 81 LECs had been created through TOPA. Only four had been foreclosed on in that time, and 80% of the remaining were in stable or excellent condition. See COAL. FOR NONPROFIT HOUS. & ECON. DEV., A STUDY OF LIMITED-EQUITY COOPERATIVES IN THE DISTRICT OF COLUMBIA 3 (2004), <https://community-wealth.org/sites/clone.community-wealth.org/files/downloads/report-cnh-ed.pdf> [<https://perma.cc/C2LZ-5RAX>].

190. See Reed, *supra* note 154, at 1, 6.

than for other residents in their surrounding area,<sup>191</sup> and the program has given D.C. one of the highest concentrations of LECs in the country.<sup>192</sup> Although the overall number of cooperatives created is likely modest, they have helped provide “a bulwark against displacement” in gentrifying neighborhoods.<sup>193</sup>

*ii. San Francisco’s Community Opportunity to Purchase Act*

Recently, several other municipalities around the country have looked to D.C.’s program as a model for mitigating their own increasingly unaffordable rents. San Francisco has a new law called the Community Opportunity to Purchase Act (COPA) that gives nonprofits a first right to purchase apartment buildings listed for sale.<sup>194</sup> Other than the identity of the right holder, COPA works similarly to D.C.’s law. It expands on a pre-existing San Francisco program called the Small Sites Program, which helped nonprofits acquire buildings, but only those with three or fewer units.<sup>195</sup> A substantial concern about COPA is that the law does not provide a permanent source of funding, without which observers suggest the program is not likely to succeed.<sup>196</sup>

When the bill was under consideration, COPA faced a common critique (in this case from a real estate trade group) that the law would merely “shuffle ownership” of existing units rather than create new ones.<sup>197</sup> But

191. See COAL. FOR NONPROFIT HOUS. & ECON. DEV., *supra* note 189, at 14 (finding that median LECs building monthly membership charges were about half of HUD’s fair market rental rate for the District).

192. See Mike Ege, *Can the City Buy Private Land for Non-Profit Housing? Ordinance Faces Legal, Logistical Challenges*, BAY CITY BEACON (Apr. 8, 2019), [https://www.thebaycitybeacon.com/politics/can-the-city-buy-private-land-for-non-profit-housing/article\\_00ea6738-5a26-11e9-8262-9bbfe52c6fc0.html](https://www.thebaycitybeacon.com/politics/can-the-city-buy-private-land-for-non-profit-housing/article_00ea6738-5a26-11e9-8262-9bbfe52c6fc0.html) [<https://perma.cc/PT65-GA7A>].

193. See DIAMOND, *supra* note 151, at 9.

194. See Jared Brey, *Nonprofits May Soon Have the First Chance to Buy Apartment Buildings in San Francisco*, NEXT CITY (Apr. 9, 2019), <https://nextcity.org/daily/entry/nonprofits-may-soon-have-the-first-chance-to-buy-apartment-buildings-in-san> [<https://perma.cc/87NP-KPSB>]; *Administrative, Business and Tax Regulations Codes — Nonprofit Organizations’ First-Right-to-Purchase Multi-Family Residential Buildings*, CITY & CNTY. S.F. BD. SUPERVISORS, <https://sfgov.legistar.com/LegislationDetail.aspx?ID=3781283&GUID=DACC669F-23E4-480B-B4B3-CA6D1D7D90E6> [<https://perma.cc/4UPJ-NZNY>] (last visited Oct. 31, 2020).

195. COPA applies to buildings with more than three units. This is especially important because D.C.’s TOPA has been shown to work better in bigger buildings, which were previously not available for a nonprofit first right to purchase in San Francisco. See Ege, *supra* note 192.

196. See Brey, *supra* note 194.

197. See Jim Rutkowski, *Multi-Unit Properties Face Complicated New Regulations*, BAY CITY BEACON (Oct. 8, 2019), <https://www.thebaycitybeacon.com/politics/multi-unit-properties-face-complicated-new-reg>

proponents of the law point out that the city is losing more affordable units than it builds every year, and programs that preserve what little affordable housing remains are sorely needed.<sup>198</sup> One hopeful advocate cast the possibilities of the law in social housing terms: COPA is “the DeLorean that will take us to a future where we won’t need rent control, because housing will be finally treated as a utility and not as a commodity.”<sup>199</sup>

*iii. Montgomery County, Maryland’s Public Right of First Refusal*

The Maryland Housing Opportunities Commission, Montgomery County’s public housing agency, oversees a statutory first right of purchase — specifically, a right of first refusal — for the county and tenant associations in properties with four or more units built before 1981.<sup>200</sup> The Commission has only used the law eight times in 30 years, but the law punches above its weight in terms of impact.<sup>201</sup> Because the program includes long-term planning, buildings are acquired strategically.<sup>202</sup> Access to dedicated funding sources allows the Commission to make purchases much more quickly than municipalities that do not.<sup>203</sup> And that the Commission is “organized as a local independent agency . . . insulates political representatives from needing to pick sides in what are often contentious fights over affordable housing developments.”<sup>204</sup> Even where the County does not ultimately use its right to purchase a building, the law has nonetheless given it leverage to negotiate with developers to add affordability.<sup>205</sup> So, even where used infrequently, the purchase opportunity law has had a positive benefit in the long term.<sup>206</sup> That the right is used so rarely, though, has led to criticism that it would be better to tailor the first right of purchase more narrowly to a smaller subset of residential buildings.<sup>207</sup> A more tailored right would minimize costs

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ulations/article\_9e4dc54c-ea4f-11e9-a39d-67e637c87623.html  
[<https://perma.cc/2UA8-PHG5>].

198. *See Ege, supra* note 192.

199. *Id.*

200. *See Damrosch, supra* note 149, at 841; *see also Rights of First Refusal, supra* note 148.

201. *See Damrosch, supra* note 149, at 841.

202. *See id.* at 841–42.

203. *See id.* at 841.

204. *Id.*

205. *See id.* at 841–42 (“For example, Montgomery County will automatically waive its right of first refusal if the new buyer agrees to a three-year moratorium on rent increases.”).

206. *See id.* at 841–43.

207. *See id.* at 841–42 n.139.

imposed on owners generally, given how few buildings the County purchases.<sup>208</sup>

### C. Lessons from Two New York City Housing Programs

Two New York City housing programs offer particular lessons for any attempt to create a first right of purchase program in the City. The HDFC cooperative program, as the City's primary tenant ownership program, has faced issues that will inform any future effort to give tenants — especially low-income tenants — the ability to buy their homes. A much more recent program, Neighborhood Pillars, has developed a way to finance nonprofit acquisition of buildings at risk of becoming unaffordable.<sup>209</sup> Both programs offer lessons and tools for any future program seeking to preserve affordability in existing buildings at the point of ownership transfer.

#### *i. Lessons Learned: History and Challenges of HDFC Cooperatives*

Starting in the 1970s, New York City experienced a wave of disinvestment and abandonment of rental buildings by landlords.<sup>210</sup> After the City's in rem foreclosure law<sup>211</sup> was adjusted in 1976 to allow the City to foreclose on and take into ownership buildings with just one year of tax

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208. *See id.* at 841, 844.

209. *See Neighborhood Pillars*, N.Y.C. DEP'T HOUS. PRES. & DEV., <https://www1.nyc.gov/site/hpd/services-and-information/neighborhood-pillars.page> [<https://perma.cc/L4M7-DQUG>] (last visited Oct. 31, 2020).

210. *See Decade of Fire*, INDEP. LENS, <https://www.pbs.org/independentlens/films/decade-of-fire/> [<https://perma.cc/4ZBQ-WKQB>] (last visited Nov. 13, 2020). A number of factors contributed to this phenomenon, including loss of working class jobs in the City due to de-industrialization, devolution of funding for social services and safety net programs to the local level, federal policy that redlined urban neighborhoods of color and contributed to white flight to the suburbs, the New York City fiscal crisis, and rampant corruption in the state's fire insurance program. *See id.*; *see also* Andrew Scherer, *Is There Life After Abandonment — The Key Role of New York City's in Rem Housing in Establishing an Entitlement to Decent, Affordable Housing*, 13 N.Y.U. REV. L. & SOC. CHANGE 953, 954–56 (1985) (explaining the market dynamics of landlord abandonment).

