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## ZONING, TENANT HARASSMENT, AND THE PROPERTY CONTRADICTION: LESSONS FROM THE SPECIAL CLINTON DISTRICT

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### INTRODUCTION

Landlord harassment against low-income, rent-regulated tenants is an enduring problem in New York City that forces vulnerable tenants from their homes as landlords illegally pursue greater profits. Protection from harassment was a significant issue during Mayor Michael Bloomberg's unprecedented land use revision of nearly 140 rezonings from 2002 to 2014.<sup>1</sup> As communities throughout the city began to understand the inequitable effects of rezoning, particularly for low-income communities of color,<sup>2</sup> many tenants and community groups began to organize and demand greater protection from the anticipated effects that rezoning would have on

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<sup>1</sup> Tom Angotti, *Land Use and Zoning Matter*, in *ZONED OUT! RACE, DISPLACEMENT AND CITY PLANNING IN NEW YORK CITY* 18, 32 (Tom Angotti & Sylvia Morse eds., 2016).

<sup>2</sup> Sarah Laskow, *The Quiet, Massive Rezoning of New York*, POLITICO (Feb. 24, 2014, 11:10 AM), <http://www.politico.com/states/new-york/city-hall/story/2014/02/the-quiet-massive-rezoning-of-new-york-078398> [<https://perma.cc/VE5R-LVMD>] (“Upzoned lots tended to be in areas that were less white and less wealthy, with fewer homeowners. Downzoned lots tended to be areas that were more white and had both higher incomes and higher rates of homeownership than upzoned areas.”).

their communities.

Groups throughout the city, including those in the East Village, Lower East Side, and Chinatown (rezoned in 2008); Greenpoint and Williamsburg (rezoned in 2009); and West Clinton (rezoned in 2011), all began to demand that the rezoning include provisions to protect against anticipated real estate speculation and subsequent displacement of long-time residents.<sup>3</sup> Vigilant groups looked to the zoning code of New York City's Special Clinton District ("SCD") as an effective model of such protections.<sup>4</sup> Noted for its effective anti-harassment and no-demolition provisions, the SCD offered staunch penalties for building owners found to have harassed and intimidated tenants to force them out of their homes.<sup>5</sup> In response to the Bloomberg rezonings, some community groups began to demand that rezoning plans for their neighborhoods include these provisions.<sup>6</sup> The city rebuked these demands with the rationale that other measures were now in place to protect tenants,<sup>7</sup> particularly the Tenant Protection Act ("TPA").<sup>8</sup>

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<sup>3</sup> Groups included the Community Development Project of the Urban Justice Center and the Chinatown Justice Project of the Committee Against Anti-Asian Violence. See Jennifer 8. Lee, *Special-District Zoning Is Urged for Chinatown*, N.Y. TIMES: CITY ROOM (Mar. 4, 2009, 3:41 PM), <https://cityroom.blogs.nytimes.com/2009/03/04/special-district-zoning-is-urged-for-chinatown/> [<https://perma.cc/2HRA-DKZR>] ("There is definitely a precedent for this kind of zoning change; that is why we are advocating this for Chinatown," said Esther Wang, a project coordinator with Caaav, the anti-Asian violence group. She pointed to the Special Clinton District . . . ."); see also Emmanuel Felton, *West Clinton Rezoning Seeks to Balance Gentrification and Neighborhood Character*, MIDTOWN GAZETTE (Dec. 11, 2012, 7:04 PM), <http://themidtowngazette.com/2012/12/west-clinton-rezoning-seeks-to-balance-gentrification-and-neighborhood-character/> [<https://perma.cc/9LH2-AACW>] ("[H]ousing advocates expressed some reservations. Anti-harassment protections . . . have won favor with residents since they were established under the Special Clinton District in 1972, but the West Clinton rezoning did not extend these protections throughout the area now zoned for increased residential development.").

<sup>4</sup> Lee, *supra* note 3.

<sup>5</sup> Emily Goldstein, *Stronger Anti-Displacement Tools for a Re-Zoned City*, ASS'N FOR NEIGHBORHOOD & HOUSING DEV. (Jan. 20, 2015), <https://anhd.org/stronger-anti-displacement-tools-for-a-re-zoned-city/> [<https://perma.cc/SAU3-SHJ5>] ("The Special [Clinton] District . . . comes with sufficient penalties to provide a serious disincentive to building owners."); see also Felton, *supra* note 3.

<sup>6</sup> Lee, *supra* note 3 ("A detailed survey of the rapid pace of gentrification in Chinatown . . . was released Wednesday by two community organizations, which argued that a special protective zone with tenant protections should be drawn around the historic and densely packed immigrant neighborhood.").

<sup>7</sup> The author was involved with the campaign to extend the SCD to 11th Avenue as part of the 2011 West Clinton rezoning, and had several conversations with City Council Speaker Christine Quinn and her staff, who initially supported the SCD provisions, but eventually cited the Tenant Protection Act as adequate protection.

<sup>8</sup> Manny Fernandez, *Tenants Gain Right to Sue Landlords for Harassment*, N.Y. TIMES: CITY ROOM (Mar. 13, 2008, 4:14 PM), <http://cityroom.blogs.nytimes.com/2008/03/13/tenants-gain-right-to-sue-landlords-for->

Current New York City Mayor Bill de Blasio's recently announced plans to rezone several communities and his stated priority to protect tenants vulnerable to displacement have reinvigorated debates about tenant protections from landlord harassment.<sup>9</sup>

This article examines the validity of the City's initial claims that the TPA offers ample protections to communities vulnerable to harassment by comparing the anti-harassment provision of the SCD zoning to the 2008 Tenant Protection Act. Key to this examination is the inherent contradiction between the social character of land and its private ownership and control, which Richard Foglesong termed the "property contradiction."<sup>10</sup> This fundamental contradiction engenders two interrelated schemes of land use regulation that tenants face in their struggle for safe, affordable housing in New York City: zoning and the regulated housing market. To analyze tenant harassment, one must understand these two enforcement structures. With Foglesong's property contradiction as a guide, this study concludes with specific policy recommendations for the current rezonings.

## I. THE PROPERTY CONTRADICTION

Housing occupies a unique position within the inherent tensions of a capitalist democracy. It is a necessity for survival and a quasi-public good. Appropriately, as part of the country's National Housing Goal, Congress called for the "realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family" in the Preamble to the 1949 Housing Act.<sup>11</sup> Simultaneously, housing is a commodity: something bought and sold for investment and profit. These two disparate values are in constant tension with each other, especially when housing is scarce, as in New York City.<sup>12</sup>

Foglesong's "property contradiction" describes the discord housing presents in a capitalist democracy, where there is an inherent "contradiction

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harassment/ [https://perma.cc/A7NL-MAZA].

<sup>9</sup> Abigail Savitch-Lew, *Where Mayor de Blasio's Rezoning Proposals Stand*, CITY LIMITS (Jan. 5, 2017), <http://citylimits.org/2017/01/05/where-mayor-de-blasios-rezoning-proposals-stand/> [https://perma.cc/9D33-CTE3].

<sup>10</sup> RICHARD E. FOGLESONG, *PLANNING THE CAPITALIST CITY: THE COLONIAL ERA TO THE 1920S* 24 (1986).

<sup>11</sup> 42 U.S.C. § 1441a(a) (1974).

