



Journal of
Affordable Housing
& Community Development Law

VOLUME 29, NUMBER 1
2020

From the Editor-in-Chief

Stephen R. Miller v

From the Chair

Kelly Rushin Lewis vii

Letters to Regulators

Judy Crosby, Glenn Graff, Forest Milder, Mark Shelburne, Brad Tomtishen & Susan Wilson 1

Digest of Recent Literature

Rita Burns, Theresa Omansky, Sam Dougan, Arete “Arlene” Koutras, Sara Silverstein Ferrara, Stephanie Johnson & Moriah Wilkins 11

Organizational Profile

Colorado Coalition for the Homeless: Innovating to Create Lasting Solutions to Homelessness
Meredith Ritchie & Cathy Alderman 21

Articles

The Limits of Good Law: A Study of Housing Court Outcomes
Nicole Summers 29

The Great “Yes in My Back Yard” (YIMBY) Movement: Driven by the Gig Economy
Dwight Merriam 57

New York’s Housing Stability and Tenant Protection Act of 2019: What Lawyers Must Know
Gerald Lebovits, John S. Lansden & Damon P. Howard 75

**FORUM ON AFFORDABLE HOUSING
AND COMMUNITY DEVELOPMENT LAW**

EDITORS

Editor-in-Chief

STEPHEN R. MILLER
University of Idaho College of Law
514 W Jefferson Street
Boise, Idaho 83702
millers@uidaho.edu

Associate Editors

EMILY J. BLUMBERG
Klein Hornig LLP
Washington, D.C.
eblumberg@kleinhornig.com

SARA SILVERSTEIN FERRARA
Klein Hornig LLP
Washington, D.C.
sferrara@kleinhornig.com

Laurie Hauber

Lane County Legal Aid/Oregon Law Center
376 East 11th Avenue
Eugene, Oregon 97401
hauberyang@gmail.com

Matt Rossman

Case Western Reserve University School of Law
11075 East Boulevard
Cleveland, Ohio 44106
matthew.rossman@case.edu

Senior Editor

TIM IGLESIAS
University of San Francisco
2130 Fulton Street
San Francisco, California 94117
iglesias@usfca.edu

Managing Editor

JULIE ROBERTS FURGERSON
American Bar Association
Washington, D.C.
julie.furgerson@americanbar.org

Forum Manager

DAWN R. HOLIDAY
American Bar Association
Chicago, Illinois
dawn.holiday@americanbar.org

The *Journal of Affordable Housing & Community Development Law* is the official publication of the Forum on Affordable Housing & Community Development of the American Bar Association, with three issues per year. It is targeted toward attorneys and other housing and community development specialists. It provides current practical information, public policy, and scholarly articles of professional and academic interest.

Disclaimer: The opinions expressed in the articles published in the *Journal of Affordable Housing & Community Development Law* are those of the authors and do not reflect those of the American Bar Association or the Forum on Affordable Housing and Community Development Law.

Membership: For information about membership in the Forum, please contact the ABA Service Center, 321 North Clark Street, Chicago, Illinois 60654-7598, 1-800-285-2221, FAX 312-988-5528, or visit americanbar.org.

Back Issues: Back issues are available for \$15 per copy plus \$3.95 shipping and handling charges. Contact ABA Service Center, 321 North Clark Street, Chicago, Illinois 60654-7598, 1-800-285-2221, FAX 312-988-5528, or ShopABA.org.

Member Address Changes: Send your member number and new address to coa@americanbar.org or change online at www.americanbar.org.

Permission to reprint: Requests to reproduce portions of this issue should be addressed to Contracts, Copyrights & Policies, American Bar Association, 321 North Clark Street, Chicago, Illinois 60654-7598, FAX 312-988-6030, or e-mail copyright@americanbar.org.

© 2020 American Bar Association.

Journal of Affordable Housing & Community Development Law (ISSN 1084-2268 (print); ISSN 2163-0305 (online)) is published as a membership benefit by the American Bar Association, 321 North Clark Street, Chicago, Illinois 60654-7598. Subscriptions are available to nonmembers at an annual rate of \$60. **Postmaster:** Send address changes to Affordable Housing Member Records, American Bar Association, ABA Service Center, 321 North Clark Street, Chicago, IL 60654-7598.

From the Editor-in-Chief

Stephen R. Miller

I am closing this issue of the *Journal* eight weeks into quarantine for the novel coronavirus. Planning for the issue began in the fall, a time and place that now feels far distant. Most of the articles in this issue were completed prior to any shelter-in-place declarations, and so most do not address the COVID-19 issues that now so completely consume much of legal practice. Moreover, the very premise of this issue—a focus on state and local government innovation in housing policy—could seem poorly timed when there is an extraordinary federal effort to forestall widespread economic pains that most of us have not seen in our lifetimes.



Stephen R. Miller

Bearing all of this in mind, the articles in this issue nonetheless present vital analysis of legal issues that COVID-19 has only exacerbated. Indeed, the question of federalism—which level of government is primarily responsible for public welfare—has reemerged as a central issue as federal and state governments contemplate a coordinated response to COVID-19. Taken in that context, the core of this issue illustrates the power that state and local governments can flex to address public welfare generally, and housing policy in particular. Readers of this issue will learn about New York’s effort to redefine landlord-tenant law in a profound, far-reaching generational shift. Another article provides empirical evidence on what happens with implied warranty of habitability claims in courts and, by extension, the role of attorneys in eviction proceedings. A third article analyzes the YIMBY movement alongside efforts to re-zone single-family districts. Alongside these contributions, we also have a profile of the Colorado Coalition for the Homeless, our literature digest, and a letter sent from the Forum regarding COVID-19 policy. Regardless of where COVID-19 has taken us when this issue reaches all of you, I know that these articles will continue to inform debate and drive important conversations about federalism in housing policy. Many thanks to all of our contributors.

I also want to draw attention to one article that was cut from this issue that is now available online. When we were planning this issue, it seemed the biggest issue on everyone’s mind was the presidential election to be held this November. To that end, we began a review of all presidential candidate platform policies on affordable housing. With the changes seen since the coronavirus, the relevance of this review seemed increasingly out-of-date. When we stopped work on this article, we had already completed a review of all Democratic presidential candidate platforms, though

Stephen R. Miller is the Associate Dean for Faculty Development and Professor of Law, University of Idaho College of Law-Boise. Contact: millers@uidaho.edu.

President Trump had not yet issued a housing platform for 2020. While this review is perhaps a relic of a different time, and incomplete without the President's policy prescriptions, it may still prove to be a valuable resource for those seeking an understanding of how housing issues were discussed during this presidential cycle. For that reason, our last version of the presidential platform housing policy review is currently available for free online.¹

On a personal note, our lives have all changed dramatically in the last few months. My wife is an infectious disease doctor, and so COVID-19 hasn't been just a news story in our house; we have lived the frontlines every day. I know the toll this has taken on medical professionals all over the country, not just in the hot spots. I want to thank them all for their extraordinary efforts to keep us all safe. Given the *Journal's* focus, I also want to thank all of those working to forge new housing policies and procedures in these times. It is almost certain that the policies borne of this crisis will set a new housing agenda that we cannot yet fully imagine.

Stephen R. Miller
Boise, Idaho

1. Stephen R. Miller, *Housing Policy Ideas from the 2020 Presidential Candidate Platforms*, 29 *J. AFFORDABLE HOUS. & CMTY. DEV. L.* (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3547833.

From the Chair

Kelly Rushin Lewis

As you know by now, the Forum’s signature event, our May conference, has been canceled. Given the COVID-19 crisis, this decision will have come as no surprise to anyone, but such knowledge in no way reduces the sting of having to make a simple—but difficult—choice. Of course, we are all making such choices every day, and it is my sincere hope that the cumulative effect of these decisions is that each of you is healthy, safe, and prepared to meet the challenges of this pandemic.



Kelly Rushin Lewis

On what would have been the first day of the conference, we will be hosting a “state of the industry” panel. Over the next several months, we will also be scheduling a series of webinars to explore topics that we had planned to discuss in person. Looking further ahead, the Forum leadership team will continue to identify ways that we can pursue our mission of providing up-to-the-minute, relevant information to our members and colleagues. And, as public health agencies, elected officials, and business groups learn more about how we can safely reopen our local and national economies, we look forward to planning in-person events when we can do so safely.

On a personal note, never has the phrase “absence makes the heart grow fonder” seemed more relevant. This pandemic has reminded us all of the value of our professional and personal relationships. For that reason, I am compelled to get on my soapbox about Forum membership. I want to remind our readers and members—you—about the importance of participation in the Forum and the benefits of participating in our events and interacting with your colleagues.

As Chair, I was recently asked to provide the “Story of My Forum” to the ABA Sections and Officers Division, with a particular focus on the benefits our Forum provides to its members. I’m still not totally sure what the ultimate purpose or use of this information was, but it proved to be an interesting exercise. I would like to share what I wrote with our readers—again, you—as I think we could all use a reminder of why being a member is so important. Please bear with me as I summarize what I provided to the ABA:

As you may know, the **Forum on Affordable Housing and Community Development Law** was created in 1991 and now has over 3000 members. It produces this journal you are reading, which regularly provides in-depth articles on a breadth of housing and community development topics. The

Kelly Rushin Lewis is a partner in the Birmingham office of Jones Walker where she leads the firm’s national Tax Credit Finance Team.

Forum also has historically produced one to two books per year on housing and community development topics—the more recently developed short publications and primers have been particularly successful.

With the exception of this year, we hold our annual conference every May in Washington, D.C., with a national audience comprised of notable lawyers, developers, investors, governmental and agency employees, and more. The May conference is considered a focal point in our industry as it provides invaluable opportunities to interface with HUD and the IRS and provides an array of technical programs and thought-provoking, policy-focused plenaries.

In addition, the Forum has instituted a “Boot Camp” educational training program for new lawyers as well as those who are looking for a refresher or who are transitioning into this practice. The “Boot Camp” was instituted several years ago to provide an alternative training format that provides a “deeper dive” with longer panels and more interactive sessions. This past year it was held in Denver with record attendance.

Throughout the year, we also provide (at least quarterly if not more frequently) webinars and teleconferences that serve both as continuing education and as a literal forum for our members to gather and discuss new developments. Lastly, Forum members and leadership actively work to provide comments to HUD and IRS on any new regulations or guidance, ensuring that, at a minimum, our concerns are heard and often help to actually shape such regulations and/or guidance.

Beyond pure content and moving more to the intangible, our Forum lives up to its name via the engagement and vibrancy of our membership. This is a true forum, not just for knowledge but also for networking, professional development, and growth. It is a forge in which lasting friendships are made and professional, scholarly, and legal differences are hammered out. When you contemplate the work that the Forum does on conferences, webinars, and publications, it is mind-boggling to realize that the vast majority of this work is done by volunteers—once again, you. As a long-standing member and now Chair, I am very proud to be a part of this industry and particularly this Forum.

In sharing the above, I am sure that I am not telling you anything you do not already know. But reflecting on the great strengths of our Forum and putting these thoughts onto the page for the ABA, quite simply, moved me. It brought home how deeply I respect and appreciate all of the work of our organization and underscored the value our members bring to each other and to our profession. So I feel that they are worth sharing with you.

All of this said, I continue to be surprised (and a little dismayed) at how many people in our industry are not members of the Forum and do not attend our meetings. When I ask why, the reply is often some form of “Well, I attend this or that because there is more networking there” or “That is where my clients are,” etc.

To be sure, I understand that there are only so many groups in which one can participate. But wouldn't your first choice be an organization that actually can make you better at what you do? Not just through attending conferences or webinars, but also through dialogue with those who are at the forefront of our industry? I have certainly received work referrals from ABA colleagues (so I think the purported lack of networking is a myth); but equally, if not more, important, I cannot begin to count the times that I have had a question or concern on a particular topic and have been able to get immediate, expert-level feedback from a Forum member and/or friend.

So my message for this article is this: please, on behalf of myself and all of our membership, I implore you to reach out to your colleagues who are not participating in the Forum. Tell them about your experiences and what benefits the Forum provides. Threaten to unfriend them on Facebook, if it comes to that. (Is there any greater pain?!)

Don't just tell your fellow lawyers: tell everyone. Bankers, investors, developers, and others can all benefit from being part of the Forum. Let them know that the ABA has recently revised its dues, as well, so they are often substantially less than in the past.