211. *See* New York City, N.Y., Local Law No. 45 (1976) (codified as amended at New York City Administrative Code § 11-4120). Until 1996, this law allowed the City to foreclose on “properties that were significantly delinquent in their taxes” by taking ownership of the properties. OFF. OF N.Y.C. COMPTROLLER SCOTT M. STRINGER, BUILDING AN AFFORDABLE FUTURE: THE PROMISE OF A NEW YORK CITY LAND BANK 6 (2016), [https://comptroller.nyc.gov/wp-content/uploads/documents/The\\_Case\\_for\\_A\\_New\\_York\\_City\\_Land\\_Bank.pdf](https://comptroller.nyc.gov/wp-content/uploads/documents/The_Case_for_A_New_York_City_Land_Bank.pdf) [<https://perma.cc/4C84-MG3U>]. After 1996, the City moved away from in rem foreclosures to the tax lien sales model, which deals with tax-delinquent properties by putting a lien on the property for the unpaid debt and selling the lien to third parties, who can “foreclose on a property if the lien remains unpaid.” *Id.* at 7.



arrears,<sup>212</sup> New York City suddenly became landlord to tens of thousands of units in a “massive public takeover.”<sup>213</sup> The City, eager to transfer these buildings back out of public ownership, created a program to allow tenants to form LECs and buy their units from the City for as little as \$250.<sup>214</sup> These HDFC cooperatives had several requirements designed to keep them affordable: “flip-tax” provisions that transfer some of the profit on a sale to the cooperative itself, income requirements for new shareholders who would buy into the cooperatives, and tax subsidies to keep maintenance fees low.<sup>215</sup> These requirements were designed to limit the profit motive of the seller, keep resale prices and maintenance costs low, and ensure that HDFC cooperatives sold to second owners prioritized lower-income New Yorkers.<sup>216</sup>

Decades later, many such buildings have flourished and have been integral to the stability and economic development in the neighborhoods where they are located. To the concern of those who want to see the program maintain affordability for future low-income residents, however, some HDFC cooperative units have sold at close to market rate despite the income restrictions on buyers.<sup>217</sup> But many other HDFC cooperative

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212. See Scherer, *supra* note 210, at 956–57; Michael Goodwin, *City Struggling in Attempts to Sell Tax-Delinquent Apartment Buildings*, N.Y. TIMES (Apr. 8, 1981), <https://www.nytimes.com/1981/04/08/nyregion/city-struggling-in-attempts-to-sell-tax-delinquent-apartment-buildings.html> [<https://perma.cc/AVS9-SYJY>] (“The number of foreclosures has increased dramatically since the city passed a law in 1976 that shortened the permitted period of delinquency from three years to one.”).

213. Scherer, *supra* note 210, at 953, 956. At the peak of landlord abandonment in 1975, the City took over 40,000 units a year; by 1985, the City owned 5,100 in rem buildings totaling 48,000 units. See *id.* at 954, 957.

214. See Michelle Higgins, *Bargains with a ‘But,’* N.Y. TIMES (June 27, 2014), <https://www.nytimes.com/2014/06/29/realestate/affordable-new-york-apartments-with-a-cat-ch.html> [<https://perma.cc/BT5K-35HP>]. The City first attempted to sell these buildings to private developers but found that they frequently were not interested because of the buildings’ locations and bad conditions. See also Scherer, *supra* note 210, at 962.

215. See Higgins, *supra* note 214.

216. See *id.*

217. See Nikita Stewart, *Under City Program, Renters-Turned-Homeowners Could Become Renters Again*, N.Y. TIMES (July 29, 2018), <https://www.nytimes.com/2018/07/29/nyregion/co-op-low-income-nyc-rent.html> [<https://perma.cc/8DZX-N45R>]. That some cooperative shareholders have been able to sell their units for \$1 million or more shows the economic transformation of these buildings and neighborhoods. See *id.* High sales also represent the gentrification of these buildings — although there is an income limit for HDFC buyers, there is no asset limit; the buyers who can qualify while still being able to pay thus generally are those who can draw on family wealth. See Abigail Savitch-Lew et al., *City Pushes to Regulate Low-Income Coops Amid Some Shareholders’ Opposition*, CITY LIMITS (Feb. 24, 2017), <https://citylimits.org/2017/02/24/city-pushes-to-regulate-low-income-coops-amid-some-shareholders-opposition/> [<https://perma.cc/H84B-PKJ6>]. High sales are worrying because a unit

buildings are in distress<sup>218</sup> — behind on tax and utility bills, and with issues such as pests, mold, and lack of heat and hot water.<sup>219</sup> In 2015, the City began foreclosing on these cooperatives and then transferring them to nonprofit developers to run the buildings as rentals if the HDFC board did not form a plan to pay the debts.<sup>220</sup> HDFC cooperative residents criticized the move, pointing out that the City had set up the now-struggling cooperatives for failure by neglecting them for years.<sup>221</sup> HDFC buildings' issues have stemmed from a combination of building mismanagement, lack of resources, lack of oversight from New York City's Department of Housing Preservation and Development (HPD), and bureaucratic hurdles.<sup>222</sup>

In 2016, the City released its proposed reforms for the program: in exchange for a bigger tax break, buildings would pay for stricter oversight by a manager and monitor, agree to regulations such as more stringent subletting rules, and most significantly for some, impose a new sales cap.<sup>223</sup> Buildings that did not agree to the price cap would cease to receive any tax exemption at all.<sup>224</sup> Many cooperative residents objected strongly,<sup>225</sup> arguing that the plan seemed punitive after all the work residents put in over the years, that the price caps were overbearing and paternalistic, and that HDFC residents had not been given enough

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that sells for such a high amount will almost certainly never again be in the reach of low- or middle-income buyers. *See id.*

218. *See De Blasio Wants Monitors to Oversee 1,200 Privately Owned Co-ops*, REAL DEAL (Feb. 27, 2017), <https://therealdeal.com/2017/02/27/de-blasio-wants-monitors-to-oversee-1200-privately-owned-co-ops/> [https://perma.cc/33JY-Z8FA]. The number of HDFC cooperatives in distress is well above average numbers for other rental or cooperative buildings in the City. *See Oscar Perry Abello, Help Is on the Way for Low-Income Co-op Buildings in NYC*, NEXT CITY (Mar. 1, 2017), <https://nextcity.org/daily/entry/preserving-nyc-affordable-housing-habitat-cdfi-loan> [https://perma.cc/V6JK-PZP6] (citing an estimate that 300, or 25% of HDFC cooperative buildings, are distressed). It is perhaps not surprising that many of them are struggling, given that distress was a trait inherent to the buildings' origins.

219. *See Stewart, supra* note 217.

220. *See id.* If HDFC boards make an arrangement with the City to pay their arrears, they can be removed from the pending foreclosure list. *See id.*

221. *See Savitch-Lew et al., supra* note 217.

222. *See Stewart, supra* note 217.

223. *See Isabel Vincent & Melissa Klein, Inside de Blasio's 'Land Grab' Aimed at Boosting Affordable Housing Data*, N.Y. POST (Feb. 26, 2017, 5:29 AM), <https://nypost.com/2017/02/26/inside-de-blasios-land-grab-aimed-at-boosting-affordable-housing-data/> [https://perma.cc/839X-UTKA].

224. *See Savitch-Lew et al., supra* note 217.

225. *See id.*

opportunity for input into the proposal.<sup>226</sup> The Urban Homesteading Assistance Board (UHAB) — the primary nonprofit organization that provides technical assistance for HDFC cooperatives — had pushed for reform and even lower price caps, but still found these proposed reforms to be too much of a “blanket solution.”<sup>227</sup> The proposed reforms were ultimately not passed, but variations have been introduced in each legislative session since then.<sup>228</sup> While few new cooperatives are created in the HDFC program anymore, its successes and challenges over its history will likely be the main political and policy reference point for any new program that seeks to make tenants owners of low-income cooperatives.

*ii. Neighborhood Pillars Program: A Model for Financing a New York City TOPA Law*

Neighborhood Pillars, launched in 2018, is an HPD<sup>229</sup> program that helps nonprofits buy privately owned buildings at risk of rent increase in order to lock in affordable rents.<sup>230</sup> The program aims to create a “firewall against displacement” by ensuring that buildings in gentrifying neighborhoods with low rents are not sold to speculative investors who will hike rents or displace current tenants.<sup>231</sup> The program’s financing mechanism assists nonprofits and other qualified sponsors to buy privately owned apartments from for-profit landlords by leveraging government

226. See Andrew Reicher, *CityViews: The Case for New Regs for the City’s Affordable Co-ops*, CITY LIMITS (Mar. 21, 2017), <https://citylimits.org/2017/03/21/cityviews-the-case-for-new-regs-for-the-citys-affordable-co-ops/> [<https://perma.cc/RM6T-7ELD>].

227. See Vincent & Klein, *supra* note 223.

228. Assembly Member Harvey Epstein has circulated his draft bill on HDFC reforms for possible 2020 introduction. See Erica F. Buckley, *2020 Is the “Year of the Homeowner” in the New York State Legislature*, NIXON PEABODY (Feb. 3, 2020), <https://www.nixonpeabody.com/en/ideas/articles/2020/02/03/year-of-the-homeowner-in-nys> [<https://perma.cc/87QS-8V2D>]; see also *Summary of NYS Assemblymember Harvey Epstein’s January 6, 2020 Draft Legislation to Change the NYS Private Housing Finance Law (PHFL)*, HDFC COAL. (Jan. 17, 2020), <https://www.hdfccoalition.org/wp-content/uploads/2020/01/EpsteinSummaryEnglishSpanishBill1.17.2020.pdf> [<https://perma.cc/84LY-DJJG>].