<sup>12</sup> There has been an official, statutory housing emergency in New York City since 1974, based on a constant vacancy rate of less than five percent. *See* FURMAN CTR. FOR REAL ESTATE & URBAN POLICY, *FACT BRIEF: RENT STABILIZATION IN NEW YORK CITY* 1-2 (2012), [http://furmancenter.org/files/publications/HVS\\_Rent\\_Stabilization\\_fact\\_sheet\\_FINAL\\_4.pdf](http://furmancenter.org/files/publications/HVS_Rent_Stabilization_fact_sheet_FINAL_4.pdf) [https://perma.cc/U5DT-R7B9].

between the social character of land and its private ownership and control.”<sup>13</sup> Marxists express the property contradiction as the difference between exchange value and use value.<sup>14</sup> A commodity’s use value is a relative, subjective concept.<sup>15</sup> It considers “the physical properties of the commodity”<sup>16</sup> and its specific uses for a specific user or group of users.<sup>17</sup> Housing’s use-value includes its functions as shelter, a safe or private space, a place where lives are lived and shared and memories are made, an expression of identity and aesthetics, or a source of pride.<sup>18</sup> A commodity’s exchange-value under capitalism is its monetary value according to the market.<sup>19</sup> There is a tension in this contradiction because “the exchange relation of commodities is characterized precisely by its abstraction from their use-values.”<sup>20</sup> For scholar and Marxist geographer David Harvey, this raises the following question:

[I]s it a good idea to allow use value in housing, which is crucial to people, [to] be delivered by a crazy exchange value system? . . . [W]e’ve released the exchange value dynamics in the theory that it’s going to provide the use value but frequently what it does is it screws up the use values and people don’t end up getting good . . . housing.<sup>21</sup>

However, one needn’t look as far left as Marx to understand the dual

<sup>13</sup> FOGLESONG, *supra* note 10, at 24.

<sup>14</sup> See DAVID HARVEY, SEVENTEEN CONTRADICTIONS AND THE END OF CAPITALISM 15-16 (2014) (“To the degree [the use value and exchange value] are often at odds with each other they constitute a contradiction . . .”).

<sup>15</sup> Gary E. Pivo, *Use Value, Exchange Value, and the Need for Public Land-Use Planning*, 1 BERKELEY PLAN. J. 40, 41 (1984) (“The use value of a commodity depends on the needs and wants of the people who consume it.”).

<sup>16</sup> KARL MARX, CAPITAL: A CRITIQUE OF POLITICAL ECONOMY, Vol. I 126 (Ben Fowkes trans., Penguin Books 1976).

<sup>17</sup> Pivo, *supra* note 15, at 41.

<sup>18</sup> HARVEY, *supra* note 14, at 15-16 (“Its potential uses are, in short, myriad, seemingly infinite and very often purely idiosyncratic.”).

<sup>19</sup> Housing’s exchange value under capitalism is its monetary value according to the market as reflected by rent paid or purchase price of property. See JOHN R. LOGAN & HARVEY L. MOLOTCH, URBAN FORTUNES: THE POLITICAL ECONOMY OF PLACE 2 (2d ed. 2007) (“For some, places represent residence or production site; for others, places represent a commodity for buying, selling, or renting to somebody else.”).

<sup>20</sup> MARX, *supra* note 16, at 127.

<sup>21</sup> David Bollier, *David Harvey on the Tyranny of Exchange Value*, DAVID BOLLIER: NEWS & PERSP. ON COMMONS (Aug. 27, 2013, 7:49 AM), <http://bollier.org/blog/david-harvey-tyranny-exchange-value> [<https://perma.cc/8WDH-RNLS>].

interests at play in housing under capitalism and how they engender the property contradiction. In the Federalist Papers, James Madison keenly acknowledged these tensions and the role of government in protecting the balance between competing interests:

But the most common and durable source of factions has been the various and unequal distribution of property. Those who hold and those who are without property have ever formed distinct interests in society. . . . A landed interest, a manufacturing interest . . . grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views. The regulation of these various and interfering interests forms the principal task of modern legislation, and involves the spirit of party and faction in the necessary and ordinary operations of the government.<sup>22</sup>

The “regulation,” “task of modern legislation,” and “ordinary operations of government” that Madison writes of with regard to unequal distribution give rise to two legislative schemes key to this analysis of tenant harassment in New York City: zoning and regulated housing.

## II. ZONING

Zoning—the state’s use of its police powers to regulate buildings’ sizes, uses, and relationship to their locations<sup>23</sup>—is a direct expression of the property contradiction. Capital’s relation to land as an investment is in tension with the government’s responsibilities to regulate land in accordance with democratic principles and fulfill citizens’ vision for how they want to use their communities, homes, and institutions.

New York City adopted the country’s first comprehensive zoning ordinance in 1916.<sup>24</sup> Powerful business interests saw zoning as a tool to

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<sup>22</sup> THE FEDERALIST NO. 10 (James Madison),

[http://avalon.law.yale.edu/18th\\_century/fed10.asp](http://avalon.law.yale.edu/18th_century/fed10.asp) [<https://perma.cc/YD2Q-VT4E>].

<sup>23</sup> JOHN W. DICKEY, METROPOLITAN TRANSPORTATION PLANNING 469 (2d ed. 1983).

<sup>24</sup> Keith D. Revell, *Regulating the Landscape: Real Estate Values, City Planning, and the 1916 Zoning Ordinance*, in THE LANDSCAPE OF MODERNITY: NEW YORK CITY, 1900-1940 19, 19 (David Ward & Oliver Zunz eds., 1992).

protect the value of existing real estate.<sup>25</sup> Upscale Fifth Avenue clothing retailers feared that the garment trade that supplied them would move closer, bringing their mostly Jewish immigrant workers and destroying the affluent character of the district.<sup>26</sup> The consortium of retailers worked with lawyer Edward M. Bassett to form the quasi-official Commission on Heights of Buildings.<sup>27</sup> The committee proved adept at winning support and disarming opposition, quickly pressuring the city to adopt its first zoning resolution.<sup>28</sup> Similar plans were rapidly adopted throughout the country and eventually survived a constitutional challenge in the 1926 watershed case *Village of Euclid v. Ambler Realty Co.*, where the Supreme Court legitimized the flexible use of police powers to regulate land use for the public welfare.<sup>29</sup>

New York's 1916 zoning resolution was largely unchanged until 1961.<sup>30</sup> The 1961 revision promoted incentive zoning: allowing developers to build taller buildings in exchange for including quasi-public park-like space, plazas, and arcades in the design.<sup>31</sup> The next significant change in the city's zoning came during Mayor Michael Bloomberg's three terms from 2002-2014.<sup>32</sup> Bloomberg spearheaded a massive piecemeal rezoning of nearly 140 neighborhoods.<sup>33</sup> More than one-third of the city's land area was rezoned,<sup>34</sup> creating an increase of almost 100 million square feet of residential development capacity.<sup>35</sup>

Zoning can be used to either encourage or limit development. Upzoning creates additional development rights by allowing higher building

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<sup>25</sup> PETER HALL, *CITIES OF TOMORROW: AN INTELLECTUAL HISTORY OF URBAN PLANNING AND DESIGN SINCE 1880* 59-63 (4th ed. 2014).

<sup>26</sup> *Id.* at 61.

<sup>27</sup> *Id.* at 60.

<sup>28</sup> *Id.* at 60-61.

<sup>29</sup> *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926) ("The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation.").

<sup>30</sup> See JEROLD S. KAYDEN ET AL., *PRIVATELY OWNED PUBLIC SPACE: THE NEW YORK CITY EXPERIENCE* 9-11 (2000).

<sup>31</sup> See *id.* at 11-12.