The Governing Committee of the Forum can (and will) do membership outreach, but your friends and colleagues trust your opinion and will listen to YOU. With ABA membership falling and given the plethora of other organizations that are out there, it is more important than ever that we encourage anyone we know in our industry to join, attend, and participate. As mentioned, all of our amazing programming is made possible by our members. Thanks to our expansive, collegial membership, we have a buoyant group that can provide valuable and insightful dialogue.

Let's all work to build our brand and continue to support these online and—someday soon—in-person events so that it becomes clear to even the busiest, most well-connected individual: membership in the Forum and participation in our programs are a must for anyone in our industry.

Thank you for everything you do to support the Forum. Be safe and be healthy.



LETTERS TO REGULATORS

*Judy Crosby, Glenn Graff, Forest Milder, Mark Shelburne,
Brad Tomtishen & Susan Wilson*

April 2, 2020

Ms. Nicole Cimino
Branch Chief
Office of Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Mr. Michael Novey
Associate Tax Legislative Counsel
Office of Tax Policy
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Dear Ms. Cimino and Mr. Novey:

Following up on discussions that you have had with some of the undersigned, we would like to present recommendations for urgent and necessary guidance from the Internal Revenue Service (the “IRS”) and the Department of Treasury (“Treasury”) to alleviate the significant disruption caused by the COVID-19 pandemic to the development and operation of low-income housing tax credit (“LIHTC”) properties. While we are all active members of the Tax Credit and Equity Financing Committee (the “Committee”) of the American Bar Association’s Forum on Affordable Housing and Community Development Law (the “Forum”), and while we have consulted with other members of the Committee and the Forum, this request is not made on behalf of the Forum and has not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

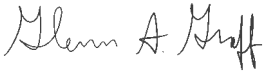
Thank you for your consideration of this request. We would be pleased to discuss these matters with you or your staff at your convenience.



Judy Crosby
Kutak Rock
Co-Chair of the Tax Credit and
Equity Financing Committee



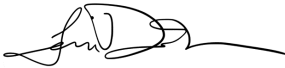
Mark Shelburne
Novogradac & Company
Member of the Tax Credit and
Equity Financing Committee



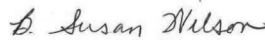
Glenn Graff
Applegate & Thorne-Thomsen,
P.C.
Former Chair and Co-Chair of the
Tax Credit and Equity Financing
Committee and Member of the
Forum's Governing Committee



Brad Tomtishen
Tomtishen Aoun PLLC
Co-Chair of the Tax Credit and
Equity Financing Committee



Forrest Milder
Nixon Peabody, LLP
Former Chair of the Forum
Member of the Tax Credit and
Equity Financing Committee



B. Susan Wilson
Enterprise Community Invest-
ment, Inc.
Co-Chair of the Tax Credit and
Equity Financing Committee

Request for Relief to Alleviate COVID-19 Disruptions

Overview

Throughout the country, governmental entities are recommending social distancing and, in many cases, enforcing stay-at-home orders that exempt only essential workers. In addition, some exempt workers are unable to work due to family responsibilities or potential or actual exposure to COVID-19. As a result, there are shortages of construction materials and workers, delays in permitting and local approvals, delays in public hearings and meetings of bond issuers, difficulties in conducting due diligence activities including site visits, surveys and environmental studies, inefficiencies in preparing legal documents and recording deeds and mortgages, and interruptions in daily operations of properties, including the ability to interact with residents and arrange maintenance and repair activities.

Transactions that should be closing right now are beginning to be delayed because of the uncertainty that technical requirements of Section 42 and the regulations thereunder may not be met given the disruptions due to the COVID-19 pandemic. In addition, for projects which had planned on beginning construction later this year or even next year, it may be difficult to meet all the timing requirement of Section 42 due to COVID-19 related disruptions and delays. Efforts of property managers that should be focused exclusively on the health and safety of tenants and staff are at risk of being diverted to satisfy technical requirements of the program.

Accordingly, the Forum of Affordable Housing and Community Development Law submits this request for relief from certain of the technical requirements applicable to LIHTC projects.

Need for Action

We acknowledge that some of the relief we are requesting may be available to certain LIHTC projects under the provisions of Revenue Procedure 2014-49 and 2014-50. Revenue Procedures 2014-49 and 2014-50 apply to projects located in jurisdictions for which the President has declared a major disaster under the Robert T. Stafford Disaster Relief and Emergency Act ("*Stafford Act*"). For several reasons, however, we believe that Revenue Procedures 2014-49 and 2014-50 are inadequate to address the situation at hand.

First, although the President has declared major disaster areas in many states (approximately half as of the date of this letter) and other states have requested such declarations, the COVID-19 pandemic affects all projects in all states and it is critical that uncertainty be resolved by providing uniform relief. Second, the relief in the revenue procedure requires action by the applicable state housing credit agency. The staff and boards of these agencies have communicated that they are already stressed, and their ability to act is limited. The pandemic is inherently different than the disasters contemplated by Revenue Procedures 2014-49 and 2014-50, and it is important that automatic relief be granted nationwide to relieve uncertainty and the burdens on state agencies. Third, as described below, relief is needed in ways not addressed by the revenue procedures.

As described in the following section, we believe that the IRS has significant authority to address projects that are not located in major disaster areas and urge the IRS to use its authority to fully address the unprecedented issues raised by the pandemic.

Authority of the IRS to Grant Requested Relief

There are two theories under which the Service may act.

First, Section 7508A provides that, "in the case of a taxpayer determined by the Secretary [of the Treasury] to be affected by a federally declared disaster (as defined by Section 165(i)(5)(A)), the Secretary may specify a period of up to 1 year that may be disregarded in determining ... whether

any of the acts described in paragraph (1) of Section 7508(a) were performed within the time prescribed therefor ...”

Section 165(i)(5)(A) provides “The term “Federally declared disaster” means any disaster subsequently determined by the President of the United States to warrant assistance by the Federal Government under the Robert T. Stafford Disaster Relief and Emergency Assistance Act.”

The Stafford Act has two relevant definitions:

(1) Emergency.—

“Emergency” means any occasion or instance for which, in the determination of the President, Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States.

(2) Major disaster.—

“Major disaster” means any natural catastrophe (including any hurricane, tornado, storm, high water, wind driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought), or, regardless of cause, any fire, flood, or explosion, in any part of the United States, which in the determination of the President causes damage of sufficient severity and magnitude to warrant major disaster assistance under this chapter to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby.

However, we respectfully note that Section 165 does not require a “major disaster.” It requires a disaster where “in the determination of the President, Federal assistance is needed.” Plainly the President’s finding of a national emergency in this situation is consistent with this conclusion. We believe a fair reading of the statute leads one to conclude that a disaster under Section 165(i)(5)(a) can include both Major Disasters and Emergencies. Accordingly, relief under Section 7508A (and, by reference, Section 7508) is authorized.

Notice 2020-18 reaches a similar conclusion:

“On March 13, 2020, the President of the United States issued an emergency declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act in response to the ongoing Coronavirus Disease 2019 (COVID-19) pandemic (Emergency Declaration). The Emergency Declaration instructed the Secretary of the Treasury ‘to provide relief from tax deadlines to Americans who have been adversely affected by the COVID-19 emergency, as appropriate, pursuant to 26 U.S.C. 7508A(a).’ ”

Once relief is authorized, Section 7508A(a)(1) provides a lengthy list of actions that may be taken. Most have to do with filing returns and making claims for refunds, but the Section ends with “(K) *Any other act required or permitted under the internal revenue laws specified by the secretary.*”

Accordingly, consistent with the major disaster declared in many states, and the President's declaration of an "emergency" generally, we have a disaster that requires federal assistance, and the Secretary of the Treasury could grant one year extensions for any act required or permitted under the revenue laws.

As noted above, this is not the only source of authorization.

More specifically as to the LIHTC, Section 42(n) gives the Secretary of Treasury authority to issue "such regulations as may be necessary or appropriate to carry out the purposes of this section" Treas. Reg. 1.42-13(a) repeats that authority and adds that the Secretary can provide guidance in a variety of ways.

Consistent with that authority, the Service has issued many rulings authorizing agencies grant extensions of certain deadlines, see the aforementioned Rev. Proc. 2014-49 and 2014-50, and the many rulings cited therein. Those guidance items typically provided specific extensions of deadlines to specific locales. However, we note that after Hurricane Katrina, the Service issued Notice 2005-69. It announced that for a temporary period of 13 months (i.e., even longer than the one year period specified in Section 7805A) owners across the entire country could rent to individuals displaced by the hurricane without regard to income limitations. We observe that this kind of relief was a common-sense policy determination, and not a mere waiver of any specific Code provision or period of time. Similarly, in Notice 2007-66, Rev. Proc. 95-28, and Rev. Proc. 2007-54 the IRS gave relief pursuant to Section 42(n).

Accordingly, based on either of these theories, we respectfully offer that the Service is authorized to take suitable action to respond to the current crisis, including the actions proposed in this request.

Requested Relief

We respectfully request that the IRS publish a notice granting relief to LIHTC properties with respect to the following items:

- Provide a nationwide 12-month extension of the 10% Test deadline required by IRC Section 42(h)(1)(E)(ii) for carryover allocations issued in 2019, 2020 and 2021.
- Provide a nationwide 12-month extension to the normal 24-month period to meet the minimum rehabilitation expenditure deadline required by IRC Section 42(e)(3) and IRC Section 42(e)(4) for rehabilitation expenditures placed in service in taxable years ending in 2020-2022.
- Provide a nationwide 12-month extension of the placed-in-service deadline required in IRC Section 42(h)(1)(E)(i) for projects issued carryover allocations in 2019, 2020 and 2021.
- Provide a nationwide 12-month extension of the 25-month rehabilitation period currently allowed under IRS Revenue Procedures 2014-49

and 2014-50 to properties that suffered a casualty loss due to a Presidentially declared major disaster in the 25-month period prior to the onset of COVID-19.

- Provide a nationwide 12-month extension (from December 31, 2020 until December 31, 2021) of the year-end deadline for property restoration that allows a LIHTC project that suffers a casualty loss not associated with a major disaster to avoid loss of LIHTC for 2020.
- Provide a nationwide 12-month moratorium on both physical inspections and tenant file reviews as required by IRS regulation 1.42-5.
- Provide a nationwide 12-month moratorium on tenant income recertification requirements.
- Provide a nationwide 12-month extension for all open noncompliance corrective action periods.
- Provide a nationwide temporary suspension of income limitations and transient occupancy rules to allow rental of low-income units (i) to homeless persons infected or suspected of being infected with COVID-19 to allow them to safely quarantine themselves given the reduced capacity and social distancing issues that many shelter facilities are facing during this period, and (ii) to medical personal and other essential workers infected or suspected of being infected with COVID-19. Such treatment should apply both for purposes of Section 42 and Section 142 and also provide that such temporary usage would not impact the classification of such housing as residential rental property or a qualified residential rental project.
- Amend the instructions to the Form 8609-A to allow taxpayers to claim LIHTC without a Form 8096-A executed by a credit agency if the failure to have a Form 8609 is due to reasonable cause and not due to willful neglect consistent with Section 42(l)(1). The problem addressed by this action predated the declaration, but the COVID-19 emergency has made it substantially worse.
- Provide a nationwide 12-month extension for qualifying for the transition rules applicable to the Historic Rehabilitation Tax Credit. Under Section 47, a taxpayer may claim the 20% rehabilitation credit in the year property is placed in service if, among other requirements, the rehabilitation satisfies a 24-month or 60-month rehabilitation period that begins within 180 days of December 22, 2017, (*i.e.*, starts on or before June 20, 2018) and ends 24 months or 60 months thereafter. It is requested that the 24-month and 60-month rehabilitation periods be extended to 36 and 72 months.

Proposed Form of Notice

Given the urgency of this request, we have taken the liberty of drafting a partial proposed form of notice which may be helpful to you in granting the requested relief. Specifically, the attached Exhibit A contains draft

Purpose and Background statements. We are currently drafting the substantive provisions, however we encourage the IRS to not wait on the outcome of these efforts.

Conclusion

In this difficult time, urgent action is required to relieve uncertainty and allow the LIHTC to continue its critical role in providing affordable housing to the low-income tenants severely affected by the pandemic. As outlined above, we believe that the IRS has authority to extend deadlines and take similar actions that will alleviate the disruption caused by the pandemic. The requested relief is consistent with similar actions taken by the IRS in the past, but new and additional actions are required given the unprecedented and wide-ranging effects of the COVID-19 pandemic.