229. New York City’s Department of Housing Preservation and Development, established in 1978, oversees the City’s programs related to all aspects of privately owned housing, including new construction and preservation of affordable housing, enforcement of the Housing Maintenance Code, and neighborhood planning. See *About HPD*, N.Y.C. DEP’T HOUS. PRES. & DEV., <https://www1.nyc.gov/site/hpd/about/about-hpd.page> [<https://perma.cc/Y4PH-7TZB>] (last visited Oct. 9, 2020).

230. See *Neighborhood Pillars*, *supra* note 209.

231. See OFF. OF THE MAYOR, CITY OF N.Y., HOUSING NEW YORK 2.0, at 22 (2017), <https://www1.nyc.gov/assets/hpd/downloads/pdfs/about/housing-new-york-2-0.pdf> [<https://perma.cc/AZC9-9RW7>].

subsidy to access additional private financing.<sup>232</sup> Only a small number of buildings have gone through the program so far,<sup>233</sup> but they have succeeded in locking in permanent affordability at levels affordable to pre-existing tenants for many units.<sup>234</sup> These results show that the program's financing mechanism may hold promise for the preservation of more affordable housing in New York City.

Nonprofits that identify qualifying buildings in their catchment areas can apply to HPD for support — both financial and technical — in acquiring them.<sup>235</sup> Qualifying buildings have three or more units and already have below-market rents.<sup>236</sup> Those below-market rents are what would attract speculative buyers; the buildings' purchase, renovation, and preservation as affordable would thus head off the opportunity for investors to hike rents to make a profit.<sup>237</sup> Neighborhood Pillars buildings are required to permanently restrict rents on 30%–50% of the units, and to restrict rents on the remainder of the units for the 30-year term of the regulatory agreement.<sup>238</sup> Crucially, Neighborhood Pillars offers funding to new owners for buildings in which maintaining tenants' currently affordable rents would not otherwise support the cost of acquiring the buildings. The City aims to preserve those affordable rents by filling that gap.

Because potential Neighborhood Pillars buildings are otherwise on the open market for purchase, nonprofits interested in buying need access to

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232. See Jared Brey, *New York Program Helps Keep Apartments Affordable*, NEXT CITY (Sept. 5, 2019), <https://nextcity.org/daily/entry/new-york-program-helps-keep-apartments-affordable> [<https://perma.cc/E8KN-NUBP>].

233. As of August 2019, HPD had facilitated the acquisition of ten buildings totaling 339 units. There has not been a publicly reported number of units since. See Press Release, N.Y.C. Dep't of Hous. Pres. & Dev., *City and Partners Announce First Round of Acquisitions for Neighborhood Pillars Program* (Aug. 22, 2019) [hereinafter *City and Partners Announce First Round of Acquisitions*], <https://www1.nyc.gov/site/hpd/news/053-19/city-partners-first-round-acquisitions-neighborhood-pillars-program#/0> [<https://perma.cc/T4WS-824L>].

234. See *Neighborhood Pillars Term Sheet*, N.Y.C. DEP'T HOUS. PRES. & DEV. (Dec. 2018), <https://www1.nyc.gov/assets/hpd/downloads/pdfs/services/neighborhood-pillars-term-sheet.pdf> [<https://perma.cc/53FE-794T>].

235. See Press Release, N.Y.C. Dep't of Hous. Pres. & Dev., *De Blasio Administration Launches Neighborhood Pillars Program to Protect Tenants and Preserve Affordability* (Dec. 20, 2018) [hereinafter *De Blasio Administration Launches*], <https://www1.nyc.gov/office-of-the-mayor/news/608-18/de-blasio-administration-launches-neighborhood-pillars-program-protect-tenants-preserve> [<https://perma.cc/LG7R-HPHF>].

236. See *Neighborhood Pillars Term Sheet*, *supra* note 234. Qualifying buildings also may not have regulatory agreements regarding affordability with the City, State, or federal government. See *id.*

237. See Brey, *supra* note 232.

238. See *Neighborhood Pillars Term Sheet*, *supra* note 234.

financing on a quick timeline to compete with private buyers. The Down Payment Assistance Fund (DPAF) fills the gap so that nonprofits can compete timewise, while also taking advantage of private financing.<sup>239</sup> The DPAF is thus a key tool for helping nonprofits buy these buildings.<sup>240</sup>

Although the HDFC cooperative program and Neighborhood Pillars have created relatively few affordable housing units compared to the total number of units across the City, they both contain important tools and lessons for new housing programs going forward.

### III. BUILDING A TOPA LAW FOR NEW YORK CITY

TOPA laws can be a vital tool in preserving affordability in changing neighborhoods. In New York City, where property values are ever-increasing, and long-time residents of changing neighborhoods are often pushed out by rising rents, such a tool may be key for addressing the affordability crisis. The City's scarcity of affordable, developable land<sup>241</sup> makes an affordability preservation tool such as TOPA even more vital: building new subsidized housing at rents that low-income New Yorkers can afford is immensely expensive,<sup>242</sup> so doing more to maintain or even decrease rents in existing buildings is especially imperative. And the possibility that property values for multifamily apartment buildings may decrease in the economic downturn makes this an even timelier opportunity for New York City.

This Part first lays out the criteria for a successful TOPA law in New York City. It then describes a preliminary proposal from a New York state senator for a TOPA law, as well as a more detailed discussion of important considerations for shaping the legislation.

#### A. How to Build a TOPA Law for New York City: Criteria Borrowed from Social Housing Models

A TOPA law in New York City should prioritize (1) permanent affordability, (2) democratic resident control, and (3) racial and economic equity. These criteria, which aim to respond to tenant disempowerment created by market pressures and landlord-friendly housing policies, also

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239. See Brey, *supra* note 232. The City then partners with the New York City Acquisition Fund in providing the acquisition loan (with much of the original down payment revolving to the Down Payment Assistance Fund). See De Blasio Administration Launches, *supra* note 235; see also *Neighborhood Pillars Term Sheet*, *supra* note 234.

240. See De Blasio Administration Launches, *supra* note 235.

241. See HOUSING NEW YORK, *supra* note 24, at 22, 31.

242. See *supra* Section I.E.

closely mirror the goals of social housing.<sup>243</sup> “Social housing” describes models that recast housing as a public good, along the lines of mass transit or public libraries.<sup>244</sup> These models are not necessarily publicly owned, but they aim to lessen the effect of market pressure on rents by removing ownership from the speculative real estate market or imposing long-term affordability constraints, thus “decommodifying” housing.<sup>245</sup> The affordability crisis in New York City calls for a TOPA law, and social housing concepts will make that law stronger.

*i. Permanent Affordability*

The City’s housing problem manifests in rents that are too high for New Yorkers to afford. Consequently, any policy response to the problem needs to bring down the cost of housing for residents. In the context of a TOPA law, the details of what affordability looks like depend on what type of ownership structure the tenants choose: a nonprofit rental building’s affordability will be reflected in its rents, while an LEC’s affordability will be reflected in buy-in prices and maintenance fees. Tenants exercising their TOPA right will also have a hand in balancing dimensions of affordability — how low costs are, how long they are ensured, and how many units are included.

A significant contributor to New York City’s housing crisis is that most publicly subsidized affordable units have expiration dates: affordable housing development programs work by offering subsidy in exchange for time-limited rent restrictions.<sup>246</sup> Not all landlords will increase rents to market-rate when the restriction expires, but those in thriving real estate markets like New York City are especially likely to do so.<sup>247</sup> Advocates therefore have long argued that the City should impose a permanent affordability requirement for new housing programs.<sup>248</sup> While a permanent affordability mandate has challenges, such as a decrease in the number of units produced because of increased development cost,<sup>249</sup> a mandate would also have the obvious benefit of protecting affordable rents indefinitely into the future. Permanent affordability may be too difficult to finance in some

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243. See Mironova & Waters, *Social Housing*, *supra* note 31.

244. *See id.*

245. *See id.*

246. See Reina, *supra* note 40, at 1277–79.

247. *See id.* at 1279–80.

248. See PERMANENT AFFORDABILITY, *supra* note 33.

249. See Reina, *supra* note 40, at 1281. Permanent affordability mandates may also affect where new subsidized housing is built, and it may hamper the City’s flexibility in allocating resources in the future. *See id.*

cases, but it remains a worthwhile goal for a TOPA program to be ultimately weighed by tenants.

*ii. Tenant Control*

A range of factors has led to broad tenant disempowerment in New York City.<sup>250</sup> Tenants have had little control over where they can afford to live, conditions in their apartments, and whether they can stay in a building or neighborhood.<sup>251</sup> A just housing system must enable each New Yorker to have a safe, stable, and affordable roof over their head, but it also must give power back to the tenants.