<sup>32</sup> Angotti, *supra* note 1, at 32.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> AMY ARMSTRONG ET AL., *FURMAN CTR. FOR REAL ESTATE & URBAN POLICY, POLICY BRIEF: HOW HAVE RECENT REZONINGS AFFECTED THE CITY'S ABILITY TO GROW?* 8 (2010), [http://furmancenter.org/files/publications/Rezoning\\_Furman\\_Center\\_Policy\\_Brief\\_March\\_2010.pdf](http://furmancenter.org/files/publications/Rezoning_Furman_Center_Policy_Brief_March_2010.pdf) [https://perma.cc/AC4R-62TL].

densities.<sup>36</sup> This can have a destabilizing effect on a community.<sup>37</sup> For example, early knowledge of rezoning can trigger waves of speculative real estate investment. Landlords may act aggressively to empty buildings of tenants, making them more attractive to prospective buyers who want to demolish the buildings and rebuild at their increased density. Downzoning, on the other hand, “involves a reduction in buildable floor area.”<sup>38</sup> This general form of zoning typically occurs “in places where communities strongly oppose new development and want to minimize chances that underutilized sites will be built on.”<sup>39</sup> The Bloomberg-era rezonings were highly discriminatory and included downzoning predominantly white areas with high homeowner rates and upzoning areas that were less white and less wealthy with more renters and fewer homeowners.<sup>40</sup>

Rezonings are a stark example of the property contradiction in which the social character of land is subordinated to private ownership. Moses Gates, of the New York-based Association of Neighborhood and Housing Development, noted the tension of the rezonings: “All of these public rezoning actions that have a public cost in terms of light and air and building envelope. All of the value is going into private interests. What’s the option of capturing some of that value for the public?”<sup>41</sup> Even given the ulterior motives to preserve landed interests behind the original 1916 zoning law, Bloomberg’s development-led rezoning further attenuated the police power standard that requires zoning to bear a “substantial relation to the public health, safety, morals, or general welfare.”<sup>42</sup> The Bloomberg administration’s development-based priorities and its failure to protect the social character of land, particularly for low-income communities, is a direct expression of the property contradiction.

### III. REGULATED HOUSING IN NYC

Housing regulation—government intervention to correct the market’s

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<sup>36</sup> Angotti, *supra* note 1, at 21.

<sup>37</sup> See *generally id.* at 23-24 (describing, among other things, the effects of the upzoning of Fourth Avenue in Brooklyn, which “resulted in the displacement of residents and businesses and the construction of high-rise luxury towers and upscale businesses”).

<sup>38</sup> *Id.* at 24.

<sup>39</sup> *Id.*

<sup>40</sup> See Laskow, *supra* note 2.

<sup>41</sup> *Id.*

<sup>42</sup> *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926). The *Euclid* standard was affirmed locally by a 2011 report from the New York Department of State. See Gerard Flynn, *5 Challenges to De Blasio’s Promise of Inclusive Planning*, CITY LIMITS (Apr. 1, 2015), <http://citylimits.org/2015/04/01/5-challenges-to-de-blasios-promise-of-inclusive-planning/> [https://perma.cc/4SNE-P4SR].

failure to provide safe, affordable housing—is a further expression of the property contradiction. The interests of those who control land through private ownership (and anticipate increased returns for the exchange of that land) are in tension with the interests of those who use the land (valuing it for its social quality and making it their home).

In 1867, the New York legislature passed its first comprehensive housing law, the Tenement House Act of 1867, inaugurating the state’s intervention in rented housing.<sup>43</sup> The modern descendants of the Tenement House Act are traced to a number of statutes that also serve to mitigate the property contradiction.<sup>44</sup> The Rent Stabilization Law of 1969 (“RSL-1969”) declared that a

. . . serious public emergency continues to exist in the housing of a considerable number of persons within the city of New York and . . . that such emergency necessitated the *intervention of federal, state and local government in order to prevent speculative, unwarranted and abnormal increases in rents . . . uprooting long-time city residents from their communities . . .*<sup>45</sup>

The threshold for a statutory housing emergency is a vacancy rate of less than 5%.<sup>46</sup> By this metric, New York City has had a housing emergency for nearly five decades.<sup>47</sup>

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<sup>43</sup> RICHARD PLUNZ, A HISTORY OF HOUSING IN NEW YORK CITY 22 (rev. ed. 2016). Prior to the Tenement House Act of 1867, New York City “building law was concerned primarily with the prevention of fire and disease.” *Id.* at 1. The Act controlled “tenements” which it defined as “[a]ny house, building, or portion thereof, which is rented, leased, let or hired out to be occupied or is occupied, as the home or residence of more than three families living independent of one another and doing their own cooking upon the premises, or by more than two families upon a floor, so living and cooking and having a common right in the halls, stairways, yards, water closets, or privies or some of them.” *Id.* at 22.

<sup>44</sup> For a more detailed chronology and summary of the applicable laws, see N.Y.C. RENT GUIDELINES BD., RENT REGULATION PRIOR TO THE ESTABLISHMENT OF THE BOARD (2014), <http://www.nycrgb.org/html/about/intro%20PDF/historyoftheboard.pdf> [<https://perma.cc/AVG5-R3AK>].

<sup>45</sup> N.Y.C. ADMIN. CODE § 26-501 (2017) (emphasis added).

<sup>46</sup> FURMAN CTR. FOR REAL ESTATE & URBAN POLICY, *supra* note 12, at 1-2.

<sup>47</sup> *Id.* (noting that a “housing emergency” was declared by the City in 1974 and “renewed every three years since”); see also ELYZABETH GAUMER & SHEREE WEST, N.Y.C. DEP’T OF HOUS. PRES. & DEV., SELECTED INITIAL FINDINGS OF THE 2014 NEW YORK CITY HOUSING AND VACANCY SURVEY 2 (2015), <http://www1.nyc.gov/assets/hpd/downloads/pdf/2014-HVS-initial-Findings.pdf> [<https://perma.cc/X47H-PCVX>].



RSL-1969 is the enabling act for a number of regulatory schemes. Currently, the most common form of housing regulation in New York City is rent stabilization,<sup>48</sup> as enacted under the Emergency Tenant Protection Act (“ETPA”) of 1974.<sup>49</sup> These protections include security of tenure in the form of statutory lease renewal,<sup>50</sup> provision of services without reduction,<sup>51</sup> and rent increases regulated by the Rent Guidelines Board.<sup>52</sup> The rent regulations also allow for apartments to become deregulated<sup>53</sup> or adjusted on an individual basis<sup>54</sup> under certain conditions. The deregulation of apartments, particularly through a process of High Rent/Vacancy Deregulation,<sup>55</sup> creates tenant vulnerability by putting tenants at special risk of landlords’ attempts to use forms of harassment to force tenants to vacate.

Since the implementation of the Rent Regulation Reform Act of 1993 (“RRRA-93”),<sup>56</sup> apartments can deregulate under certain circumstances, allowing owners to then charge market prices, which creates a great incentive for landlords to aggressively displace tenants.<sup>57</sup> “The deregulation of these apartments has become one of the most disruptive forces in the city, as tenants scramble to keep their homes and landlords maneuver to get rid of them.”<sup>58</sup> High Rent/Vacancy Deregulation, as per the Rent Act of 2015,<sup>59</sup> allows an apartment to be deregulated when, upon vacancy, the

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<sup>48</sup> Rent stabilization generally applies to buildings of six or more units built before January 1, 1974 and is administered by the New York State Division of Housing and Community Renewal. *See generally Rent Stabilization FAQ*, N.Y.C. RENT GUIDELINES BD., <http://www.nycrgb.org/html/resources/faq/rentstab.html> [<https://perma.cc/JQF4-GUPQ>] (last updated Sept. 23, 2016) (noting that approximately one million apartments are protected under rent stabilization).