EXHIBIT A TO REQUEST FOR RELIEF
FORM OF PROPOSED IRS NOTICE

Low-Income Housing Credit COVID-19 Relief
Notice 2020-__

I. PURPOSE

On March 13, 2020, the President of the United States issued an emergency declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121- 5206 (the Stafford Act) in response to the ongoing Coronavirus Disease 2019 (COVID-19) pandemic. The Emergency Declaration instructed the Secretary of the Treasury “to provide relief from tax deadlines to Americans who have been adversely affected by the COVID-19 emergency, as appropriate, pursuant to 26 U.S.C. 7508A(a).”

Pursuant to the Emergency Declaration, this notice provides relief under sections 42(n) and 7508A(a) of the Internal Revenue Code by modifying and supplementing the relief that is provided in Rev. Proc. 2014-49, 2014-37 I.R.B. 535, and Rev. Proc. 2014-50, 2014-37 I.R.B. 540.

The expanded relief in this notice is limited to the Emergency Declaration. Except as expressly provided in this notice, all provisions of Rev. Procs. 2014-49 and 2014-50 continue to apply by their terms without modification.

II. BACKGROUND

Section 7508A provides the Secretary of the Treasury or his delegate (Secretary) with authority to postpone the time for performing certain acts under the internal revenue laws for a taxpayer determined by the Secretary to be affected by a Federally declared disaster as defined in section 165(i)(5)(A). Pursuant to section 7508A(a), a period of up to one year may be disregarded in determining whether the performance of certain acts is timely under the internal revenue laws.

Under §Section 42(n) of the Internal Revenue Code and § 1.42-13(a) of the Income Tax Regulations, the Secretary may provide guidance to carry out the purposes of § 42 through various publications in the Internal Revenue Bulletin.

Rev. Procs. 2014-49 and 2014-50 provide temporary relief from certain requirements of §§ 42 and 142(d) of the Internal Revenue Code in the context of a major disaster.

Rev. Proc. 2014-49 provides guidance and relief to the owners of qualified low-income housing projects (each such project, a § 42 Project) and to Agencies (as defined in section 5.01 of Rev. Proc. 2014-49) that are responsible for those § 42 Projects.

Rev. Proc. 2014-50 provides guidance to issuers of exempt facility bonds financing qualified residential rental projects under § 142(d) (each such issuer, an Issuer; each such project, a § 142(d) Project) and to operators of those § 142(d) Projects. Various aspects of these revenue procedures apply with respect to § 42 Projects and § 142(d) Projects both inside and outside of the area in which the major disaster occurs.

The circumstances surrounding the Emergency Declaration closely match the underlying rationales for the relief provided Rev. Procs. 2014-49 and 2014-50. Like a major weather event, the nation's response to COVID-19 almost certainly will lead to consequential disruptions in transactions and construction, including citywide mandatory halts in construction activity, understaffed lenders, suspended site inspections, and broken supply chains.



DIGEST OF RECENT LITERATURE

Maintaining Housing Stability: Interim Lessons from the Denver Supportive Housing Social Impact Bond Initiative

Mary Cunningham, Sarah Gilliespie, Devlin Hanson, Michael Pergamit Alyse D. Oneto, and Prasanna Rajasekaran (Urban Institute); Tracey O'Brien, Liz Sweitzer, and Christine Velez (The Evaluation Center at the University of Colorado Denver) Urban Institute (November 2019)

(<https://www.urban.org/research/publication/maintaining-housing-stability-interim-lessons-denver-supportive-housing-social-impact-bond-initiative>)

This report provides an interim analysis of the Denver Supportive Housing Social Impact Bond Initiative (“Denver SIB”), which was launched in 2016. The purpose of the Denver SIB is to create a supportive housing model that addresses the needs of chronically homeless individuals in Denver and disrupts the jail-to-street cycle that this population faces. The Denver SIB was funded in 2016 by the County and City of Denver as well as eight private investors, and it was expanded in 2018 after early signs of success. This report first provides background on Denver’s chronically homeless population, which was estimated for 2019 to be 1,158 individuals in the metropolitan area. It also explains the costs associated with the jail-homelessness cycle, in which homeless individuals are repeatedly arrested for nuisance crimes, such as loitering or camping on the street. To address these issues, the Denver SIB partnered with various social service organizations and targeted individuals who had been arrested at least eight times in three consecutive years with at least three arrests marked as transient, meaning that the individual had no address or provided a shelter address. A lottery system as then used to randomly assign members of the targeted population to the supportive housing program, which included subsidized housing, customized clinical services, behavioral health services, links to community resources, and transportation assistance.

The Urban Institute tracked four milestones for the engagement of the 533 individuals referred to the program over a six-month time frame:

Contributors: Rita Burns, Berman Indictor LLP, Philadelphia, PA; Theresa Omansky, Emmet, Marvin & Martin, LLP, New York, NY; Sam Dougan, Klein Hornig LLP, Washington, DC; Arete “Arlene” Koutras, Windels Marx Lane & Mittendorf, LLP, New York, NY; Sara Silverstein Ferrara, Klein Hornig LLP, Washington, DC; Stephanie Johnson, Klein Hornig LLP, Washington, DC; Moriah Wilkins, Northeastern University School of Law, Boston, MA.

(1) participant location, (2) participant engagement in the program, (3) housing application approval, and (4) lease up. The report finds that 54% of the participants signed a lease to move into an apartment within six months of their initial referral, and it details some of the challenges associated with each stage of engagement, along with strategies used to overcome them. Next, the report explores the housing stability of participants at six months, one year and two years after they initially entered housing, with retention rates of 92%, 85%, and 79% respectively. Challenges to housing retention included finding the right housing placement and navigating relationships with participants. These obstacles were best addressed through individualized care and intensive services.

The report next explores the number of jail stays by participants and finds that 64% of participants had at least one jail stay within two years of entering housing. The report also details the impact of case management, as the Denver SIB providers worked to establish relationships with key actors in the criminal justice system and advocated for participants throughout court processes. This involvement helped to create a safety net for participants. Finally, the report concludes that housing stability rates appear promising, and, while participant jail stays may seem high, the true impact cannot be understood until a final report is conducted in 2021 that compares program participants with a randomized control group.

Young Children Receiving Housing Vouchers Had Lower Hospital Spending into Adulthood

Doug Donovan

The HUB, Johns Hopkins University (December 10, 2019)

(<https://hub.jhu.edu/2019/12/10/housing-vouchers-hospitalization-costs>)

A study conducted by the *Journal of American Medical Association* (“JAMA”) used data collected by the U.S. Department of Housing and Urban Development (“HUD”) in the experimental program “Moving To Opportunity for Fair Housing Demonstration Project.” The program enrolled 4,604 families living in public housing developments or in high-poverty neighborhoods in Baltimore, Boston, Chicago, Los Angeles, and New York from 1994 to 1998 and (1) gave some families a housing voucher that had to be used in a low-poverty neighborhood, (2) gave some families a housing voucher that did not have any neighborhood restrictions, and (3) assigned some families to a control group in which they were not provided with a housing voucher. HUD followed participating households for up to 21 years after they enrolled in the program in order to track hospitalizations over time. They found that children whose household received a housing voucher were admitted to the hospital fewer times than children whose households did not receive such vouchers. Children age 12 and under whose household received a housing voucher spent 27% less on hospitalizations and were hospitalized 18% less than children whose

households did not receive a housing voucher. Furthermore, a reduction by 10 percent in neighborhood poverty was found to correspond with a \$152/year decrease in spending on hospital visits for children under 18. While not conclusive, these findings support the theory that living in an area with a lower incidence of poverty may reduce health care costs.

Rapid Re-housing in High-Cost Market: What Do Programs Look Like?

Samantha Batko, Sarah Gillespie, and Amanda Gold

Urban Institute (November 2019)

(https://www.urban.org/sites/default/files/publication/101371/rapid_re-housing_in_high-cost_markets.pdf)

This article discusses a study of rapid re-housing programs in four high-cost markets: Boston, Los Angeles, Seattle, and Washington, DC. The rapid re-housing programs are designed to act as an emergency intervention to end a period of homelessness. The programs focus on providing an immediate cure, rather than a long-term solution, and their efficacy is judged by looking at whether individuals exit the program and move into permanent housing or if they return to homelessness within one year. Beyond this national metric, programs also consider how to ensure that families are successful, and note that successful re-housing is different for each family. Sometimes successful re-housing means shared housing with a roommate or another family; other times, it means reconnecting with family or friends in another location.

Securing permanent housing for families is a critical part of rapid re-housing programs, and unit availability is a constant challenge. The programs are able to mitigate this challenge with concerted efforts to cultivate relationships with landlords and by working to expand the geographic area in which they can access information about available units. Rapid re-housing programs provide families with financial assistance in the form of rent subsidies and offer services to help individuals increase their income.

Rent subsidies are structured differently in various programs, but a common theme is that assistance is not provided for a predetermined amount of time. Rather, families are regularly reassessed to determine ongoing eligibility. Whether a family needs to be referred for ongoing housing assistance is an individualized assessment that can change over time. Unfortunately, regardless of the amount they are paying for rent while in the program, it is highly likely that they will be severely rent burdened when they exit.

Services outside the scope of housing are provided to families as well, ranging from legal advice to childcare to domestic violence support. Programs generally refer individuals to organizations in the community for these services so that the connection will remain even after families move out of rapid re-housing. Participants in rapid re-housing programs

generally are required to have regular check-ins with a caseworker, but all other services are optional.

Data regarding families' experiences after leaving rapid re-housing programs is lacking, in part because programs typically have low response rates to requests for feedback upon participants' exit from the rapid re-housing programs. Furthermore, many programs have stopped making efforts to reach out to families because of a belief that it could be counterproductive to the programs' goal of helping families become less reliant and more independent.

**On the Path to Health Equity: Building Capacity to Measure
Health Outcomes in Community Development, Findings
from a National Demonstration Project**

Enterprise Community & NeighborWorks America (2019)

(<https://www.enterprisecommunity.org/download?fid=11674&nid=8676>)

This article explores the Health Outcomes Demonstration Project designed and implemented by NeighborWorks America and Enterprise Community Partners, two national organizations in the affordable housing and community development field. This joint project sought to use data to better measure the connection between health inequities and social determinants of health (SDOH), defined as the "conditions in the places where people live, learn, work, and play."

The project offered an innovative set of health outcome measurement tools and evaluation resources, developed by Success Measures, an evaluation resource group, to twenty affordable housing and community development organizations across the United States from 2017 to 2019. The participating organizations were guided through the process of designing and implementing a study to measure health outcomes of one of their programs. Fourteen of the organizations evaluated housing-based services offered to residents of their multifamily affordable housing properties, including services focused on nutrition, physical activity, financial literacy, social activities, mental health, tutoring, and employment.

To help housing and community development organizations measure changes in health outcomes, Success Measures developed a set of more than sixty-five health-outcome measurement tools. These tools included survey questions, interview guides, and other resources that were used to gather data from clients, residents, or community members. The tools provided a comprehensive way to measure the impact of affordable housing and community development programs on factors that influence individual and community health outcomes.

At the conclusion of the project, participating organizations were able to articulate the connections between their housing and community development work and residents' health outcomes. Participants explained that the process of evaluating health outcomes helped them to better understand

the synergies between health and the housing and community development fields as well as the connection between health outcomes and a broader range of SDOH. Understanding this connection encourages organizations to integrate health outcomes as part of new grant applications and funding opportunities. The evidence also directly informs programmatic decisions and funding over the long term as organizations endeavor to best meet residents' needs. For example, in response to a survey where respondents reported lower levels of exercise, a service provider offered new fitness classes and a TV exercise program to all residents. An organization in Chicago found that their participants reported low fruit and vegetable consumption. As a result, the organization implemented a program to build garden beds and work with residents to grow fresh food right in their backyards. Beyond informing programming changes, evaluation data can also provide valuable direction to inform broader strategic decisions regarding health disparities in low-income communities.

In addition to conducting their independent research, representatives from the participating organizations attended in-person meetings, which facilitated dynamic peer-learning opportunities by creating a dedicated space and time for the participants to engage with one another about their clients, challenges, and the role of evaluation within their organizations. Together, the participants explored the relevance of the SDOH framework to their work, considered strategies for improving data collection, and practiced communicating findings to stakeholders. Convening in person was critical to the project's success and led to long-lasting relationships that will serve the housing and community development field well in the future.

