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## **Billionaires' Row as Intellectual Property: "Intellectualization" of Real Property in the Ultraluxury Housing Market**

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# BILLIONAIRES’ ROW AS INTELLECTUAL PROPERTY: “INTELLECTUALIZATION” OF REAL PROPERTY IN THE ULTRALUXURY HOUSING MARKET

*Lucas Daniel Cuatrecasas\**

*“Superprime” condominiums — condos worth more than \$10,000,000 — represent the apex of the land market in global cities. In New York City, several superprime condo developments have sprouted up in recent years, with many of them clustering in an area south of Central Park popularly dubbed Billionaires’ Row. This Article argues that these superprime condos, despite being real property, have begun to behave like intellectual property. This “intellectualization” of superprime condos has happened in three mutually reinforcing ways: (1) these condos depend on state regulation to give them surplus value; (2) these condos have become dematerialized; and (3) these condos’ dematerialized value — i.e., the intangible surplus they produce by conveying a narrative about an ultraluxury lifestyle — is largely untethered to the real property interest that underlies them. Viewing superprime condos as intellectual property offers unique arguments in support of the position that New York City must increase vertical density to alleviate its housing crisis — a crisis that superprime condos, under New York City’s current zoning regime, bring into further relief. Namely, it is not clear what public interest is served by state regulation’s facilitation of superprime condos’ intangible surplus, nor is it clear why state regulation has no so-called safety valve permitting reduction of that intangible surplus to further broader public goals (e.g., increasing housing stock).*

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\* J.D., New York University School of Law (2021); A.B., Harvard College (2018). Special thanks to Bo S. L. Kim and Paris Rogers for helpful comments on earlier drafts. All views and errors mine.

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### INTRODUCTION

Judges and scholars often define what intellectual property is by analogizing it to, or distinguishing it from, real property.<sup>1</sup> This makes some sense. Land ownership is one of the oldest ways to store wealth and has been of immense economic importance throughout history.<sup>2</sup> The term “intellectual property” is a more recent development in Western legal thought, even though some forms of intellectual property law have ancient origins.<sup>3</sup> Further, the law of intellectual property makes its subject matter

1. See, e.g., *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003–04, 1011 (1984) (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)) (holding that trade secrets are property for purposes of the Fifth Amendment’s Taking Clause and citing real property-related takings caselaw in its analysis of whether that property may have been taken); *James v. Campbell*, 104 U.S. 356, 358 (1881) (stating that a patent cannot be “appropriated or used by the government itself, without just compensation, any more than it can appropriate or use without compensation land which has been patented to a private purchaser”); Irina D. Manta, *Keeping IP Real*, 57 HOUS. L. REV. 349, 352–53, 357–58 (2019) (advocating for the use of an economic conception of rivalrousness in the analysis of intellectual property law, as opposed to the physical conception of rivalrousness used to analyze real and other physical property); Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1032–33 (2005) (calling it “fundamentally misguided” to view the economic characteristics of intellectual property as analogous to those of real property); Frank H. Easterbrook, *Intellectual Property Is Still Property*, 13 HARV. J.L. & PUB. POL’Y 108, 109 (1990) (“[T]he right to exclude [others from using your intellectual property] is no different in principle from General Motors’ right to exclude Ford from using its assembly line, or an apple grower’s right to its own crop.”); cf. KATHARINA PISTOR, *THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY* 24 (2019) (“[I]ntangibles . . . have outpaced land in the creation of wealth, but these assets use the same legal modules that were first tried and tested for coding land as capital.”).

2. See MATTHEW SOULES, *ICEBERGS, ZOMBIES, AND THE ULTRA THIN: ARCHITECTURE AND CAPITALISM IN THE TWENTY-FIRST CENTURY* 22 (2021) (“The quanta of architecture and urbanism (land, buildings, and their subdivided elements) have served as investment assets and vehicles to store wealth since at least the time of Vitruvius, the first century BCE . . . .”); *infra* note 40.

3. See, e.g., Robin Feldman, *Regulatory Property: The New IP*, 40 COLUM. J.L. & ARTS 53, 57 (2016) (“Although patents and copyrights trace their heritage back to the Constitution, the concept of intellectual property as a unified field developed more recently, emerging in

— ideas that are, as a non-legal matter, freely usable and duplicable — behave more like real property, a limited resource.<sup>4</sup> So thinking of the newer category of “intellectual property” in terms of the older category of real property is understandably convenient.<sup>5</sup>

Conversely, this Article argues that a rarefied form of real property — superprime condominium residences in global cities<sup>6</sup> — has begun to behave like intellectual property.<sup>7</sup> These ultraluxury homes for the superrich represent the apex of the urban land market, with “superprime” often defined as a residence worth more than \$10,000,000.<sup>8</sup> Owning real property has

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its current incarnation largely in the 1980s.” (footnote omitted)); Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839, 1849 (2007) (“Use of markings to identify and distinguish one’s property dates to antiquity, and regulations regarding use of those marks almost as long.”); cf. Sidney A. Diamond, *The Historical Development of Trademarks*, 65 TRADEMARK REP. 265, 266–67 (1975) (indicating that the practice of “branding” animals with marks began in antiquity, “long before reading and writing, so that for many centuries brands took the form of designs only”).

4. See, e.g., Mark Lemley, *IP in a World Without Scarcity*, 90 N.Y.U. L. REV. 460, 468 (2015) (“[T]he point of IP laws is to take a public good that is naturally nonrivalrous and make it artificially scarce, allowing the owner to control how many copies of the good can be made and at what price.”); see also Barton Beebe, *Intellectual Property and Post-Scarcity Society*, 2019 SING. J.L. STUD. 377, 386 (explaining that, while intellectual property law is generally intended to incentivize innovation by limiting reproduction of intangible assets, intellectual property law serves a corollary function of supplying scarcity needed for people to differentiate themselves “within a mass global consumer society”).

5. But cf. Feldman, *supra* note 3, at 58 (“Despite valiant efforts across time to equate some forms of intellectual property with property such as land, intellectual property defies that categorization.”).

6. See generally SASKIA SASSEN, *THE GLOBAL CITY: NEW YORK, LONDON, TOKYO* (2d ed. 2001) (identifying and analyzing the characteristics of “global cities”).

7. A key part of this Article’s thesis is that *law* gives superprime condos scarcity value. The somewhat adjacent analogy between superprime condos and assets whose value depends on distributed ledger technologies (i.e., computer code) goes in the right direction but picks an analogue that is factually inapposite. *Contra* Jonathan V. Last, *Towers of Babel*, BULWARK (Jan. 3, 2023), <https://plus.thebulwark.com/p/towers-of-babel> [<https://perma.cc/4VBX-D2RK>] (calling Billionaires’ Row residences “brick-and-mortar NFT[s] . . . The design and construction process is like crypto mining; the building is its own blockchain”). For the distinction between law and code, see generally LAWRENCE LESSIG, *CODE: VERSION 2.0* 120–37 (2006).

8. See, e.g., KNIGHT FRANK, *NEW YORK MARKET INSIGHT Q2 2023* 2 fig.2 (2023), <https://content.knightfrank.com/research/1203/documents/en/new-york-insight-q2-2023-10033.pdf> [<https://perma.cc/M8RL-T247>] (defining superprime sales as \$10,000,000+). Commentators sometimes use the term “ultraprime” to refer to the subset of superprime residences that exceed \$25,000,000 in value. See, e.g., KNIGHT FRANK, *THE WEALTH REPORT* 39 (2023) [hereinafter *WEALTH REPORT*], <https://content.knightfrank.com/resources/knightfrank.com/wealthreport/the-wealth-report--apr-2023.pdf> [<https://perma.cc/RYN3-3WFU>] (defining ultraprimed sales as \$25,000,000+); cf. *Super Prime Property*, BUYING AGENTS, <https://www.thebuyingagents.com/super-prime-property> [<https://perma.cc/V9B5-5VFK>] (last visited Oct. 23, 2023) (“[M]ost agents only refer to ultra-prime markets. An ultra prime [sic] market has three or more transactions above USD25,000,000 each year for three consecutive years.”). That said, commentators seem to

always gone together with wealth to some degree,<sup>9</sup> but superprime condos serve a more specialized economic purpose. Superprime condos have recently entered “a distinctive phase”<sup>10</sup> in which they have become “a new world currency,”<sup>11</sup> with their “function . . . as profit-generating investment assets ris[ing] to such significance that in many instances it overshadows the historically more prominent roles of [providing] shelter and [manifesting] culture.”<sup>12</sup> This use of ultraluxury real estate as “vertical money” appears to have become especially prominent among the recently built superprime condos south of New York City’s Central Park — the cluster of buildings popularly dubbed “Billionaires’ Row.”<sup>13</sup>

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use the term “ultraluxury” to refer to residences that fall within the \$10,000,000 superprime price cutoff, with the alternative term “superluxury” sometimes referring to residences falling within a lower price cutoff. *See* Turney Duff, *Tesla-Charging Stations and Dog Spas: What New York’s Luxury Real-Estate Buyers Want Right Now*, CNBC (Oct. 20, 2017, 3:50 PM), <https://www.cnbc.com/2017/10/20/tesla-charging-and-dog-spas-new-york-luxury-real-estate-commentary.html> [<https://perma.cc/LLF3-7NM7>] (“Sub-\$10 million apartments aren’t considered ultra-luxury in New York City’s real-estate market, says ‘Million Dollar Listing’ star Ryan Serhant.”); Julie Satow, *Luxury Condos: Dialing It Down*, N.Y. TIMES (Oct. 3, 2014), <https://www.nytimes.com/2014/10/05/realestate/luxury-condos-dialing-it-down.html> [<https://web.archive.org/web/20141004143625/https://www.nytimes.com/2014/10/05/realestate/luxury-condos-dialing-it-down.html>] (“[Appraisal firm Miller Samuel] defines luxury as . . . listings for \$3.25 million and higher; superluxury as . . . around \$5 million and higher; and ultraluxury as . . . anything starting at around \$10 million.”).

9. *See supra* note 2 and accompanying text; *infra* notes 40, 42 and accompanying text.

10. SASKIA SASSEN, *EXPULSIONS: BRUTALITY AND COMPLEXITY IN THE GLOBAL ECONOMY* 134 (2014).

11. Oliver Wainwright, *Super-Tall, Super-Skinny, Super-Expensive: The ‘Pencil Towers’ of New York’s Super-Rich*, GUARDIAN (Feb. 5, 2019, 1:00 AM), <https://www.theguardian.com/cities/2019/feb/05/super-tall-super-skinny-super-expensive-the-pencil-towers-of-new-yorks-super-rich> [<https://perma.cc/9GVM-Q59G>].

12. SOULES, *supra* note 2, at 23.

13. Martin Filler, *New York: Conspicuous Construction*, N.Y. REV. BOOKS (Apr. 2, 2015), <https://www.nybooks.com/articles/2015/04/02/new-york-conspicuous-construction> [<https://web.archive.org/web/20160311163307/http://www.nybooks.com/articles/2015/04/02/new-york-conspicuous-construction/>]; *see also* Kevin Baker, *The Death of a Once Great City*, HARPER’S (July 2018), <https://harpers.org/archive/2018/07/the-death-of-new-york-city-gentrification> [<https://perma.cc/Z9X2-8FQZ>]; David Gelles, *The Logic of an Empty \$100 Million Pad*, N.Y. TIMES (Feb. 9, 2015), <https://www.nytimes.com/2015/02/10/business/the-logic-of-an-empty-dollar100-million-pad.html> [<https://web.archive.org/web/20150213073509/https://www.nytimes.com/2015/02/10/business/the-logic-of-an-empty-dollar100-million-pad.html>]. The exact geographical boundaries of Billionaires’ Row are somewhat fluid, but most commentators seem to understand them to comprise four superprime developments on or abutting Fifty-Seventh Street between Park Avenue and Eighth Avenue: 432 Park Avenue, 111 West 57th Street (“Steinway Tower”), One57, and Central Park Tower. KATHERINE CLARKE, *BILLIONAIRES’ ROW: TYCOONS, HIGH ROLLERS, AND THE EPIC RACE TO BUILD THE WORLD’S MOST EXCLUSIVE SKYSCRAPERS* xvi (2023). Commentators also often include other geographically proximate superprime developments, including one or both of 220 Central Park South and 53 West 53 (the “MoMA Tower”), even if those developments are not on or abutting Fifty-Seventh Street. *See id.* (including 220 Central Park South); The BIM, *Why New York’s Billionaires’ Row Is Half*

As this Article will show, this transformation of real property into an investment asset — a currency — has been accompanied by a curious, telling side effect: superprime condos and the law that governs them increasingly function more like intellectual property and the various legal regimes that govern it. This Article focuses only on superprime condos in New York City, the largest market for superprime residences.<sup>14</sup> But some of its conclusions regarding this “intellectualization” of real property can likely be extrapolated to similar superprime markets around the globe.<sup>15</sup>

This “intellectualization” of New York City superprime condos has occurred in three mutually reinforcing ways. *First*, the value of these condos depends on state regulation — most prominently, though not exclusively, zoning law.<sup>16</sup> The key here is that it is spatially possible to have a significantly higher number of residences with the structural features of superprime condos. Yet zoning law helps prevent construction of such new, similar condos.<sup>17</sup> In so doing, it preserves the scarcity value of existing condos, which significantly depends on their relationship to the zoned topography of the city (e.g., unobstructed views of urban landmarks).<sup>18</sup> This is similar to how, in the form of intellectual property law, state regulation prevents reproduction of (somewhat) nondepletable and nonrivalrous ideas,<sup>19</sup> which would otherwise be much more widely duplicated.

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*Empty*, YOUTUBE (Dec. 15, 2021), <https://www.youtube.com/watch?v=Wehsz38P74g&t=612s> [<https://perma.cc/MQH3-7M3P>] (including 220 Central Park South, 53 West 53, 520 Park Avenue, and 252 East 57th Street). The four buildings on or abutting Fifty-Seventh Street, along with 53 West 53 (but not the 290-meter 220 Central Park South), are all “supertall,” a term the Council on Tall Buildings and Urban Habitat defines as 300 meters (984 feet) or taller. *See* CLARKE, *supra*, at xx–xxi; Charlie Burton, *The Ultra-Skinny Skyscrapers of New York’s Billionaire’s [sic] Row*, GQ (Mar. 23, 2019), <https://www.gq-magazine.co.uk/article/skyscraper-new-york> [<https://perma.cc/9MGF-NFT3>]; *Tall Building Criteria*, COUNCIL ON TALL BLDGS. & URB. HABITAT, <https://www.ctbuh.org/resource/height> [<https://perma.cc/3CKU-4H9M>] (last visited Nov. 2, 2023). In an effort to achieve significant height while complying with zoning-code floor-area limitations, those buildings (including 220 Central Park South) all also have a base-to-height slenderness ratio or 1:8 or lower, with 111 West 57th Street’s 1:24 ratio making it the world’s thinnest skyscraper. Burton, *supra*; *see infra* Section I.B.

14. *See infra* note 46 and accompanying text.

15. *See infra* note 55 and accompanying text.

16. *See* discussion *infra* Section II.A.

17. *See infra* text accompanying notes 80–81, 94–98.

18. *See infra* text accompanying notes 100–03, 111. It is obviously true that zoning restrictions can increase the scarcity of any type of residence. The fact pattern here is somewhat unique because, as further detailed in Part II, superprime condos’ value depends not on the use for which they are zoned (residential use) but, rather, on zoning itself.

19. *See* Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 809, 825–26 (2010) (explaining that, while the “conventional wisdom” is “that intellectual properties constitute nondepletable goods, the consumption of which is nonrivalrous,” increased use of certain intellectual property can reduce its relative utility);

*Second*, while ownership of a superprime condo is ultimately ownership of tangible property, superprime condos have increasingly become dematerialized and abstracted from their physical existence.<sup>20</sup> At one level, this occurs through the fact that owners of superprime condos often use them as investments or wealth storage mechanisms — more akin to a financial instrument than a home.<sup>21</sup> But the market for these superprime condos has become dematerialized in deeper ways as well, including through the ability to buy and sell rights to purchase superprime condos in buildings that do not yet exist.<sup>22</sup>

*Third*, and most importantly, the actual value of superprime condos to their owners appears to be largely disconnected from physical space. Rather, the value of superprime condos is tied to an intangible narrative about the owner and their lifestyle.<sup>23</sup> Although many forms of residential property may be intended to communicate such a narrative,<sup>24</sup> superprime condos are unique in that ownership of the tangible property interest in such a condo is a mere pretext for the *real* value: ownership of the *idea* of living in such a residence. This point is brought into stark relief by the fact that the owner often, perhaps usually, does not actually live in that residence.<sup>25</sup>

This “intellectualization” of real property may seem like a discrete, perhaps esoteric phenomenon. But it has far-reaching effects. The superprime condo market, a substantial but rather niche market,<sup>26</sup> represents

Manta, *supra* note 1, at 358–73 (showing that trade secrets, trademarks, patents, and copyrights each have a certain degree of rivalrousness).

20. *See infra* Section II.B.

21. *See infra* note 118 and accompanying text.

22. *See infra* text accompanying notes 125–30, 154.

23. *See infra* Section II.C.

24. *See, e.g.*, James Ackerman, *The Villa as Paradigm*, 22 PARADIGMS ARCHITECTURE 10, 29 (1986) (explaining that villas “inevitably express the mythology that causes [them] to be built,” including “power and class aspiration”).

25. *See infra* notes 117, 130 and accompanying text.

26. The total volume of superprime sales in 2022 was \$26.3 billion. WEALTH REPORT, *supra* note 8, at 39. For perspective, consider that the size of the fine art market — a market to which commentators often analogize the superprime condo market, even if these markets can involve different types of buyers — was about \$67.8 billion in 2022. *See* ART BASEL & UBS, THE ART MARKET REPORT 14, 101 fig.2.27 (2023), <https://theartmarket.artbasel.com/download/The-Art-Basel-and-UBS-Art-Market-Report-2023.pdf> [<https://perma.cc/ZKA4-6UWV>] (showing that 23% of sales in 2022 were to museums, private institutions, or other art market professionals, with the remainder of the sales being made to private collectors (72%) or art advisors and interior designers (5%)); *see also* James B. Stewart, *Overpriced Real Estate? Well, Maybe It's Art*, N.Y. TIMES (Aug. 31, 2012), <https://www.nytimes.com/2012/09/01/business/prices-for-luxury-real-estate-keep-rising-it-must-be-art.html> [<http://web.archive.org/web/20201112043113/https://www.nytimes.com/2012/09/01/business/prices-for-luxury-real-estate-keep-rising-it-must-be-art.html>] (critiquing the analogy between the fine art market and the luxury real estate market). Unsurprisingly, the size of

the confluence of broader trends in urban development and cross-border capital flows, with significant implications for global inequality.