<sup>49</sup> N.Y. UNCONSOL. LAW §§ 8621-8634 (McKinney 2015).

<sup>50</sup> *Id.* § 8630(a).

<sup>51</sup> *Id.* § 8627(b); N.Y.C. ADMIN. CODE § 26-514 (2017).

<sup>52</sup> N.Y. UNCONSOL. LAW § 8624(b) (McKinney 2015).

<sup>53</sup> *Id.* § 8625-a (detailing the process of “high income rent deregulation”).

<sup>54</sup> *Id.* § 8626(d) (permitting “individual adjustment of rents” when, *inter alia*, substantial improvements are made, major capital improvements are required, or when there is a finding that a building owner cannot maintain an annual gross rent income for the building).

<sup>55</sup> *See* N.Y. STATE DIV. OF HOUS. & CMTY. RENEWAL, FACT SHEET #26 GUIDE TO RENT INCREASES FOR RENT STABILIZED APARTMENTS IN NEW YORK CITY 1 (2016), <http://www.nyshr.org/Rent/factsheets/orafac26.pdf> [<https://perma.cc/FH5W-K723>] (explaining the process of deregulation of a high-rent apartment by high-rent vacancy deregulation).

<sup>56</sup> Rent Regulation Reform Act of 1993, 1993 N.Y. Laws 2667.

<sup>57</sup> DW Gibson, *How to Dump Tenants and Make a Fortune*, NATION (June 11, 2015), <https://www.thenation.com/article/how-to-dump-tenants-and-make-a-fortune-2/> [<https://perma.cc/J3WJ-QNVT>].

<sup>58</sup> *Id.*

<sup>59</sup> Rent Act of 2015, 2015 N.Y. Laws 34. The bill as passed was initially proposed in the Senate, although there had been a similar bill proposed in the Assembly as well. S.

calculated rent reaches a \$2,700 threshold.<sup>60</sup> High Rent/High Income Deregulation is permitted when the household has a combined income in excess of \$200,000 for each of the two preceding years, and their rent is \$2,700 or more.<sup>61</sup> A number of allowable increases can be used to deregulate an apartment.<sup>62</sup> The allowances of High Rent/Vacancy Deregulation – and in particular the vacancy allowance, which allows a landlord to increase the rent by 20% with each vacancy – set a direct incentive for building owners to drive out tenants through harassment and coercion.<sup>63</sup>

Since 1994, more than 133,173 units have been deregulated in New York City under High Rent/Vacancy Deregulation.<sup>64</sup> High Rent/Vacancy Deregulation accounts for 63% of all deregulation of the city’s stock of stabilized housing—“the largest category of subtractions from the stabilized stock . . . .”<sup>65</sup> According to affordable housing advocates, vacancy decontrol will ultimately dismantle regulated housing, destabilize communities, and

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6012, 238th Leg., Reg. Sess. (N.Y. 2015).

<sup>60</sup> 2015 N.Y. Laws 39 (amending N.Y.C. ADMIN. CODE § 26-504.2); *see also* N.Y.C. RENT GUIDELINES BD., CHANGES TO THE RENT STABILIZATION HOUSING STOCK IN 2013 6 (2014), [http://www.nycrgb.org/downloads/research/pdf\\_reports/changes2014.pdf](http://www.nycrgb.org/downloads/research/pdf_reports/changes2014.pdf) [<https://perma.cc/P46C-9C4N>]. The calculated rent for a hypothetical incoming tenant is the determining factor in a High Rent/Vacancy Deregulation, not what the actual incoming tenant is willing to pay. Accordingly, whether the market supports the higher rent is not a factor for deregulating the apartment.

<sup>61</sup> N.Y.C. RENT GUIDELINES BD., *supra* note 60, at 5-6.

<sup>62</sup> These allowances include Rent Guidelines Board increases, which dictate the legal rent increases owners may charge upon annual or biennial lease renewals; Individual Apartment Improvement increases (“IAI”), which allow landlords to recapture the cost of improvements to an apartment through rent increases ranging from 1/40th to 1/60th of the cost of improvements to the apartment; a Major Capital Improvement (“MCI”), where an owner makes a building-wide improvement, such as the installation of a new boiler, in which case the owner may be entitled to charge each rent stabilized tenant in the building a rent increase of no more than 6 percent per annum, which then becomes a permanent part of the legal regulated rent; and, most relevant to tenant harassment, a vacancy lease rent increase (or ‘vacancy allowance’) which allows a landlord to charge up to 20 percent (for two-year leases) of the original rent to a new tenant of a vacant rent stabilized unit. N.Y. STATE DIV. OF HOUS. & CMTY. RENEWAL, *supra* note 55, at 2-6.

<sup>63</sup> *Id.* at 2. A path to vacancy decontrol for a hypothetical rent stabilized apartment renting for \$1000 per month permits a landlord capturing another 20% when a tenant moves out, so the new tenant pays \$1200. If the owner does \$10,000 worth of improvements on the apartment, and 1/40th is added to the rent, that is an additional \$250; the new tenant will pay \$1,450. If that tenant leaves after a year, the landlord can add another vacancy allowance of 20% to the rent, making the legal rent \$1,740 plus the annual amount allowed by the Rent Guidelines Board, and any additional IAIs or MCIs. With a high vacancy rate, the rent can be increased, edging steadily, or rapidly, towards the \$2,700 threshold for deregulation.

<sup>64</sup> N.Y.C. RENT GUIDELINES BD., *supra* note 60, at 6-7.

<sup>65</sup> *Id.* at 3.

displace low-income tenants through gentrification.<sup>66</sup>

#### IV. SPECIAL CLINTON DISTRICT: A COMMUNITY RESPONSE TO HARASSMENT

The Special Clinton District's zoning provisions are a community response to rampant landlord harassment during an early wave of real estate speculation in the 1960s and 1970s. These provisions have been a deterrent to landlord harassment, the displacement of low-income tenants, and gentrification.

In the early 1970s, community members in the Hell's Kitchen/Clinton area of Manhattan organized in response to a proposal from the New York City Planning Commission to build a convention center in their neighborhood.<sup>67</sup> The plan would have directly displaced hundreds of families.<sup>68</sup> The community organized to relocate the center, and protect its affordable housing stock from speculative investment, which included the creation of the Special Clinton District ("SCD"), an elaborate zoning scheme designed to protect the small-scale, residential character of the community, and shield low-income residents from the effects of aggressive development.<sup>69</sup>

The SCD encompasses the area between West 41st and West 59th Streets west of Eighth Avenue.<sup>70</sup> Most of the SCD is bound by height restrictions, highly restrictive rules governing the demolition of residential buildings,<sup>71</sup> and a stringent code to protect tenants from harassing conduct

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<sup>66</sup> See *Vacancy Decontrol Means the End of Rent Regulation*, METROPOLITAN COUNCIL ON HOUSING, [http://metcouncilonhousing.org/get\\_involved/reform\\_our\\_rent\\_regulation\\_laws/vacancy\\_decontrol\\_means\\_the\\_end\\_of\\_rent\\_regulation](http://metcouncilonhousing.org/get_involved/reform_our_rent_regulation_laws/vacancy_decontrol_means_the_end_of_rent_regulation) [https://perma.cc/NJH3-PRX9].