The diversity of participating organizations and their programs, as well as their commitment to the evaluation process, were believed to contribute to the project's success. The report concludes by recommending the work be continued in ways that will advance health equity by demonstrating the effectiveness of community-based solutions to persistent health disparities. Partnerships between community organizations and local health care providers must be fostered in order to develop treatment plans that address the needs of the local population, and participating organizations gained confidence and skills in evaluating their work to meet these needs.

Creative People and Places Building Health Equity in Housing

Scott Burris, Katie Moran-McCabe, Nadya Prood, Kim Blankenship, Angus Corbett, Abraham Gutman, and Bethany Saxon
Temple University, Center for Public Health Law Research (2019)

This article was the fourth part of a six-part series focused on evaluating the role of law in housing equity and creative uses of law to improve health equity through housing. Researchers interviewed fifty professionals who work in housing law, research, advocacy, or policy and distilled ten important themes from the conversations.

Theme 1: Housing is connected to everything, and it is important to recognize that it is tied to many aspects of health and well-being. Individuals who were interviewed discussed some of the consequences of viewing housing in isolation and the need to consider factors like proximity to public transportation and accessibility to education in planning housing development.

Theme 2: Racial segregation remains pervasive in housing, and our legal system has failed to eliminate, or even substantially reduce, housing segregation. Racism pervades effort to increase affordable housing as developers face strong community opposition to the addition of affordable housing in many middle-class communities, and there is a tendency to build affordable housing in neighborhoods with less expensive land in already segregated low-income communities.

Theme 3: Zoning laws impede housing equity. Interviewees talked about how local governments use zoning laws to exclude multifamily affordable housing from higher-opportunity communities, citing use and area restrictions. Zoning laws must be changed to allow for the development of multifamily affordable housing. Taking zoning authority away from local governments could help to reduce the frequency with which zoning laws impede affordable housing development.

Theme 4: Litigation can be used as a tool to force systemic change. There have been successes in impact litigation, including in fair housing cases, but litigation must be an element of broader efforts for change.

Theme 5: Laws are not being properly enforced. Housing professionals cite increased resources and political desire to increase and improve enforcement efforts as necessary to bring about change.

Theme 6: Legal details can be used to create opportunities or barriers. For example, in some instances, incentives imbedded within the qualified allocation plan can make a big difference in the housing that is developed with low income housing tax credits and lead to more units of permanent supportive housing. Yet requirements for local government approval can provide an avenue for communities to protest the building of affordable housing in their neighborhoods.

Theme 7: In the administration of housing programs, the red tape is prevalent, and “unfair or pointless technicalities [] snare regular people.” In particular, one interviewee explained how red tape can harm individuals with disabilities.

Theme 8: Significant gaps in knowledge and understanding of complex regulatory regimes make it difficult to propose policy reform. Many specific policies have not been evaluated or researched, which makes it challenging to understand their benefits and shortcomings.

Theme 9: Funding is a significant indicator of a program’s efficacy. Housing professionals noted that a lack of resources pervades all types of housing programs—from vouchers to landbanks to budgets for enforcing fair housing laws—and that increased funding would improve the programs’ impact.

Theme 10: Housing laws are failing to protect individuals who are most in need. For example, with respect to landlord-tenant law, poor renters are often at the mercy of their landlords; fair housing laws generally fail to protect individuals with criminal backgrounds; and housing code enforcement can end up displacing families who have nowhere else to go.

Exile from Main Street

Deborah Archer

55 *Harv. Civil Rights-Civil Liberties L. Rev.* (CR-CL) (forthcoming 2020)

“Exile from Main Street” examines the impact that policing-based housing policies, coupled with mass incarceration, have had on the housing options of people who have had contact with the criminal legal system. In her article, Deborah Archer focuses on how people with criminal backgrounds or even criminal histories with minor convictions are excluded from public housing, affordable housing, and even private housing based on their pasts. With the increase in policing-based housing policies, such as the “one strike” eviction policies, mandatory lifetime bans for individuals with certain convictions, and crime-free municipal ordinances, people and their families are being excluded from the housing market and left with few or no stable housing options. Furthermore, due to the history of mass criminalization’s racial focus, people of color are the most heavily impacted by these exclusionary housing policies.

Archer argues that policing-based housing policies that purport to promote safety actually function much like the racially restrictive covenants that were invalidated in *Shelley v. Kraemer* and must be corrected to undo their harmful effects on already marginalized people and communities. Archer’s article explores the history of exclusionary housing policies and their relationship with the criminal legal system, addresses the impact that these policies have had on people with little to no contact with the criminal legal system, and describes ways to create housing policies that promote the general welfare of all its citizens.

Out of Reach

Andrew Aurand, Abby Cooper, Dan Emmanuel, Ikra Rafi & Diane Yente,
Nat’l Low Income Housing Coalition (2019)
(<https://reports.nlihc.org/oor>)

In this thirtieth anniversary edition, the 2019 *Out of Reach* documents the growing disparity between the cost of housing and the wages that individuals across the country are receiving. Over the last three decades, the cost of modest rental housing has become increasingly out of reach for low-wage and low-income renters. In many localities, individuals would have to work 2.5 to 3 jobs just to spend no more than 30% of their income on housing. But the struggle to afford rental housing is not just confined to minimum wage workers. Even moderate wage workers must work an

average of 52 hours a week to spend 30% or less of their income on housing for a modest apartment.

As the report shows, on average across the nation, the price range of what low- and moderate-income families and individuals can afford a month is between \$231, for an individual relying on entitlement programs, and \$931, for the average full-time worker wage. Despite what low-income earners can afford, the average monthly fair-market rent for a one-bedroom is \$970 and \$1,194 for a two-bedroom. The report's data demonstrates that most individuals find it difficult to find affordable housing, and, if they do find housing, they end up spending more than 30% of their income on housing.

Low-Wage Work

Federal and state minimum wages are simply not enough for most people in this nation to truly be able to afford housing. There is not one state, metropolitan area, or county in the United States where a worker can earn the federal or state minimum wage and afford a modest-two-bedroom rental at fair market price by working the traditional 40 hours/week. There are only 28 counties where a full-time minimum wage worker can afford a one-bedroom rental home at fair market rent, but these are counties where the state minimum wage is higher than the federal minimum wage. Additionally, projections indicate that the number of low-wage jobs are expected to grow significantly within the next ten years, which makes it imperative that we strive towards making affordable housing more widely available now. Overall, based on the data and the market rates of housing across the country, a low-wage worker cannot afford a one-bedroom rental home at fair market rent without spending more than 30% of their income on rent.

Racial and Gender Disparities

When considering racial and gender disparities in housing, the income disparities and access to housing become even more grave. Black and Hispanic households are more likely to be low-income earners and have higher percentages of individuals experiencing what is considered "extremely low-incomes" in comparison to their White counterparts. The median Black or Hispanic worker earns about 27% less than the median White worker and as a result, they face even larger gaps between the wages they earn and the cost of housing. Because of this wage inequality, over 50% of Black and Hispanic renters spend more than 30% of their incomes on housing compared to about 40% for White renters. The data in this report illustrates that Black and Hispanic wage earners are making far below what is needed to secure both one-bedrooms and two-bedrooms and are likely working multiple jobs or spending far more than 30% of their income on housing. Similarly, gender plays a significant role in an individual's ability to afford housing. Women earn less than males at all wage levels. This disparity in wages ultimately burdens their ability to afford housing and has a propensity to

have implications for children who only live with one parent and women are more likely to be the sole parent of children.

The Shortage of Affordable Homes for the Lowest-Income Renters

As it stands, the private market fails to provide a sufficient supply of affordable housing for low-income renters. Development of rental properties is becoming more expensive, and developers are looking for higher-income renters to offset the costs of funding the housing projects. The median asking rent in 2017 for multi-family apartment in a new building is over seven times more than the extremely low-income renter can afford and about \$700 more than what the average full-time wage worker can afford. Only about a third of renters in 2017 could afford the median asking rent. Although these disparities are very real, the majority of eligible low-income households are denied federal housing assistance because the housing programs are grossly underfunded.

Federal Policy to Address Rental Housing Affordability

The report highlights a number of federal initiatives and policies that can be implemented to improve housing access nationwide. First, it proposes a significant boost in the resources available for the national Housing Trust Fund. This increase would aid in creating and maintaining housing for lower income individuals and families. Second, there could be more federal funds supporting public-private partnerships and contracting to create low-income rental homes to expand affordable housing availability. Third, the report advocates for an expansion of the Housing Choice Voucher program with policies that ban discrimination against voucher holders. Fourth, the report suggests an expansion in tax incentives for creating affordable housing, such as expanding and improving the Low-Income Housing Tax Credit (LIHTC) program. In addition to these changes and expansions, representatives in Congress could continue to push and re-introduce legislation that would create more equity in housing, such as “The American Housing and Economic Mobility Act,” “The Ending Homelessness Act of 2019,” the “Rent Relief Act,” and the “Housing Opportunity, Mobility, and Equity Act.”

The Numbers

The report’s data illustrates and documents Housing Wages in every state to demonstrate the disparities that exist in both thriving and less vibrant economies across the country. *Out of Reach* 2019 ranks the most expensive jurisdictions for two-bedroom housing, summary data for each state, detailed data about wages, housing costs, and the area medians in each state, the number of renters in each jurisdiction, and the most expensive areas within a state—just to name a few of the data points explored.



ORGANIZATIONAL PROFILE

Colorado Coalition for the Homeless: Innovating to Create Lasting Solutions to Homelessness

Meredith Ritchie & Cathy Alderman

Understanding Homelessness in Colorado

With almost 10,000 people experiencing homelessness statewide, it is abundantly clear that no community in our state is immune from the causes and consequences of homelessness. A complex issue like homelessness requires multifaceted solutions paired with a comprehensive understanding of the roots and causes, the impact on and in the community, the response of housed neighbors, and the unique and collaborative ways that we must address homelessness as responsible community members.

Homelessness often does not happen overnight or because of one single “bad” decision but because of an overwhelming number of unfortunate

Meredith Ritchie has served as in the nonprofit sector for fifteen years specializing in branding, communications, and public education for social-justice focused organizations. Earlier in her career, Meredith was the Director of Marketing and Communications at St. John’s Community Services in Washington, DC, and consulted for the Department of Labor on communications strategies. In Denver, Meredith continued her career in social justice and now serves as the Director of Communications at the Colorado Coalition for the Homeless. She has a bachelor’s degree from American University.

Cathy Alderman has served as the Vice President of Communications and Public Policy for the Colorado Coalition for the Homeless (CCH) since 2015 and oversees the Education and Advocacy (E&A) Team. The E&A Team is responsible for public/media relations, lobbying activities, social media, publications, community engagement, public outreach, and education. Before joining CCH, Cathy served as the Vice President of Public Affairs for Planned Parenthood of the Rocky Mountains (PPRM) and the PPRM Action Fund overseeing policy, political, and community engagement work for a four-state region. Cathy has also worked for the Association of PeriOperative Registered Nurses (AORN) on legislative issues related to patient safety in the operating room, the Ohio Department of Jobs and Family Services overseeing the Medicaid Managed Care Contracts Division, and the Madison County Health Department in Ohio as an Epidemiologist and Legal Adviser. Cathy received her Juris Doctor from Tulane University Law School and a Master of Science in Public Health from the Tulane School of Public Health in Tropical Medicine. She graduated from Loyola University with a Bachelor’s Degree in Philosophy and a minor degree in Environmental Management.

circumstances compounded by the systems that make it nearly impossible to crawl out of the cycle of poverty and homelessness. Homelessness can be the result of a severe mental health crisis and no access to medical care causing a loss of employment, domestic violence situations that included financial abuse, severe childhood trauma that led to years of self-medicating with alcohol and drugs to combat their mental health issues, and many other similarly compounded and multifaceted situations.

The stories of homelessness, no matter what the circumstances, almost always involve the criminal justice system because of the criminalization of homelessness, an ill-advised policy that erupted about twenty-five years ago and has had a stronghold on the unhoused population ever since. Throughout the 76 most populous cities in Colorado, there are 351 laws which criminalize being unhoused, according to the University of Denver's Sturm College of Law 2016 report "Too High a Price." These crimes, which often come with tickets, fines, or jail, are imposed for survival outside, such as sleeping, urinating and defecating, staying out of the elements, sharing food, keeping oneself warm, and earning money, among others. These same activities bear no consequence when a person does them inside the comfort of their home. Across the nation, anti-homelessness laws continue to increase, including bans on sleeping outside or in vehicles, panhandling, sharing food, and trespassing.