The importance of tenant control stems from the reasons that tenants were disempowered to begin with. The roots of tenant disempowerment are varied and complex, but they overlap substantially with other forms of oppression, namely racial and economic. Redlining starting in the first half of the twentieth century directly led to increased racial segregation and the systematic removal of resources from neighborhoods of color.<sup>252</sup> Urban renewal policies further stripped resources from New York City's communities of color and further entrenched racial housing segregation by supporting cities in acquiring land in "blighted" neighborhoods in order to relocate the residents, demolish structures, and create public and private development.<sup>253</sup>

Like urban renewal, more recent waves of gentrification capitalized on the lack of investment in New York City's neighborhoods of color, especially formerly racially segregated neighborhood.<sup>254</sup> Gentrification imposes yet another layer of disempowerment by selectively bringing wealth into disinvested neighborhoods that does not benefit long-time residents.<sup>255</sup> The neighborhood's long-time residents start to be priced out, with commercial and cultural touchpoints in the neighborhood displaced as

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250. *See supra* Section I.C.

251. *See* Whitlow, *supra* note 64, at 1128–29.

252. Starting in the 1930s, a set of federal guidelines were imposed that deterred banks from investing in neighborhoods where people of color, Jewish people, and immigrants lived. The resulting policy was called redlining. *See* Braden Crooks, *What Is Redlining?*, VIMEO (2016), <https://vimeo.com/172945692> [<https://perma.cc/K7WY-J79L>] (Dr. Mindy Fullilove explaining the process and history of redlining).

253. Urban renewal was a federal funding program, most active in the 1950s–1960s. *See About*, URB. REVIEWER, <http://www.urbanreviewer.org/#map=12/40.7400/-74.0690&page=about.html> [<https://perma.cc/844R-JWFS>] (last visited Sept. 27, 2020).

254. *See* Whitlow, *supra* note 64, at 1100 n.96.

255. *See id.* at 1101–03.

well.<sup>256</sup> New Yorkers of color are thus harmed both by the departure and the re-entry of white people into what has become their neighborhood.

This very brief history of racial injustice regarding housing and neighborhoods in New York City demonstrates the importance of re-empowering tenants, specifically tenants of color, in structuring a plan that addresses the core problems with the City's housing market. While on its face, the affordability crisis is a question of rent amount relative to income, more deeply, it is a problem with profit-driven policies and racist structures.<sup>257</sup> That racism is evident in homelessness, eviction, and foreclosure statistics, as well as health, education, and economic outcomes.

The solution, then, to the affordability crisis, must address the problem at all levels. A solution that decommodifies housing without giving power to tenants risks the situation that public housing in New York City currently faces. While New York City Housing Authority (NYCHA) buildings are almost entirely protected from market pressures by public ownership and permanently affordable rents set to tenants' incomes, building conditions are nonetheless in a state of crisis level.<sup>258</sup> Racism has imbued both the politics of appropriating adequate funds to maintain housing conditions and the administration and management of the housing itself.<sup>259</sup> These factors have led to tremendous repair and maintenance backlogs, and the lack of tenant power has contributed significantly to that imbalance.

Tenant control — at the point of sale as well as extending into the future — is thus an essential element for designing a TOPA law for New York City. In a city of tenants, placing the power to make crucial decisions in their hands, rather than in the hands of landowners, is a needed step toward housing justice.

### *iii. Racial and Economic Equity*

Racial and economic equity, like tenant empowerment, are essential ingredients for a successful TOPA law because injustice underlies New York City's affordability crisis. The City's dynamics of extractive disinvestment and reinvestment through redlining policies, urban renewal,

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256. See MADDEN & MARCUSE, *supra* note 57, at 43–44.

257. See Rasheedah Phillips, *Addressing Race and Gender Inequities at the Root of Housing Injustice*, LAW & POL. ECON. PROJECT (Jan. 16, 2020), <https://lpeproject.org/blog/addressing-race-and-gender-inequities-at-the-root-of-housing-injustice/> [<https://perma.cc/T8Z7-4NWN>].

258. See Sadeef Ali Kully, *Understanding NYCHA's New Rescue Plan*, CITY LIMITS (Aug. 10, 2020), <https://citylimits.org/2020/08/10/understanding-nychas-new-rescue-plan/> [<https://perma.cc/GK7P-Q3DP>].

259. See *id.*



and gentrification have all contributed to the grave disparities in who can afford secure housing. TOPA law provisions that further racial and economic equity are thus especially important.

Other New York City housing models provide examples of how to bake equity into a housing program. Models like Mitchell-Lama rentals are especially socially egalitarian because they are mixed-income — they embrace tenants with a broader range of incomes than in many other forms of subsidized housing.<sup>260</sup> HDFC cooperatives also contribute to social equity, largely because of their history: having their roots in tenant organizing in disinvested neighborhoods means that most still have more lower-income residents than comparable models.<sup>261</sup> Conversely, both public housing and owner-occupied housing tend to entrench inequality, given their connections to racial segregation.<sup>262</sup>

### B. Senator Myrie's Proposal

Inspired by D.C.'s TOPA, New York State Senator Zellnor Myrie<sup>263</sup> announced in early 2020 his intention to draft similar legislation for New York State.<sup>264</sup> Partly prompted by the recent success in New York State rent law reform, Myrie envisions a TOPA law for New York as a next step in the broader fight for housing affordability.<sup>265</sup> In addition to Myrie's bill for tenants, a New York City Council bill has been introduced that would establish a first right of purchase for nonprofit organizations.<sup>266</sup>

260. See Mironova & Waters, *How Social Is That Housing?*, *supra* note 128.

261. *See id.*

262. *See id.*

263. Senator Myrie is a freshman Senator from Central Brooklyn. In his campaign, he discussed his upbringing in rent-stabilized housing in Brooklyn and the importance of that stability. *See About*, ZELLNOR FOR ST. SENATE, <https://zellnorforstatesenate.com/about/> [<https://perma.cc/48UM-FJ2N>] (last visited Oct. 8, 2020). He serves on the Housing, Construction, and Community Development Committee and has made affordable housing a priority during his tenure in the State Senate. *See id.*

264. See Georgia Kromrei, *Bill: Make Landlords Give Tenants First Shot to Buy Buildings*, REAL DEAL (Jan. 31, 2020, 8:35 AM) [hereinafter Kromrei, *Make Landlords Give Tenants First Shot*], <https://therealdeal.com/2020/01/31/bill-make-landlords-give-tenants-first-shot-to-buy-buildings/> [<https://perma.cc/J8DC-3EBV>]; Sydney Pereira, *Tenants Would Get Priority to Buy Their Landlord's Building Under New Bill*, GOTHAMIST (Feb. 3, 2020), <https://gothamist.com/news/tenants-would-get-priority-buy-their-landlords-building-under-new-bill> [<https://perma.cc/CJ8F-EHZG>].

265. *See* Pereira, *supra* note 264.

266. *Giving Qualified Entities a First Opportunity to Purchase and an Opportunity to Submit an Offer to Purchase Certain Residential Buildings When Offered for Sale*, N.Y. CITY COUNCIL, <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4573837&GUID=0603C069-82DE-4977-904B-A07F3F468D90&Options=&Search=> [<https://perma.cc/8TS6-M8GR>] (last

Many expected that the Housing Stability and Tenant Protection Act, by effectively locking in stabilized rents, would make it more difficult for overleveraged landlords to keep their buildings.<sup>267</sup> And with the added strain of the COVID-19 pandemic, landlords who already had tight finances are likely to be in even worse shape.<sup>268</sup> Senator Myrie's TOPA proposal is designed to take advantage of those landlords leaving the market: when they decide to sell (or default on their loan), the law would require that tenants are offered the opportunity to buy those buildings first.<sup>269</sup> Especially in the context of the COVID-19 economic downturn, advocates hope this intervention will stave off some of the predatory real estate investment seen in New York City's 2001 and 2008 housing market drops.<sup>270</sup> Myrie's TOPA proposal will also be designed to further capitalize on this move away from a speculative model of housing<sup>271</sup> by facilitating tenant ownership in an LEC model.<sup>272</sup>

Like the D.C. law, Senator Myrie's proposal also includes the option for tenants to (1) buy the building, (2) assign that right to a developer of their choosing, or (3) concede their rights for a fee from the landlord.<sup>273</sup> The proposed legislation will also lay out a process for agreeing to a price: each side would get an appraisal, with a third party deciding if the appraisals differ.<sup>274</sup> The plan includes funding for tenants to buy their building through low-interest loans or other options, structured similarly to HPD's Neighborhood Pillars Program.<sup>275</sup> Additionally, it is intended to dovetail with the community land trust model; tenants can assign their first right of purchase to a CLT in New York City, which would be able to assist in developing the building as an affordable rental or LEC.<sup>276</sup>

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visited Nov. 13, 2020). The bill was introduced by Councilmember Carlina Rivera, who warned that "in times such as this, when the real estate market is in flux, . . . speculators can easily swoop in and increase gentrification in our neighborhoods." Sadeef Ali Kully, *Advocates: NYC Needs More Money, New Model to Meet Housing Crisis*, CITY LIMITS (June 26, 2020), <https://citylimits.org/2020/06/26/advocates-nyc-needs-more-money-new-model-to-meet-housing-crisis/> [<https://perma.cc/4JEE-HRZY>].