<sup>67</sup> *Transcript of the City Planning Commission Meeting on the Development Plan for the NYC Convention and Exhibition Center*, N.Y.C. COMMUNITY BOARD 4, [http://www.nyc.gov/html/mancb4/html/land/cpc\\_meeting\\_nyc\\_convention\\_ctr.html](http://www.nyc.gov/html/mancb4/html/land/cpc_meeting_nyc_convention_ctr.html) [https://perma.cc/N58F-6TTC].

<sup>68</sup> Jane O'Reilly, *Invitation to a Festival*, N.Y. MAG., May 13, 1974, at 55, 64.

<sup>69</sup> N.Y.C. Zoning Resolution § 96-00 (2016) (listing "community and city-wide goals," including "to preserve and strengthen the residential character of the community," "to permit rehabilitation and new construction within the area in character with the existing scale of the community and at rental levels which will not substantially alter the mixture of income groups presently residing in the area," and "to preserve the small-scale character and variety of existing stores and activities and to control new commercial uses in conformity with the existing character of the area").

<sup>70</sup> *Special Purpose Districts: Manhattan*, N.Y.C. DEP'T CITY PLAN., <https://www1.nyc.gov/site/planning/zoning/districts-tools/special-purpose-districts-manhattan.page> [https://perma.cc/NSY2-L4MT].

<sup>71</sup> The demolition provisions of the SCD are not addressed in this article, but work in tandem with the anti-harassment provisions, and are essential to the law's effectiveness

by building owners and their agents.<sup>72</sup>

Section 96-110 of the SCD zoning regulation deters harassment by forcing building owners found to have harassed tenants to surrender nearly a third of the property for low-income housing<sup>73</sup> in perpetuity.<sup>74</sup> Here, harassment includes any conduct by the owner that “causes or is intended to cause” occupants to vacate or “to surrender or waive any rights in relation to such occupancy.”<sup>75</sup> Harassment includes any “use or threatened use of force,” interruption of “essential services,” or failing to maintain the building such that it is “unfit for human habitation” under section 27-2140 of the City Administrative Code.<sup>76</sup>

The New York City Department of Housing Preservation and Development (“HPD”) is charged with enforcement of the SCD harassment prohibitions.<sup>77</sup> Enforcement is triggered when an owner wishes to make a “material alteration” to the property that requires an Alteration Type 1 permit from the Department of Buildings (“DOB”).<sup>78</sup> Then, an owner must first apply for and obtain a “Certificate of No Harassment” (“CONH”) from HPD.<sup>79</sup> Upon receiving an application for a CONH, HPD will initiate an investigation to determine whether there has been any harassment in the building during the preceding 15 years,<sup>80</sup> or longer, should HPD have “reasonable cause” to believe there was harassment prior to the 15-year inquiry period.<sup>81</sup> The investigation consists of sending notices to the building’s current and former tenants, local housing groups, and placing a

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against tenant displacement.

<sup>72</sup> N.Y.C. Zoning Resolution § 96-104(c) (listing height and setback regulations for buildings); *id.* § 96-110 (detailing anti-harassment processes).

<sup>73</sup> “Low income housing shall mean dwelling units or rooming units occupied or to be occupied by persons or families having an annual household income at the time of initial occupancy equal to or less than eighty percent of the median income for the primary metropolitan statistical area, as determined by the United States Department of Housing and Urban Development or its successors from time to time for a family of four, as adjusted for family size.” *Id.* § 96-110(a)(9).

<sup>74</sup> *Id.* § 96-110(a)(3).

<sup>75</sup> *Id.* § 96-01(a).

<sup>76</sup> *Id.* § 96-01(a)-(c); N.Y.C. ADMIN. CODE § 27-2140.

<sup>77</sup> N.Y.C. Zoning Resolution § 96-110(c)(1).

<sup>78</sup> N.Y.C. DEP’T OF BLDGS., PW1 USER GUIDE 5 (2014),

[https://www1.nyc.gov/assets/buildings/pdf/pw1\\_userguide.pdf](https://www1.nyc.gov/assets/buildings/pdf/pw1_userguide.pdf) [<https://perma.cc/Z3RP-JMMB>] (explaining that an Alteration Type 1 permit is required when an alteration requires an amended or new Certificate of Occupancy—e.g., when a single-family home is changed to a two-family home or when a building’s use is changed from commercial to residential).

<sup>79</sup> N.Y.C. Zoning Resolution § 96-109(b).

<sup>80</sup> *Id.* § 96-110(a)(8).

<sup>81</sup> Telephone Interview with Deborah Rand, Assistant Comm’r of Hous. Litig., N.Y.C. Dep’t of Hous. Pres. & Dev. (Mar. 24, 2015).

public notice in the City Record.<sup>82</sup> Investigators also make site visits and attempt to personally contact current and prior tenants.<sup>83</sup>

If HPD's investigation does not reveal a reasonable cause to believe that harassment has occurred during the inquiry period, HPD will issue a CONH.<sup>84</sup> If HPD finds there is a reasonable cause to believe that there was prior harassment, HPD will schedule a hearing to be administered by the New York City Office of Administrative Trials and Hearings ("OATH") and then consider the report and recommendation of the hearing officer to either grant or deny the CONH.<sup>85</sup>

The SCD Zoning Resolution is a powerful deterrent to tenant harassment because "[t]he ordinance is silent on how far back in time *or title* a search for harassment activities can run."<sup>86</sup> Any evidence of harassment meeting the reasonable cause standard for an indefinite period, regardless of whether or not the current owner was the perpetrator of the harassment, is sufficient to deny a CONH.<sup>87</sup> As such, the likelihood of a retroactive harassment investigation before any extensive renovation can be initiated serves to deter landlords from harassing tenants in an effort to deregulate apartments through High Rent/Vacancy Deregulation.

The SCD's zoning provisions are an effective deterrent to landlord harassment, preserving Clinton as one of the City's great socioeconomically diverse neighborhoods and protecting its vulnerable rent-regulated housing.<sup>88</sup> The SCD is a decisive example of government intervention to

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<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> N.Y.C. Zoning Resolution § 96-110(c)(7)(i).

<sup>85</sup> R.C.N.Y. § 10-06(a) (2016); N.Y.C. Zoning Resolution § 96-110(c)(7)(ii). 96-110 dictates that a hearing be held and the judge issue a report and recommendation, but does not specifically say OATH is the venue because OATH did not exist at the time of the Zoning Resolution. It was established in 1979. Telephone Interview with Deborah Rand, Assistant Comm'r of Hous. Litig., N.Y.C. Dep't of Hous. Pres. & Dev. (Mar. 24, 2015).

<sup>86</sup> Faith Glickman Rossi, Note, *Turning Up the Heat in Hell's Kitchen: Linking Harassment to Owners Seeking Building Permits in New York City's Clinton District*, 10 CARDOZO L. REV. 747, 753 (1989) (emphasis added).

<sup>87</sup> *ABN 51st St. Partners v. City of New York*, 724 F. Supp. 1142, 1145 (S.D.N.Y. 1989) ("Pursuant to Section 96-109, alteration permits are denied by the Department of Housing, Preservation and Development (HPD) for buildings where harassment has occurred regardless of whether the landlord who committed the harassment still owns the building. The purpose of Section 96-109 is to prevent the displacement of lower income tenants from the Clinton neighborhood." (footnote omitted)). The court also held that section 96-109 did not constitute a "taking" under the Fifth Amendment because the owner could still get an economic return, noting that a "[r]eduction of value . . . [is] not destruction of value." *Id.* at 1155 (alteration in original).