Criminalizing survival makes it extremely difficult for people experiencing homelessness to get out of the cycle because people are routinely punished further for having a criminal record. Background checks are required for housing, jobs, and sometimes access to certain benefits. Exacerbating this is that wages have not kept up with the cost of housing, so a minimum-wage job cannot cover both housing costs and criminal fines, much less legal assistance.

Compounding the issue of homelessness further is cost of living and affordable and available rental units in the state. The 2019 "Out of Reach" Report by the National Low Income Housing Coalition states that a person needs to work a minimum of seventy-three hours per week at minimum wage to afford a one-bedroom apartment at Fair Market Rent in Colorado. This data is an average across the state, meaning that a person living in a more expensive city like Denver or Boulder would invariably need to work more hours at minimum wage to live in the same one-bedroom apartment. But living in suburban or rural communities to afford an apartment may come with another price tag: minimal social services and lack of public transportation.

Similarly, the Gap Report by the National Low Income Housing Coalition notes that 76 percent of extremely low-income renter households are severely cost burdened, meaning that they are spending more than fifty percent of their income on housing costs. With a shortage of 114,071 affordable and available rental homes for extremely low-income, renters are forced to pay more for housing than 30 percent and sometimes 50 percent of income.

Can We Solve Homelessness?

Organizations across the country are working diligently to bring an end to homelessness with a variety of services including much-needed shelters, emergency cold-weather shelters, transitional and permanent housing, comprehensive healthcare, support services, food banks, and substance-use recovery programs. These programs provide critical services but are constrained by limited financial resources. In the Denver metropolitan region alone, there are over 70 organizations providing all these services and more; however, they are working to serve at minimum 5,755 people experiencing homelessness and are inundated with unmet and severely complex needs. The wait-list for housing is often years. Shelters are full. Food banks have lines around the block. Simply put, the need far outweighs the available resources.

One of the biggest reasons for this is that Colorado is one of only three states that does not have a statewide strategy or funding source to address homelessness. The very limited dollars in the Colorado budget for housing is in the housing grants line item of \$9.25 million, but, without a permanent fund, it is at risk annually while competing against other public interests like education and transportation, which are all essential in our growing community. Most of the funding for housing in Colorado comes from federal funds, which, in the current political environment, are uncertain and stagnant.

Colorado Coalition for the Homeless

For over 30 years, the Colorado Coalition for the Homeless has dedicated its time, focus, and energy to creating lasting solutions to homelessness in Colorado. To achieve this lofty goal, the Coalition has a network of staff, donors, volunteers, partners, and advocates who work to provide housing, healthcare, and comprehensive support services through an integrated care model. The Coalition believes housing alone does not solve homelessness, but supporting a person holistically on their journey to stability can. Each year, the Coalition serves over 20,000 people experiencing or at-risk of homelessness with a wide array of services and works to look at the root causes of homelessness: skyrocketing housing market, unemployment and underemployment, affordable healthcare, renters' rights, mental illness, and domestic violence through advocacy at the local, state, and federal level.

To address the most critical need of people experiencing homelessness, the Coalition works to match people with suitable housing where they can achieve stability, along with an improved quality of life and level of health. To combat the affordable housing shortage in metro Denver, the Coalition operates 18 high-quality affordable housing properties, supporting over 4,111 households with housing options in a rapidly unaffordable state.

The Coalition provides quality medical, dental, vision, pharmacy, and mental health services to people experiencing or at-risk of homelessness. Stout Street Health Center, a state-of-the-art Federally Qualified Health

Center, and its five satellite locations use a trauma-informed approach to tend to the mental and physical welfare of 14,154 patients who may not have had access to quality healthcare in the past.

Support services provide clients with case management, childcare, nutritional counselling, healthcare navigation, addiction recovery, public benefit counselling, translation services, and transportation—providing the necessary resources for people to live and thrive in their communities. Outreach offers information, referrals, and connections with local support services, as well as crisis intervention and needs assessments, to those living on the streets of Denver.

Creative Solutions

Innovative ideas are how communities move the needle on ending homelessness in our communities. First and foremost, closing the gap on needed affordable housing units (3.9 million nationwide) will help people who are living on the edge of homelessness find suitable and safe housing, which helps ensure that there does not need to be a choice between housing and food, or housing and healthcare.

Housing First and Denver Social Impact Bond Initiative

The Housing First approach works. It is designed to help people experiencing chronic homelessness move more quickly off the streets or out of the shelter system and into housing through low-barrier housing options. Housing First includes rapid access to housing, crisis intervention, and follow-up intensive case management and therapeutic support services to prevent the recurrence of homelessness. It quite literally houses a person first and then diligently works to address the issues that led to homelessness, like substance-use disorders, mental health, psychiatric disabilities, among many others, through intensive treatment and case management. Nationwide, this model has worked to house people and help them remain housed for two decades, but more support for programs like this one is imperative.

Housing First helps people experiencing homelessness, but it also saves cities money because it reduces the number of people experiencing homelessness chronically using emergency rooms, inpatient medical and psychiatric care, detox services, incarceration, and emergency shelter. The Denver Social Impact Bond initiative, a partnership between the City of Denver, Mental Health Center of Denver, Colorado Coalition for the Homeless, and private investors—which housed 250 people experiencing chronic homelessness—is a proven example.

Launched in 2016, the Denver Social Impact Bond program uses funds from lenders to provide housing and supportive case management services to people who frequently use the city's emergency services, including police, jail, the courts, and emergency rooms. The program uses a Pay for Success model, in which the city agreed to pay investors \$15.12 for each day that each qualifying participant was stably housed and not in jail. In its

first year, the project had remarkable success with participants spending a total of 12,457 days in housing, resulting in over \$188,000 in the city's first repayment to investors and the mayoral endorsement for additional funds to expand the program. Based upon previous studies, the expected outcomes of a 35 to 40 percent reduction in jail bed days and approximately 80 percent increase in housing stability among the target population would result in a payment near \$9.5 million to investors.

The Denver Social Impact Bond program is an initiative aimed at measurably improving the lives of people most in need by driving resources towards better, more effective programs. Social Impact Bonds are a unique type of performance-based contracts where private and/or philanthropic lenders loan funds to accomplish a specific objective and are repaid based on whether the program achieves its goals. By shifting the focus to preventive services, service providers such as the Colorado Coalition for the Homeless can better serve this population while saving taxpayers millions of dollars each year. The cost of providing safety-net services to 250 of Denver's population experiencing homelessness is approximately \$7 million per year. Stable housing and supportive services can prevent expensive encounters with the criminal justice and safety-net systems and can help people lead more stable and productive lives.

The Coalition provided subsidized units to the program through Renaissance at North Colorado Station property, Renaissance Downtown Lofts property, and scattered-site apartment homes throughout Denver. This combined effort to provide permanent supportive housing saves the city an average of \$29,000 per resident in emergency-related costs, transforms the lives of 250 of Denver's most vulnerable citizens, and improves the quality of life in the downtown neighborhood by reducing the number of people who call the streets their home. As of December 31, 2018, the Denver Social Impact Bond program housed 330 people experiencing homelessness. Two years after entering housing, 79 percent remained in housing. Preliminary data on reduction in jail days is promising, but results will not be fully released until the project's end in 2020.

*Fusion Studios: From Quality Inn to Studio Apartments for
People Experiencing Homelessness*

Another recent creative project by the Colorado Coalition for the Homeless was the acquisition and conversion of a former hotel into 139 studio apartments for people experiencing homelessness. Renaissance Housing Development Corporation, a subsidiary of the Colorado Coalition for the Homeless, developed Fusion Studios through the acquisition of the Quality Inn and Suites at 3737 North Quebec Street in Denver to provide affordable housing to help meet the affordable housing shortage in Denver. This initiative provides a unique opportunity to quickly lease apartments for individuals and couples struggling to find affordable housing, including those experiencing homelessness in Denver, by converting an existing operating hotel into affordable housing at a fraction of the cost and

timeline of constructing new housing. From acquisition to move in will be a total of eight months, where a typical predevelopment and construction takes a total of three years.

The building is four stories and a total of 100,000 square feet. Approximately \$500,000 in capital improvements were completed prior to the acquisition in 2018, including carpeting in the guest rooms, laundry upgrades, and a lobby upgrade. Each studio is fully furnished with a bed, dresser, desk and chair, television, and window coverings. Bedding will be provided. In addition, each unit has a kitchenette. A full-service food pantry is also available for residents.

Governor Jared Polis joined the Coalition in celebrating the grand opening of Fusion Studios, noting the creativity and thoughtfulness of Coalition leadership to acquire this property. "This is an example of an amazing job of cutting through red tape, taking something that was a Quality Inn, and at a fraction of the normal cost of building something new and a fraction of the time, opening the doors," said Governor Polis.

*Fort Lyon: Housing with Supportive Services for Veterans
Experiencing Homelessness*

A third unique project that addresses the severe lack of substance use treatment and mental health care services in Colorado that ultimately play a role in homelessness is the Fort Lyon Residential Supportive Community (Fort Lyon). Fort Lyon provides transitional housing and support services to people experiencing or at risk of homelessness with substance use disorders from across Colorado with a priority on providing services to veterans experiencing homelessness.

Situated on 552 acres in the Lower Arkansas Valley, the Fort Lyon program is a state-wide collaborative led by the Colorado Coalition for the Homeless, Bent County, and the Colorado Department of Local Affairs. Fort Lyon is a one-of-a-kind, innovative, and comprehensive residential housing campus that provides education and job training in a modified therapeutic community environment where long-term recovery from substance use and co-occurring mental illness is expected.

Within the context of evidence-based interventions such as trauma-informed care, cognitive behavioral therapy, 12-step recovery, and motivational interviewing, participants have the opportunity to participate in peer-led recovery groups, work and learn marketable job skills, attend classes either on site and/or at Otero and Lamar junior colleges, attend vocational training programs, and a variety of life skill-building activities for up to 24 months. Fort Lyon Supportive Residential Community combines housing with peer support, educational, vocational, and employment services for up to 250 people at any given time from across the state of Colorado.

Fort Lyon served 2,065 people experiencing homelessness seeking recovery between 2013 and 2018. The average length of stay for residents has consistently increased over this same timeframe, beginning at 142 days and increasing to an average of 263 days in 2018. An increase of length of

stay increases opportunities for a person to recover from substance and alcohol use and to address the underlying issues impacting their lives and exit to an appropriate housing option.

Sixty-two percent of Fort Lyon residents exited to housing options in communities of their choice, ranging from their city of origin to new locations with job or schooling opportunities. This includes permanent supportive housing, renting with or without a subsidy, staying with friends or family, residing in a psychiatric facility, or owning. In six-month post assessments, of those participants that staff were able to contact to survey, there was a 100 percent decrease in alcohol use and illicit drug use in both 2017 and 2018. There was a significant increase in the physical, psychological, and environmental health; and social relationship scores of former residents, leading to better quality of life for residents after their stay at Fort Lyon. Over five years, Fort Lyon has helped hundreds of people recover from substance-use disorders and attain housing.

*Stout Street Health Center: Integrated Health Care for Patients
Experiencing Homelessness*

Like substance use, mental and medical health services are scarce for people experiencing homelessness. In an effort to improve health outcomes, the Coalition has dedicated over 35 years to health care for people experiencing homelessness. Stout Street Health Center, a national model for integrated health care paired with permanent supportive housing, is the outcome of 30 years of medical service experience provided by the Coalition to people experiencing homelessness. Staffed with a creative workforce dedicated to serving this unique population, Stout Street Health Center focuses on the unique needs of people experiencing homelessness, using trauma-informed care architecture and service delivery, low-barrier access, and full-service health care in one building.

With 98.7 percent of patients having low income and 91.9 percent experiencing homelessness, Stout Street Health Center is a unique model of integrated health care targeted to the needs of patients experiencing homelessness. It fully incorporates patient-centered, trauma-informed medical and behavioral health care, substance treatment services, dental and vision care, and social services on the first two floors of the 52,000 square-foot facility with four floors of 78 supportive housing above.