Most obviously, superprime condos deplete the housing stock in global cities, like New York City, that are facing severe affordable housing crises.<sup>27</sup> They do this both by occupying land on which affordable housing could be developed and by raising the market price of residential property more generally.<sup>28</sup> Both processes further the “expulsion” of urban residents of more modest means from cities and, in so doing, deepen the widening gulf between the superrich and the rest of humanity.<sup>29</sup> Further, architectural and urbanist writing on ultraluxury residences in global cities has associated superprime condos with a separate class of negative externalities centered on the physical environment. These negative externalities include “kill[ing] much [of the] urban tissue” — e.g., “little streets and squares, density of street-level shops and modest offices” — that gives cities their vitality,<sup>30</sup>

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mainstream markets with corporate buyers (e.g., the market for corporate control) dramatically outmatches the size of these smaller markets for what we could potentially consider Veblen goods. See Hal J. Leibowitz et al., *2022 M&A Review and Outlook*, WILMERHALE (Apr. 27, 2023), <https://www.wilmerhale.com/en/insights/blogs/material-wilmerhale-ma/20230417-2022-m-a-review-outlook> [https://perma.cc/KV2U-WH5V] (noting that global deal volume in the mergers-and-acquisitions market was \$3.15 trillion in 2022).

27. See, e.g., ANNIE KUCKLICK & LISA MANZER, *FUND FOR THE CITY OF N.Y., OVERLOOKED & UNDERCOUNTED: STRUGGLING TO MAKE ENDS MEET IN NEW YORK CITY* 35 fig.AC (2023), <https://issuu.com/uwnyc/docs/nyctcl2023> [https://web.archive.org/web/20230629024116/https://issuu.com/uwnyc/docs/nyctcl2023] (showing that 50% of all New York City households live in unaffordable housing, if affordable housing is defined as housing for which no more than 30% of a household’s income is spent); Stefanos Chen, *Taller Towers, Fewer Homes*, N.Y. TIMES (Sept. 23, 2022), <https://www.nytimes.com/2022/09/23/realestate/nyc-apartments-housing-shortage.html> [https://web.archive.org/web/20220923090516/https://www.nytimes.com/2022/09/23/realestate/nyc-apartments-housing-shortage.html] (discussing luxury condos’ displacement of affordable housing).

28. See ROWLAND ATKINSON, *ALPHA CITY: HOW THE SUPER-RICH CAPTURED LONDON* 80–81 (2020) (explaining how, by generating an “over-heated and over-priced housing market,” luxury residential developments in London impose a “stealth tax” on all Londoners); SOULES, *supra* note 2, at 41 (“Housing costs are increasingly detached from local economies, prompting crises of affordability.”); Chen, *supra* note 27.

29. See THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 5–7 (Arthur Goldhammer trans., 2014) (noting the applicability to urban real estate of David Ricardo’s paradoxical observation that, as population and productivity increase, so will the price of land, exacerbating existing inequalities between landowners and the rest of society); Saskia Sassen, *Locked Out*, 160 *RSA J.* 20, 25 (2014) (explaining that the superprime market entails “a significant expulsion of homeowners from their urban space and a significant appropriation by global buyers of urban land”); see also SASSEN, *supra* note 10, at 1–11 (arguing that the global economy has entered a phase characterized by various “expulsions” of people from their environments or networks, due in part to the increasing breadth of asset classes that are financialized).

30. Saskia Sassen, *Who Owns Our Cities – and Why This Urban Takeover Should Concern Us All*, *GUARDIAN* (Nov. 24, 2015, 3:30 AM),



eroding the local specificity of existing neighborhoods,<sup>31</sup> and harming the physical environment (e.g., by dimming the city with the shadows cast by the supertall residential skyscrapers that often house superprime condos).<sup>32</sup>

Additionally, it is widely recognized that purchases of superprime condos may facilitate money laundering and tax evasion.<sup>33</sup> This is also a significant

<https://www.theguardian.com/cities/2015/nov/24/who-owns-our-cities-and-why-this-urban-takeover-should-concern-us-all> [<https://perma.cc/39WR-AG5Q>]; see Baker, *supra* note 13 (contending that New York City’s “favorite nooks and crannies are being annihilated” by luxury real estate development).

31. Alexandra Schwartz, *Hudson Yards Is the Hotel California of New York*, NEW YORKER (Mar. 23, 2019), <https://www.newyorker.com/culture/cultural-comment/hudson-yards-is-the-hotel-california-of-new-york> [<https://perma.cc/22NY-N4W2>] (characterizing recent luxury development in the Hudson Yards neighborhood of Manhattan as “all about a frictionless sameness: being able to do and eat and buy the same things, in the same kinds of settings, no matter where on the globe one may be”); Caitlin Blanchfield, *New York’s New Skyscrapers*, ARTFORUM (Mar. 2015), <https://www.artforum.com/print/201503/new-york-s-new-skyscrapers-50270> [<https://perma.cc/NY6Z-2NFQ>] (noting the “disjunction of scale and dislocation from context” that Billionaires’ Row superprime condo developments have in common); see also Roberta Brandes Gratz, *How New York Is Zoning Out the Human-Scale City*, N.Y. REV. BOOKS (Dec. 30, 2019), <https://www.nybooks.com/online/2019/12/30/how-new-york-is-zoning-out-the-human-scale-city> [<https://web.archive.org/web/20221208155614/https://www.nybooks.com/online/2019/12/30/how-new-york-is-zoning-out-the-human-scale-city/>] (opining that zoning policies enabling development of supertall buildings have wrought “cataclysmic” changes to the “city’s fabric” by “overwhelming the surroundings, dislocating current uses, dispersing existing tenants, and radically undermining the character of neighborhoods that have evolved over decades”).

32. See MUN. ART SOC’Y N.Y., *THE ACCIDENTAL SKYLINE* 20 figs.21 & 22 (2017), <https://www.mas.org/wp-content/uploads/2017/10/accidental-skyline-report-2017.pdf> [<https://perma.cc/5YVP-UW6K>] (showing the projected increase in shadows over Central Park between 2014 and 2025 due to superprime condo development); Bianca Bosker, *How Tall Is Too Tall?*, ATLANTIC (Dec. 17, 2022), <https://www.theatlantic.com/magazine/archive/2023/01/supertall-mega-skyscraper-building-nyc/672228> [<https://web.archive.org/web/20221217223042/https://www.theatlantic.com/magazine/archive/2023/01/supertall-mega-skyscraper-building-nyc/672228>] (noting that supertall residential skyscrapers are “energy-inefficient resource hogs,” although density-related efficiencies could offset this inefficiency); Warren St. John, *Shadows Over Central Park*, N.Y. TIMES (Oct. 28, 2013), <https://www.nytimes.com/2013/10/29/opinion/shadows-over-central-park.html> [<http://web.archive.org/web/20220622153208/https://www.nytimes.com/2013/10/29/opinion/shadows-over-central-park.html>] (explaining how superprime condo development on Billionaires’ Row can significantly block Central Park’s exposure to sunlight from the south).

33. See, e.g., Louise Story & Stephanie Saul, *Stream of Foreign Wealth Flows to Elite New York Real Estate*, N.Y. TIMES (Feb. 7, 2015), <https://www.nytimes.com/2015/02/08/nyregion/stream-of-foreign-wealth-flows-to-time-warner-condos.html> [<https://web.archive.org/web/20230415142809/https://www.nytimes.com/2015/02/08/nyregion/stream-of-foreign-wealth-flows-to-time-warner-condos.html>] (identifying several owners of luxury condominiums in the Time Warner Center in New York City and discussing findings or allegations that these owners or their affiliates engaged in crimes or other legal violations); sources cited *infra* notes 119–20. *But cf.* Carol Willis, *The Logic of Luxury 2.0*, in GLOBAL

problem. This problem takes on international dimensions when a national of one country engages in financial misconduct in connection with buying a superprime condo in another country.<sup>34</sup> Although the details of using superprime condos to conceal or cleanse income are beyond the scope of this Article, this aspect of the ultraluxury housing market contributes to inequality by eroding the tax base,<sup>35</sup> as well as perpetuating the illicit markets or activities that may be the source of those purchasers' funds.<sup>36</sup>

This Article's analysis has direct implications for understanding and mitigating these bad externalities of superprime condos. As an initial matter, this Article's analysis of zoning law's role in the superprime condo market supports a conclusion that is already widely (though far from universally) embraced: if New York City believes superprime condos' negative externalities in the form of affordable housing reduction and facilitation of financial misconduct are a net cost, then it should "upzone" to increase the housing stock.<sup>37</sup> More fundamentally, viewing superprime condos as intellectual property raises the question of why the law should underwrite the intangible surplus<sup>38</sup> — the idea of living in a place that reflects the

INTERCHANGES: RESURGENCE OF THE SKYSCRAPER CITY 24, 31 (Antony Wood & David Malott eds., 2015), <https://global.ctbuh.org/resources/papers/download/2434-the-logic-of-luxury-20.pdf>

[<https://web.archive.org/web/20230206084728/https://global.ctbuh.org/resources/papers/download/2434-the-logic-of-luxury-20.pdf>] (questioning the journalistic merits and methodology of *The New York Times*'s investigation of owners of condos in the Time Warner Center).

34. See *infra* notes 35–36, 119.

35. See Amadeo Argentiero et al., *Tax Evasion and Inequality: Some Theoretical and Empirical Insights*, 22 *ECON. GOVERNANCE* 309, 309 (2021) ("Tax evasion represents a major source of inequality irrespective of the redistribution goal in a country."). This dynamic furthers inequality internationally when nationals of poorer countries evade taxes in those countries via purchases of superprime properties in richer countries. ATKINSON, *supra* note 28, at 94 (explaining, in the context of superprime development in London, that "[l]aunders is a problem because much of it represents an evacuation of resources, primarily from poorer countries").

36. See Lisa A. Barbot, *Money Laundering: An International Challenge*, 3 *TUL. J. INT'L & COMP. L.* 161, 164–65, 167–69 (1995) (listing several ways money laundering can fund or perpetuate predicate criminal activity and describing how money may be laundered in jurisdictions other than the jurisdiction in which the predicate criminal activity occurred).

37. See discussion *infra* Section III.A.

38. My use of the term "intangible surplus" throughout this Article is intended to be descriptive. "Intangible" qualities — e.g., the view from the condo, its location, even its name — account for a substantial portion of a superprime condo's value. See *infra* text accompanying notes 99, 109, 111. Because these qualities necessarily make the condo more valuable than the cost of building the physical space of the condo (thus making the development of the condo financially viable), I refer to those qualities as "surplus." See KARL MARX, *CAPITAL: A CRITIQUE OF POLITICAL ECONOMY* 167–68, 207 (Frederick Engels ed., Samuel Moore & Edward Aveling trans., 1906) (giving the name "surplus value" to the difference between an original sum of money and the greater sum of money received for a commodity purchased with the original sum).

owner's ultraluxury lifestyle — enjoyed by superprime condo owners at the expense of housing for other New Yorkers.<sup>39</sup>

Part I of this Article first provides background on the ultraluxury housing market in global cities, with a focus on New York City. Part I then turns to a high-level overview of the zoning regime in New York City that enables and shapes superprime condos' value. Part II explains the three ways in which superprime condos have come to resemble intellectual property: they depend on state regulation to give them surplus value; they have become dematerialized; and their dematerialized value — their intangible surplus — is largely untethered to the real property interest that underlies them. Part III turns to the upshot of the foregoing analysis: at present, it is not clear that the intangible surplus that the law creates for superprime condo owners is adequately tempered by countervailing policy goals (e.g., increasing housing stock). A Conclusion follows.

## I. BACKGROUND

### A. The Ultraluxury Urban Housing Market

The close relationship between land and wealth is ancient.<sup>40</sup> And, indeed, today's global capitalist regime — which has the notion of transferable property rights at its core — is intimately linked to the development of real property law.<sup>41</sup> Nor, obviously, is the concept of using architecture to display and store wealth a new phenomenon.<sup>42</sup>

What is new is that super high-end real property in global cities — for example, New York, Los Angeles, and London — has emerged as a distinct

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39. See discussion *infra* Section III.B.

40. See Geoffrey P. Miller, *Land Law in Ancient Times*, 71 CHI.-KENT L. REV. 233, 233 (1995) (“Land was the principal source and reservoir of wealth in [ancient times]. To own substantial amounts of land was to be wealthy; not to own land was to depend on others who did.”); SOULES, *supra* note 2, at 22; see also Richard A. Benton et al., *Real Estate Holdings Among the Super-Rich in the USA*, in CITIES AND THE SUPER-RICH: REAL ESTATE, ELITE PRACTICES, AND URBAN POLITICAL ECONOMIES 41, 41 (Ray Forrest et al. eds., 2017) (“Historically, land ownership was the primary determinant of elite status . . . .”); PIKETTY, *supra* note 29, at 145–49 figs.3.1 & 3.2 (showing the preeminence of farmland as a source of wealth between 1700 and the beginning of the twentieth century).

41. See PISTOR, *supra* note 1, at 29–33 (explaining how the sixteenth- to nineteenth-century enclosure movement in England, by divesting commoners of their rights to land, made previously inalienable land tradable, a process that birthed a “new legal concept of absolute private property rights” that “has since conquered the world”).

42. See, e.g., SOULES, *supra* note 2, at 22; see also Ackerman, *supra* note 24, at 11, 15, 29–30 (discussing how villas have historically been the product of wealth and have served to communicate their owners' socioeconomic status, among other things).

asset class, with its own trends and rules.<sup>43</sup> Sales volume figures give a sense of the scope of this market. In 2021, a peak year for the ultraluxury housing market, buyers across the globe made 2,076 superprime purchases.<sup>44</sup> In 2022, the number tapered off to 1,392, which, though almost a 50% decrease, still represented an increase relative to prepandemic figures.<sup>45</sup> New York City is currently the largest superprime urban residence market, accounting for 244 of those sales.<sup>46</sup> Notably, the superprime urban housing market does not necessarily track the movements of the high-end real estate market in New York City suburbs, consistent with the view that superprime condos are not interchangeable with other kinds of real estate, even within the same broad geographic market.<sup>47</sup>

Facilitating superprime condos' emergence as a distinct asset class is the fact that they are significantly more liquid — i.e., easier to use as a tradeable asset — than other types of urban real property.<sup>48</sup> As an economic and legal matter, the transaction costs of selling a property interest in a condo are relatively lower than the transaction costs of selling other kinds of property

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43. See SASSEN, *supra* note 10, at 134 (explaining that this market “avoids regular market dynamics” due to its “very high base price”); Chris Paris, *The Homes of the Super-Rich: Multiple Residences, Hyper-Mobility and Decoupling of Prime Residential Housing in Global Cities*, in GEOGRAPHIES OF THE SUPER-RICH 94, 102 (Iain Hay ed., 2013) (“A new geography of international property markets is emerging, with growing disconnection or ‘de-coupling’ between sites of investment by the global super-rich and the dynamics of ‘national’ housing and leisure markets.”); cf. ATKINSON, *supra* note 28, at 91–92 (noting that one effect of the use of ultraluxury residences to launder money is to “distort[]” the ultraluxury residence market “as numerous properties are bought for high prices by those looking to dump as much cash as possible”). Notably, the viability of such a niche, exclusive market appears to be due in part to a recent, unprecedented increase in the number of “high net worth individuals” (those with more than \$1 million in assets), including the richer subcategory of “ultra-high net worth individuals” (those with more than \$30 million in assets). See SOULES, *supra* note 2, at 107–08; see also Ray Forrest et al., *In Search of the Super-Rich: Who Are They? Where Are They?*, in CITIES AND THE SUPER-RICH 1, 10 (Ray Forrest et al. eds., 2017) (“[S]tructural and institutional changes . . . have increased the scale, scope and thus the presence of extreme wealth.”).

44. WEALTH REPORT, *supra* note 8, at 39.

45. WEALTH REPORT, *supra* note 8, at 39.

46. For comparison, Los Angeles and London are the runners-up to New York in terms of superprime sale volume, accounting for, respectively, 225 and 223 sales in 2022. See WEALTH REPORT, *supra* note 8, at 39.

47. See, e.g., Jane Timm, *In NYC Suburbs, Sales Are up, but Pricey Houses Struggle*, REAL DEAL (Aug. 1, 2012), <https://therealdeal.com/magazine/new-york-august-2012/the-suburban-squeeze> [<https://perma.cc/QW74-M47B>] (“[W]hile luxury Manhattan homes are currently selling faster than more modestly priced properties, the opposite is true in many suburbs.”).

48. See, e.g., SOULES, *supra* note 2, at 23, 46–47 (explaining how ultraluxury residences' function as a relatively liquid asset held for investment purposes makes them qualitatively different from other forms of architecture).

interests (e.g., a cooperative apartment).<sup>49</sup> Moreover, superprime condos are typically contained in a residential skyscraper (often a “supertall,” “superslender” skyscraper), where residences’ dimensions, fixtures, and amenities are not only highly standardized within each building but across buildings.<sup>50</sup> This renders the real property interests represented by these condos more fungible than other types of urban real estate, which again increases their liquidity.<sup>51</sup>

Additionally, as noted, buyers in the ultraluxury housing market often appear to conceptualize superprime condos less as residences and more as a vehicle for speculation or capital accumulation.<sup>52</sup> Part II explores this point further. This again correlates with liquidity, as superprime condos necessarily can serve these functions only if their owners can turn these condos into their equivalent value in cash with relative ease. Yet, as the next Section shows, this market would not be possible without a specialized legal regime that creates the conditions for the value exchanged in this market.