<sup>88</sup> See MANHATTAN COMMUNITY BD. 4, MANHATTAN COMMUNITY DISTRICT 4 AFFORDABLE HOUSING PLAN 10 (2015), <http://www.nyc.gov/html/mancb4/downloads/pdf/2015%20PDFs/july/00%20EXEC%20Af>

bring equilibrium to the polar tensions at play in the property contradiction. As the City began a campaign to rezone many neighborhoods during the Bloomberg administration, communities looked to have the SCD anti-harassment provisions included in their rezonings. The City often rejected these demands, arguing that protections in the Tenant Protection Act of 2008 were adequate to protect tenants from harassment.

## V. TENANT PROTECTION ACT OF 2008

On March 30, 2008, Mayor Bloomberg signed the Tenant Protection Act of 2008 (“TPA”) into law, creating Local Law 7, which for the first time gave tenants the right to sue their landlords in Housing Court for making threats, disrupting essential services, and other harassing behavior intended to disturb a lawful occupant’s residence.<sup>89</sup> The TPA provides that “[t]he owner of a dwelling shall not harass any tenants or persons lawfully entitled to occupancy of such dwelling . . . .”<sup>90</sup> The Act defines harassment as “any act or omission by or on behalf of an owner that . . . causes or is intended to cause any person lawfully entitled to occupancy of a dwelling unit to vacate such dwelling unit or to surrender or waive any rights in relation to such occupancy . . . .”<sup>91</sup> The act cites examples of harassing behavior, including: the use of force, interruptions of essential services, baseless court proceedings, removing the door or the tenant’s possessions, or other tactics that “substantially interfere with or disturb the comfort, repose, peace or quiet” of the tenant.<sup>92</sup>

The law allows tenants to sue for injunctive relief from future harassment. If a court finds a landlord to have violated the injunction they shall impose a civil penalty at least “one thousand dollars and not more than five thousand dollars”<sup>93</sup> (increased to ten thousand dollars in 2014).<sup>94</sup> A tenant can bring a claim of harassment against an offending owner in Housing Court as a counterclaim against an owner’s attempt to evict the

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fordable%20Housing%20Plan-%20%20FINAL%207.30.2015.pdf [https://perma.cc/JXE8-EU2M]; cf. JASON HACKWORTH, *THE NEOLIBERAL CITY: GOVERNANCE, IDEOLOGY, AND DEVELOPMENT IN AMERICAN URBANISM* 129 (2007).

<sup>89</sup> N.Y.C. Local Law No. 7 (2008).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*; see also Fernandez, *supra* note 8.

<sup>94</sup> N.Y.C. Local Law No. 47 (2014); Mireya Navarro, *City to Publicly Shame Harassing Landlords*, N.Y. TIMES (Sept. 30, 2014), <http://www.nytimes.com/2014/10/01/nyregion/city-to-publicly-shame-harassing-landlords.html> [https://perma.cc/2QNJ-67QN].

tenant.<sup>95</sup>

The city's largest landlord group, the Rent Stabilization Association, immediately challenged the new law. Their suit and subsequent appeal claimed that the TPA improperly grants a type of authority to the Housing Part of New York City Civil Court that may only be granted by the State Legislature.<sup>96</sup> Prior to the passage of TPA, a tenant could only bring their landlord to housing court for issues relating to the physical condition of their apartment or the denial of essential services. The TPA added harassment as a violation that a tenant may bring against a landlord in housing court.<sup>97</sup> Justice Eileen A. Rakower dismissed the claims, noting that the legislature "may respond to even a single instance of financially motivated harassment, and seek to discourage the same by swift enactment of relevant legislation."<sup>98</sup>

## VI. ANALYSIS: DOES THE TPA OFFER PROTECTION EQUAL TO THE SCD?

The SCD zoning resolution offers strong protections against tenant harassment in the form of a standard and burden of proof more favorable to tenants, extended statute of limitations, and significant consequences likely to deter landlord harassment. However, it is of little utility to a tenant's current harassment, which may be better remedied by the protections of the TPA.

### *A. Standard and Burden of Proof*

Tenants are afforded a more favorable standard and burden of proof under the SCD Zoning Resolution than the TPA. Under the Zoning Resolution there is "a rebuttable presumption that harassment occurring within the inquiry period was committed by or on behalf of the owner . . .

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<sup>95</sup> LEGAL AID SOC'Y, KNOW YOUR RIGHTS: TENANT HARASSMENT IN NEW YORK CITY 1-2 (2013), [https://www.legal-aid.org/media/180998/kyr\\_tenant\\_harrassment\\_en.pdf](https://www.legal-aid.org/media/180998/kyr_tenant_harrassment_en.pdf) [<https://perma.cc/HZS4-ALR9>].

<sup>96</sup> *Prometheus Realty Corp. v. City of New York*, 80 A.D.3d 206, 300 (1st Dep't 2010); see also Manny Fernandez, *Court Upholds City's Tenant Protection Act*, N.Y. TIMES: CITY ROOM (Aug. 5, 2009, 5:06 PM), <http://cityroom.blogs.nytimes.com/2009/08/05/court-upholds-citys-tenant-protection-act/> [<https://perma.cc/K92E-97NS>].

<sup>97</sup> *Court Decision Upholds Tenant Protection Act*, LEGAL SERVICES N.Y.C., [http://www.legalservicesnyc.org/index.php?option=com\\_content&task=view&id=357&Itemid=100](http://www.legalservicesnyc.org/index.php?option=com_content&task=view&id=357&Itemid=100) [<https://perma.cc/Z5HS-UN9J>].

<sup>98</sup> *Prometheus Realty v. City of New York*, No. 111132/08, 2009 WL 2440294 (N.Y. Sup. Ct. July 31, 2009) (trial order).

.<sup>99</sup> If HPD has reasonable cause, they will not issue a CONH, but will schedule a hearing where an administrative judge will make a report and recommendation to be considered before HPD grants or denies the CONH.<sup>100</sup> While the TPA shifted the burden of disproving harassment to landlords as an affirmative defense, tenants still must first establish harassment with official governmental documentation.<sup>101</sup>

### *B. Statute of Limitations*

The SCD Zoning Resolution's fifteen-year period of inquiry is more favorable to tenants than the likely three-year statute of limitations of the TPA.<sup>102</sup> However, in practice, the longer period may be immaterial to obtaining the desired remedy, as a tenant wants to address harassment while it is happening and gain immediate relief. The longer inquiry period of the SCD is however, an important tool in showing a pattern or practice of harassment, as well as remedying harassment that successfully displaced a tenant in the past.

### *C. Utility to Tenant*

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<sup>99</sup> N.Y.C. Zoning Resolution § 96-110(c)(2) (2016).

<sup>100</sup> *Id.* § 96-110(c)(7).

<sup>101</sup> *See, e.g.*, N.Y.C. ADMIN CODE § 27-2115(h)(2) (noting that a tenant claiming harassment based on the physical conditions of a dwelling must support their claim with verified violations of record issued by a government agency); Andrew Scherer & David Robinson, *Housing Law*, in *NEW YORK ELDER LAW HANDBOOK* § 9:2.7 (2010) (“As a result of these amendments, tenants are relieved of the burden of showing that the owner’s conduct was intentional if the owner’s conduct causes the tenant to vacate, surrender, or waive any rights. Furthermore, the owner has the burden of establishing as an affirmative defense that the conditions did not result from intentional conduct, that the owner corrected the problem, and that the owner’s corrective actions were ‘reasonable’ and in ‘good faith.’”).