Providing preventative health care that is accessible and welcoming reduces emergency room visits, costs taxpayers less annually, and lessens the burden on emergency rooms to treat otherwise preventable illnesses. Additionally, Stout Street Health Center is a \$23 million cost savings to Medicaid each year and has an economic impact of \$56.9 million in its current operations.

Innovation to Create Lasting Solutions to Homelessness

Innovative ideas to tackle affordable housing shortages and keep people stably housed to address and prevent the cycle of homelessness are imperative. We must make creative investments, think outside of the

traditional systems and structures, and build what is necessary to support people experiencing and at risk of homelessness. Colorado Coalition for the Homeless endeavors to put this into practice with all of its initiatives. Resources are finite, but with thoughtful responses and progressive—even wild—ideas we move closer to lasting solutions to homelessness.



ARTICLES

The Limits of Good Law: A Study of Housing Court Outcomes

Nicole Summers

I. Study Background and Design.....	33
A. Study Context.....	33
B. Data.....	35
C. Methodology.....	36
1. All nonpayment cases dataset.....	36
2. Violation dataset.....	38
II. Results and Discussion.....	39
A. Question 1: To What Extent Do Tenants Who Have Meritorious Warranty of Habitability Claims Receive Rent Abatements?.....	39
1. All nonpayment of rent cases.....	39
2. Violation cases.....	40
3. Discussion.....	41
B. Question 2: To What Extent Do Tenants with Meritorious Warranty of Habitability Claims Receive Other Benefits from the Claim, Such as a Longer Time Period to Repay Rental Arrears or the Avoidance of a Possessory Judgment?.....	41
1. All nonpayment of rent cases.....	42
2. Violation cases.....	43
3. Discussion.....	44
C. Question 3: Does the Warranty of Habitability Serve as an Effective Tool to Hold Landlords Accountable for Making Needed Repairs?.....	45
1. All nonpayment of rent cases.....	47
2. Violation cases.....	47
3. Discussion.....	47
D. Question 4: Is the Warranty of Habitability Operationalization Gap Simply a Result of the Lack of Legal Representation?.....	48
1. All nonpayment cases.....	49
2. Violation cases.....	49
3. Discussion.....	50
III. Implications of the Findings for Our Understanding of the Warranty of Habitability and Access to Justice.....	50
IV. Conclusion.....	53

This Article presents the results of the first large-scale empirical study rigorously assessing the extent to which there is a warranty of habitability operationalization gap—a gap between the number of tenants with meritorious claims and the number of tenants who receive some benefit from the claim. Determining that there is a large gap, the study explores the reasons underlying it through further empirical analysis. The results upend the leading theories on why the warranty of habitability is underenforced.

The study was conducted in the largest rental market in the country, New York City, looking specifically at nonpayment of rent eviction cases. Data was collected and analyzed to determine: (1) the overall rate of rent abatements in cases in which the tenant has a meritorious warranty of habitability claim; (2) whether and to what extent tenants with meritorious warranty claims receive other benefits from the claim, such as longer periods of time to repay rental arrears or avoidance of possessory judgments; (3) whether and to what extent the warranty functions as a tool within eviction proceedings to secure repairs; and (4) whether and to what extent legal representation affects a tenant's ability to benefit from the warranty where he or she has a meritorious claim.

The study was conducted using two unique datasets of nonpayment of rent eviction cases from 2016. The first dataset is a statistically significant sample of all nonpayment of rent eviction cases in which the tenant appeared. The second dataset is a statistically significant sample of nonpayment of rent eviction cases in which the tenant appeared and there were open "hazardous" or "immediately hazardous" Housing Code violations at the unit at the time the case was filed.¹ This dataset was constructed

Clinical Instructor, Harvard Legal Aid Bureau, Harvard Law School; Research Affiliate, New York University Furman Center for Real Estate and Urban Policy. JD 2014, Harvard Law School; MALD 2014, The Fletcher School of Law and Diplomacy at Tufts University; AB 2008, Brown University. I thank Vicki Been for substantial support in designing the study that is the subject of this paper and for insightful comments at all stages of the writing process. For very helpful feedback on prior drafts of this piece, I am grateful to Yun-chien Chang, Russell Engler, Renagh O'Leary, Cristina Rodrigues, Jessica Steinberg, Paul Tremblay, and the participants in the NYU Colloquium on the Law, Economics, and Politics of Urban Affairs, the Harvard Law School Clinical Scholarship Workshop, and the Works in Progress Session at the American Association of Law Schools Conference on Clinical Legal Education. I am indebted to Maxwell Austensen, Maria (Mili) Chapado, and Xingzhi Wang for performing the data analyses used in the study. I also thank Rob Collinson and Luis Herskovic for providing additional data support, and Alisa Numansyah for heroically collecting and scanning over one thousand case files across all five boroughs of New York City. Scott Davis, Ethan Fitzgerald, Andrew Gerst, and Alex Wilson provided excellent research assistance. Finally, I thank the Office of Court Administration and the New York City Department of Housing Preservation and Development for providing data used in the study.

1. The Housing Code system in New York City has three classifications of violations: "Class A" for nonhazardous violations, such as a bathroom door that needs refitting or

based on a unique unit-level matching of eviction case data with Housing Code violation data. In total, over twelve hundred nonpayment of rent eviction case files were collected, reviewed, and coded.

The study found that very few tenants with meritorious warranty of habitability claims actually benefited from the law. Overall, less than 2 percent of tenants who had meritorious claims received rent abatements. Perhaps even more astonishing, only 7 percent of tenants whose landlords have been cited by the City for hazardous or immediately hazardous Housing Code violations—a subset of those who had meritorious claims—received abatements. The findings also rule out the possibility that tenants with meritorious claims are reaping other types of benefits from their claims. Tenants with meritorious claims are no more likely to avoid possessory judgments or to receive longer periods of time to repay arrears as compared with tenants without meritorious warranty claims.

The study further found that although tenants are more likely to benefit from the warranty of habitability when they have legal representation, the lack of representation does not sufficiently account for the operationalization gap. The significant majority—at least 70 percent—of tenants who were represented by counsel and had meritorious warranty of habitability claims still did not receive a rent abatement. Finally, the findings showed that while eviction proceedings are indeed functioning as a forum to order landlords to perform needed repairs, the forum lacks accountability. Specifically, in 72 percent of cases in which the landlord agreed to make repairs in a court-ordered settlement agreement and there was a subsequent settlement agreement in the case, the tenant reported that those repairs were still outstanding at the time of the subsequent settlement agreement.

These findings make two broad sets of contributions to the scholarly literature on the warranty of habitability. First, the findings provide rigorous evidence of the existence of an operationalization gap in the law. While much research has pointed to problems with the warranty's implementation, prior empirical studies have consistently taken one of two forms. One set of studies has examined the overall frequency with which tenants assert warranty of habitability claims in court or receive rent abatements, without distinguishing between tenants who do and do not have meritorious claims.² A second set of studies has taken the form of nonrepresentative

painting that needs to be done; "Class B" for hazardous violations, such as a defective carbon monoxide detector; and "Class C" for immediately hazardous violations, such as the lack of heat or hot water. See N.Y.C. ADMIN. CODE § 27-2001 *et seq.* Class A violations must be repaired within 90 days, Class B within 30 days, and Class C within 24 hours. *Id.*

2. See Paula A. Franzese, Abbott Gorin & David J. Guzik, *The Implied Warranty of Habitability Lives: Making Real the Promise of Landlord-Tenant Reform*, 69 RUTGERS L. REV. 1, 22–23 (2016); Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533, 547–48 nn.52–54 (1992); Anthony J. Fusco Jr., Nancy B. Collins & Julian R. Birnbaum, *Chicago's Eviction Court: A Tenants' Court*

observational or case studies that have looked at outcomes among small groups of tenants with meritorious claims.³ This study is the first thus far to rigorously examine on a large, representative scale the extent to which tenants benefit from the warranty of habitability when they have meritorious claims. It is also the first study to assess the possibility that tenants use the warranty of habitability to obtain beneficial outcomes in their cases other than rent abatements.

Second, the findings of this study debunk the conventional wisdom on the reasons for the ineffectiveness of the warranty of habitability. Since the warranty's initial enactment nearly fifty years ago, scholars have tried to explain why tenants have not appeared to benefit from the law to the extent originally envisioned. The existing scholarship reflects a general consensus around two explanations: (1) tenants lack access to counsel,⁴ and (2) there are onerous legal requirements for asserting a claim. Recent scholarship has also hypothesized that the warranty is underutilized in part because judges lack ready access to Housing Code violation records.⁵ The findings of this study upend all of these existing theories.

of No Resort, 17 URB. L. ANN. 93, 109–11 (1979); Marilyn Miller Mosier & Richard A. Soble, *Modern Legislation, Metropolitan Court, Miniscule Results: A Study of Detroit's Landlord-Tenant Court*, 7 U. MICH. J. L. REFORM 8, 42 (1973).

3. See Michele Cotton, *When Judges Don't Follow the Law: Research and Recommendations*, 19 CUNY L. REV. 57, 67–69 (2015) (noting that many of the fifty-nine cases studied involved serious housing code violations recorded in city inspections); Franzese, Gorin & Guzik, *supra* note 2, at 23 n.97 (finding that among a sample of thirty-one cases studied in which the warranty of habitability was raised, it successfully led to repairs in approximately half).

4. See, e.g., Mosier & Soble, *supra* note 2, at 62 (“Another reason for the insignificant effect of the legislation on Detroit tenants is that while the legislation augments a tenant’s possible defenses, it does not provide for representation of those tenants in court.”); Fusco, Collins, and Birnbaum, *supra* note 2, at 114–16 (emphasizing the importance of representation in determining tenant outcomes); Franzese, Gorin & Guzik, *supra* note 2, at 31 (proposing increased access to counsel as a solution to improve the effectiveness of the warranty of habitability); Cotton, *supra* note 3, at 83–84 (citing lack of access to counsel as a barrier to effective assertion of the warranty of habitability).

5. These doctrines include rent escrow, good-faith withholding, and written notice requirements. See David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CAL L. REV. 389, 407 (2011) (drawing attention to the “little-appreciated substantive doctrines” that emerged after the law’s original enactment and arguing that they have operated as major barriers to the warranty’s effectiveness); Franzese, Gorin & Guzik, *supra* note 2, at 20–22 (arguing that New Jersey’s rent escrow requirement is one of the primary reasons for the state’s findings regarding the low frequency with which the warranty is raised). On paper, the rent escrow requirement in New Jersey gives trial courts the discretion to order that rent be paid into escrow during the pendency of the eviction case. Franzese, Gorin, and Guzik found that in practice, however, judges treat escrow hearings with little individualized attention and, as a matter of course, order rent be deposited with the court, regardless of the conditions of the premises. *Id.* at 19–20, 37. The authors acknowledge that they do not know whether their findings regarding the

I. Study Background and Design

A. Study Context

New York City was an optimal site for this study for multiple reasons. For one, New York's warranty of habitability laws lack the restrictive rules that previous scholarship has blamed for the law's ineffectiveness. Specifically, tenants are not required to deposit their unpaid rent into escrow, nor are they required to demonstrate that the reason for the nonpayment was withholding of rent for defective conditions.⁶ Notice requirements are also liberal: tenants are never required to provide notice in writing, let alone through the Code enforcement agency.⁷ New York City also has a centralized and publicly accessible Housing Code record database that judges can easily reference.⁸

In recent years, approximately 200,000 nonpayment of rent eviction cases have been filed annually in New York City Housing Court.⁹ Consistent with the eviction case resolution processes nationwide, the overwhelming majority of such cases are resolved through settlement agreements.¹⁰ Nearly all settlements take the form of repayment agreements in which the tenant agrees to pay the rental arrears owed within a stated period of time.¹¹ There are three key outcomes negotiated in a repayment agreement. First, the parties negotiate the amount of money that must be repaid. Any rent abatement granted to the tenant will be incorporated into this amount. Where a rent abatement is granted, the agreement will reference

presence of the rent escrow requirement and the low usage rates are correlative or causative. *Id.* at 20; see also Karen Tokarz & Zachary Schmook, *Law School Clinic and Community Legal Services Providers Collaborate to Advance the Remedy of Implied Warranty of Habitability in Missouri*, 53 WASH. U. J. L. & POL. 169, 178 (2017).

6. See NY REAL PROP. LAW § 235-b.

7. See *Chapman v. Silber*, 760 N.E.2d 329, 334 (N.Y. 2001) (stating that notice is adequate if the landlord "reserves the right to enter in order to inspect or to make [] repairs").