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49. See *id.* at 133–34 (explaining that one way the condominium form increases liquidity is by “reduc[ing] structural obstacles to ownership and exchange”). A critical point in the New York City market, where cooperative apartments are abundant, is that transfers of condos are generally subject to fewer restrictions than transfers of coops. See CLARKE, *supra* note 13, at 20 (noting that superprime condos are attractive to certain buyers because condo transfers, unlike coop transfers, do not require third-party approval); Michael H. Schill et al., *The Condominium versus Cooperative Puzzle: An Empirical Analysis of Housing in New York City*, 36 J. LEGAL STUD. 275, 281–82 (2007) (explaining that condo associations “typically” do not impose restrictions on condo transfers, although the association sometimes has a right of first refusal, whereas transfers of coops are subject to a board application by the prospective owner).

50. For the meaning of “supertall” and a note on these buildings’ “slenderness” ratios, see *supra* note 13. Within buildings, units’ dimensions are typically fixed (often because a unit occupies an entire floor), although some units may be bigger than others. See SOULES, *supra* note 2, at 99; Andrew Nelson, *111 West 57th Street Reveals Two-Story Model Tower & Officially Launches Sales*, N.Y. YIMBY (Sept. 14, 2018, 8:00 AM), <https://newyorkyimby.com/2018/09/111-west-57th-street-reveals-two-story-model-tower-officially-launches-sales.html> [<https://perma.cc/G3AP-J2CJ>] (“The 1,428-foot tower will create 46 condominiums, exclusively selling single floor or duplex units . . . Each residence will have 14-foot high ceilings, and interiors designed by Studio Sofield.”). Across buildings, superprime condos share certain staple characteristics, including the condominium form, being in similar areas of New York City, and brand-name architecture and interior design. See *infra* notes 146–48 and accompanying text. Superprime developments also tend to boast similar amenities, including meals prepared by Michelin-star chefs and increasingly extensive enological capabilities. Gelles, *supra* note 13; Alix Strauss, *Wine, Wine and More Wine: The Latest Amenity for Luxury Condo Owners*, N.Y. TIMES (Feb. 24, 2023), <https://www.nytimes.com/2023/02/24/realestate/luxury-condo-wine-room.html> [<http://web.archive.org/web/20230228224432/https://www.nytimes.com/2023/02/24/realestate/luxury-condo-wine-room.html>].

51. See SOULES, *supra* note 2, at 47, 99.

52. See *supra* notes 21, 48 and accompanying text.

## B. The Legal Conditions for Superprime Condos

Of course, no real estate market would be possible without mechanics for ownership and transfer of land.<sup>53</sup> Real property law provides those mechanics. But real property law also facilitates the existence of superprime condos in other, more specific ways. Through elaborate zoning schemes, the law permits and encourages the construction of the residential skyscrapers that house superprime condos.<sup>54</sup> Critically, if it had developed under different laws, the market for New York City superprime condos may not have expanded to the degree we see today.<sup>55</sup>

The most important concept for understanding zoning law's relationship to the development of superprime condos is floor area ratio (FAR). FAR is the amount of floor area a zoning lot can permissibly contain, expressed as a function of its lot area.<sup>56</sup> It is the principal mechanism by which New York City limits buildings' bulk, and New York City's zoning ordinance imposes a FAR on all uses within zoning districts.<sup>57</sup> For example, if a 10,000 square foot lot has a FAR of two, the floor area of that lot can't exceed 20,000 square feet, but that floor area could be distributed in various ways, such as a two-floor building (each floor is 10,000 square feet) covering the entirety of the lot and an eight-floor building (each floor is 2,500 square feet) covering a fourth of the lot.<sup>58</sup> The applicable FAR depends on the relevant building's zoning district, its zoned use, and the building's specific characteristics.<sup>59</sup>

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53. In other words, a real estate market requires private alienable property rights. *See supra* note 41; *see also* Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 555–56 (2005) (explaining how stable ownership created through property law facilitates value-increasing asset transfers).

54. *See infra* text accompanying notes 56–81. *See generally* Wainwright, *supra* note 11.

55. Some of the general contours of the law discussed in this Section appear in the law of other jurisdictions that are also home to many luxury condos, suggesting that some of the analysis here, as well as in Part II, could be extrapolated to those other jurisdictions. *See infra* note 81.

56. N.Y.C. ZONING RES. § 12-10 (definition of “floor area ratio”).

57. N.Y.C. DEP'T OF CITY PLAN., ZONING HANDBOOK 18 (2018) [hereinafter ZONING HANDBOOK], <https://www.nyc.gov/assets/planning/download/pdf/about/publications/zoning-handbook/zoning-handbook.pdf> [<https://perma.cc/N88C-B4DD>].

58. *See* ZONING HANDBOOK, *supra* note 57, at 19.

59. *See* ZONING HANDBOOK, *supra* note 57, at 18 (explaining that different uses within the same district may be subject to different FARs and portions of a building's gross floor area may sometimes fall outside of what counts as “floor area” under New York City's zoning ordinance). Importantly, before 2019, floor area used for “mechanical equipment” did not count toward the “floor area” subject to FAR restrictions, whereas such floor area now counts toward FAR-restricted floor area for towers in certain high-density residential districts if that floor area occupies the predominant portion of a story, is located above the building's base and below the highest story containing residential floor area, and exceeds 25 feet when aggregated with any other floor area that is within a 75-foot range and is also used for “mechanical equipment.” N.Y.C. ZONING RES. §§ 12-10, 23-16(a)(2) (subsection (8) of “floor area” definition); N.Y.C. BLDGS. DEP'T, BUILDINGS BULLETIN 2019-009 (2019),

FAR works in tandem with a web of other zoning restrictions and regulatory regimes to control development of the built environment.<sup>60</sup> Importantly, New York State law makes 12 the maximum FAR for dwellings in residential districts.<sup>61</sup> Accordingly, New York City's zoning ordinance does not contain any residential zoning district in which FAR may exceed 12.<sup>62</sup>

Critically, there are two ways to change the initial distribution of FAR among buildings: (1) zoning lot mergers and (2) transferable development rights (TDRs).<sup>63</sup> A zoning lot merger occurs when a lot with unused FAR (say, an old, underbuilt building) is merged with another lot to create a single lot subject to a single FAR.<sup>64</sup> Because FAR depends on *lot area*, this results

[https://www.nyc.gov/assets/buildings/bldgs\\_bulletins/bb\\_2019-009.pdf](https://www.nyc.gov/assets/buildings/bldgs_bulletins/bb_2019-009.pdf) [<https://perma.cc/8HHB-GSVR>] (interpreting, and providing examples of the application of, this 25-foot cap as set forth in the zoning ordinance). The city introduced this 25-foot cap on exempt "mechanical equipment" floor area because of a perception that developers had exploited this carveout to build taller buildings (including 432 Park Avenue) by allocating significant portions of those buildings' height to "mechanical voids." See Carol Tannenhauser, *City Council Approves Cap on 'Mechanical Voids,' but Falls Short of Limiting Tall Building Heights*, W. SIDE RAG (June 4, 2019), <https://www.westsiderag.com/2019/06/04/city-council-approves-cap-on-mechanical-voids-but-falls-short-of-limiting-tall-building-heights> [<https://perma.cc/JZ3Y-H8Q7>]; Matthew Haag, *How Luxury Developers Use a Loophole to Build Soaring Towers for the Ultrarich in N.Y.*, N.Y. TIMES (Apr. 20, 2019), <https://www.nytimes.com/2019/04/20/nyregion/tallest-buildings-manhattan-loophole.html> [<https://web.archive.org/web/20190420085831/https://www.nytimes.com/2019/04/20/nyregion/tallest-buildings-manhattan-loophole.html>].

60. See ZONING HANDBOOK, *supra* note 57, at 10, 12–24 (providing a broad overview of zoning restrictions in New York City); Francisco Augspach, *Development Rights Purchases by Zoning Lot Merger in New York City*, 37 N.Y. REAL PROP. L.J. 18, 18 (2009), <http://www.augspachlaw.com/wp-content/uploads/2014/05/Development-Rights-Purchases-by-Zoning-Lot-Merger-in-New-York-City.pdf> [<https://perma.cc/XR7U-F35B>] ("Zoning approvals require compliance with the entire framework, not just with FAR.").

61. N.Y. MULT. DWELL. LAW § 26(3).

62. However, in the absence of the state-law cap, developers would be able to exceed residential FAR cap under the zoning ordinance, subject to public review. See Jay A. Segal et al., *NY Governor Announces Policies to Increase Residential Density in New York City*, GREENBERG TRAUER (Jan. 10, 2022), <https://www.gtlaw.com/en/insights/2022/1/ny-governor-announces-policies-to-increase-residential-density-in-new-york-city> [<https://perma.cc/4EKL-GTPN>] (explaining that the city's zoning ordinance limits residential FAR to 12, subject to public review); *infra* notes 100, 162.

63. See ZONING HANDBOOK, *supra* note 57, at 26–27. It is also possible, in some circumstances, to increase a building's FAR without taking FAR from another building (e.g., a developer may dedicate certain portions of the property to public use). See Augspach, *supra* note 60, at 19. This Article distinguishes between zoning lot mergers and TDRs because the legal mechanisms underlying the two are different. But because their ultimate effects and economic nature are the same, the literature often refers to both as TDRs. See, e.g., Vicki Been & John Infranca, *Transferable Development Rights Programs: "Post-Zoning?"*, 78 BROOK. L. REV. 435, 440 (2013).

64. These mergers occur by virtue of the merged lot's compliance with subsection (d) of the New York City zoning ordinance's definition of "zoning lot," which contains specific requirements, including that the merged lots be contiguous for a minimum of 10 linear feet.

in the transfer of unused FAR to other portions of the lot.<sup>65</sup> For example, assuming two 50,000 square-foot lots, each with a FAR of two, each lot is permitted to develop 100,000 square feet of floor area. If one lot is not using 30,000 square feet of that floor area, a zoning lot merger of the two lots will permit the second lot to develop 30,000 square feet more than it previously could (for a total of 130,000 square feet).<sup>66</sup>

Generally speaking, TDRs accomplish the same thing where a building not only does not use, but also is prevented from using, surplus FAR.<sup>67</sup> U.S.-trained lawyers will remember the basic concept from the property casebook chestnut *Penn Central Transportation Co. v. New York City*.<sup>68</sup> If a building (like Grand Central Terminal) is landmarked, it is subject to restrictions on its development.<sup>69</sup> To make up for that opportunity cost, New York City gives that lot TDRs that it can sell.<sup>70</sup> Those TDRs correspond to the unused FAR on that lot. Consider, for example, a lot that contains a landmarked building and thus cannot use 30,000 square feet of floor area it could otherwise develop. That lot may sell those 30,000 square feet to a lot that is contiguous to, across the street from, or catty-corner from it (or, in some cases, connected to it by a chain of lots under common ownership), subject to certain restrictions.<sup>71</sup> Likewise, in what are called “special purpose

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See James Power, *Floor Area Transfer by Zoning Lot Merger*, 262 N.Y.L.J. (July 23, 2019), <https://www.kramerlevin.com/images/content/5/3/v3/53271/NYLJ07222019409342Kramer.pdf> [<https://perma.cc/F9K7-XN5J>] (explaining this point); Augspach, *supra* note 60, at 22 (same).

65. ZONING HANDBOOK, *supra* note 57, at 27 (providing an example of transfer of unused FAR by zoning lot merger).

66. Augspach, *supra* note 60, at 19 (providing an example using these floor area numbers).

67. See ZONING HANDBOOK, *supra* note 57, at 26–27 (discussing TDRs granted to owners because the city has landmarked their buildings or because their buildings are in a special purpose district — e.g., the Chelsea High Line, where zoning is meant to facilitate views from the High Line); Christopher Serkin, *Penn Central Take Two*, 92 NOTRE DAME L. REV. 913, 918 (2016) (“If, for whatever reason, a municipality wants to prevent development in a certain location — perhaps for historic preservation — it can create TDRs for the affected property owners.”).

68. 438 U.S. 104, 113–15, 137 (1978) (describing TDRs and regarding their compensatory function as weighing against the conclusion that New York City’s landmarking law resulted in a taking of the property on which Grand Central Terminal stood).

69. See *id.* at 111–12.

70. See *id.* at 113–15; see also Been & Infranca, *supra* note 63, at 443 (explaining that, in 1968, New York City introduced the TDR program “to compensate landmark property owners for financial losses incurred due to the restrictions imposed by the city’s new Landmark Preservation Law”).

71. N.Y.C. ZONING RES. § 74-79; see N.Y.U. FURMAN CTR. FOR REAL EST. & URB. POL’Y, BUYING SKY: THE MARKET FOR TRANSFERABLE DEVELOPMENT RIGHTS IN NEW YORK CITY 2–4 (2013), [https://furmancenter.org/files/BuyingSky\\_PolicyBrief\\_21OCT2013.pdf](https://furmancenter.org/files/BuyingSky_PolicyBrief_21OCT2013.pdf) [<https://perma.cc/8BD9-KJV7>] (explaining this correspondence between unused FAR and resulting TDRs); Willis, *supra* note 33, at 26.



districts,” the city grants certain buildings a similar — and sometimes greater — ability to sell unused square footage.<sup>72</sup> In special purpose districts, the transferee and transferor lots do not necessarily need to be contiguous.<sup>73</sup> Transfers in special purpose districts sometimes require the owner of the transferring lot to agree proactively to specified restrictions.<sup>74</sup> For example, in the Theater Subdistrict, where certain theaters are eligible to be TDR transferors, the owner of such a theater must agree to use it as a theater for the life of the development receiving the TDRs.<sup>75</sup>

Both of these mechanisms permit developers to amass the abundant FAR needed for supertall residential skyscrapers.<sup>76</sup> However, zoning lot mergers appear to be the more common mechanism.<sup>77</sup> Critically, once a lot has

72. The transferor buildings in special purpose districts may be — but don’t have to be — landmarks. *See* Been & Infranca, *supra* note 63, at 446–47 (broadly describing TDR programs in special purpose districts and noting that some theaters in the Theater Subdistrict are landmarks).

73. *See* Been & Infranca, *supra* note 63, at 446.

74. *See* Been & Infranca, *supra* note 63, at 446–47.

75. *See* N.Y.C. ZONING RES. § 81-743(a), (e) (providing for this requirement); Been & Infranca, *supra* note 63, at 447; *see also* Michael Kruse, *Constructing the Special Theater Subdistrict: Culture, Politics, and Economics in the Creation of Transferable Development Rights*, 40 URB. LAW. 95, 115–19 (2008) (providing historical background on the legal framework for TDRs in the Theater Subdistrict, including this requirement).

76. *See, e.g.*, MUN. ART SOC’Y N.Y., *supra* note 32, at 16 fig.16 (visually identifying the basis under zoning law for each stratum of extra FAR added to the baseline FAR of the lot on which 432 Park Avenue was built); Willis, *supra* note 33, at 26–27 (“Put simply, the developers of the current super-slender, ultra-luxury towers endeavor to use the expensive FAR of both their original lots and purchased air rights to rearrange their floor area as high in the sky as possible.”); Alison Gregor, *In Midtown East, the Seagram Building’s New Neighbor*, N.Y. TIMES (Oct. 23, 2015), <https://www.nytimes.com/2015/10/25/realestate/in-midtown-east-the-seagram-buildings-new-neighbor.html> [web.archive.org/web/20151026072430/https://www.nytimes.com/2015/10/25/realestate/in-midtown-east-the-seagram-buildings-new-neighbor.html] (discussing a residential skyscraper development’s use of TDRs from a landmark designed by Mies van der Rohe). Commentators often use the term “air rights” to describe the additional FAR that enables development beyond the amount of FAR currently used by a property. *See, e.g.*, Willis, *supra* note 33, at 26; Wainwright, *supra* note 11. For this Article’s limited purposes, such surplus FAR and “air rights” are synonyms.

77. *See* N.Y.U. FURMAN CTR. FOR REAL EST. & URB. POL’Y, *supra* note 71, at 5 tbl.1 (showing that, between 2003 and 2011, the number of development rights transfers effected as zoning lot mergers (385) far outstripped the numbers of such transfers effected via the landmark program (2) or via a special purpose district (34)); Josh Lipton & Andrew Levine, *The Price of Air in New York City is Far from Free—Selling at Prices that Baffle the Mind*, NYREJ (Sept. 3, 2019), <https://nyrej.com/print/40867> [https://perma.cc/63QR-8PQ9] (“The most common form of air rights transfer is through zoning lot mergers as it does not require city approval.”); Wainwright, *supra* note 11 (explaining that, in practice, zoning lot mergers may involve cobbling together bits and pieces of land on a single city block, resulting in a “complex jigsaw puzzle of adjoining lots”); Caroline Spivack, *Upper West Side Tower Tops Out amid Legal Feud*, CURBED (Aug. 15, 2019), <https://ny.curbed.com/2019/8/15/20807217/upper-west-side-200-amsterdam-avenue->

received extra FAR through a zoning lot merger, a developer may proceed to develop that extra FAR “as-of-right,” without public review.<sup>78</sup> Moreover, developers can also increase the height of buildings by introducing floors dedicated entirely to mechanical equipment, which do not count toward the total FAR usable for a building so long as they do not exceed a specified height.<sup>79</sup> Importantly, when used to produce supertall buildings, zoning lot mergers and TDRs necessarily also depress the height of buildings around

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tops-out

[<https://web.archive.org/web/20190815223501/https://ny.curbed.com/2019/8/15/20807217/upper-west-side-200-amsterdam-avenue-tops-out>] (noting that the superprime condo development 200 Amsterdam, “which is located on a 39-sided zoning lot between 67th and 68th streets, has faced intense scrutiny from preservationists and elected officials who argue that the property was erected on an unlawfully crafted, ‘gerrymandered’ lot”); *see also* Comm. for Environmentally Sound Dev. v. Amsterdam Ave. Redevelopment Ass’n, 194 A.D.3d 1, 4 (N.Y. App. Div. 2021) (holding that the 200 Amsterdam zoning lot conformed with (d) of the definition of “zoning lot” § 12-10 of the city’s zoning ordinance).