<sup>102</sup> The TPA does not define a statute of limitations; instead, courts must determine the appropriate statute of limitations to be applied. In applying a statute of limitations, courts have been instructed to “look for the reality, and the essence of the action and not its mere name.” *Goldberg v. Sitomer, Sitomer & Porges*, 97 A.D.2d 114, 117 (1st Dep’t 1983) (quoting *Morrison v. Nat’l Broadcasting Co.*, 19 N.Y.2d 453, 459 (1967)); *Westminster Props., Ltd. v. Kass*, 163 Misc.2d 773, 774 (N.Y. Sup. Ct. 1995). Article II of the CPLR delineates the limitations for most causes of action. Given the relative newness of the law, the author discovered no case law that addresses the statute of limitations of the TPA. The New York State Homes and Community Renewal Tenant Protection Unit, which enforces the TPA, has researched the topic, finding that a three-year limitation demanded under CPLR 212(2) applies. Email from Argyro Boyle, Deputy Legal Dir., N.Y. State Homes & Cmty. Renewal, to Sean Meehan (May 2, 2017, 9:20 AM). However, a landlord might compellingly argue that the one-year limitation of CPLR Section 215(7) for landlord retaliation should be applied. N.Y. C.P.L.R. 215(7) (McKinney 2006).



The SCD zoning resolution is only relevant to tenants that live in the SCD, or the few other areas that have adopted similar protections.<sup>103</sup> Therefore it is of little utility to most of the city's tenants. Further, even those tenants in the SCD may not bring a claim of harassment under the SCD zoning resolution themselves; rather, it is triggered by the landlord applying for a building permit, so it is of little utility as an affirmative tenant remedy. In contrast, the TPA offers tenants immediate injunctive relief by bringing an action in Housing Court.<sup>104</sup> However, it is very difficult for low-income tenants to obtain counsel for such cases because legal service providers prioritize eviction cases.<sup>105</sup> As a result, enforcement of the TPA relies mainly on low-income, pro se tenants to enforce the law.<sup>106</sup> Also, courts do not seem receptive to tenant claims of harassment: “[o]f more than 3,600 cases filed [between 2008 and fall 2014], most have been dismissed, 810 led to settlements and 45 had a finding of harassment.”<sup>107</sup>

#### *D. Deterrent to Landlord*

The surrender of property for affordable housing under the SCD zoning resolution is a far greater deterrent to harassment than the civil penalties of

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<sup>103</sup> See Chris Ragalie & Kim Vauss, *No Harassment Expands*, DECODER: BUILDING CODE (Feb. 25, 2016), <http://www.decodernyc.com/certificate-no-harassment-expands-multiple-dwellings-nyc/> [<https://perma.cc/Z2LV-NG8P>] (“The DOB is now expanding the Certificate of No Harassment to include multiple dwellings in . . . [t]he Special Hudson Yards District[,] Preservation Area P-2 of the Special Garment Center District[,] [t]he Greenpoint-Williamsburg anti-harassment area[, and] [t]he Special West Chelsea District . . .”).

<sup>104</sup> LEGAL AID SOC’Y, *supra* note 95, at 1 (“If the Court finds the tenant has been harassed, it will order the landlord to cease the harassment against the tenant.”).

<sup>105</sup> Not until this year did New York City even guarantee access to legal representation for low-income tenants facing eviction; the de Blasio administration and City Council have now prioritized funding legal services to fight eviction proceedings. Press Release, City of N.Y., State of the City: Mayor de Blasio and Speaker Mark-Viverito Rally Around Universal Access to Free Legal Services for Tenants Facing Eviction in Housing Court (Feb. 12, 2017), <http://www1.nyc.gov/office-of-the-mayor/news/079-17/state-the-city-mayor-de-blasio-speaker-mark-viverito-rally-universal-access-free> [<https://perma.cc/EW7J-VPT3>]. Without dedicated funding, however, legal services organizations are less likely to take on other types of housing cases.

<sup>106</sup> IMPACT CTR. FOR PUBLIC INTEREST LAW, HOUSING JUSTICE: WHAT THE EXPERTS ARE SAYING ON NEW YORKERS’ RIGHT TO COUNSEL IN EVICTION PROCEEDINGS 6 (2015), [https://d3n8a8pro7vhnmx.cloudfront.net/righttocounselnyc/pages/23/attachments/original/1433269447/FINAL\\_expert\\_report.pdf](https://d3n8a8pro7vhnmx.cloudfront.net/righttocounselnyc/pages/23/attachments/original/1433269447/FINAL_expert_report.pdf) [<https://perma.cc/43TP-EAFB>] (noting repeatedly that 90% of tenants in Housing Court are unrepresented, and 90% of landlords arrive with representation).

<sup>107</sup> Navarro, *supra* note 94.

the TPA. The SCD's capacity to impose a cure for harassment whereby a landlord must surrender nearly a third of their property, a status change that will adhere to the land in perpetuity (thereby hindering his ability to sell the property), is a strong deterrent to harassing tenants. In contrast, the TPA's maximum fine of \$10,000 likely does not serve as a deterrent in a competitive real estate market. Harassment may in fact prove to be a good business decision in a cost/benefit analysis, because the increased value of a deregulated apartment quickly absorbs the imposed penalty. As New York City Public Advocate Letitia James noted, "[t]he payment of fines and violations is simply the cost of doing business in the city of New York . . . ."<sup>108</sup>

Long-time tenant advocate John Fisher argues that the TPA might be detrimental to the tenant movement: "When you pass legislation that is weak, it maintains the illusion that tenants have the ability to gain redress in some meaningful way, and they don't. . . . It actually does more damage. In a lot of ways I think this is snookering people."<sup>109</sup> Tenant harassment remains a good business practice for unscrupulous landlords who wish to push out rent-stabilized tenants. Thus, in contrast to the SCD zoning resolution, the TPA offers little to deter tenant harassment.

## VII. POLICY RECOMMENDATIONS FOR CURRENT ZONING PLANS

In May of 2014, New York City Mayor Bill de Blasio released his affordable housing plan, *Housing New York: A Five-Borough, Ten Year Plan*, which sets out an ambitious goal to "create and preserve 200,000 units of affordable housing for approximately 500,000 New Yorkers over the next ten years."<sup>110</sup> The February 2015 report *Housing New York: Zoning for Quality and Affordability* revealed that rezonings were a fundamental mechanism by which the Mayor planned to achieve his affordable housing goals.<sup>111</sup> This report was met with immediate criticism from communities

<sup>108</sup> Greg B. Smith, *De Blasio Opposes Plan to Protect Tenants from Slumlords Over Fear It Will Harm His Push for Affordable Housing*, N.Y. DAILY NEWS (Feb. 22, 2016, 5:43 PM), <http://www.nydailynews.com/news/politics/de-blasio-opposes-plan-protect-tenants-slumlords-article-1.2540342> [<https://perma.cc/D4WC-XJM3>].

<sup>109</sup> Daniel Fitzsimmons, *Bill Highlights Issues for Harassed Tenants*, N.Y. PRESS (Sept. 30, 2014, 6:01 AM), <http://www.nypress.com/bill-highlights-issues-for-harassed-tenants/> [<https://perma.cc/38NJ-TEFB>].