8. See Franzese, Gorin & Guzik, *supra* note 2, at 19, 22, 36, 38.

9. See N.Y.C. HUMAN RES. ADMIN., N.Y.C. OFFICE OF CIVIL JUSTICE 2017 ANNUAL REPORT AND STRATEGIC PLAN *19 [https://perma.cc/CYR4-A3MD]. In 2016, the year this study was conducted, 202,300 nonpayment cases were filed.

10. In this study, less than one percent of nonpayment of rent evictions went to trial. For a discussion of the widespread practice across jurisdictions of resolving eviction cases through "hallway negotiations," see Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L. J. 37, 47 (2010).

11. The data in this study showed that twenty-two percent of all nonpayment cases in which the tenant appeared were resolved through a settlement agreement in which the landlord agreed to discontinue the case (presumably because all the arrears had been paid or otherwise accounted for). One percent of cases resulted in settlement agreements in which the tenant agreed to move out, 0.5 percent resulted in dismissal (presumably because of a procedural or other type of defect), and eight percent resulted in a default judgment. Cases that resulted in a discontinuance, move-out agreement, or default judgment were excluded from the analysis, unless otherwise indicated.

the abatement explicitly. Second, the parties negotiate the length of time for repayment. If the tenant repays the amount owed by the deadline, the tenancy will be reinstated. Third, the parties negotiate whether the agreement will include a judgment for the landlord.¹² What occurs if the tenant misses a payment under the agreement depends on whether the agreement contained a judgment for the landlord. If the agreement includes a judgment, the landlord is authorized to evict the tenant immediately upon the tenant's breach of the agreement terms. If the agreement does not include a judgment, the landlord must file a motion seeking the court's permission to go forward with the eviction.

Oftentimes, cases will include multiple settlement agreements. Where the tenant fails to pay the arrears by the deadline in the first agreement, either the tenant or the landlord can bring the case back to court. The tenant most likely would do so to seek an extension of time to pay. The landlord would bring the case back to court to seek authority for an eviction where a judgment was not awarded in the initial settlement agreement and the tenant failed to pay by the required deadline.¹³ Although parties have the option to have a hearing before the judge in both scenarios, the most frequent result will be a subsequent repayment agreement with a new deadline.

The eviction case procedures provide numerous opportunities for tenants to assert that repairs are needed in their units and for judges to order those repairs. The Housing Court's pro se answer form, used by virtually all tenants who submit an answer, provides as one of the standardized response options that repairs or services are or were needed in the unit. Judges also ask tenants whether repairs are needed as part of their review of the settlement agreement. Whenever the tenant reports that repairs are needed, the judge will require that the agreement include a provision obligating their performance. The agreement will enumerate the specific defective conditions and

12. It is generally understood that these latter two outcomes—amount of time to pay and whether a judgment issues—operate in an inverse relationship in negotiations. Thus, the landlord will agree to either a stipulation without a judgment and a shorter period of time to pay the arrears, or a stipulation with a judgment and a longer period of time to pay.

13. Where a tenant fails to pay by the payment deadline and the stipulation includes a judgment, the tenant will file a post-judgment "Order to Show Cause" seeking a stay in the execution of the eviction. See Orders to Show Cause, N.Y. State Unified Court System, <https://www.nycourts.gov/courts/nyc/civil/osc.shtml> [<https://perma.cc/E63G-MSDR>]. Orders to Show Cause are liberally granted, and thus landlords tend to agree to a settlement allowing for a new deadline for the payment of the arrears. Where the original settlement stipulation does not include a judgment, the landlord will file a motion for issuance of the judgment and the execution upon the tenant's failure to pay by the payment deadline. Such a motion will also typically resolve in a subsequent settlement stipulation, this time including a judgment, with a new payment deadline. These subsequent settlement stipulations are allocated in the same manner as initial settlement stipulations and thus will include provisions requiring the performance of repairs with the same regularity.

will provide “access dates” on which the repairs will be made. This process is repeated for each settlement agreement in the case.

Judges also have tools to verify the presence of defective conditions in the tenant’s unit. The Housing Code enforcement database, maintained by the New York City Department of Housing Preservation and Development (“HPD” or “the Code enforcement agency”), is publicly accessible online and is searchable by unit. This database includes a multiyear history of the complaints made, inspections performed, and violations issued for each unit. All judicial benches are equipped with desktop computers and wireless Internet, allowing judges to easily access the available data. Judges also have the authority to order the Code enforcement agency to perform Housing Code inspections.

B. Data

Two distinct datasets were constructed for this study. The first dataset was a statistically significant random sample of all nonpayment of rent eviction cases filed in 2016 in which the tenant appeared.¹⁴ The dataset was built using the New York Office of Court Administration’s comprehensive database of all eviction case filings.¹⁵ Approximately ninety-seven thousand cases satisfied the inclusion criteria.¹⁶ From these 97,000 cases, 746 index numbers were randomly selected using a data randomization generation tool. The selection was stratified in order to account for borough-level differences in the data.¹⁷ Seven hundred and forty-six cases is a representative sample of the total study population at a 90 percent confidence interval, with a margin of error of 3 percent and a response distribution of 50 percent. The files for all 746 cases were retrieved from the Housing Court, scanned, and coded. The unit-level addresses for these cases were also matched with the HPD Housing Code enforcement database. This matching allowed each case to be linked to the unit’s Housing Code complaint and violation history.

The second dataset was a random sample of all nonpayment of rent eviction cases filed in 2016 in which the tenant appeared *and* in which one or more “hazardous” (Class B) or “immediately hazardous” (Class C) Housing Code violations were open at the unit at the time the case was

14. A tenant appears by filing an Answer at the Housing Court clerk’s office. Cases in which the tenant defaulted were excluded because a default judgment generally precludes the tenant from asserting claims and defenses.

15. The NYU Furman Center was provided this database by the Office of Court Administration pursuant to a data use agreement that restricts usage to certain research purposes.

16. A total of 202,300 nonpayment of rent eviction petitions were filed in 2016. *See infra* note 162. Thus, the tenant defaulted in over half of all the nonpayment proceedings.

17. A stratified sample is one that is proportional to certain differentiating criteria. Thus, here, the number of cases from each borough in the sample was proportional to the number of cases from that borough in the total dataset. The sample was a 0.5 percent stratified sample.

filed. This dataset was constructed by matching the Office of Court Administration database with the HPD Housing Code violation database at the unit level.¹⁸ The matching identified 1,553 cases. From these 1,553 cases, 507 case index numbers were randomly selected using a data randomization generation tool. The selection was stratified in order to account for any borough-level differences in the data. Five hundred and seven cases is a representative sample of the total study population at a 90 percent confidence interval, with a margin of error of 3 percent and a response distribution of 50 percent. The files for all 507 cases were retrieved from the New York City Housing Court, scanned, and coded.

C. Methodology

1. All nonpayment cases dataset

The first dataset—which I will refer to as the “all nonpayment cases” dataset—constituted a representative sample of all nonpayment of rent eviction cases in which the tenant had the ability to pursue claims and defenses.¹⁹ Within this dataset, cases were grouped based on whether the tenant had a meritorious warranty of habitability claim.²⁰

Cases were assigned to the meritorious claim group based on the presence of factors indicating that the tenant had experienced serious conditions of disrepair, and thus likely could have established a warranty of habitability claim. These factors included (1) the assertion that repairs were needed in the tenant’s Answer; (2) the inclusion of substantial repairs in the initial settlement agreement; and (3) the inclusion of substantial repairs in multiple settlement agreements. Some evidence of conditions of disrepair was present in the majority of nonpayment of rent cases. In half (50 percent) of all nonpayment of rent cases, tenants asserted that repairs were needed in their Answer to the complaint. Slightly over half (51 percent) of cases included substantial repairs in the initial settlement agreement. There was not perfect overlap between cases in which repairs were asserted in the Answer and imposed in the settlement agreement—only 36 percent of cases met both conditions. Overall, 10 percent of cases had

18. The HPD data did not include information for violations at properties owned by the New York City Housing Authority (NYCHA)—in other words, public housing—and thus the matched dataset used for this study was neither inclusive of nor can it be taken to reflect outcomes involving NYCHA units.

19. The tenant had the ability to pursue claims and defenses in these cases because the tenant filed an Answer. A tenant who does not file an Answer defaults and, in most instances, results in a default judgment. Although it is possible to defend a case after receiving a default judgment, a tenant in this posture will not have the same opportunity to pursue claims and defenses as a tenant who appears. *See infra* note 168.

20. Some cases did not fall into either classification because it was ambiguous whether the tenant had a meritorious warranty of habitability claim. These cases were excluded from the analysis.

repairs asserted in the Answer *and* substantial repairs included in *multiple* settlement agreements.²¹

Cases were assigned to the comparison group where all available information indicated that the tenant had not experienced conditions of disrepair sufficient to establish a warranty of habitability claim.²² Specifically, cases were assigned to the comparison group where the tenant did not assert repairs in the Answer, there were no substantial repairs included in the settlement agreement, and there were no open “hazardous” (Class B) or “immediately hazardous” (Class C) code violations at the unit at the time the case was filed.²³ Thirty-four percent of all nonpayment of rent cases met these conditions. I refer to this group as the “no meritorious claim” group.

Table 1: Descriptive Statistics of All Nonpayment of Rent Eviction Cases

Evidence of conditions of disrepair	Percentage of nonpayment of rent eviction cases
Need for repairs asserted in Answer	50%
Substantial repairs in settlement agreement*	51%
Repairs asserted in Answer <i>and</i> substantial repairs in settlement agreement	36%
Repairs in Answer <i>and</i> substantial repairs in <i>multiple</i> settlement agreements*	10%
No evidence of conditions of disrepair**	(34%)

* One of two “meritorious claim” groups

** “No meritorious claim” group

The group of cases with meritorious warranty of habitability claims—which I will refer to as the “meritorious claim” group—was configured and tested using two different definitions: (1) cases in which the settlement agreement required the landlord to make substantial repairs (Definition 1), and (2) cases in which *multiple* settlement agreements required the landlord to make substantial repairs *and* the tenant asserted that repairs were

21. This figure is likely relatively low in part because many cases do not involve multiple settlement agreements.

22. The available information, however, did not provide insight into whether the tenant had suffered conditions of disrepair sufficient to constitute a violation of the warranty of habitability at an earlier time in his or her tenancy. Thus, there may have been some cases included in the comparison group that were cases in which the tenant had the ability to pursue a warranty of habitability claim.

23. All three conditions were required to be met for a case to be assigned to the comparison group. Cases in which needed repairs were asserted in the Answer but in which substantial repairs were not included in the settlement agreement were not included in either group because it was ambiguous whether the tenant had a meritorious warranty of habitability claim. These cases were excluded from the analysis.

needed in his or her Answer (Definition 2).²⁴ The criteria included in Definition 1 were more inclusive but less confident indicators of a meritorious warranty of habitability claim, whereas the criteria used in the second definition were less inclusive but more confident indicators. In the Definition 2 group, cases were included only if two or more settlement agreements required repairs of the same conditions and the access dates in the first agreement had passed by the date of the second agreement.²⁵

2. Violation dataset

The second dataset—which I will refer to as the “violation dataset”—constitutes a representative sample of cases in which one or more “hazardous” (Class B) or “immediately hazardous” (Class C) Housing Code violations were open at the unit at the time of filing. These are cases in which there was an even stronger indication that the tenant had a meritorious warranty of habitability claim. Conditions of disrepair that constitute Class B or Class C violations nearly always affect habitability, and the open status of the violation indicates both that the landlord had notice of the condition of disrepair and that the landlord likely had not yet completed repairs. This dataset thus comprised a third meritorious claim group.

The purpose of the violation dataset was primarily supplemental, as the cases included likely comprise only a small fraction of all nonpayment of rent cases in which the tenant had a meritorious warranty of habitability claim. Many tenants do not report defective conditions to the City, or do so only once their landlord has repeatedly failed to make repairs.²⁶ Thus, the “all nonpayment cases” dataset provides a more comprehensive representation of the use of the warranty of habitability across all nonpayment of rent eviction cases. The violation dataset is included to respond to potential concerns that the methodology used to identify cases with meritorious warranty of habitability claims in the first dataset are overly inclusive, and thus that the findings are diluted. Each case included in the violation dataset had on average 3.7 Class C violations, 0.5 Class B violations, and 1.3 Class A violations open at the time of case filing, totaling 5.5 open viola-

24. Cases were only included in the “meritorious claim” group where the conditions requiring repairs, as stated in the settlement stipulation, were sufficient to constitute a warranty of habitability violation.