267. See Kromrei, *Make Landlords Give Tenants First Shot*, *supra* note 264.; see also *supra* Section I.C.

268. See Brenzel, *supra* note 104.

269. See Kromrei, *Make Landlords Give Tenants First Shot*, *supra* note 264.

270. See Kully, *supra* note 266.

271. See *id.*

272. See Pereira, *supra* note 264.

273. See Kromrei, *Make Landlords Give Tenants First Shot*, *supra* note 264.

274. See *id.*

275. See Pereira, *supra* note 264.

276. See Kully, *supra* note 266. CLT advocates in New York City have promoted both Senator Myrie's forthcoming bill and the city bill that would give nonprofit organizations the first right of purchase as mechanisms for CLTs to acquire property. See *id.*

Before successful implementation, this proposal will undoubtedly face many challenges. The biggest challenge, as with deeply affordable housing programs generally, is establishing a dedicated funding source that is substantial enough to support real estate acquisition in New York City.<sup>277</sup> Myrie conceded: “Anything touching on the budget will obviously be a source of contention, but what we’re really discussing here is investment for long term affordability, which I don’t view as a cost, but really, an investment.”<sup>278</sup> Another criticism, already leveled by some in the industry, is that tenant ownership programs require at least as much public funding as other affordable housing programs, often for many fewer units.<sup>279</sup> Critics also suggest that building management is too difficult a task for tenants.<sup>280</sup> Several New York City economic and racial justice organizations that work on housing, however, support the proposed plan.<sup>281</sup>

### C. Fleshing Out a Proposal for New York City

As shown in the variation between the models discussed above,<sup>282</sup> TOPA laws can differ by (1) who has the right to purchase and whether that right is assignable, (2) what ownership structures and affordability restrictions are required, (3) how the acquisition and rehabilitation are financed, (4) how the purchase price is decided, and (5) how the program is structured (which properties are included, how technical assistance is provided, notice requirements, and timeline structure). This proposal seeks to outline how each of these variables should be decided for a New York law,<sup>283</sup> based on the criteria above.<sup>284</sup>

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277. See Kully, *supra* note 266.

278. See Pereira, *supra* note 264.

279. See Kromrei, *Real Estate Pros*, *supra* note 15.

280. See *id.* This criticism, however, ignores that the law would include funding for technical assistance.

281. These organizations include the Community Service Society, the Urban Homesteading Assistance Board, the New Economy Project, and the tenant coalition Housing Justice For All. See Kromrei, *Make Landlords Give Tenants First Shot*, *supra* note 264.

282. See *supra* Section II.B.

283. This bill could be proposed at either the city or state level. If proposed at the city level, it may run afoul of home rule laws around housing legislation. It would not seem to be preempted by state legislation like the New York City’s Tenant Empowerment Act, which created a right of first refusal and first opportunity to purchase for tenants of buildings leaving the Mitchell-Lama and several federal housing programs. See *Real Est. Bd. of N.Y., Inc. v. City Council of City of N.Y.*, 842 N.Y.S.2d 218, 224 (Sup. Ct. 2007). Because a TOPA law would not directly set rents, it may not violate the Urstadt Law, either. However, challenges of this nature would be sidestepped if the legislation is introduced at the state level, even if it only applies to New York City.

284. See *supra* Section III.A.

*i. Who Has the Right to Purchase and Assignability*

The first variable — who has the right to purchase — concerns whether (1) the tenants themselves should have the opportunity to purchase (as with TOPA in Washington, D.C.), (2) community organizations should have that opportunity (as with COPA in San Francisco and the proposed COPA in New York City), or (3) the government itself may exercise that right (as in Montgomery County). The first option places emphasis on tenant empowerment, while the latter two place emphasis on the continued affordability of the housing, regardless of who is living in it. Per the above criteria, both tenant control and creating continued affordability of housing are goals important to develop in this proposal.

As D.C.'s program has shown, however, the law can do each of these: it can give the first decision to tenants, even as the City holds a secondary right to purchase if tenants opt not to take advantage of TOPA.<sup>285</sup> When the City exercises its right, as in D.C., it ultimately places the building in nonprofit ownership, with added affordability requirements.<sup>286</sup> Because of this, a city or district right to purchase and a nonprofit right to purchase collapse into the same category, in some ways.<sup>287</sup> The question, then, is which group should take priority in a purchase opportunity law: the tenants, or the city and nonprofits.<sup>288</sup>

Because tenant control is a main criterion for this proposal, tenants should be given the first right to decide the future of their home. Tenants can then exercise their option to either take ownership themselves through an LEC model<sup>289</sup> or choose a nonprofit developer to partner with to preserve the building as affordable rentals.<sup>290</sup> Tenants' first right of purchase should take precedence over the City's right for all the same

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285. See D.C. CODE ANN. § 42-3404.32(a) (West 2008) ("The District's opportunity to purchase shall be subordinate to the right of a tenant."); *supra* Section II.B.i.

286. See REED, *supra* note 154, at 4.

287. If a city were to buy a multifamily apartment building and keep ownership, it would be a form of public housing. While this is a possibility contemplated by some, it is a different undertaking than usually intended by TOPA, COPA, and DOPA laws.

288. Further complicating this question is the fact that tenants, in exercising their right, may choose to assign their right to a nonprofit developer of their choice, in furtherance of a partnership in which the tenants would not have ownership, but could have a level of input in the process. See DIAMOND, *supra* note 151, at 6.

289. Tenant ownership can be a powerful tool when chosen by a tenant association, so (as Senator Myrie appears to intend) LECs should be a primary option for tenants to consider. See Pereira, *supra* note 264. The LEC ownership structure provides an especially good path for low-income tenants to become homeowners for two reasons: the initial price for membership and monthly maintenance fees are both low and, because the cooperative is obtaining the loan, individual household credit does not factor in. See Reed, *supra* note 154, at 4.

290. See *infra* Section III.C.ii.

reasons that tenant control is an important dimension of social housing: it re-distributes power back from the landlord to the tenants, leads to outcomes that better fit the community, and provides a mechanism for addressing racial and economic inequality.<sup>291</sup>

As seen in Washington, D.C., the majority of tenants whose buildings are for sale do not take advantage of their TOPA rights.<sup>292</sup> One way to recapture this missed opportunity is to give the City a secondary purchase right, which it may use if the tenants opt not to use theirs.<sup>293</sup> After purchasing a property, the City can then transfer it to a nonprofit developer with additional affordability requirements.<sup>294</sup> The City thus is able to intervene and preserve the affordability of that building, whether or not the tenants decide to exercise their right.

While a first right of purchase for a city may not be an ideal affordable housing policy in every case, it does have certain advantages. Compared with eminent domain,<sup>295</sup> for example, a broad statutory first right of purchase for a city is likely to be less politically objectionable because, under a TOPA law, the seller has already decided to sell.<sup>296</sup> Acquisition by eminent domain is also likely to be substantially more expensive<sup>297</sup> than preserving affordability under a TOPA law. However, unlike eminent domain, a TOPA law does not allow the City to choose *when* to buy a desired property.<sup>298</sup> In that respect, a first right to purchase is more similar to competitive purchase on the open market than it is to eminent domain.<sup>299</sup> The advantage of a city's first right to purchase over competitive purchase on the open market is that the purchase right gives the government agency

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291. See *supra* Section III.A.iii.

292. See DIAMOND, *supra* note 151, at 10. Ideally, New York's law would also help boost the percentage of buildings in which tenants make use of the law.

293. Washington, D.C., recently put into place a first right to purchase for the District, which will be secondary to TOPA. See Austerhuhle, *supra* note 178. Although the District will not be able to exercise its right until the tenants opt not to exercise theirs, the processes will run concurrently to cut down overall length of the process. See Telerski, *supra* note 178.

294. Because the City has limited resources to acquire buildings, prioritization of buildings will necessarily target those that are the most advantageous, in terms of opportunity to preserve or create affordability, or prevent displacement.

295. Eminent domain is "[t]he inherent power of a governmental entity to take privately owned property, esp. land, and convert it to public use, subject to reasonable compensation for the taking." *Eminent Domain*, BLACK'S LAW DICTIONARY (11th ed. 2019).

296. See Damrosch, *supra* note 149, at 818. Contrariwise, this also means that the City does not have control over timing of the sale, as it does with eminent domain.

297. See generally Yun-chien Chang, *An Empirical Study of Compensation Paid in Eminent Domain Settlements: New York City, 1990–2002*, 39 J. LEGAL STUD. 201 (2010).