78. ZONING HANDBOOK, *supra* note 57, at 27. Transfer of TDRs via the landmark program requires city approval, although such approval is sometimes ministerial, as opposed to discretionary. *See* N.Y.C. ZONING RES. §§ 74-791, 74-792 (setting forth requirements for obtaining a discretionary special permit for landmark transfers); N.Y.C. ZONING RES. § 81-642 (setting forth specific requirements for ministerial approval of landmark transfers in the East Midtown Subdistrict). As for transfers of TDRs via special purpose districts, requirements for such transfers differ depending on the special purpose district but include notification to or approval by the city, with such approval again sometimes being ministerial, as opposed to discretionary. *See* Been & Infranca, *supra* note 63, at 446–48, 450 & n.80, 452–53 (providing an overview of permitted transfers within the Theater Subdistrict, Special West Chelsea District, and Special Hudson Yards District and noting the presence of a TDR scheme in the South Street Seaport Subdistrict); *see also* N.Y.C. ZONING RES. § 81-744 (setting forth the approval process for transfers in the Theater Subdistrict, consisting of a certification by the city and, for FAR increases in the “Eighth Avenue Corridor” beyond those permitted by certification, authorization by the city); N.Y.C. ZONING RES. § 98-33(a), (e) (setting forth notification and restrictive declaration requirements for transfers in the Special West Chelsea District); N.Y.C. ZONING RES. §§ 93-32, 93-34 (setting forth requirement of city certification for transfers in the Special Hudson Yards District); N.Y.C. ZONING RES. §§ 91-64, 91-65 (setting forth requirement of city certification for transfers within the South Street Seaport Subdistrict).

79. More specifically, mechanical floors must be no more than 25 feet tall when aggregated with other such floors in a 75-foot range. Using such mechanical floors to boost building height had previously been much more attractive, as it was not subject to this limitation. *See supra* note 59. However, the practice of using mechanical floors for this purpose seems likely to continue. The 25-foot limitation only rebalances, but does not fundamentally change, the calculus underlying the use of such floors. *See* Christopher Wright, *Question of the Month: Can Mechanical Voids Be Used to Increase Building Heights Under Existing Zoning Regulations?*, LASSER L. GRP. (Oct. 28, 2021), <https://lasserlg.com/mechanical-voids-used-to-increase-building-heights> [<https://perma.cc/CV2U-T3BM>] (explaining that the 25-foot limitation makes the “assumption . . . that developers would never give up zoning floor area for increased height . . . [But i]f a developer can increase the height of the upper floors by 160 ft. (the equivalent of 16 floors), would they not consider sacrificing a single floor of zoning floor area?”).

them.<sup>80</sup> The overall effect of this zoning scheme is to make the views available from supertall residential buildings scarce and thus valuable — a point to which Part II returns.<sup>81</sup>

The legal scheme above makes superprime development physically and economically possible. Under a different legal scheme, these superprime condos could be physically impossible to construct (e.g., under a legal scheme that does not permit transfers of TDRs) or could lose virtually all their current scarcity value (e.g., under a legal scheme lacking any FAR cap), such that they would not be worth building at all.<sup>82</sup> Of course, any zoning

80. See, e.g., N.Y.C. ZONING RES. § 74-792 (“In any and all districts, the transfer [of development rights] once completed shall irrevocably reduce the amount of floor area that can be utilized upon the lot occupied by a landmark by the amount of floor area transferred.”); Willis, *supra* note 33, at 26 (“[W]hen the underbuilt area of a lot is sold and used on an adjacent site, that low-rise space will then remain open forever.”).

81. See Andi Schmiel interviewed by Tereza Østbø Kuldova, *On Private Views, Luxury, and Corruption*, 5 J. EXTREME ANTHROPOLOGY 124, 129 (2021) (observing that, when all FAR in a particular area has been purchased, “you can be certain that no one is going to block your views”); see also Willis, *supra* note 33, at 25 (“Views have value, and in New York, the gold standard is Central Park . . . Such trophy assets are in limited supply, whether Picassos, Pollacks, or penthouses.”). We can observe a similar fact pattern in other cities that are attractive sites for luxury real estate development. Cf. SOULES, *supra* note 2, at 54–55 (noting that Vancouver and Melbourne, among other cities, are viewed as desirable locations for real estate investment); SOULES, *supra* note 2, at 93 (characterizing Toronto as experiencing “a combination of rapid new growth and heightened international real estate investment”); SOULES, *supra* note 2, at 100, 149 (observing that “pencil towers” like those on Billionaires’ Row are being built in Melbourne and Toronto and discussing “Southbank by Beulah in Melbourne, which will be Australia’s tallest building upon completion”); SOULES, *supra* note 2, at 47–49, 149, 156–68 (discussing several luxury residential towers in Vancouver, including Vancouver House); Geoff Nixon, *Toronto’s Expanded Multiplex Era Is Coming. But How Much Housing Will It Actually Provide?*, CBC (May 20, 2023, 4:00 AM), <https://www.cbc.ca/news/canada/toronto/toronto-multiplexes-housing-economics-1.6848643> [<https://perma.cc/K72U-SEHU>] (quoting one commentator’s observation that Toronto’s density is currently concentrated in downtown high-rise neighborhoods, while “[t]he rest of the city is kind of like a sea of low-rise housing”); Kenneth Chan, *8 Future Towers in Metro Vancouver That Will Be Taller than Shangri-La (RENDERINGS)*, DAILY HIVE (May 18, 2022, 5:50 PM), <https://dailyhive.com/vancouver/metro-vancouver-future-tallest-towers> [<https://perma.cc/D8BZ-GUQA>] (explaining that, because building heights in downtown Vancouver are limited by zoning restrictions that protect scenic views, the tallest buildings in Vancouver may, in the future, be outside of Vancouver’s downtown); Katie Roberts-Hull, *Our Cities Are Not Museums. We Must Stop Nimby’s Weaponising Heritage Laws to Block Affordable Housing*, GUARDIAN (May 6, 2023, 8:00 PM), <https://www.theguardian.com/commentisfree/2023/may/07/our-cities-are-not-museums-we-must-stop-nimbys-weaponising-heritage-laws-to-block-affordable-housing> [<https://perma.cc/5SNY-AJEU>] (noting that heritage protections in Victoria, Australia “tend to trigger ‘downzoning’” of the protected areas such that they fall into a zone where height is capped at two stories, which limits density in those areas).

82. Cf. Stephan Boppart, *Billions for Buildings*, in CREDIT SUISSE, BULLETIN: THE HIGH-RISE BUILDING 12, 14 (2015) (noting that, even though, above a certain threshold, building taller skyscrapers fails to increase efficient land use, “[g]reat views from upper floors can also mean added value for residential and commercial real estate,” with that added value

system, by restricting land uses, encourages development to follow a certain pattern.<sup>83</sup> What matters are the intricacies of that system. In New York City, these intricacies favor or at least facilitate the development of supertall residential skyscrapers for superprime condos. Part II reflects on how these legal conditions have not only created new types of structures but have also changed the nature of the zoned property itself.

## II. THE “INTELLECTUALIZATION” OF ULTRALUXURY URBAN REAL PROPERTY

This Part explains how superprime condos have become like intellectual property. It addresses three interrelated, mutually reinforcing facets of this transformation. Section II.A argues that it is more the law — and less physical space limitations — that creates the scarcity that underlies superprime condos’ value. Section II.B shows how superprime condos have become dematerialized as a result of their liquidity and fungibility as assets, a point illustrated by the emergence of markets for the rights to buy superprime condos even in the absence of those condos’ physical existence. Section II.C discusses how the value of superprime condos is predicated on intangible factors (primarily, the narrative these condos convey about their owners’ lifestyles) that are largely untethered to the underlying land.

### A. Scarcity Through Law

Land and intellectual property derive their scarcity from different sources. Land is scarce because there is only so much of it on the face of the Earth.<sup>84</sup> Intellectual property is not inherently scarce. More copies of it can (in general) always be created.<sup>85</sup> But government regulation says that only certain people can use intellectual property in certain ways (e.g., only the

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potentially offsetting the inefficiency); Brian Potter, *Why Skyscrapers Are So Short*, WORKS PROGRESS (Jan. 21, 2022), <https://worksinprogress.co/issue/why-skyscrapers-are-so-short> [<https://perma.cc/D4SH-CA4R>] (noting that, while return on investment has tended to taper off at a certain level of building height, “an increasing number of Manhattan supertall residential buildings suggests that this limit might be increasing, at least for luxury residential real estate”).

83. See, e.g., *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (upholding a zoning scheme that, among other things, prohibited commercial and industrial uses in residential districts).

84. See Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 832 (2009) (“Although noting land’s finitude is an unoriginal, even banal, observation, the tendency of economic theory to treat land as a fungible commodity makes it worth remembering that the supply of land is ultimately limited.”).

85. See *supra* note 4 and accompanying text; see also *infra* note 182 and accompanying text.

copyright owner has the right to make copies of a work).<sup>86</sup> This in effect makes intellectual property rights scarce.<sup>87</sup>

A condominium property interest is an interest in land. It consists of a fee simple interest in a particular unit and a tenancy-in-common interest in the common areas of the building.<sup>88</sup> There is only so much land in New York City, London, and Los Angeles, to take the top three locations for superprime condos.<sup>89</sup> However, building technologies now permit construction of increasingly tall buildings.<sup>90</sup> As a practical matter, the most salient limit to the height of skyscrapers seems to be getting the financing to build them.<sup>91</sup>

Put otherwise, the possibility of extreme vertical density means that cities could house significantly more apartments, including condominium apartments, than they currently do.<sup>92</sup> But even the most pro-development urban denizens are perhaps unlikely to want to live in a city in which every apartment building is as tall as the Burj Khalifa. That would create its own problems — among them, a reduction in sunlight and pleasant views for one’s apartment.<sup>93</sup> Of course, zoning law prevents such a situation from

86. See 15 U.S.C. §§ 1114(1)(a), 1125(a)(1) (providing for civil liability for infringement of registered and unregistered trademarks); 17 U.S.C. § 106 (setting forth a copyright owner’s exclusive rights); 35 U.S.C. §§ 154(a), 261, 281 (setting forth a patentee’s exclusive rights and giving patentees the right to sue for infringement).

87. See *supra* note 4 and accompanying text; see also *infra* note 182 and accompanying text.

88. See Schill et al., *supra* note 49, at 277.

89. See *supra* note 46 and accompanying text.

90. See, e.g., Bosker, *supra* note 32 (“There’s basically nothing stopping us from erecting a mile-high building, experts insist, except maybe money.”); Nate Berg, *Is There a Limit to How Tall Buildings Can Get?*, BLOOMBERG (Aug. 16, 2012, 8:50 AM), <https://www.bloomberg.com/news/articles/2012-08-16/is-there-a-limit-to-how-tall-buildings-can-get> [<https://perma.cc/K732-NA2K>] (speculating that, if it is possible to sufficiently widen a building’s base, “[t]heoretically, then, a building could be built at least as tall as 8,849 meters, one meter taller than Mount Everest”).

91. See, e.g., Boppart, *supra* note 82, at 14 (showing that total cost per square meter of building a skyscraper increases after the skyscraper reaches an inflection point between 50 and 80 stories); Berg, *supra* note 90 (noting that “leading skyscraper architects” often cited funding issues when asked to identify the “single biggest limiting factor that would prevent humanity creating a mile-high tower or higher”).

92. See David Schleicher, *City Unplanning*, 122 YALE L.J. 1670, 1695–98 (2013) (explaining that New York City has sought to slow its increase in density, even as housing demand has increased); see also Jason M. Barr, *Asia Dreams in Skyscrapers*, N.Y. TIMES (Oct. 11, 2017), <https://www.nytimes.com/2017/10/11/opinion/china-asia-skyscrapers.html> [<https://web.archive.org/web/20230628160710/https://www.nytimes.com/2017/10/11/opinion/china-asia-skyscrapers.html>] (arguing that, while United States cities appear reluctant to do so, cities should accommodate increasing urban populations through increased vertical density).

93. See Kheir Al-Kodmany, *The Logic of Vertical Density: Tall Buildings in the 21st Century City*, 1 INT’L J. HIGH-RISE BLDGS. 131, 131 (2012) (“[Tall buildings] influence the micro-environment by casting shadows and blocking views and sun light.”); *supra* notes 32, 80–81 and accompanying text.

occurring. In New York City, as discussed, this takes the form of an absolute limit on vertical density: the sum of the FAR of the entire city.<sup>94</sup> Through the mechanisms for transfers of FAR discussed in Section I.B, the distribution of the city's limited supply of FAR can be rearranged but, critically, that supply cannot be increased.<sup>95</sup>

This “cap-and-trade system”<sup>96</sup> creates the conditions for the key drivers of superprime condos' value. Most obviously, it means that there is a hard limit to the number of superprime condos that can be built in New York City. Based on 2018 data, New York City contains 3.7 billion square feet of unused development rights.<sup>97</sup> Even assuming (quite improbably) that all unused, residentially zoned square footage is used for superprime condos, the supply of residentially zoned FAR will at some point become depleted. When it comes to urban real estate, it is zoning law, and not the limited space on the face of the Earth, that caps the overall number of superprime condos, making them scarcer, in relative terms, than they would be without zoning law.<sup>98</sup>

Relatedly, commentary on superprime condos suggests that a substantial portion of the value of such condos is attributable to the desirability of their location as well as the spectacular views they offer.<sup>99</sup> The supertall buildings on New York City's Billionaires' Row are clustered around Fifty-Seventh Street not only because that street is zoned to permit considerably more FAR than other locations<sup>100</sup> but also because Fifty-Seventh Street is at the south

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94. See Willis, *supra* note 33, at 26, 29, 32 (emphasizing the absolute limit on the city's total FAR).

95. See Willis, *supra* note 33, at 26, 29, 32.

96. Willis, *supra* note 33, at 26, 32.

97. See *Accidental Skyline: Air Rights*, MUN. ART SOC'Y N.Y., [https://www.mas.org/interactive\\_features/accidental-skyline-air-rights](https://www.mas.org/interactive_features/accidental-skyline-air-rights) [<https://perma.cc/4LUC-7NHX>] (last visited Oct. 23, 2023) (noting that this is “equivalent to the built area of more than 1,300 Empire State Buildings”).

98. See Gregor Schwerhoff et al., *Equity and Efficiency Effects of Land Value Taxation* 3 n.2 (Int'l Monetary Fund Working Paper No. WP/22/263, 2022), <https://www.imf.org/en/Publications/WP/Issues/2022/12/17/Equity-and-Efficiency-Effects-of-Land-Value-Taxation-527079> [<https://perma.cc/FV89-9K8F>] (“Urban land, the most valuable type of land, is not limited directly by the availability of land, but by zoning.”).

99. See, e.g., SOULES, *supra* note 2, at 112, 151 (noting that “long, epic, distant view[s]” and “scarcity of location . . . in relation to other cities” — as well as scarcity in terms of “neighborhood,” “site,” and “specific location within a building” — are of particular importance to superprime development).

100. See CLARKE, *supra* note 13, at 60 (noting the potential that was latent in pre-Billionaire's Row Fifty Seventh Street, which “had the highest FAR in the city, and yet few were making use of it”). The portion of Fifty-Seventh Street directly south of Central Park has a baseline FAR of 15. This lets residential skyscrapers on that street exceed the maximum residential FAR of 12, as those buildings can be treated as mixed developments that can use more than the 12 FAR maximum, so long as the FAR in excess of that maximum comes from non-residential uses. See N.Y.C. ZONING RES. § 35-23 (providing that the residential portions

end of Central Park. Thus, condos in those buildings will have prime — and otherwise inaccessible — views of the park, not to mention other features of New York City’s skyline.<sup>101</sup> Again, due to New York City’s FAR cap, the height of these buildings effectively depresses the height of the buildings around them.<sup>102</sup> Thus, without the FAR cap, the value of superprime condos, net of the cost of building them, would be significantly reduced if not effectively eliminated. Assuming (reasonably) that demand for a home in, and views of, New York City outstrips the current supply of superprime condos, unchecked development would generally produce taller buildings, blocking the views currently enjoyed by superprime condos and likely reducing locational value in other ways (e.g., by razing landmarks).<sup>103</sup> In a world of unchecked development, superprime condos would just be apartments, surrounded by more apartments. Current zoning law prevents such value depletion.

Of course, the law shapes and preserves the value of superprime condos in many other ways. Take property tax law for example. New York’s “421-a” tax exemption, until its demise in 2022, had long reduced property taxes on superprime condos, thus making them more financially viable as development projects.<sup>104</sup> A similar boost to financial viability is New York

of buildings in certain commercial districts are subject to the bulk regulations of specified corresponding residential districts). *Compare* N.Y.C. ZONING RES. § 81-211(b) (providing that, in the Special Midtown District, the basic FAR for C5-3, C6-6, and C6-7 districts is 15), and *ZoLa: New York City’s Zoning & Land Use Map*, N.Y.C. DEP’T CITY PLAN., <https://zola.planning.nyc.gov> [<https://perma.cc/V3S7-V66A>] [hereinafter *ZoLa*] (last visited Oct. 23, 2023) (showing that the entire portion of Fifty-Seventh Street that falls directly below Central Park is within a C5-3 or C6-6 district), with N.Y.C. ZONING RES. § 23-152 (providing that the maximum FAR for R10 districts is 12), and *Residence Districts: R10 - R10A - R10X*, N.Y.C. DEP’T CITY PLAN., <https://www.nyc.gov/site/planning/zoning/districts-tools/r10.page> [<https://perma.cc/4CKB-5YN3>] (noting that R10 is the “highest residential density in the city”).

101. *See, e.g., Views*, 111 W. 57TH ST., <https://111w57.com/views> [<https://perma.cc/PY45-LKD4>] (last visited Nov. 2, 2023); Enes Yilmazer, *Inside the MOST EXPENSIVE and HIGHEST Penthouse in the WORLD!*, YOUTUBE (May 8, 2023), [https://www.youtube.com/watch?v=aN9DH\\_GxqEo&t=604s](https://www.youtube.com/watch?v=aN9DH_GxqEo&t=604s) [<https://perma.cc/QGA9-X2WZ>] (showing views from the penthouse of Central Park Tower).

102. *See supra* notes 80–81 and accompanying text.

103. *See* Schmied & Østbø Kuldova, *supra* note 81, at 129 (“[T]he department of city planning could always just add air rights to any area in the city; it is a bit like printing money.”); *supra* notes 80–81 and accompanying text; *see also* Joachim Beno Steinberg, Note, *New York City’s Landmarks Law and the Recission Process*, 66 N.Y.U. ANN. SURV. AM. L. 951, 955–57 (2011) (arguing that the historic and aesthetic features of New York City landmarks are privately held public goods).