<sup>110</sup> CITY OF N.Y., HOUSING NEW YORK: A FIVE-BOROUGH, TEN-YEAR PLAN 27 (2014), [http://www.nyc.gov/html/housing/assets/downloads/pdf/housing\\_plan.pdf](http://www.nyc.gov/html/housing/assets/downloads/pdf/housing_plan.pdf) [<https://perma.cc/K682-N4YU>].

<sup>111</sup> *Housing New York: Zoning for Quality and Affordability*, N.Y.C. DEP'T PLAN., <https://www1.nyc.gov/site/planning/plans/zqa/zoning-for-quality-and-affordability.page> [<https://perma.cc/75WC-4GJT>].

aware of the inequitable effects that the Bloomberg-era rezonings had on low-income populations. Tamara Quiñones of the Bronx-based group Community Action for Safe Apartments (“CASA”) affirmed:

We need strong anti-harassment and anti-displacement policies that will take a comprehensive, neighborhood-based approach to protect those of us who live and worked in the areas slated for re-zonings. In neighborhoods like the South Bronx, rezonings have the potential of causing a net loss of affordable housing if we don’t do this right. We can’t build housing without having a plan to protect and improve the affordable housing that already exists.<sup>112</sup>

The Mayor’s *Housing New York* plan recognized the deleterious effect that tenant harassment has on affordable housing’s preservation. The plan’s guiding principles acknowledged that “[t]he City needs to protect tenants in rent-regulated units more aggressively. We cannot allow landlords to harass tenants and drive them out of our rent-regulated housing stock. Keeping those units affordable is critical to our overarching goals of addressing inequality.”<sup>113</sup> As such, the Mayor’s rezoning plans should include proven protections equal to or greater than those of the Special Clinton District. To that end, the following policy recommendations are offered.<sup>114</sup>

### 1. Eliminate High Rent/Vacancy Deregulation

As stated above, the policy of allowing apartments to leave regulation after the rent reaches a certain amount – especially when the amount may lawfully increase primarily through high tenant turnover – encourages landlords to harass tenants. When tenants leave, landlords are allowed a 20% increase in the rent in addition to the cost of any improvements the

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<sup>112</sup> Emily Goldstein, *Re-Zonings Need Community Input*, ASS’N FOR NEIGHBORHOOD & HOUS. DEV. (Mar. 12, 2015), <https://anhd.org/re-zonings-need-community-input/> [<https://perma.cc/334R-2XXE>].

<sup>113</sup> CITY OF N.Y., *supra* note 110, at 7.

<sup>114</sup> Upon initially researching this article in 2015, I was encouraged to learn that others were engaged in similar thought. Conversations with Bob Kalin at Housing Conservation Coordinators; Jonathan Furlong and Emily Goldstein from Association for Neighborhood & Housing Development; and Harvey Epstein at Urban Justice Center were particularly resonant. Aside from informing these recommendations, the work of these individuals has influenced a number of similar anti-displacement bills currently before the City Council.

landlord may do or claim to do. Eliminating vacancy deregulation is essential to ending tenant harassment.

2. Enact citywide legislation; forego piecemeal zoning; adopt Introduction No. 152-A.

All of the city's residents should have equal protection from harassment, not just those who live in zones with these special measures. Anti-harassment laws should be adopted as citywide legislation and not through piecemeal zoning. Such legislation would replace zoning's inherent uncertainty and lack of political accountability.

Since beginning research for this article a broad coalition of tenant advocates and legal service providers has also recognized how effective the SCD Zoning Resolution is at controlling tenant harassment and displacement. Their work culminated in Introduction No. 152-A, a proposed bill currently before the City Council that would extend many of the SCD protections across the city.<sup>115</sup> Given Mayor de Blasio's stated priority in preventing tenant harassment, the City should adopt this prescient bill.

3. Include a surrender of property as a consequence of tenant harassment.

The surrender of property as a consequence of tenant harassment has proven to be an effective deterrent.<sup>116</sup> Any monetary penalty will always be subject to market-based cost/benefit analysis and tenant harassment will be reduced to a business decision. If the Mayor is serious about protecting vulnerable tenants and maintaining the city's affordable housing stock, the SCD's remedy for a finding of harassment is a proven deterrent.

4. Allow for investigations of harassment outside the building process.

Any indicia of harassment should trigger an investigation of harassment

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<sup>115</sup> See *Introduction 0152-2014*, N.Y. CITY COUNCIL: LEGIS. RES. CTR., <http://legistar.council.nyc.gov/Legislation.aspx> (last visited Apr. 15, 2017) (select "2014" in the drop-down menu next to the search window; then select "Introduction" in drop-down menu to the right of the date; then search "152-a" in the search field; click "Int 0152-2014"; click "Legislation Text").

<sup>116</sup> *Hearing on Proposed Introduction 152-A Before the Comm. on Hous. and Bldgs.*, N.Y.C. Council (2016) (statement of Sarah Desmond, Executive Director of Housing Conservation Coordinators) ("The SCD has been a valuable tool to mitigate the impacts of gentrification and to lessen the rate of displacement of long term, lower income residents. Our records show more than 100 permanently affordable units have been developed as a result of compliance with 'cure' provisions.").

and the consequences and penalties of the SCD zoning resolution. This should include excessive building violations and tenant complaints. Tying an investigation to a landlord's application for a building permit, as under the current SCD zoning, is of little use to a tenant while they are subject to harassment.

5. Include a period of inquiry at least equal to that of the SCD.

In investigating harassment, the SCD zoning allows investigators to look back 15 years or more if there is reasonable cause to believe that harassment occurred. This extended period of inquiry is an essential part of the provision's effectiveness as a deterrent and should be maintained or extended in new regulations.

6. Maintain the 'reasonable cause' standard of proof.

The relatively low standard of proof for harassment claims further serves to deter tenant harassment, which can be difficult for tenants to prove. The reasonable cause standard of proof balances this inequity.

7. Track and study displacement associated with rezoning.

Our knowledge of displacement of vulnerable tenants associated with rezonings is primarily anecdotal. As Tom Angotti notes in his book *Zoned Out!*, "there has never been a study of how many people were displaced by rezonings, where they went, whether they are better off or not, and whether their new living conditions are better or worse."<sup>117</sup> Because the City's affordable housing program is so reliant on rezoning to produce new affordable units, displacement needs to be studied to ensure that rezoning is not destroying more affordable housing than it is replacing.

#### CONCLUSION

Housing under capitalism exemplifies the property contradiction: it is both a necessity and a commodity. Government's use of zoning and rent regulations bring equilibrium to the distribution of this quasi-public good. In fear of a great wave of speculation and displacement, the Clinton community of the 1970s organized for the unique zoning provisions of the Special Clinton District, which proved to be an effective deterrent to tenant harassment. Communities which had the same fears during the Bloomberg

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<sup>117</sup> Angotti, *supra* note 1, at 41.

era rezonings and sought the protections of the SCD provisions were assured that the Tenant Protection Act of 2008 offered sufficient protection. Although the TPA is an important enforcement tool with applicability beyond the SCD provisions, it is not as strong a deterrent as the SCD zoning's anti-harassment provisions. Under the TPA, rent-regulated tenants are still vulnerable to harassment and their vulnerability is increasing as private equity firms have adopted tenant harassment as a business practice to insure returns on investment in rent-regulated housing.

The current mayor has introduced an affordable housing plan that relies heavily on rezoning. Although the plan is similar to that of Mayor Bloomberg, it includes an express priority to protect tenants in rent-regulated housing from harassment and subsequent displacement. Accordingly, it would behoove the mayor to embrace provisions akin to those in the SCD, which have been proven to deter tenant harassment.

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