298. The City does not choose when to buy because the law is triggered by the seller's move to sell.

299. See Damrosch, *supra* note 149, at 844.

bargaining power it would not otherwise have.<sup>300</sup> For example, Montgomery County commonly reaches agreements with developers that they agree to a moratorium on rent increases or another public benefit if the County waives its purchase right.<sup>301</sup> In this way, a government agency can use its purchase right to leverage other positive affordability outcomes, even if it does not ultimately buy.<sup>302</sup>

## *ii. Limitations on the Resulting Development Structure*

### *1. Ownership Structure*

Considerations about which entities should be given a first right of purchase are closely tied to what they would be permitted to do with that right. Washington D.C.'s TOPA law includes the full range of possible development structures: tenants may convert to an LEC, assign their purchase right to a nonprofit organization that could develop the building as affordable rentals, or assign their purchase right to a for-profit developer to create market-rate rentals or condominiums.<sup>303</sup>

New York City, however, should exclude the last category: market-rate rental or condominium developments. Rather, New York City's TOPA law should favor LECs first, and nonprofit-operated affordable rentals second. While the total cost of acquisition and rehabilitation would be similar for affordable rentals and LECs, the financing structure would be significantly different.<sup>304</sup> Both paths would likely have access to a range of government subsidies, but rentals would have the advantage of being the most common form of affordable housing, with several large subsidy programs available.<sup>305</sup>

Nascent conversations in New York among advocates about the possibility of this law are already rightfully centering LECs as a major goal

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300. *See id.* at 841–42.

301. *See id.* at 842.

302. *See id.* (“For example, Montgomery County will automatically waive its right of first refusal if the new buyer agrees to a three-year moratorium on rent increases.”).

303. *See supra* Section II.B.i.

304. Nonprofit-operated rentals would likely lean on government subsidy and other pre-existing financing mechanisms, such as the Neighborhood Pillars program, and the floor for affordability would be determined by those programs.

305. Buyouts that allow the developer to increase rents or condo prices and therefore ensure higher rental income, however, have been common in D.C. *See* KATHRYN HOWELL, SCOTT BRUTON & ANNA CLEMENS, COAL. FOR NONPROFIT HOUS. & ECON. DEV., CREATING AND SUSTAINING LIMITED-EQUITY COOPERATIVES IN THE DISTRICT OF COLUMBIA (2020), [https://www.cnhed.org/wp-content/uploads/2020/03/Creating-and-Sustaining-Limited-Equity-Cooperatives-in-Washington-DC\\_FINAL.pdf](https://www.cnhed.org/wp-content/uploads/2020/03/Creating-and-Sustaining-Limited-Equity-Cooperatives-in-Washington-DC_FINAL.pdf) [<https://perma.cc/K55V-H45S>].

of the proposed legislation.<sup>306</sup> In many ways, LECs epitomize tenant empowerment, while also providing long term, deep affordability.<sup>307</sup> LECs have downsides,<sup>308</sup> but overall do the most to shelter buildings from market pressure, benefitting both tenant-owners and the broader neighborhood.

Affordable, nonprofit-run rentals are the other development structure New York City should allow in its TOPA law. As with LECs, the law could require rentals to have long-term and deep affordability, and could also incentivize tenant governance mechanisms.<sup>309</sup> However, renters have less control over their housing than tenant-owners in LECs, and may have different affordability outcomes due to different financing models.

Tenants may have good reason to prefer to use their first right of purchase to create affordable rentals rather than an LEC, however. In larger buildings, especially, tenants may prefer a rental building because that structure lets a nonprofit organization rather than the tenant association take on the financial risk and labor.<sup>310</sup> Depending on the funding options provided by the City, it also may not be possible or desirable for tenants to take on the financing burden of an LEC themselves. And depending on the makeup of individual buildings, tenants may or may not prefer homeownership.<sup>311</sup> Because LECs require proactive tenant buy-in, buildings acquired through the City's secondary purchase right would also result in nonprofit-owned affordable rental apartments.

## 2. Type of Owner

Related to the ownership structure of buildings that opt to use a possible TOPA law are permissible owner types. While the building's tenants are the initial deciders, and they have the option of becoming the ultimate building owners, they can also assign their right to a nonprofit developer. However, unlike D.C.'s TOPA law, a TOPA law for New York City should not allow buildings acquired through the law to be assigned to for-profit developers. For-profit developers agree to a deal in order to extract profit. So, the affordable rents that tenants may be promised come at the cost of

306. See Kromrei, *Make Landlords Give Tenants First Shot*, *supra* note 264.

307. See Reed, *supra* note 154, at 4–5. LECs may also be less likely than other affordable options, such as rentals, to rely on market-rate units to cross-subsidize affordable units.

308. See *supra* Section II.C.i.

309. Mitchell-Lama rentals, for example, give tenants rights over certain governance decisions. See Mironova & Waters, *How Social Is That Housing?*, *supra* note 128.

310. See Oscar Perry Abello, *How Tenants in D.C. Are Preserving Their Affordable Apartments*, NEXT CITY (Jan. 19, 2018), <https://nextcity.org/daily/entry/how-tenants-dc-preserving-apartments> [<https://perma.cc/8CGJ-44VN>] (noting that working with a developer, nonprofit or not, is “typical” for larger buildings taking advantage of TOPA).

311. Younger or otherwise transient tenants, for example, may prefer to rent.

affordability for other units or future tenants. While for-profit developers of market-rate rentals or condominiums usually provide discounts or protections to tenants who opt to stay, they do not lock in affordability for the building broadly, and they leave the building open to market pressures going forward.<sup>312</sup> Allowing for-profit developers to benefit from a TOPA law would also fail to challenge the extractive model of residential real estate ownership that this law seeks to impede. New York City should therefore not permit profit-seeking developers to be assigned a TOPA right.<sup>313</sup>

### 3. *Affordability Restrictions*

Housing affordability is multi-faceted: developing a rental building with below-market rents creates inevitable tradeoffs.<sup>314</sup> Depending on the amount of funding available, tenants may need to choose between how far below market the rents are set, versus how long they are guaranteed at that level, versus the overall number of affordable units in a building.<sup>315</sup> Because each of the three dimensions of affordability is important, this proposal will allow tenants to decide how to weigh each dimension in their redevelopment. For example, tenants may opt to develop two vacant units in the building as market-rate rentals to subsidize deeper affordability for units already occupied by low-income tenants when the sale occurs.

While tenants should be able to make decisions that best fit their needs to an extent, any funding that comes with a TOPA law for New York should also impose an affordability floor. In D.C., for example, tenant associations that receive funding from the City's First Right Purchase Program typically must impose 40-year affordability restrictions.<sup>316</sup> And San Francisco's law requires all buildings acquired through its COPA to impose permanent affordability.<sup>317</sup> Affordable rental buildings around the country may also receive financing through other government subsidy programs, which impose affordability requirements as well.<sup>318</sup>

A TOPA law for New York City may also require, for example, that rents are set to be affordable for the tenants already in the building, or that

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312. See HOWELL ET AL., *supra* note 305 and accompanying text.

313. However, in service of affordability and a non-speculative housing model, nonprofit developers and affordable cooperatives *should* have the ability to strategically use commercial spaces or market-rate residential units to cross-subsidize more deeply affordable rents for the majority of units.

314. See *supra* Section I.E.

315. See *supra* Section I.E.

316. See Reed, *supra* note 154, at 4.

317. See *supra* Section II.B.ii.

318. See DIAMOND, *supra* note 151, at 13.



a certain percentage of rents for vacant units are set at levels affordable for current residents of the neighborhood. The value of letting a building's tenants decide the exact affordability breakdowns is that the outcomes will steer further toward what renters need, which is notably not reflected in what tenants usually have.<sup>319</sup>

### *iii. Financing*

As illustrated in both the Stuyvesant Town example and in other cities that have attempted a law like this, the main obstacle between tenants and ownership is, frequently, access to capital. A TOPA law sets up the structure and timeline to allow tenants to secure financing, but a purchase right without a dedicated funding source is not enough to create a social housing pipeline (recall the Stuyvesant Town tenants who fell almost a billion dollars short of the winning bid).<sup>320</sup> Because the cost of real estate in New York City is so high, public subsidy would be required for tenants to afford acquisition costs.<sup>321</sup>

As Senator Myrie has noted, one way to make public funding for housing stretch further is by using and expanding on New York City's new Neighborhood Pillars program.<sup>322</sup> Neighborhood Pillars, unlike most City programs, was created to enable private acquisition of buildings to preserve affordability.<sup>323</sup> The program works by strategically leveraging a smaller amount of public funding to secure private financing.<sup>324</sup> Neighborhood Pillars' financing mechanism could be adapted to tenant or nonprofit acquisition of buildings through a TOPA law.

### *iv. How Purchase Price Is Determined*

New York City's TOPA law should set the purchase price for building sales at the amount of the highest third-party offer.<sup>325</sup> The other two ways to set the purchase price in a right of first refusal transaction are formula

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319. See OFF. OF N.Y.C. COMPTROLLER SCOTT M. STRINGER, *supra* note 25, at 11.