104. *See* N.Y. REAL PROP. TAX LAW §§ 421-a(16)(xxviii) (applying only to projects that commenced on or after January 1, 2016 and on or before June 15, 2022 and are completed on or before June 15, 2026); HAYLEY RAETZ & MATTHEW MURPHY, N.Y.U. FURMAN CTR. FOR REAL EST. & URB. POL’Y, THE ROLE OF 421-A DURING A DECADE OF MARKET RATE AND AFFORDABLE HOUSING DEVELOPMENT 16 fig.5 (2022),

State's requirement that property tax assessors value condominiums using an income-based, as opposed to a market price-based, method.<sup>105</sup> Likewise, as discussed, the legal structure of a condominium provides liquidity that is attractive to superprime condo buyers.<sup>106</sup>

Moreover, some Billionaires' Row developments have obtained U.S. federal trademark registrations for their names — for example, 53W53, 432PARKAVENUE, and CENTRAL PARK TOWER.<sup>107</sup> U.S. federal trademark law thus protects to some degree the exclusivity of these

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[https://furmancenter.org/files/publications/The\\_Role\\_of\\_421-a\\_Final.pdf](https://furmancenter.org/files/publications/The_Role_of_421-a_Final.pdf)

[<https://perma.cc/2VLD-GTK5>] (showing a precipitous decline in use of 421-a between 2010 and 2020, likely due to the enactment of the “Affordable New York” iteration of 421-a, “which dramatically limited the ability of condo builders to use the program”); Stefanos Chen, *The Taxman Cometh for Some Condos*, N.Y. TIMES (Dec. 6, 2019), <https://www.nytimes.com/2019/12/06/realestate/the-taxman-cometh-for-some-condos.html> [<https://web.archive.org/web/20230312064925/https://www.nytimes.com/2019/12/06/realestate/the-taxman-cometh-for-some-condos.html>] (“[T]he 421-a program allowed condo buildings to be exempted from millions of dollars in property taxes for 10 to 25 years, depending on location and other criteria.”).

105. See N.Y.U. FURMAN CTR. FOR REAL EST. & URB. POL’Y, SHIFTING THE BURDEN: EXAMINING THE UNDERTAXATION OF SOME OF THE MOST VALUABLE PROPERTIES IN NEW YORK CITY 2 (2013), [https://furmancenter.org/files/FurmanCenter\\_ShiftingtheBurden.pdf](https://furmancenter.org/files/FurmanCenter_ShiftingtheBurden.pdf) [<https://perma.cc/9ZB6-WJPZ>] (citing N.Y. REAL PROP. TAX LAW § 581(1)(a)) (“New York City interprets this provision to mean that co-op buildings and condo buildings with at least four units should be valued . . . as if they were rental properties.”); N.Y.C. INDEP. BUDGET OFF., FISCAL BRIEF: FROM TAX BREAKS TO AFFORDABLE HOUSING: EXAMINING THE 421-A TAX EXEMPTION FOR ONE57 6–7 (2015), <https://www.ibo.nyc.ny.us/iboreports/from-tax-breaks-to-affordable-housing-examining-the-421-a-tax-exemption-for-one57-july-15-2015.pdf> [<https://perma.cc/58YJ-QVKD>] (showing that this requirement provides a greater tax break to owners of condos in One57 than does the tax break from the 421-a exemption, which One57 was able to use).

106. See *supra* notes 48–49 and accompanying text. Additionally, relative to coops, condos may be attractive to those seeking to launder money derived from criminal activity, because purchasing a condominium does not involve an application process that subjects the purchaser to potential third-party scrutiny. See, e.g., CLARKE, *supra* note 13, at 251 (“For the most part, this system [of requiring coop approval for purchase of coop shares], in place at many grand older buildings in the city, ensured that the owners didn’t have to worry about living among supposed criminals and fugitives.”).

107. 53W53, Registration No. 5240988; CENTRAL PARK TOWER, Registration No. 5596042; 432PARKAVENUE, Registration No. 5033392. The 432PARK AVENUE and CENTRAL PARK TOWER marks are both stylized, and the CENTRAL PARK TOWER mark includes a design. Trademark lawyers may be unsurprised that the 432PARKAVENUE mark was registered on the less-desirable supplemental register — which, unlike the principal register, is open to marks that have not become distinctive — after the U.S. Patent and Trademark Office issued an office action rejecting the initial application for registration on the principal register on the ground that the mark was primarily geographically descriptive. Office Action Outgoing, Dec. 18, 2015; see 15 U.S.C. § 1091(a). For similar reasons (TOWER being descriptive; CENTRAL PARK being primarily geographically descriptive), the application for registration of CENTRAL PARK TOWER on the principal register prompted an office action suggesting that the applicant disclaim this wording in its entirety, which the applicant then did. Office Action Outgoing, Jan. 14, 2016.



buildings' names. Insofar as these names are distinctive, no one else can use them if that use would result in consumer confusion as to commercial source.<sup>108</sup> More important, developers choose such names with the intention of imbuing these residences with an attractive aura.<sup>109</sup> Superprime condos' bid for trademark protection illustrates how intellectual property law can protect that aura.<sup>110</sup>

But the function zoning law performs — making the value of superprime condos physically possible — is arguably more fundamental than the various functions these other laws perform, which largely center on increasing the financial viability of superprime condos or supplementing the desirability or exclusivity of these residences. Indeed, a broad view would be that zoning law further preserves the value of superprime condos by protecting public goods (e.g., Central Park, landmarked buildings) that have unique value to superprime condos (e.g., the scarce views of Central Park or landmarked buildings available from superprime condos).<sup>111</sup>

108. See *supra* note 86 (setting forth the Lanham Act's provisions protecting against trademark infringement).

109. See Council on Tall Bldgs. & Urb. Habitat, *CTBUH Video Interview - Harry Macklowe*, YOUTUBE (Mar. 1, 2016), <https://www.youtube.com/watch?v=K-wP810H7kY> [<https://perma.cc/J7WX-8HJS>] (interviewing 432 Park Avenue developer Harry Macklowe, who says that "432 Park Avenue" is meant to "evoke a certain amount of reaction" and be "easy to remember, sensible, very honest"); The B1M, *supra* note 13 (interviewing real estate broker Ryan Serhant, who says that names like "432 [Park Avenue]," "One57," "111 [West 57th Street]," and "220 [Central Park South]" are "a brand" and "like a Birkin bag"); Anne Machalinski, *What's in a Name? Luxury Properties Look to Entice Buyers with Unique Monikers*, MANSION GLOB. (Sept. 23, 2016), <https://www.mansionglobal.com/articles/what-s-in-a-name-luxury-properties-look-to-entice-buyers-with-unique-monikers-40698> [<https://perma.cc/JL3A-QQTH>] (citing real estate professionals' views that development names beginning with "One," such as "One57," "make you think it's the most important," and that, in New York, an address such as "432 Park Avenue" or "15 Central Park West," "tells a story" and, "if it's a great [address], is the brand"); *infra* note 110; *infra* Section II.C.

110. See generally Stefan Bechtold & Christopher Jon Sprigman, *Intellectual Property and the Manufacture of Aura*, 36 HARV. J.L. & TECH. 291 (2023) (arguing that firms are using intellectual property law to protect narratives of authenticity connected to the consumer products they sell (i.e., the "aura" of those products)). This represents a sort of legal round-tripping: intellectual property law can be used to protect scarcity value created by zoning laws that, as this Article argues, act like intellectual property law.

111. See N.Y.C. ADMIN. CODE § 25-303 (giving the landmarks preservation commission the power to designate landmarks); N.Y.C. ZONING RES. § 74-711 (permitting, subject to certain findings by the landmarks preservation commission, the modification of use and bulk regulations (but not the floor area ratio) applicable to landmarks). Central Park's continued status as a public park does not depend on a zoning district designation. See N.Y.C. ZONING RES. § 11-13; ZoLa, *supra* note 100 (showing Central Park as falling into a "Parks" zoning district). Rather, it depends on New York law's designation of Central Park as a public park. See N.Y. GEN. CITY LAW § 20(2) (restricting the ability of cities in New York State to sell any of their parks and other public places, subject to certain exceptions); N.Y.C. CHARTER § 383 (making public parks inalienable); *An Act to Alter the Map of the City of New York, by Laying out Thereon a Public Place, and to Authorize the Taking of the Same*, in FIRST ANNUAL

In this sense, the mechanism for capturing value from superprime condos starts to resemble the mechanisms for capturing value from intangible property. A substantial portion of superprime condos' value — their intangible surplus<sup>112</sup> — is due to their limited quantity, locational advantages, and exclusive aura, but these value-drivers hinge less on the real property underlying these condos and more on the law governing that real property and its attendant intangible benefits.

One might object that the law simply helps extract the preexisting value of the land underlying superprime condos. In other words, the underlying land — not the regulation of that land — is ultimately what buyers seek and pay for.<sup>113</sup> But saying that superprime condos' value depends on the underlying land is a bit like saying that the value of a New York City taxi medallion<sup>114</sup> depends on the existence of New York City or of cars.<sup>115</sup> It is true, but it misses the point. With respect to both superprime condos and taxi medallions, the real value is the fact that state regulation says that only so many of them can exist, even if, absent such regulation, New York City, the land it is built on, and cars would still have some value.<sup>116</sup> As for whether the significant value that the law adds is inseparable from the underlying land, the next Section addresses that question.

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REPORT ON THE IMPROVEMENT OF THE CENTRAL PARK 88, 88 (1857) (declaring the land now occupied by the park to be “a public place, in like manner as if the same had been laid out by the commissioners appointed in and by the act of the legislature, entitled ‘an act relative to improvements touching the laying out of streets and roads in the city of New York and for other purposes,’ passed April 3d, 1807”). However, the day-to-day protection of Central Park is largely a matter of private law, as a private corporation, the Central Park Conservancy (CPC), manages the park under a contract with the city. *See* Michael Murray, *Private Management of Public Spaces*, 34 HARV. ENV'T L. REV. 179, 213 (2010) (“The CPC has become the agent ultimately responsible for all operations in the park.”).

112. *See supra* note 38.

113. *Cf.* Sassen, *supra* note 29, at 25 (“In London, much of the super-prime housing is . . . a form of investment, not just in housing, but in London land.”).

114. *See* Katrina Miriam Wyman, *Problematic Private Property: The Case of New York Taxicab Medallions*, 30 YALE J. ON REGUL. 125, 127 (2013) (“Since 1980, New York taxi medallions have been a better investment than U.S. housing and gold.”).

115. *See id.* at 130–32 (noting that yellow medallion taxis enjoy a state-granted “monopoly” in the city’s market for street hails).

116. *See* Steven J. Eagle, *The Perils of Regulatory Property in Land Use Regulation*, 54 WASHBURN L.J. 1, 10–11, 14, 19 (2014) (explaining how, by ensuring scarcity of certain regulatory rights — e.g., taxi medallions, development rights, zoning laws that favor “downtown merchants” at the expense of “incompatible” or “big box” stores — governments effectively make those rights into private property) (citing Wyman, *supra* note 114, at 168); *see also* Feldman, *supra* note 3, at 56–57, 96–97 (analyzing regulatory entitlements in the life sciences industry that function like intellectual property and noting that the government may be tempted to create similar entitlements for “other innovative industries”).

## B. Dematerialization of Real Property

A common observation about superprime condos is that often, even typically, no one lives in them.<sup>117</sup> Rather, high net worth individuals often use superprime condos as an investment or simply as a relatively safe asset in which to park money (similar in nature to a deposit account or buying U.S. treasury bonds).<sup>118</sup> More nefariously, people who have amassed money through illegal means may, in addition to the above, use superprime condos to launder that money.<sup>119</sup> Similarly, some people may put money into

117. See, e.g., CLARKE, *supra* note 13, at xiv, 250 (noting Billionaires' Row condos are "largely empty" and that "[i]n some cases, wealthy buyers on Billionaires' Row paid millions to well-known designers to furnish their homes and then never stayed there"); SOULES, *supra* note 2, at 50 ("A sober assessment of current global real estate trends cannot avoid the conclusion that vacancy is a preferred investment class."). The 2021 New York City Housing and Vacancy Survey found that 353,400 housing units — about 1% of the total number of housing units in New York City, 3,644,000 — were vacant and not available for rent or sale in 2021. Among the units for which respondents gave only a single reason for the vacancy (as opposed to two or more reasons), "the most prevalent reason was that the unit was held for seasonal, recreational, or occasional use," a category "comprising [units] maintained as pied-a-terre, units held for investment purposes, and those used as short-term rentals where the entire unit is occupied on a temporary basis." Further, among the subset of vacant and unpurchasable/unrentable units that were in condominium or cooperative buildings, half were "maintained as second homes (i.e., for seasonal, recreational, or occasional use)." N.Y.C. DEP'T OF HOUS. PRES. & DEV., 2021 NEW YORK CITY HOUSING AND VACANCY SURVEY: SELECTED INITIAL FINDINGS 34–35, 74 (2022), <https://www.nyc.gov/assets/hpd/downloads/pdfs/services/2021-nychvs-selected-initial-findings.pdf> [<https://perma.cc/B4L4-7ZT5>]. However, some superprime condo units may be vacant simply because no one has bought them yet. See Stefanos Chen, *One in Four of New York's New Luxury Apartments Is Unsold*, N.Y. TIMES (Sept. 13, 2019), <https://www.nytimes.com/2019/09/13/realestate/new-development-new-york.html> [<https://web.archive.org/web/20230823214227/https://www.nytimes.com/2019/09/13/realestate/new-development-new-york.html>].

118. See, e.g., CLARKE, *supra* note 13, at 250 ("For many of the buyers [on Billionaires' Row], their apartments were third, fourth, or even fifth residences. They were places they visited infrequently, or simply places to park cash."); SOULES, *supra* note 2, at 42, 52 ("[T]he purchase of a secondary home for recreational use is often at least partly informed by speculation."); Isabella Farr, *Meet the 20-Somethings Funneling Their Crypto Millions into Real Estate*, REAL DEAL (June 14, 2021, 4:00 PM), <https://therealdeal.com/new-york/2021/06/14/meet-the-20-somethings-funneling-their-crypto-millions-into-real-estate> [<https://perma.cc/ZEB3-M5FS>] (noting the attractiveness of "the more stable and tangible asset class of real estate" to people who have amassed wealth through cryptocurrency investment). Some superprime condo owners may use this wealth storage function to keep their wealth located outside of a jurisdiction that the owner perceives as posing a risk to that wealth. See CLARKE, *supra* note 13, at 89–91 (describing a desire to "stash their cash beyond Putin's reach" among certain Russian buyers of luxury New York City real estate).

119. See CLARKE, *supra* note 13, at 249–50 (discussing the use of alternative entities to facilitate money laundering or tax evasion through superprime condo purchases); CÉCILE REMEUR, EUROPEAN PARLIAMENT, UNDERSTANDING MONEY LAUNDERING THROUGH REAL ESTATE TRANSACTIONS 2 (2019), [https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/633154/EPRS\\_BRI\(2019\)633154\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/633154/EPRS_BRI(2019)633154_EN.pdf) [<https://perma.cc/3M4C-3PFE>] (discussing the popularity of real estate

superprime condos to evade taxes.<sup>120</sup> None of these uses depends on superprime condos serving as a residence. So it makes sense that superprime condo owners — who, due to their wealth, likely own more than one residence — do not necessarily live in their condos.<sup>121</sup>

The fact that, despite their outward appearance, superprime condos are not primarily residences already represents a shift. Of course, historically, rich people have often owned multiple residences.<sup>122</sup> But superprime condos' use as financial products has eclipsed their use as residences to such a degree that it is difficult to think of a superprime condo as performing the same leisure-oriented function that such additional residences (e.g., countryside villas) have historically served.<sup>123</sup> At a deeper level, this lack of kinship between superprime condos and other luxury real estate also means that, if superprime condos are valuable, it must be for reasons other than what they can be physically used for.<sup>124</sup>

transactions as a method of money laundering); S. Alexandra Bieler, Note, *Peeking into the House of Cards: Money Laundering, Luxury Real Estate, and the Necessity of Data Verification for the Corporate Transparency Act's Beneficial Ownership Registry*, 27 *FORDHAM J. CORP. & FIN. L.* 193, 199–200 (2022) (explaining the characteristics of transactions in U.S. real estate that make these transactions attractive as a vehicle for money laundering); Niels Johannesen, Jakob Miethé & Daniel Weishaar, *Homes Incorporated: Offshore Ownership of Real Estate in the U.K.* (CESifo Working Paper No. 10159, 2022), [https://www.cesifo.org/DocDL/cesifo1\\_wp10159.pdf](https://www.cesifo.org/DocDL/cesifo1_wp10159.pdf) [<https://perma.cc/99KG-JJQR>] (“[I]t remains simple to launder money and evade capital taxes in the home country through investments in foreign real estate markets as there is no systematic cross-border reporting of real estate assets.”); Rhoda Weeks-Brown, *Straight Talk: Cleaning Up*, *FIN. & DEV.*, Dec. 2018, at 44, 44, <https://www.imf.org/en/Publications/fandd/issues/2018/12/imf-anti-money-laundering-and-economic-stability-straight> [<https://perma.cc/V5P4-XSJJ>] (“In some ways, expensive homes are the modern mobster’s collection of laundromats.”); Michael Hudson, Ionuț Stănescu & Sam Adler-Bell, *How New York Real Estate Became a Dumping Ground for the World’s Dirty Money*, *NATION* (July 3, 2014), <https://www.thenation.com/article/archive/how-new-york-real-estate-became-dumping-ground-worlds-dirty-money> [<https://perma.cc/2CUB-44GG>] (“[H]igh-end real estate in the city is an alluring destination for corrupt politicians, tax dodgers and money launderers around the globe.”).

120. See *ORG. FOR ECON. CO-OP. & DEV., REPORT ON TAX FRAUD AND MONEY LAUNDERING VULNERABILITIES INVOLVING THE REAL ESTATE SECTOR* ¶¶ 7 ex.1, 26 ex.2 (2007), <https://www.oecd.org/ctp/exchange-of-tax-information/42223621.pdf> [<https://perma.cc/8NHP-SPMT>] (providing examples of how real estate transactions may facilitate tax fraud); *supra* note 119.

121. See *CLARKE, supra* note 13, at 250; Paris, *supra* note 43, at 96–97, 102.

122. See, e.g., Nina Gray & Pamela Herrick, *Decoration in the Gilded Age: The Frederick W. Vanderbilt Mansion, Hyde Park, New York*, 10 *STUD. DECORATIVE ARTS* 98, 102 (2002–2003) (describing the Vanderbilt family’s movement between different residences over the course of a year).

123. See Ackerman, *supra* note 24, at 11 (“A villa is a building in the country — or at least outside the city — designed for its owner’s enjoyment and relaxation . . . [T]he basic program of the villa has remained unchanged for more than two thousand years.”).

124. See *SOULES, supra* note 2, at 125 (“Any emphasis on bodily use is antithetical to the investor-oriented architecture of the superprime.”).

Indeed, as architect and urbanist Matthew Soules has argued, the use of ultraluxury urban residences as financial products has pushed them closer to the realm of virtual reality or the metaverse (or what Soules, in a play on the dual meaning of the word “real” in this context, calls “real virtuality”), with their architecture becoming “defunctionalized in terms of traditional architectural purpose and electronically mediated as investment imagery.”<sup>125</sup> Although the buildings that contain superprime condos still exist in physical form, the value of those residences is substantially if not entirely decoupled from their physical existence. As Soules observes, one indication of this decoupling is the active and crucial “presales” market for superprime condos.<sup>126</sup> In that market, buyers enter into contracts to buy a unit before the building containing that unit exists.<sup>127</sup> Buyers may keep that contractual right to buy, or they may sell it on secondary markets before the underlying condo units are built.<sup>128</sup> Both the primary and secondary markets for presales suggest that superprime condos can have value independent of their physical existence, particularly in light of the fact that the physical condominium may never be developed or may differ nontrivially from the

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125. SOULES, *supra* note 2, at 196–200 (quoting Reinhold Martin, *Financial Imaginaries: Toward a Philosophy of the City*, 42 GREY ROOM 60, 73 (2011) (“[Architecture] has become a kind of real virtuality, in which, from the point of view of the markets and those who manipulate them, the actual, tangible existence of anything that can plausibly be called a useful object (i.e., a real building) has been superseded by a set of representations.”)). Indeed, Soules observes that “the production of investment images” through digital renderings of architecture has become critical in the marketing of superprime condos. *See* SOULES, *supra* note 2, at 199–200.

126. *See* SOULES, *supra* note 2, at 193 (noting that a certain number of presales may be required to secure financing for superprime development); *see also* Michelle Higgins, *The Take-It-on-Faith Condo*, N.Y. TIMES (Nov. 16, 2012), <https://www.nytimes.com/2012/11/18/realestate/the-take-it-on-faith-condo.html> [<https://web.archive.org/web/20210609183936/https://www.nytimes.com/2012/11/18/realestate/the-take-it-on-faith-condo.html>] (noting that more than 60% of the 92 condos in the then-incomplete superprime development One57 had been sold).

127. This is like a futures contract for the underlying condo, except that the terms of the deal may provide that the buyer or seller can default under certain circumstances. *See* SOULES, *supra* note 2, at 192; *cf.* Su Han Chan et al., *Presales, Leverage Decisions, and Risk Shifting*, 36 J. REAL EST. RSCH. 475, 476 (2014) (noting that, in some contracts, the buyer can default if remaining payments on the presale contract exceed the spot price and that the seller can default if that spot price is unexpectedly low or if remaining construction costs are unexpectedly high).

128. *See* SOULES, *supra* note 2, at 192 (“[A] presales contract might be bought and sold multiple times between initial purchase from the developer and the unit’s completion.”); Anne Machalinski, *Buying Off Floor Plans Often Means a Lower Price and More Choices*, MANSION GLOB. (Oct. 6, 2017), <https://www.mansionglobal.com/articles/buying-off-floor-plans-often-means-a-lower-price-and-more-choices-76560> [<https://perma.cc/XL7W-GRZ6>].

materials shown to the buyer at the presale stage.<sup>129</sup> Coupled with the reality that superprime condos are not primarily used as residences, these presales markets underscore that a superprime condo is principally an *idea* conveyed by its design, affordances, and location.<sup>130</sup>

In this respect, superprime condos closely resemble — and perhaps are now primarily — intangible assets.<sup>131</sup> To be sure, a superprime condo owner still has ownership of a physical asset, their condominium unit, and that ownership makes that physical asset excludable (i.e., a condo owner has the right to exclude others from the physical space of their condo).<sup>132</sup> But that physical asset is merely the precondition, an “alibi,”<sup>133</sup> for the *idea* of the condominium unit. As previously discussed, ideas are generally nondepletable and nonrivalrous — i.e., usable by anyone at any time, without limits.<sup>134</sup> Yet, as the previous Section explained, zoning law puts limits on the ownership and enjoyment of these ideas by introducing artificial scarcity into the market for superprime condos. In this sense, zoning law functions similarly to intellectual property law,<sup>135</sup> which gives intangible assets economic value by stopping people from using those assets without permission (thus increasing scarcity and excludability).<sup>136</sup> Put otherwise, while a condo owner’s fee simple ownership of a unit makes the unit’s physical space excludable, zoning law makes the intangible value of the unit

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129. See Chan et al., *supra* note 127, at 476 (noting the risk of developer default); Higgins, *supra* note 126 (noting the risk that the condominiums ultimately built by the developer may differ from what is advertised to presale buyers).

130. Soules refers to the markets for what are effectively just the ideas of condos as “entirely postmaterial worlds of architectural exchange value.” SOULES, *supra* note 2, at 196.

131. See SOULES, *supra* note 2, at 195–200, 203 (“[T]he technologies of finance are propelling architecture toward . . . a postshelter and postmaterial formation . . .”).

132. See Herman Mark Schwartz, *Club Goods, Intellectual Property Rights, and Profitability in the Information Economy*, 19 BUS. & POL. 191, 193 (2017) (characterizing excludability as “essentially, can I legally prevent someone from consuming a good?”).

133. Cf. BARTON BEEBE, TRADEMARK LAW: AN OPEN-SOURCE CASEBOOK 14–15 (version 10, digital ed. 2023), <https://www.tmcasebook.org/wp-content/uploads/2023/07/BeebeTMLaw-v10-digital-edition.pdf> [<https://perma.cc/FHB3-A455>] (using the word “alibi” to describe physical goods (e.g., a tshirt) that are desirable principally because of the intellectual property for which they are a substrate (e.g., the brand POLO or PRADA on that tshirt)).

134. See Lemley, *supra* note 4, at 466–68.

135. This use of the term “intellectual property law” is meant to encompass not only the familiar categories of patents, copyrights, trademarks, trade secrets, and right of publicity but also other legal regimes that make information scarcer and more excludable. See, e.g., Feldman, *supra* note 3, at 54, 75 (including “regulatory property” — e.g., Food and Drug Administration regulations granting certain market exclusivity rights for “orphan” drugs — in the category of “intellectual property”).

136. See Feldman, *supra* note 3, at 54, 75 (summarizing how regulatory property in the life sciences industry protects the exclusivity of certain assets in various ways); see also *supra* notes 4, 86 and accompanying text.

both scarce and excludable. Thus, superprime condos are not only similar to intangible assets but are also similar to intellectual property.

Yet the above analysis does not explain why superprime condos remain valuable when considered independently of the underlying real property interest. In the case of other intellectual property — e.g., a hit song — the value protected by the law is clear. In the case of superprime condos, if land is not the ultimate source of their value, what is? The next Section seeks to answer that question.

### C. Intangible Surplus

This Section contends that the idea of a superprime condo is valuable because it conveys a narrative about the owner and their lifestyle. In this sense, superprime condos closely resemble forms of intellectual property protection that reinforce the link between the intellectual property owner and a set of social concepts or associations.<sup>137</sup> Consider trademark law. Protection of the trademark ROLEX, for example, permits Rolex to stop others from putting ROLEX on their own watches and selling those knockoffs into the market.<sup>138</sup> While trademark law's core concern is simply ensuring consumers can be sure their ROLEX-branded watches come from Rolex,<sup>139</sup> giving Rolex control over quality and supply in this way also strengthens Rolex's associations with wealth, prestige, and watchmaking excellence.<sup>140</sup> Other forms of intellectual property can play a similar

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137. See, e.g., *Gucci Am., Inc. v. Dart, Inc.*, 715 F. Supp. 566, 567 (S.D.N.Y. 1989) (reasoning that luxury brand Gucci suffers harm as a result of counterfeiting of its trademarks because, among other things, consumers “will be discouraged from acquiring a genuine Gucci because the items have become too commonplace and no longer possess the prestige and status associated with them”); *Rolex Watch USA, Inc. v. Canner*, 645 F. Supp. 484, 495 (S.D. Fla. 1986) (reasoning that defendant wristwatch counterfeiters infringed plaintiff's trademarks by selling watches that, among other things, could “discourage[]” consumers “from acquiring a genuine because the items have become too common place and no longer possess the prestige once associated with them”); see also Kal Raustiala & Christopher Jon Sprigman, *Rethinking Post-Sale Confusion*, 108 TRADEMARK REP. 1, 14–18 (2018) (explaining how trademark law may help preserve luxury brands' “association with wealth and high social status” and noting that brands' interest in preserving this association is typically couched in the language of “consumers' generalized desire for exclusivity and specialness”); Beebe, *supra* note 19, at 845–55 (pointing to *Mastercrafters Clock & Radio Co. v. Vacheron & Constantin-Le Coultre Watches, Inc.*, 221 F.2d 464 (2d Cir. 1955), as a case employing similar reasoning).

138. See *Canner*, 645 F. Supp. at 496 (finding defendant counterfeiters liable for trademark infringement).

139. See *Jack Daniel's Props., Inc. v. VIP Prods. LLC*, 599 U.S. 140, 146 (2023) (“[A] mark tells the public who is responsible for a product.”).

140. Trademark law strengthens these associations both by incentivizing Rolex to maintain consistent product quality and by underwriting a perception among consumers that Rolex is a differentiated product. See William M. Landes & Richard A. Posner, *The Economics of Trademark Law*, 78 TRADEMARK REP. 267, 271–72 (1988) (explaining the incentive to

narrative-making function, even if they are less explicitly concerned with branding than trademarks.<sup>141</sup> Indeed, Stefan Bechtold and Christopher Jon Sprigman have shown how copyright, design patent, and industrial design rights can serve similar functions “to help create and control a narrative about a product.”<sup>142</sup> The ultimate result of such uses of intellectual property is to create an “aura” around a product, which may be enjoyed to some extent even by those who do not own or use the product.<sup>143</sup>

The intangible asset value of superprime condos functions similarly. Ownership of a superprime condo creates or reinforces associations between the owner and a host of concepts, which lend themselves to creation of an “aura.”<sup>144</sup> Broadly, the concepts associated with a superprime condo appear to be the same as those associated with a Rolex watch or many other luxury goods: wealth, prestige, and excellence. The narrative is that a superprime condo owner is a person who can afford the finest things money can buy — although, perhaps, some effort is made not to be garish.<sup>145</sup> Thus, for the exteriors of these buildings, developers often call on globally recognized, well-regarded architects (“starchitects”) to produce eye-catching designs.<sup>146</sup> For the interiors, a separate slate of designers may be called in, and few expenses are spared.<sup>147</sup> Interior surfaces are outfitted with limestone, oak

maintain consistent product quality); *see also* Bechtold & Sprigman, *supra* note 110, at 296–97 (noting the “darker producerist account” of trademark law whereby “trademarks are often used by producers to create preferences . . . for elements of product differentiation, like branding or product design”); Kenneth Neil Cukier, *Let the Good Times Roll*, *ECONOMIST* (May 12, 2005), <https://www.economist.com/news/2005/05/12/let-the-good-times-roll> [<https://perma.cc/8PLJ-LYXW>] (discussing Rolex watches’ function as status symbols and reputation for quality and toughness).

141. *See* Bechtold & Sprigman, *supra* note 110, at 296, 298–99 (describing how intellectual property rights beyond trademarks — including design patent and copyright law — can help shape narratives about products through a process that resembles “a merger of the distinctiveness function of trademark law with the concept of authorship that underlies copyright law”).

142. Bechtold & Sprigman, *supra* note 110, at 296, 298–99, 309–19, 323–24.

143. *See* Bechtold & Sprigman, *supra* note 110, at 301, 351–53.

144. *See generally* Bechtold & Sprigman, *supra* note 110.

145. *Cf.* CENT. PARK TOWER, <https://centralparktower.com> [<https://perma.cc/M7EL-N6VN>] (last visited Oct. 23, 2023) (featuring a film in which Central Park Tower is described as, among other things, “respectful”).

146. Willis, *supra* note 33, at 24, 28; Katherine Clarke, “*If I Could I Would Kill Him*”: *The 5 Best Soundbites from Rafael Viñoly’s 432 Park Discussion*, *REAL DEAL* (May 4, 2016), <https://therealdeal.com/new-york/2016/05/04/if-i-could-i-would-kill-him-the-5-best-soundbites-from-rafael-vinolys-432-park-discussion> [<https://perma.cc/YTZ5-8QP4>] (referring to 432 Park Avenue’s architect, Rafael Viñoly, as a “starchitect”).

147. To take a couple of examples, SHoP Architects designed the building 111 West 57th Street, where Studio Sofield designed the interiors, and Jean Nouvel designed the building 53 West 53, where Thierry Despont designed the interiors. *See Design*, 111 W. 57TH ST., <https://111w57.com/design> [<https://perma.cc/447Z-2NQT>] (last visited Nov. 2, 2023); *Architecture*, 53WEST53 ABOVE MOMA, <https://www.53w53.com/architecture>



wood, and statuary marble; sumptuous wine cellars and blue-chip artwork are typical.<sup>148</sup> These rarefied exteriors and interiors buttress the notions of wealth and high status that are already conveyed by the unparalleled views of the city from these condos.

But the sheer intensity of superprime condos' role as status symbols may give them a more complex social meaning to their owners. Beyond simply signaling wealth, superprime condos also seem to evoke a more unique cluster of concepts that center on emphasizing and perhaps celebrating wealth inequality. The narrative here is that a superprime condo owner is someone whose wealth affords radical freedom but, in so doing, also demands a lifestyle that shields them from those who may represent a potential threat to that wealth.<sup>149</sup> Thus, urbanist Rowland Atkinson, writing about ultraluxury housing in London, has argued that superprime condos' aesthetic — particularly, views “high above street level” showing “a risky city kept at bay” — “relates to forms of social triumph and personal success that are divorced from, or potentially in opposition to, the social life of the wider city or to ideas of social reciprocity.”<sup>150</sup> Soules similarly observes that such views are fundamentally “asocial,” abstracted away from their local

[<https://perma.cc/K5XS-V7E9>] (last visited Nov. 2, 2023); *Interiors*, 53WEST53 ABOVE MoMA, <https://www.53w53.com/interiors> [<https://perma.cc/TX47-5NRH>] (last visited Nov. 2, 2023).

148. See Bosker, *supra* note 32 (noting “an amenities arms race . . . with perks such as a pool with an underwater soundtrack curated by Carnegie Hall”). To take the Steinway Tower and the MoMA tower as examples again, at the former “opulent lobbies [are] decked out in limestone, marble, blackened steel and velvet, floors paved in smoke-gray solid oak and original artworks by Picasso and Matisse,” John Blake, *The World’s Skinniest Skyscraper Is Now Complete—and its Interiors Are Remarkable*, CNN: STYLE (Nov. 24, 2022, 10:57 AM) <https://www.cnn.com/style/article/steinway-skyscraper-interior-design/index.html> [<https://perma.cc/63H3-RSR6>], and, at the latter, there are “kitchens with backlit Statuary marble and bathrooms awash in honey-hued Peruvian travertine, Verona limestone and polished-nickel lollipop-shaped mirrors,” Tim McKeough, *Understatement Is the New Luxury*, N.Y. TIMES (Oct. 16, 2020), <https://www.nytimes.com/2020/10/16/realestate/nyc-condo-design.html> [<https://web.archive.org/web/20230510190441/https://www.nytimes.com/2020/10/16/realestate/nyc-condo-design.html>]; see also *supra* note 50.

149. See ATKINSON, *supra* note 28, at 140–161 (analyzing the extensive security features of ultraluxury residences in London and linking these features to “the feeling that one is . . . a potential target”); see also William Davies, *Elites Without Hierarchies: Intermediaries, ‘Agency’ and the Super-Rich*, in CITIES AND THE SUPER-RICH: REAL ESTATE, ELITE PRACTICES, AND URBAN POLITICAL ECONOMIES, *supra* note 40, at 19, 22, 25 (positing that the superrich may generally be attracted to a form of “negative liberty” contingent on “be[ing] and “remain[ing] *super-rich*” and consisting of radical freedom from the state: “less tax, less regulation, less attention from the tax collectors, fewer barriers to the movement of high-net-worth individuals and their assets”).

150. Rowland Atkinson, *Necroarchitecture: Lifeless Dwellings and London’s Super-Rich*, 43 INT’L J. URB. & REG’L RSCH. 1, 6 (2018).

context and meant to be consumed alone.<sup>151</sup> Put otherwise, these aspects of superprime condos' aesthetics seem intended to highlight that superprime condo owners are sharply differentiated from the rest of society by their wealth. The simultaneously alluring and anxiety-provoking *jouissance* of this narrative may explain the bunker-chic aesthetic of some superprime condos.<sup>152</sup>

These narratives, which rely on and incorporate the scarcity discussed in Section II.A, are what make superprime condos as valuable as they are. As this Part has shown, the bulk of superprime condos' value comes from favorable government regulation that protects these assets' scarcity and from the ideas — the narratives — that are associated with these assets. That surplus is entirely intangible.<sup>153</sup> Moreover, as markets for superprime condo presales illustrate, this intangible surplus can be decoupled from the underlying property interest and freely bought and sold.<sup>154</sup> As a result, superprime condos have come to behave more like intellectual property interests than real property interests.

### III. IMPLICATIONS

This Part explains the policy implications of the foregoing analysis of superprime condos. It first addresses the general policy implications of the treatment of superprime condos in Section II.A, which do not depend on the analogy between superprime condos and intellectual property that this Article proposes. This Part then discusses how the intellectual property analogy supports these general policy implications in underappreciated ways.