320. See *supra* Introduction.

321. Federal subsidy is generally required for an acquisition program of this size. See Ingrid Ellen et al., *Using a Down Market to Launch Affordable Housing Acquisition Strategies*, BROOKINGS INST. (July 23, 2020), <https://www.brookings.edu/research/using-a-down-market-to-launch-affordable-housing-acquisition-strategies/> [<https://perma.cc/G59W-AT79>].

322. See Pereira, *supra* note 264.

323. See *id.*

324. See *supra* Section II.C.ii.

325. This method derives from the common law definition of a right of first refusal. See CORBIN & HOLMES, *supra* note 145. This is also the pricing mechanism for D.C.'s TOPA. See *supra* Section II.A.

price and appraised market price.<sup>326</sup> As opposed to using a formula price, the highest third-party offer may seem fairer to the seller because it is what they would have received in the absence of the TOPA law. And in contrast to the appraised market price, the highest third-party offer is less expensive to obtain, and less subject to bias.<sup>327</sup> The shortcomings of each method demonstrate the slipperiness of “market price,” but the highest third-party offer is the most practical option. While this method requires the landlord to list their building and receive offers to set the TOPA price, it avoids the likely pitfalls of the other options.

#### *v. Program Structure*

Beyond the main elements related to right holders, development structure, financing, and sales price, there are a number of smaller program details that need to be included in the law and its regulations. For example, the law and regulations will have to state which properties are subject to a first right to purchase, the timeline and notice requirements, and what type of technical assistance will be available for tenants.

While D.C.’s TOPA originally included *all* rental buildings in the City in the statute,<sup>328</sup> many other TOPA programs only apply to residential buildings with more than a certain number of units or built before a certain year.<sup>329</sup> D.C. changed its law in 2018 to exclude single-unit buildings in response to objections that tenants “with no real interest in buying the unit” were too easily able to use “delay tactics and other unscrupulous actions.”<sup>330</sup> Limiting eligible buildings to those built before the law is passed may also counteract a possible disincentive for new development. In order to facilitate the criteria in this proposal, however, eligible buildings should be defined as broadly as possible. The downsides of including more buildings are relatively small compared to the benefit of giving tenants the opportunity to secure long-term, deeply affordable housing.

Lawmakers will also have to strike a careful balance in determining the timeline on which tenants must exercise their rights and the ways that sellers must provide notice. Because a TOPA law’s requirement to act in coordination is a significant demand on tenants, a more generous timeline for tenant decisions is better for them. Giving tenants more time to reach a

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326. See Damrosch, *supra* note 149, at 823.

327. See Public Affairs, *Berkeley Talks Transcript: How the Real Estate Industry Undermined Black Homeownership*, BERKELEY NEWS (Apr. 10, 2020), <https://news.berkeley.edu/2020/04/10/berkeley-talks-transcript-keeanga-yamahtta-taylor/> [<https://perma.cc/AX4X-5C4N>].

328. See *Rights of First Refusal*, *supra* note 148.

329. See Damrosch, *supra* note 149, at Appendix A1.

330. See *Rights of First Refusal*, *supra* note 148.

joint decision also increases tenant power by allowing time to collect information, and supports equitable outcomes by allowing more of the building's tenants, as well as possibly neighborhood stakeholders, to give input. However, sellers are likely to object if too much time is permitted for tenants to reach a decision and secure financing, because it delays the sale and increases their transaction costs. Legislators therefore must strike a balance, while erring toward tenant control.

Requirements for how sellers notify tenants of their rights are closely related to timeline considerations. While legislators must ensure that tenants receive proper notice of their landlord's intent to sell, notification requirements that are too complex also have a downside: they may leave both parties open to expensive litigation to unwind the deal years later if unambiguous compliance is too challenging.<sup>331</sup>

As already under discussion by both critics and proponents of Senator Myrie's proposal, it will be a substantial obstacle for the City to ensure sufficient technical assistance for tenants navigating this process.<sup>332</sup> Often unseen by renters, there is a significant amount of background knowledge and labor that goes into organizing tenant associations; making informed financial and other decisions as a tenant association; navigating city resources and laws, as well as private lenders' requirements; assessing, making decisions about, and overseeing the rehabilitation of the building itself; and then, management of the building itself once rehabilitation and transfer of ownership are complete.<sup>333</sup> Lack of available technical assistance across all of these areas has been a major contributor to why more tenants have not successfully taken advantage of TOPA in Washington, D.C.<sup>334</sup> Similarly, the provision of technical assistance has been a challenge in programs like the HDFC Cooperative program.

#### IV. CONSIDERATIONS FOR IMPLEMENTATION

This Part describes additional considerations for how to implement a successful TOPA law.

##### A. Contending with the Legacy of HDFC Cooperatives

Because it centers tenant ownership and cooperatives, a TOPA law for New York City will need to grapple with the substantial challenges faced by HDFC cooperatives — historically and at present. HDFC cooperative challenges have included the level of physical disrepair that buildings were

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331. See Damrosch, *supra* note 149, at 846.

332. See Pereira, *supra* note 264.

333. See DIAMOND, *supra* note 151, at 14–16.

334. See generally *id.*

in when they entered the program, lack of government oversight and resource allocation, and the difficulty of resident-led building management.<sup>335</sup> Because it is both a tenant ownership program and the City's main mechanism for creating LECs, the HDFC cooperative program resembles a TOPA law more closely than any other New York City housing program. The variety and magnitude of problems historically faced by HDFC cooperatives<sup>336</sup> mean that any new program that takes up the tenant ownership mantle will need to address HDFC cooperative program shortcomings clearly in order to succeed.

The buildings that were ultimately converted to HDFC cooperatives specifically came from the City's stock of buildings that had been neglected, abandoned, or even severely damaged by landlords.<sup>337</sup> A TOPA program in New York City beginning now therefore would not face nearly the level of disrepair that HDFC cooperative buildings had when tenants took ownership.

The City is also now better positioned to provide adequate oversight and resources and tackle the challenges inherent to resident-led building management. Indeed, the City has proposed reforms for the HDFC cooperative program<sup>338</sup> that could more easily be implemented for TOPA law LECs from the beginning.<sup>339</sup> HDFC cooperatives, especially at conversion, have not always had adequate technical assistance. The capacity that has been built over the decades, however, could be expanded to meet the new need.

The opposition of current HDFC cooperative shareholders to stronger regulations<sup>340</sup> may also provide insight into the challenges a TOPA law would face in New York City. Although the history between the programs would be different, similar tensions are likely to remain: homeownership

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335. *See supra* Section II.C.i. Michael Diamond details the technical issues faced by tenant associations in forming and buying their buildings to create cooperatives. *See* DIAMOND, *supra* note 151, at 2.

336. *See supra* Section II.C.i.

337. *See* Scherer, *supra* note 210, at 954–56. HDFC cooperatives came from the stock of buildings that the City had foreclosed on and were thus in uncommonly poor condition. *See id.*

338. *See* Reicher, *supra* note 226.

339. Most HDFC cooperatives are almost completely unregulated; only 20% of HDFC cooperatives have regulatory agreements. *See* Frank Lovece, *The Off-Balance World of HDFC Co-ops*, HABITAT, May 2016, at 22–29. The rest have no formal mechanism through which the City can actively monitor or assist them. *See id.* This has led to City foreclosure of HDFC cooperatives in certain cases with a high level of financial distress. *See* Savitch-Lew et al., *supra* note 217. While there have been recent efforts to impose a regulatory agreement on all HDFC cooperative buildings that seek a tax abatement renewal, the issue has been very fraught. *See supra* Section II.C.i.

340. *See supra* Section II.C.i.

versus rentals, initial shareholders versus those who buy in later, and limits on homeownership benefits such as price caps and oversight by city government.<sup>341</sup> Combined with stronger program design, in which the City makes clear up front what types of resale restrictions will apply in exchange for subsidy, a TOPA law would have a much stronger chance of succeeding. Homeownership programs targeting historically redlined communities can be fraught, however,<sup>342</sup> and the City will still need to navigate the appropriate amount of regulation without undue paternalism.

### B. Legal Concerns

The main case in New York that sheds light on how courts would handle a TOPA law in New York City or State is *Real Estate Board of N.Y., Inc. v. City Council of City of N.Y.*,<sup>343</sup> which strongly points toward the constitutionality of a TOPA law in New York, especially if TOPA were passed at the state level. The case concerns a New York City purchase opportunity law, Local Law No. 79,<sup>344</sup> which gave tenants of certain state- or federally supported housing developments<sup>345</sup> the rights of first refusal and first offer when owners of those developments opted to leave those subsidized housing programs.<sup>346</sup> Quickly challenged by the Real Estate Board of New York, Local Law 79 was declared invalid by the Supreme Court of New York County.<sup>347</sup> Leaving aside the plaintiff's takings, due process, and equal protection claims, the court held that the state law that

341. LECs formed under TOPA would have oversight and a range of regulations designed to keep the LEC affordable permanently, partly because the LEC would be subsidized. Tenant owners, as has been true for HDFC cooperative shareholders, may chafe against having limitations that unsubsidized homeownership does not. Andrew Reicher, executive director of UHAB wrote compellingly on these issues in his op-ed in *City Limits* about the proposed HDFC cooperatives reforms. See Reicher, *supra* note 226.

342. Promotion of homeownership, especially to historically redlined racial groups, risks what Keeanga-Yamahtta Taylor calls "predatory inclusion," wherein the offer of an opportunity such as homeownership without correcting the underlying racist and exploitative system creates even worse outcomes for individuals who participate. See Nawal Arjini, *Keeanga-Yamahtta Taylor Says There Is No Housing Crisis: 'It's Just Housing Under Capitalism,'* NATION (Sept. 24, 2019), <https://www.thenation.com/article/archive/keeanga-yamahtta-taylor-race-profit/> [<https://perma.cc/JCE8-45BV>].

343. 842 N.Y.S.2d 218 (Sup. Ct. 2007).

344. N.Y. ADMIN. CODE § 26-801 (2005).

345. The programs were Mitchell-Lama (occupied on or after January 1, 1974), Project-Based Section 8, and HUD Sections 202, 207, 221, 232, and 236.

346. See John L. Kelly, *Local Law 79/New York City Tenant Empowerment Act — Update,* NIXON PEABODY (Apr. 26, 2007), <https://www.nixonpeabody.com/en/ideas/articles/2007/04/26/local-law-79new-york-city-tenant-empowerment-act-update> [<https://perma.cc/3C3Q-WQR2>].

347. *Real Est. Bd. of N.Y.*, 842 N.Y.S.2d at 227.

created one of the affordable housing programs did preempt the challenged local law.<sup>348</sup>

This decision bodes well for a state-level TOPA in New York State. Although Local Law No. 79 was invalidated, the grounds were limited to preemption relative to the state law that created the Mitchell-Lama housing program. So, the preemption issue could easily be sidestepped by enacting a TOPA law at the state level rather than the city level. A city-level TOPA law could also avoid preemption conflict in *Real Estate Board of N.Y.* by exempting buildings in government-subsidized housing programs authorized by state and federal laws.

Another possible legal challenge to TOPA laws is that their price-setting mechanism violates the takings clause.<sup>349</sup> However, TOPA laws that set the price using either the highest third-party offer or an appraised fair market value are likely to avoid takings clause violations.<sup>350</sup> Courts have found that a right of first refusal law does “not constitute a taking because property owners retain the use and enjoyment of their property, as well as the main economic value of selling their property.”<sup>351</sup> And even if a court found that a TOPA law violated a due process right, it seems likely that it would pass both the public use test and the just compensation test.<sup>352</sup>

A TOPA law in New York State, then, so long as the pricing mechanism is set properly, is not likely to face a successful constitutional challenge.

### C. Weighing Costs

The main critique of a possible tenant opportunity to purchase in New York City, shared by private real estate actors as well as nonprofit and government actors, is that it is too expensive per unit of preserved affordability.<sup>353</sup> While the program may be expensive if viewed on a per-unit basis, that analysis does not account for the broader benefits of deeply affordable housing in mission-aligned ownership: taking buildings off of the speculative market means that the gains for tenants are deeper, last longer, and extend beyond lower rents. The benefits include resident power and redress for historical injustice — it means a more just city for everyone.

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348. *See id.*

349. *See* Damrosch, *supra* note 149, at 821 n.42 (citing *Minn. United Snowmobilers Ass’n v. Block*, 660 F.2d 1240, 1254 (8th Cir. 1981)); *A Brief Review of State and Local Preservation Purchase Laws*, *supra* note 161, at 217.

350. *See* Damrosch, *supra* note 149, at 821 n.42.

351. Damrosch, *supra* note 149, at 821 n.42 (citing *Minn. United Snowmobilers*, 660 F.2d at 1254).

352. *See* Franzese, *supra* note 162, at 100–02.

353. *See* Kromrei, *Real Estates Pros*, *supra* note 15.

Further, the D.C. example actually provides reasons to feel optimistic about the cost-benefit analysis of LECs developed under a TOPA law, even viewed in purely economic terms.<sup>354</sup> And preliminary data from the Neighborhood Pillars program indicates that after leveraging private financing, the amount of subsidy-per-unit for rental rehabilitation and preservation compares favorably to other preservation programs.<sup>355</sup> So, in addition to providing a host of benefits beyond low rents, offering a purchase right to LECs may also be a good deal.

The COVID-19 economic downturn and housing market fallout after the 2019 rent laws may together provide an opportunity for New York City to facilitate the conversion of failing buildings on the private market into social housing. In addition to its market consequences, the pandemic has also created a surge in the already crisis-level need for housing that people can afford in New York City.<sup>356</sup> So while the suffering economy has already started to limit public resources for all but the most essential programs,<sup>357</sup> any available funding dedicated to a TOPA law would pay dividends into the future.

And meanwhile, a greater political appetite for rethinking housing has become clear in New York City. A powerful tenant coalition brought about the 2019 laws, which were seen as sweeping and radical.<sup>358</sup> Many of the same activists and advocates have been pushing to cancel rent amidst the COVID-19 pandemic.<sup>359</sup> The latter movement, especially, is in sync with a national conversation to reprioritize housing in the Homes Guarantee platform<sup>360</sup> and federal legislation such as Congressperson Ilhan Omar's rent relief bill.<sup>361</sup> These changes bode well for a TOPA law in New York.

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354. See Reed, *supra* note 154, at 4.

355. See City and Partners Announce First Round of Acquisitions, *supra* note 233.

356. See Oksana Mironova & Thomas J. Waters, *A Sudden Shock to an Overburdened System: NYC Housing & COVID-19*, CMTY. SERV. SOC'Y (Apr. 6, 2020), <https://www.cssny.org/news/entry/nyc-housing-covid-19> [<https://perma.cc/R4ML-9XAA>].

357. See Mays, *supra* note 42.

358. See Samuel Stein, *Tenants Won This Round*, JACOBIN (June 18, 2019), <https://jacobinmag.com/2019/06/new-york-housing-tenants-universal-rent-control> [<https://perma.cc/8KK9-HGVZ>] (calling the legislation "a striking expression of tenants' power").

359. See Sadeef Ali Kully, *Fearing Evictions, Tenant Groups Push Rent Cancellation, New Housing Voucher*, CITY LIMITS (July 20, 2020), <https://citylimits.org/2020/07/20/fearing-evictions-tenant-groups-push-rent-cancellation-new-housing-voucher/> [<https://perma.cc/8V5P-APE3>].

360. See PEOPLE'S ACTION, A NATIONAL HOMES GUARANTEE (2019), [https://homesguarantee.com/wp-content/uploads/Homes-Guarantee\\_-Briefing-Book.pdf](https://homesguarantee.com/wp-content/uploads/Homes-Guarantee_-Briefing-Book.pdf) [<https://perma.cc/6J3K-QR42>].

361. See Mironova & Waters, *Social Housing*, *supra* note 31.

A last concern is that giving tenants the power to decide how their building is developed may create outcomes that favor the tenants ahead of other interests. For example, if six out of ten units in a building are occupied when the tenants exercise their TOPA rights, the tenants would be reasonably inclined to set higher rents in the currently vacant units to subsidize lower rents in their own apartments. While the law should place some limits on options that favor individual tenants over sustainable affordability (especially when tied to funding), this proposal also defers broadly to the principle that what is good for tenants is also good for neighborhoods.

### CONCLUSION

New York City has not meaningfully addressed its housing crisis through existing affordable housing programs, which, despite investing a lot of money, have failed to create the amount, depth, or length of affordability needed to address the problem. As argued above, this is largely because the main affordable housing programs at the local, state, and federal levels are all geared toward private investment and operate within the speculative market. The shortcomings of New York City's current models show that we need to think about housing differently: less as a commodity and more as a public good. Social housing is a response to this issue because it not only provides a practical solution to the shortcomings of current major housing programs by reducing market pressure on housing, but also prioritizes resident control and social equity — two major absences in current housing models.

The market changes after the state rent reforms in 2019, as well as the oncoming economic downturn, present both opportunities and challenges to the goal of decommodifying housing. While local and state governments will be stretched thinner in many ways, the market may also be more accessible for non-traditional buyers like tenant associations and nonprofit organizations. The economic downturn also promises to make the City's already precariously housed residents struggle even more, making it a pivotal moment to begin implementing a social housing policy.

A TOPA law holds the promise to provide social housing in New York City on a scale that could make an impact, especially given this heightened moment. It would take advantage of the softening multifamily real estate market in New York City, even as it stops (ongoing and oncoming) tenant displacement. Because the law would cover all privately owned multifamily rental buildings, it would have an impact both across the City and over time. A mechanism for creating more truly affordable housing is the clear next step in promoting housing justice in New York City and making the City more just and livable for all its residents.