#### A. General Policy Implications

As discussed, superprime condos are associated with several negative externalities. Exacerbating New York City's housing crisis stands foremost among those externalities.<sup>155</sup> Perhaps equally prominent is superprime

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151. SOULES, *supra* note 2, at 151.

152. See ATKINSON, *supra* note 28, at 142 (“The result is an aesthetic that seems to combine special ops with Italian tailoring.”); cf. JACQUES LACAN, *The Subversion of the Subject and the Dialectic of Desire in the Freudian Unconscious*, in *ÉCRITS* 671, 696 (Bruce Fink trans., 2006) (employing *jouissance* in its Lacanian sense, denoting both pleasure and its negation).

153. See *supra* note 38.

154. See *supra* notes 126–29 and accompanying text.

155. Although the primary concern is that superprime condos reduce the supply of affordable housing through both creation of unaffordable units and raising prices generally, see *supra* notes 27–29 and accompanying text, this may not be the only way superprime condos can reduce the supply of affordable housing. Commentators also worry that the use of superprime condos as largely unoccupied financial products drains the public fisc of funds that could otherwise be used to pay for or incentivize affordable housing. As urbanist Roberta

condos' use for money laundering and tax evasion.<sup>156</sup> As the market for superprime condos is highly international, money laundering- and tax evasion-related negative externalities transcend national borders.<sup>157</sup> Additionally, as noted in the Introduction, commentators have also alleged that superprime condos generate a separate class of problems, which generally center on the various ways that superprime condos may have a negative effect on the city's physical environment.<sup>158</sup>

The implications of Part II's analysis are clear with respect to these social problems, except with respect to potential negative effects on the city's physical environment (many of which — e.g., reduction of local character — may be caused by construction of new skyscrapers generally).<sup>159</sup> Namely, the analysis in Part II is unequivocally pro-development. The law subverts superprime development by capping the aggregate vertical density of New York City, meaning that, in this zero-sum game, more superprime condos means less square footage for affordable housing. The logical conclusion of this analysis is that, if law- and policymakers value affordable housing over the intangible surplus created by superprime condos, they should increase density — “upzone” — at the expense of reducing the value of that surplus.

This conclusion is not novel.<sup>160</sup> Of course, few would take aim at New York City zoning law's reliance on the concept of FAR in general, given how central that concept is to the zoning ordinance.<sup>161</sup> But many have

Brandes Gratz puts it, “[a]bsentee apartment owners add nothing to the city: they don't shop in local stores, add people to the streets, or enhance the city's culture. They diminish the residential diversity that nourishes the living city. They even deprive local government of revenue, since these apartments are built with tax breaks and any local tax the owners may later pay is effectively cancelled out.” Gratz, *supra* note 31; cf. N.Y.C. INDEP. BUDGET OFF., *supra* note 105, at 6 (finding that 301 more units of affordable housing would have been produced if, instead of subsidizing the superprime development One57 through tax abatements conditional on construction of affordable housing, New York City had paid cash subsidies for affordable housing in an amount equal to the cost of the tax break).

156. See *supra* notes 119–20 and accompanying text.

157. See *supra* notes 35–36 and accompanying text.

158. See *supra* note 32 and accompanying text.

159. See *infra* note 166 and accompanying text.

160. See, e.g., Ilya Somin, *Opinion: The Emerging Cross-Ideological Consensus on Zoning*, WASH. POST: VOLOKH CONSPIRACY (Dec. 5, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/12/05/the-emerging-cross-ideological-consensus-on-zoning> [<https://web.archive.org/web/20151206135556/https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/12/05/the-emerging-cross-ideological-consensus-on-zoning/>] (“[E]conomists and other public policy experts across the political spectrum have come to realize that zoning rules are a major obstacle to affordable housing and economic opportunity for the poor and lower middle class.”).

161. Indeed, the city's FAR limits on non-residential buildings are not relevant here and may require no revision at all. For example, the highest baseline FAR in a commercial zoning district in New York City is 15, and developers can increase this FAR through the mechanisms

proposed eliminating the maximum FAR for residential buildings, which, as previously noted, is currently set at 12.<sup>162</sup> Indeed, in mid-2023, for the third time in recent years, the New York legislature considered and rejected a proposal to lift the residential FAR cap.<sup>163</sup> Advocates contend that removing the residential FAR cap would permit higher-density residential development, which could help alleviate the city's housing crisis.<sup>164</sup> Opponents counter with arguments that often reflect the same concerns underlying the view that superprime condos have a deleterious effect on the

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discussed in Section I.B. See *Commercial Districts: C5*, N.Y.C. DEP'T CITY PLAN., <https://www.nyc.gov/site/planning/zoning/districts-tools/c5.page> [https://perma.cc/LR3D-Z64A] (last visited Nov. 2, 2023). Therefore, developers can create commercial buildings that are substantially denser than residential buildings could be. See, e.g., N.Y.C. ZONING RES. § 93-21 (setting forth, for certain areas in the Special Hudson Yards District, a baseline FAR of 10 with the potential to increase that FAR to a maximum of 30). In any event, the market for commercial buildings in New York City is subject to pressures that are different from those in the market for residential buildings in the city. Indeed, demand is currently significantly lower in the commercial market. See REG'L PLAN ASS'N, CREATING MORE AFFORDABLE HOUSING IN NEW YORK CITY'S HIGH-RISE AREAS: THE CASE FOR LIFTING THE FAR CAP 11 (2018), <https://rpa.org/uploads/old-site/library.rpa.org/pdf/RPA-12-FAR.pdf> [https://perma.cc/C9XM-DB7N] (noting that, "when Downtown Brooklyn was rezoned from industrial to modern high-rise development . . . the residential market was stronger than the commercial market in the area, [and] the district became predominantly residential instead [of commercial]"); Matthew Haag, *What Record Office Vacancies Mean for New York City's Economy*, N.Y. TIMES (May 5, 2023), <https://www.nytimes.com/2023/05/05/nyregion/nyc-office-space-vacancy-rates.html> [https://web.archive.org/web/20230505101326/https://www.nytimes.com/2023/05/05/nyregion/nyc-office-space-vacancy-rates.html/] (noting a record decline in demand for midtown Manhattan office space).

162. Importantly, these proposals advocate removing the residential FAR cap enshrined in New York State law, but they do not necessarily advocate changing the maximum FAR within any zoning district in New York City. See *supra* notes 62, 100. These proposals thus would keep 12 as the highest FAR for residential buildings in the city but permit building over that limit, subject to public review. See, e.g., REG'L PLAN ASS'N, *supra* note 161 (advocating for repealing the residential FAR cap, subject to this caveat).

163. *Victory! Budget Agreement Excludes Supersized Residential Development Proposal*, VILL. PRES. (May 1, 2023), <https://www.villagepreservation.org/campaign-update/victory-budget-agreement-excludes-supersized-residential-development-proposal> [https://perma.cc/H89F-8NW4]. One might argue that the significant amount of unused FAR in the city, see *supra* note 97, means developers should build outside of already-dense neighborhoods. Maybe so. But this argument ignores the fact that high-density neighborhoods probably are high-density because they are desirable places to live. See REG'L PLAN ASS'N, *supra* note 161, at 4–6.

164. See, e.g., Cara Eckholm, *Will Ambitious Plans for a 'New' New York Get Crushed in Albany?*, N.Y. TIMES (Mar. 29, 2023), <https://www.nytimes.com/2023/03/29/opinion/housing-future-new-york-city.html> [https://web.archive.org/web/20230329091437/https://www.nytimes.com/2023/03/29/opinion/housing-future-new-york-city.html]; Adam Brodheim & Austin Celestin, *Opinion: NYC's Residential Floor Area Ratio Cap Must Go*, CITY & STATE (Jan. 12, 2023), <https://www.cityandstateny.com/opinion/2023/01/opinion-nycs-residential-floor-area-ratio-cap-must-go/381730> [https://perma.cc/F83E-VHT8].

New York City environment (e.g., by altering neighborhoods' character).<sup>165</sup> Of course, because these concerns are applicable to new dense construction generally, these counterarguments tend to accompany virtually any significant new development project in New York City.<sup>166</sup>

This Article does not weigh in on this debate. Evaluating the specifics of any particular density-increasing proposal is beyond this Article's scope. This Article simply makes the narrower point that, assuming superprime condos' benefits are outweighed by their negative externalities in the form of affordable housing reduction and facilitation of financial misconduct, the solution must be increasing density. This conclusion is less obvious than it may seem, because zoning advocates have argued that eliminating the residential FAR cap would spur further construction of unaffordable

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165. See, e.g., Lincoln Anderson, 'Sky's the Limit' If Hochul Bill to Scrap F.A.R. Cap Is O.K.'d, VILL. SUN (Mar. 7, 2022), <https://thevillagesun.com/skys-the-limit-if-hochul-bill-to-scrap-f-a-r-cap-is-o-k-d> [<https://perma.cc/XQP4-A9DW>].

166. See, e.g., Joseph Berger, *N.Y.U.'s Plan for Expansion Draws Anger in Community*, N.Y. TIMES (Mar. 9, 2012), <https://www.nytimes.com/2012/03/10/nyregion/nyu-expansion-plan-upsets-some-greenwich-village-neighbors.html> [<https://web.archive.org/web/20120310223926/https://www.nytimes.com/2012/03/10/nyregion/nyu-expansion-plan-upsets-some-greenwich-village-neighbors.html>] (noting community opposition to New York University's proposed development in Greenwich Village on the grounds that "the proposed buildings were too dense and tall and that the addition of thousands of students and workers would erode the character of a still quaint and offbeat city quarter"); Denny Lee, *Neighborhood Report: East Village; Planners Wary of College's Expansion, but Cooper Union Calls It Essential*, N.Y. TIMES (July 28, 2002), <https://www.nytimes.com/2002/07/28/nyregion/neighborhood-report-east-village-planners-wary-college-s-expansion-but-cooper.html> [<https://web.archive.org/web/20101205071815/https://www.nytimes.com/2002/07/28/nyregion/neighborhood-report-east-village-planners-wary-college-s-expansion-but-cooper.html>] ("East Village residents and local elected officials have criticized [Cooper Union's] plan [to develop 51 Astor Place in the East Village into a commercial and academic center], saying that the large-scale development would turn their eclectic, artistic neighborhood into a sterile business campus.").

housing.<sup>167</sup> Potentially, this could be true in the short run.<sup>168</sup> But the foregoing discussion strongly suggests that, in the long run, construction of additional housing units that are physically similar to superprime condos will

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167. See, e.g., Gabriel Poblete, *More Housing Density in New York City? Not So Fast, Say Some City Lawmakers on Key Hochul Proposal*, CITY (Apr. 11, 2023, 5:03 AM), <https://www.thecity.nyc/2023/4/11/23678151/housing-density-cap-far-hochul> [https://perma.cc/QKR8-Y2Q5] (noting Assemblymember Glick's view that the proposal is a "green light for rampant luxury development"). Additionally, one could argue that it is possible to redistribute superprime condos' intangible surplus through taxation. For example, lawmakers have repeatedly considered imposing a pied-à-terre tax on high-value New York City apartments that are not used as primary residences. See, e.g., JONAS J.N. SHAENDE, FISCAL POL'Y INST., *THE PIED-À-TERRE TAX: AN INTERNATIONAL REVIEW AND EVALUATION FOR NEW YORK* (2019), <http://fiscalpolicy.org/wp-content/uploads/2019/03/Pied-a-Terre-FPI.pdf> [https://perma.cc/7ZA6-GC4N]; Paul Williams, *NY Assembly Bill Again Seeks Pied-à-Terre Tax for NYC*, LAW360: TAX AUTH. (Jan. 24, 2023), <https://www.law360.com/tax-authority/articles/1568738> [https://perma.cc/SFG8-T3YK] ("[Assemblymember] Glick has introduced similar bills in every legislative session since 2014."); see also A. 1814, 246th Leg., Reg. Sess. (N.Y. 2023) (setting forth the most recent iteration of the series of proposed pied-à-terre bills introduced in the New York Assembly). While perhaps a useful policy option, New York City pied-à-terre tax proposals are flawed, from this Article's perspective, because such taxes necessarily take for granted superprime condos' intangible surplus without focusing on whether zoning laws should produce this intangible surplus in the first place. See *infra* Section III.B.

168. Unleashing development potential will naturally result in more market-rate housing, but, as many have argued, new market-rate housing will be affordable once increased supply creates a buyer's market. See Michael Lewyn, *Downtown Condos for the Rich: Not All Bad*, 51 N.M.L. REV. 400, 416–17 (2021); see also M. Nolan Gray, *America Needs More Luxury Housing, Not Less*, ATLANTIC (Apr. 12, 2021), <https://www.theatlantic.com/ideas/archive/2021/04/theres-no-such-thing-luxury-housing/618548> [https://web.archive.org/web/20210412104325/https://www.theatlantic.com/ideas/archive/2021/04/theres-no-such-thing-luxury-housing/618548/]. Of course, even if developers were permitted to exceed the residential FAR cap, nothing stops New York City from pursuing policies that require developers to allocate a certain portion of new developments to below-market-rate housing. Indeed, the 2016 addition of Mandatory Inclusionary Housing to New York City's zoning ordinance takes this approach by requiring developers to build below-market-rate housing in certain rezoned areas. See Mackenzie Lew, *Mandatory Inclusionary Housing: Are Permanency and Affordability Possible?*, 21 CUNY L. REV. F. 1, 7–11 (2018) (providing an overview of the Mandatory Inclusionary Housing program's provisions); Moses Gates, *Dispelling Myths About Floor Area Ratio (FAR) Reform*, RPA (Apr. 1, 2022), <https://rpa.org/latest/lab/nyc-12-far-reform-myths> [https://perma.cc/XB5K-DCXW] (stating that upzonings made possible by the removal of the residential FAR cap would trigger Mandatory Inclusionary Housing requirements). However, mandating below-market-rate housing does not guarantee that developers will build it, because developers can always simply "opt out of participation." N.Y.U. FURMAN CTR. FOR REAL EST. & URB. POL'Y, INCLUSIONARY ZONING 3–4 (2021), [https://furmancenter.org/files/publications/302.6\\_Inclusionary\\_Zoning\\_-\\_Final.pdf](https://furmancenter.org/files/publications/302.6_Inclusionary_Zoning_-_Final.pdf) [https://perma.cc/LZQ5-M4GA] (noting that all Mandatory Inclusionary Housing projects to date have been "heavily subsidized," which "may . . . suggest that the various affordability requirements of [Mandatory Inclusionary Housing] are difficult for developers to achieve through cross-subsidy from market-rate units alone, given the high cost of limited development sites in New York City").

reduce the scarcity of superprime condos and thus necessarily decrease their value, resulting in a greater supply of non-superprime housing.<sup>169</sup>

Nothing about that conclusion necessarily depends on viewing superprime condos as similar to intellectual property. However, the analogy to intellectual property suggests unique arguments in support of a pro-development position. The next Section turns to those arguments.

### **B. Policy Implications of Viewing Superprime Condos as Intellectual Property**

Both real property law and intellectual property law balance private property rights against the public interest to some extent. Examples in real property law include nuisance and zoning law.<sup>170</sup> Examples in intellectual property law include the limited terms of copyrights and patents and the fair use doctrines in copyright and trademark law.<sup>171</sup>

However, there are key differences between real property law and intellectual property law in this respect. And it is these differences that provide the basis for pro-development arguments in the context of urban ultraluxury development, if we accept the analogy between superprime condos and intellectual property. To organize these differences, I will divide them into differences in determining the initial scope of property rights (what I call the “front end”) and differences in identifying permissible encroachments on those rights (what I call the “back end”).<sup>172</sup>

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169. Cf. Brodheim & Celestin, *supra* note 164 (“[O]ur potential future supertalls will become exactly what the city needs.”).

170. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387–88 (1926) (explaining that zoning must be grounded in “the police power, asserted for the public welfare” and that nuisance law may help courts “ascertain[]” the scope of that power); RESTATEMENT (SECOND) OF TORTS § 821B (1979); see also *City of Ft. Smith v. W. Hide & Fur Co.*, 239 S.W. 724, 725 (Ark. 1922) (“The distinction between a public and private nuisance lies merely in the extent of the injury or annoyance which results therefrom.”).

171. See *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1196 (2021) (citing *Stewart v. Abend*, 495 U.S. 207, 236 (1990)) (stating that copyright fair use “permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster”); see also Graeme W. Austin, *Tolerating Confusion About Confusion: Trademark Policies and Fair Use*, 50 ARIZ. L. REV. 157, 176 (2008) (stating that fair use doctrines in trademark law protect “important economic and social policies that are, in some respects, external to trademark law’s dominant concern with protecting firms against misappropriation of their goodwill, and protecting consumers against whatever harms confusion and dilution cause”); Lemley, *supra* note 4, at 467 (“[T]he government . . . relies on some combination of the temporary duration of the IP right and imperfect competition from other inventions to keep prices in line.”); *supra* note 86 and accompanying text (citing federal law provisions giving copyright, patent, and trademark owners certain exclusive rights in such intellectual property).

172. Cf. William McGeeveran, *Rethinking Trademark Fair Use*, 94 IOWA L. REV. 49, 59, 61 (2008) (describing the scope of the trademark rights that are enforceable through infringement

On the “front end,” the key point is that the scope of real property rights is not generally dependent on policy considerations, while the scope of intellectual property rights is. The scope of real property rights is an objective physical space on the face of the Earth.<sup>173</sup> The dimensions of this space depend only on how a given community has divvied up land. In contrast, the scope of intellectual property rights depends on a web of policy considerations. From a consequentialist standpoint, the government only grants new, and only protects existing, intellectual property rights to the extent that those rights further the public interest, which makes intellectual property rights fundamentally malleable.<sup>174</sup> Intellectual property doctrine primarily understands the public interest to mean promoting innovation and reducing consumer search costs in the marketplace, while balancing these objectives with the importance of a robust public domain.<sup>175</sup> So, for example, copyright or patent rights limit the public’s ability to make use of copyrighted or patented works during the term of protection, but the conventional view is that those exclusive rights incentivize the production of those works in the first place.<sup>176</sup>

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liability as the “front end” of trademark law and the defenses and exceptions to that scope as the “back end”).

173. See Lynda L. Butler, *The Horne Dilemma: Protecting Property’s Richness and Frontiers*, 75 MD. L. REV. 787, 799 (2016) (“[R]eal property interests are, by definition, tied to permanent, renewable tracts of land having demarcated boundaries.”).

174. See, e.g., *Elliott v. Google, Inc.*, 860 F.3d 1151, 1156 (9th Cir. 2017) (citing examples of marks that were once protectable but which subsequently “the public appropriated . . . as generic names,” resulting in those marks’ “genericide” (e.g., ASPIRIN, ESCALATOR)); see also Lemley, *supra* note 1, at 1031 (“On this long-standing [consequentialist] view, free competition is the norm. Intellectual property rights are an exception to that norm, and they are granted only when — and only to the extent that — they are necessary to encourage invention.”); Bechtold & Sprigman, *supra* note 110, at 296 n.10 (“[I]n the United States at least, copyright and patent rights are most often justified consequentially, and trademark justifications are exclusively consequentialist.”).

175. See, e.g., *TrafFix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 28–29 (2001) (“Trade dress protection must subsist with the recognition that in many instances there is no prohibition against copying goods and products.”); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“[C]reative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.”); see also Feldman, *supra* note 3, at 55 (“This nation’s intellectual property system — particularly the patent system — is firmly rooted in notions of neutral requirements for what constitutes a sufficient contribution to society that one can receive rights for limited times and limited purposes.”); Lemley, *supra* note 1, at 1031 (“On this [consequentialist] view, the proper goal of intellectual property law is to give as little protection as possible consistent with encouraging innovation.”).

176. See Christopher Buccafusco & Christopher Sprigman, *Valuing Intellectual Property: An Experiment*, 96 CORNELL L. REV. 1, 3 (2010) (“According to the economic account of IP, the monopolistic rights granted by copyrights and patents exist to provide economic incentives to creators.”); see also Lemley, *supra* note 1, at 1031 (“Intellectual property protection in the United States has always been about generating incentives to create.”).



Superprime condos fly in the face of this understanding of the appropriate scope of intellectual property rights. Nowhere in the zoning mechanism whereby superprime condos' scarcity is created does the law ask how the intangible surplus granted to superprime condo owners serves the public interest.<sup>177</sup> That is not to say, however, that this intangible surplus does not serve the public interest. The current state of New York City zoning law may encourage aesthetic innovation to the extent that it enables developers to capture the full value of their buildings, unmarred by other buildings that would diminish those creations' uniqueness and block desirable views.<sup>178</sup> This could have positive economic ripple effects (e.g., encouraging investment in the New York City real estate sector, injecting condo buyers' money into the local economy).<sup>179</sup> Further, superprime condo owners are not necessarily the only people who may derive some benefit from the intangible surplus of these condos.<sup>180</sup> When confronted with pictures of the lavish furnishings in or spectacular views from superprime condos, few of us could claim that there is not something mesmerizing — or at least intriguing — about the aura of these apartments.<sup>181</sup>

The real question is whether such gains in innovation, third-party enjoyment of narratives, and capital inflows offset superprime condos' negative externalities enough to warrant no change to current zoning law.

177. Recall that the intangible surplus that makes superprime condos valuable is grounded in narratives surrounding the condo owner, not in zoning's core preoccupation with preventing private land uses that clash with the broader public interest. *See generally supra* notes 18, 38, 144–52 and accompanying text.

178. *Cf.* STEFAN AL, SUPERTALL: HOW THE WORLD'S TALLEST BUILDINGS ARE RESHAPING OUR CITIES AND OUR LIVES 205 (2022) (“Super slenders balance the skyline.”); *see also* Willis, *supra* note 33, at 28 (“New York has produced a new type of skyscraper, virtually unprecedented . . . shaped by the particular constraints and opportunities of the city's zoning law and by the economics of the logic of luxury.”); Willis, *supra* note 33, at 32 (“In 2050, when these slender towers are eligible for landmark protection, I have no doubt that some — such as 432 Park Avenue and 111 W 57 Street — will be designated as superior examples of the iconic forms characteristic of New York of the 2010s.”).

179. *See* CLARKE, *supra* note 13, at 308 (“[Real estate interests] posited that even if some of these [superprime condo] buyers were in the city only a few weeks a year, they likely contributed more to the local economy in that short time than the average New Yorker does in an entire year.”); *see also supra* note 82.

180. *Cf.* Bechtold & Sprigman, *supra* note 110, at 300–01, 350–53 (arguing that the narratives of authenticity that firms use to supply their products with a particular aura have the characteristics of public goods).

181. *See, e.g.,* Joey Hadden, *I Toured One of the World's Highest Residences on NYC's Billionaires' Row and Left with Dreams of Moving In*, INSIDER (Feb. 23, 2022, 3:51 PM), <https://www.insider.com/inside-worlds-highest-homes-billionaires-row-nyc-photos-2022-2> [<https://perma.cc/E39D-8JED>] (“After my tour, I wished I could stay the night. In fact, if this building was my home, I think I'd never leave.”); Bosker, *supra* note 32 (“I'll confess that I probably dragged out the visit [to a 432 Park Avenue apartment decorated by artist Hiroshi Sugimoto] longer than I needed to. The place was so peaceful.”).

Again, this Article does not take a position on that question. But the analogy to intellectual property reveals the important consideration of whether consequentialist motives for the protection of intangible property justify the production of superprime condos' intangible surplus.

On the “back end,” the key point is that real property law, in general, focuses on protecting private goods or common pool resources, whereas intellectual property law focuses on fostering public goods. The difference here hinges again on scarcity. Public goods (e.g., information) are nonrivalrous and nonexcludable: my use of certain information generally does not detract from your ability to use it, and, without intellectual property protection, I cannot prevent you from using that information.<sup>182</sup> By contrast, private goods (e.g., houses, cars) and common pool resources (e.g., groundwater basins, forests) are both rivalrous — in other words, they are both scarce to some extent — but private goods are excludable while common pool resources are not.<sup>183</sup> Given the scarce nature of land, the encroachments on private property rights that real property law tolerates for the sake of the public interest tend to center on common pool resources that would otherwise be threatened by use of land as a private good. For example, substantial noise or pollution emitted by one property drains neighboring properties of quietness and pristineness, respectively.<sup>184</sup> Quietness and pristineness are shared among properties (noise or pollution on one property affects neighboring properties), and they are rival resources because they cannot be consumed by more than one individual at the same time.<sup>185</sup> The encroachments that intellectual property law tolerates for the sake of the

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182. See Schwartz, *supra* note 132, at 193–94, 194 fig.1 (explaining that the two binary characteristics of excludability and rivalrousness define four types of goods: private goods, public goods, common pool goods, and club goods); Lemley, *supra* note 4, at 467 (“[M]y consuming information doesn’t prevent you from also consuming it.”); see also Elinor Ostrom, *Beyond Markets and States: Polycentric Governance of Complex Economic Systems*, 100 AM. ECON. REV. 641, 645 fig.1 (2010) (providing examples of each of the four types of goods defined by the binary characteristics of excludability (“Difficulty of excluding potential beneficiaries”) and rivalrousness (“Subtractability of Use”). For the argument that information may be rivalrous to some extent, see sources cited *supra* note 19.

183. See Ostrom, *supra* note 182, at 645 fig.1. For the limited purposes of this discussion, rivalrousness can be equated with scarcity in that both concepts revolve around limitations on the simultaneous use of a good. See Schwartz, *supra* note 132, at 193 (framing the concept of rivalrousness as “does my consumption of a good subtract from what you can consume of that good?”).

184. See, e.g., *Boomer v. Atlantic Cement Co.*, 340 N.Y.S.2d 97 (N.Y. 1972) (permitting continued pollution subject to payment of damages to plaintiffs); see also R. H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1, 2, 8–9 (1960) (positing a hypothetical scenario in which a confectioner whose machinery makes noise and a doctor who requires silence for his practice work next door to each other and thus make conflicting uses of the resource of quietness).

185. See Coase, *supra* note 184, at 2 (explaining that, in cases of conflict over use of a common pool resource, the question is which resource use is higher value).

public interest, however, tend to center on firms' consumption of public goods — namely, innovation and entry into the market.<sup>186</sup> Unlike with resources like quietness or pristineness, a theoretically infinite number of firms can simultaneously seek to innovate and enter into the relevant market (whether these firms succeed is a different story).<sup>187</sup>

These back-end differences produce diametrically opposed results depending on whether superprime condos are analyzed under a real property framework or under an intellectual property framework. From the real property perspective, the zoning laws that produce superprime condos' scarcity protect common pool resources. If all FAR limits were stripped from the city's zoning code, then the city would become significantly denser.<sup>188</sup> From a preservationist standpoint, this would result in the

186. Copyright fair use again provides a helpful example of permitted encroachment on private rights for the sake of innovation. *See, e.g.*, *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1196 (2021). To the extent copyright fair use is understood less in economic terms and more in terms of its facilitation of public expression that makes use of copyrighted works, the same logic applies (i.e., a theoretically infinite number of persons can simultaneously fairly use a copyrighted work for their own forms of expression). *See generally supra* note 182 and accompanying text; *infra* text accompanying notes 191–96. Patent law contains conceptually similar features. *See, e.g.*, *Feldman, supra* note 3, at 60–61 (summarizing how the ability to improve nonobviously on an existing patent can result in overlapping rights). Intellectual property safety valves that protect innovation can also facilitate market entry, because market entry may depend on an innovative product. Additionally, trademark doctrines like descriptive fair use, which permit third parties to use a mark in a non-source identifying way to describe their own product, similarly facilitate market entry, because not being able to communicate product features would stymie market entry. *See* 15 U.S.C. § 1115(b)(4) (setting forth the descriptive fair use defense).

187. In this context, saying that “innovation” and “market entry” are public goods is equivalent to saying that information — including descriptive and generic names for products, for which trademark law restricts protection — is a public good, as both innovation and market entry make use of information. *See Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9–10 (2d Cir. 1976) (explaining that generic names for products are not protectable as a single firm “cannot deprive competing manufacturers of the product of the right to call an article by its name” but that descriptive names for products are registrable if they have become distinctive, given the need to “balance . . . between the hardships to a competitor in hampering the use of an appropriate word and those to the owner who . . . would be deprived of the fruits of his efforts”); *Sunmark, Inc. v. Ocean Spray Cranberries, Inc.*, 64 F.3d 1055, 1061 (7th Cir. 1995) (applying the descriptive fair use doctrine and concluding that, in using the words “sweet-tart” to describe its own product, defendant did not infringe SweeTARTS candy's mark); *Lemley, supra* note 1, at 1050–51 (identifying information as a public good).

188. While New York City's zoning ordinance contains various restrictions on density and height, FAR is typically viewed as the principal such restriction. *Compare* ZONING HANDBOOK, *supra* note 57, at 18, 20 (outlining non-FAR restrictions on building volume and noting other density restrictions applicable to residential buildings), *with* James S. Russell, *How to Game the Zoning Codes to Build Supertall Skyscrapers*, BLOOMBERG (June 11, 2019), <https://www.bloomberg.com/news/articles/2019-06-11/gaming-new-york-s-skyscraper-height-zoning-laws> [<https://web.archive.org/web/20210114164512/https://www.bloomberg.com/news/articles/2019-06-11/gaming-new-york-s-skyscraper-height-zoning-laws>] (“New York City does not

depletion of the city's beauty or character, as two uses of land cannot occupy the same space at once.<sup>189</sup>

From the intellectual property standpoint, the reverse is true. The FAR cap artificially *produces* rivalrousness in that, once a certain amount of FAR is dedicated to superprime condos, it cannot be used for additional superprime condo development.<sup>190</sup> In intellectual property law, such artificial rivalrousness is subject to various back-end safety valves for the public interest. Exploring each one of those safety valves in detail is a nuanced, complex endeavor beyond the scope of this Article. But consider, as just one example, the doctrine of fair use in copyright law. The section of the Copyright Act that codifies this doctrine says that “fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research, is not an infringement of copyright,” and it enumerates four factors courts must consider in determining whether use is fair: (1) the purpose of the use of the work, (2) the nature of the work, (3) the amount of the work used, and (4) the market impact of the use.<sup>191</sup> This very broad exception to copyright protection is often derided as being so open-ended as to be to only “the right to hire a lawyer.”<sup>192</sup> And, indeed, in applying this doctrine, judges have historically taken and continue to take varying approaches.<sup>193</sup> But the policy impulse behind the doctrine is intuitive. If a copyright holder has unrestricted rights to control the use of their work (e.g., footage of legendary activist and boxer Muhammad Ali), then this will reduce others' ability to use that work to create additional works (e.g., a documentary about Muhammad Ali that uses that footage), which would both introduce market inefficiencies and impoverish public expression.<sup>194</sup> The blackletter law of copyright fair use

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generally limit building heights, but instead controls bulk and density by what's called the floor area ratio (FAR).”).

189. *See generally supra* notes 93, 103, 165 and accompanying text.

190. *See generally supra* notes 94–96 and accompanying text.

191. 17 U.S.C. § 107.

192. LAWRENCE LESSIG, *FREE CULTURE: THE NATURE AND FUTURE OF CREATIVITY* 187 (2004).

193. As a prominent treatise observes with respect to the Supreme Court's “landmark [fair use] decisions from 1984, 1985, 1994, and 2021,” “[t]he malleability of fair use emerges starkly from the fact that all four cases were overturned at each level of review, three of them by split opinions at the Supreme Court level.” 4 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 13F.03[C] (2023). In the Court's most recent fair use case, *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023), Justice Sonia Sotomayor's majority opinion affirmed the judgment of the Second Circuit, which had reversed the district court. Six other Justices joined the majority opinion, with Justice Neil Gorsuch filing a concurrence, in which Justice Ketanji Brown Jackson joined. Justice Elena Kagan filed a dissent, in which Chief Justice John Roberts joined.

194. *See Monster Commc'ns v. Turner Broad.*, 935 F. Supp. 490 (S.D.N.Y. 1996) (holding that defendant's documentary about Muhammad Ali, which used clips of Muhammad Ali in

differs dramatically from that of other intellectual property law doctrines that permit unlicensed use of another's private rights (e.g., the trademark doctrines of descriptive fair use, nominative fair use, and expressive use).<sup>195</sup> But what unifies these doctrines is their policy focus on suspending intellectual property's artificial rivalrousness in order to preserve the public domain: the common reservoir of ideas, designs, and words that is thought to enrich everyone collectively.<sup>196</sup>

The extent to which those safety valves should channel private property into that reservoir is a case-by-case question, with copyright fair use being a shining example of these doctrines' extremely fact-specific nature.<sup>197</sup> However, in the context of superprime condos as intellectual property, a similar safety valve would necessarily limit a superprime condo owner's ability to claim exclusive rights to the intangible surplus linked to owning such a condo. Although, as noted above, the public may already have some access to that intangible surplus in the form of superprime condos' potential positive externalities,<sup>198</sup> the experience of owning a superprime condo necessarily remains scarce, given that the possibility (though, as discussed,

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which plaintiff allegedly owned the copyright, was likely fair use); *see also* Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1092 (2007) ("Fair use protects a zone of expressive opportunity for criticism, comment, parody, education, and other socially beneficial forms of communication that might not occur if copyright owners were given complete control over how their works were used."); Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the "Betamax" Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1623, 1630 n.162 (1982) (observing that, where the market would not provide for the transfer of rights necessary for socially beneficial uses of a work, "[i]t may be costly to society to give an author injunctive control over [such] work" and that "[w]ithout fair use, the necessity of obtaining consent might wastefully apply even to those defendants whose activities would have been objected to by no one").

195. Though they apply to different uses of trademarks, the commonality between descriptive fair use, nominative fair use, and expressive use is that they let one person (e.g., Warner Bros.) use another person's trademark (e.g., Louis Vuitton's LV monogram logo) for purposes other than to identify the first person's goods or services (e.g., in a Warner Bros.-produced film in which a reference to a Louis Vuitton product illustrates certain plot-related traits of a particular film character). *See* Jack Daniel's Props., Inc. v. VIP Prods. LLC, 599 U.S. 140, 154–55 (2023) (citing *Louis Vuitton Malletier S.A. v. Warner Bros. Ent. Inc.*, 868 F. Supp. 2d 172, 183 (S.D.N.Y. 2012) (holding that it was not trademark infringement for Warner Bros. to use Louis Vuitton's trademarks in this way in Warner Bros.' film *The Hangover: Part II*)) (explaining that trademark law's core protections against the likelihood of consumer confusion would usually be inapplicable in such a situation); *see also* Lucas Daniel Cuatrecasas, Note, *Failure to Function and Trademark Law's Outermost Bound*, 96 N.Y.U. L. REV. 1312, 1371 n.321 (2021) (summarizing these safety valves in trademark law).

196. *See supra* note 175.

197. *See* *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1197 (2021) ("[T]he concept [of fair use] is flexible, . . . courts must apply it in light of the sometimes conflicting aims of copyright law, and . . . its application may well vary depending upon context.").

198. *See supra* text accompanying notes 180–81.

not the reality)<sup>199</sup> of owning the physical space of a superprime condo is a precondition to that experience. Thus, a safety valve on that intangible surplus would permit increasing the total number of those experiences (just as copyright fair use does when a new work reproduces an existing copyrighted work), even if that intangible surplus is necessarily decreased (just as copyright fair use necessarily limits the value of the copyright holder's exclusive rights). In practical terms, a safety valve on intangible surplus would permit increasing the total number of residences in desirable and already dense areas of New York City. Viewed from the perspective of intellectual property policy, then, what is striking is that the laws governing the intangible surplus of superprime condos appear to contain no such safety valve at all.

### CONCLUSION

New York City is the largest market for superprime condos, with its “Billionaires’ Row” containing a notable concentration of these developments. Despite being real property, these superprime condos have begun to resemble intellectual property in three mutually reinforcing ways: (1) superprime condos depend on state regulation to give them surplus value; (2) they have become dematerialized; and (3) these condos’ intangible surplus is largely untethered to the real property interest that underlies them. Viewing superprime condos as intellectual property offers unique arguments in support of the position that New York City must increase vertical density to alleviate its housing crisis. Namely, it is not clear what public interest is served by state regulation’s facilitation of superprime condos’ intangible surplus, nor is it clear why that state regulation has no “safety valve” permitting reduction of that intangible surplus to further broader public goals (e.g., increasing housing stock).

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199. *See supra* Section II.B.