25. The goal of using these criteria was to identify cases in which the landlord appeared to have shirked his or her obligations to repair in the first agreement. Where the landlord had shirked such obligations, there is a strong likelihood that the tenant had a meritorious warranty of habitability claim because the landlord was on notice and failed to make the necessary repairs. It is unknown in these cases, however, if the failure to repair was the result of the tenant’s refusal to provide access.

26. See generally NEW SETTLEMENT APARTMENTS’ COMMUNITY ACTION FOR SAFE APARTMENTS (CASA) & COMMUNITY DEVELOPMENT PROJECT (CDP) AT THE URBAN JUSTICE CENTER, TIPPING THE SCALES: A REPORT OF TENANT EXPERIENCES IN BRONX HOUSING COURT (Mar. 2013), https://newsettlement.org/wp-content/uploads/2018/01/CDP.WEB_doc_Report_CASA-TippingScales-full_201303.pdf [<https://perma.cc/MB6A-BN7M>]. Oral or written notice to the landlord is sufficient to satisfy the notice requirement of a warranty of habitability claim. See *Chapman v. Silber*, 760 N.E.2d 329, 334 (N.Y. 2001).

tions per case. Ninety-five percent of cases in the dataset had one or more open Class C violation.

Using both datasets, Welch's two-sample t-tests and Pearson's chi-squared tests were performed to compare case outcomes among the three "meritorious claim" groups and the "no meritorious claim" group. As described in more detail below, outcomes compared included rent abatements, the rate of possessory judgments, the length of the repayment period, and orders to perform repairs.

II. Results and Discussion

The analysis revealed that many more tenants had meritorious warranty of habitability claims than received any benefit from the claim. A small percentage of tenants with meritorious claims received rent abatements; no tenants, however, received other benefits, such as longer repayment periods or avoidance of a possessory judgment, as a result of having a meritorious claim. And while settlement agreements very frequently imposed repair obligations, it appears that those obligations most often went unfulfilled and unenforced. The lack of legal representation accounted somewhat for the findings but was insufficient to fully explain them.

A. Question 1: To What Extent Do Tenants Who Have Meritorious Warranty of Habitability Claims Receive Rent Abatements?

The data analysis revealed that tenants who had meritorious warranty of habitability claims rarely received rent abatements. Rent abatements were granted in only 1.75 percent of all nonpayment of rent eviction cases, even though between 36 and 51 percent of the tenants in the study had meritorious claims. Put differently, a tenant with a meritorious warranty of habitability claim had between a 2.35 and 3.29 percent chance of receiving a rent abatement generally, and a 9 percent chance if there were open code violations in the unit. Even using the most conservative set of indicators to identify cases with meritorious warranty claims—cases in which there were open code violations, the tenant asserted repairs in the Answer, and substantial repairs were included in multiple settlement agreements—only 15 percent received rent abatements. In sum, the overwhelming majority of tenants who were entitled to rent abatements did not receive them. A detailed description of the statistical findings is provided below.

1. All nonpayment of rent cases

Rent abatements were awarded in 1.75 percent of all nonpayment of rent cases (13 out of 745). The percentage rose only slightly when calculated within cases with evidence of conditions of disrepair. Tenants were awarded rent abatements in 3.5 percent of cases with repairs asserted in the Answer. Of cases in which substantial repairs were included in the first settlement agreement, 2.35 percent were awarded rent abatements, and of cases in which substantial repairs were included in the settlement agreement and repairs were asserted in the Answer, 3.29 percent were awarded abatements. Abatements were granted in 2.76 percent of cases in which repairs were asserted in the Answer and substantial repairs were included

in multiple settlement agreements. No abatements were awarded in the no meritorious claim group. The average abatement amount was \$1,955. These results are presented in Table 2 below.

Table 2: Rent Abatements in All Nonpayment of Rent Cases

Case Classification	Abatement Rate
All cases	1.75%
Repairs in Answer	3.5%
Substantial repairs in settlement agreement*	2.35%
Repairs in Answer <i>and</i> substantial repairs in settlement agreement	3.29%
Repairs in Answer <i>and</i> substantial repairs in multiple settlement agreements*	2.76%
No conditions of disrepair**	0%

* One of two “meritorious warranty claim” groups

** “No meritorious warranty claim” group

2. Violation cases

Rent abatements were awarded in 9 percent of all violation cases, even though the tenants in *all* such cases had meritorious claims. The rate of rent abatements did not increase substantially even among cases with additional evidence of conditions of disrepair. Tenants were awarded rent abatements in 10 percent of violation cases in which the tenant has asserted that repairs were needed in his or her Answer. Of violation cases in which substantial repairs were included in the first settlement agreement, 13 percent were awarded rent abatements, and of cases in which substantial repairs were included in multiple settlement agreements, the same share—13 percent—were granted abatements. Abatements were awarded in 15 percent of violation cases in which repairs were asserted in the Answer and substantial repairs were included in multiple settlement agreements. The average abatement amount in the violation dataset was \$2,275. These results are presented in Table 3 below.

Table 3: Rent Abatements in Violation Cases

Case Classification	Abatement Rate
All violation cases	9%
Repairs in Answer	10%
Substantial repairs in settlement agreement	13%
Repairs in Answer <i>and</i> substantial repairs in settlement agreement	13%
Repairs in Answer <i>and</i> multiple settlement agreements	15%

3. Discussion

The data revealed that tenants received rent abatements at very low rates even where there were multiple indicators that they had meritorious warranty of habitability claims. The findings showed a large operationalization gap as measured by the award of a rent abatement: only between 2.35 and 9 percent of tenants who had a meritorious warranty of habitability claim actually benefited from that claim. At minimum, these findings show that the warranty of habitability is not operating in practice as it is designed on paper: to condition rental obligations on repairs. Instead, most tenants who experience conditions of disrepair—as many as ninety-eight out of one hundred such tenants—are being held to their full rental obligations. The result is that landlords are rarely facing financial consequences for neglecting their properties.

The data also showed that tenants were most likely to receive rent abatements when there were open code violations in the unit. Tenants were substantially less likely (approximately one-half to one-quarter as likely) to receive abatements when there was other evidence of conditions of disrepair but no code violations. This finding is striking. Although code violations provide proof of the existence of conditions of disrepair, a primary motivation for enacting the warranty of habitability was to provide an alternative to code enforcement for landlord accountability. Courts, advocates, and legislators believed that by giving tenants the power to act as “private attorney[s] general” to enforce habitability standards, the warranty would function as an important work-around to what are often inefficient and poorly resourced housing code enforcement systems.²⁷ But to the extent the warranty of habitability provides meaningful relief only where the code enforcement system has been activated, as is indicated by this data, the law is not serving this purpose.

B. Question 2: To What Extent Do Tenants with Meritorious Warranty of Habitability Claims Receive Other Benefits from the Claim, Such as a Longer Time Period to Repay Rental Arrears or the Avoidance of a Possessory Judgment?

The data also ruled out the possibility that tenants with meritorious warranty of habitability claims receive benefits from the claim other than rent abatements. As described above, the other key outcomes negotiated in a nonpayment of rent eviction case are (1) whether a possessory judgment is awarded to the landlord, and (2) the length of the repayment period afforded to the tenant. The analyses of both datasets showed that there was no statistically significant difference in either of these case outcomes between cases with and without meritorious warranty of habitability claims. Tenants with meritorious warranty claims were statistically just as likely to receive a possessory judgment as tenants

27. See Franzese, Gorin & Guzik, *supra* note 2, at 12.

without warranty claims.²⁸ In cases in which possessory judgments were awarded, there was no statistically significant difference in the length of the repayment period. Similarly, in cases in which no possessory judgment was awarded, there was no statistically significant difference in the length of repayment period.²⁹ Thus, tenants did not appear to be “trading” the opportunity for a rent abatement for other types of desirable outcomes in their cases. A detailed description of the statistical findings is provided below.

1. All nonpayment of rent cases

Among “no meritorious claim” cases, 74 percent had possessory judgments and the average length of time for repayment of arrears was 37.6 days. Where a case had a possessory judgment, the average length of time for repayment was 42 days, whereas when the case did not have a possessory judgment, the average repayment period was 24 days. As described in Part III.D.1, two different sets of criteria were used to identify the “meritorious warranty claim” group within the “all nonpayment of rent cases” dataset: (1) cases with substantial repairs in the settlement agreement (Definition 1), and (2) cases with substantial repairs in *multiple* settlement agreements *and* repairs asserted in the Answer (Definition 2). Among cases satisfying the criteria under Definition 1, 73 percent had possessory judgments and the average length of time for the repayment of the arrears was 39.3 days. Where a case had a possessory judgment, the average length of time for repayment was 44 days, whereas when a case did not have a possessory judgment, the average repayment period was 26 days. Among cases satisfying the criteria under Definition 2, 75 percent had possessory judgments and the average length of time for repayment of arrears was 40 days. Where a case had a possessory judgment, the average length of time for repayment was 44 days, whereas when a case did not have a possessory judgment, the average repayment period was 29 days.

Welch’s two-sample t-tests and Pearson’s chi-squared tests were performed to test for statistical significance in the difference in outcomes between the “no meritorious claim” cases and each of the two “meritorious warranty claim” case groups. There was no statistically significant

28. Tenants were slightly less likely to receive possessory judgments in cases in with open code violations, but this finding was not statistically significant.

29. The length of repayment period is compared separately for cases with and without possessory judgments because these two outcomes are typically negotiated in an inverse relationship with each other—tenants who wish to avoid a judgment can typically do so in exchange for a shorter repayment period, whereas tenants who prefer a longer repayment period can typically achieve this by agreement to a possessory judgment.

difference in outcomes between the “no meritorious claim” comparison group and either of the two “meritorious warranty claim” group. The full statistical results are reported in Tables 4 and 5 below.

2. Violation cases

Sixty-four percent of violation cases had possessory judgments. The average length of time for repayment of arrears among all violation cases was 36.4 days. The average repayment period was 42 days for cases with possessory judgments, and 26 days for cases without possessory judgments.

Pearson’s chi-squared and Welch’s two-sample t-tests were performed to test for statistical significance in the difference in outcomes between the violation cases and the “no meritorious claim” cases (in the “all nonpayment cases” dataset). The results showed no statistical significance in the average length of repayment period or in the rate of possessory judgments. The average length of the repayment period also did not differ at a level of statistical significance when the issuance of a possessory judgment was held constant. Specifically, the repayment period was the same in violation cases with possessory judgments and “no meritorious claim” cases with possessory judgments. There was also no statistically significant difference between violation cases without possessory judgments and “no meritorious claim” cases without possessory judgments. The full statistical results are reported in Tables 4 and 5 below.

Table 4: Possessory Judgment Rate in All Nonpayment of Rent and Violation Cases

Case classification	Percentage of cases with possessory judgment for landlord	P-value [†] based on difference with no meritorious claim group
Substantial repairs in settlement agreement*	73%	0.78
Repairs in Answer and multiple settlement agreements*	75%	0.91
Violation cases	64%	0.09
No conditions of disrepair**	74%	—

* One of two “meritorious claim” groups among all nonpayment of rent cases

** “No meritorious claim” group

† The p-value, or probability value of asymptotic significance, indicates the level of statistical significance of the outcome. P-values less than or equal to 0.05 indicate statistical significance, whereas p-values greater than 0.05 indicate that the outcome is not statistically significant.

Table 5: Average Length of Repayment Period in All Nonpayment of Rent and Violation Cases

Case classification		Repayment period		P-value based on difference with no meritorious claim group [95% Confidence Interval]	
Substantial repairs in settlement agreement*	With possessory judgment	39.3 days	44 days	0.18 [-4.5, .9]	0.16 [-4.3, .7]
	Without possessory judgment		26 days		0.29 [-6.8, 2.0]
Repairs in Answer and multiple settlement agreements*	With possessory judgment	40 days	44 days	0.17 [-5.5, 1.0]	0.34 [-3.9, 1.3]
	Without possessory judgment		29 days		0.17 [-11.3, 2.1]
Violation cases	With possessory judgment	36.4 days	42 days	0.37 [-1.3, 3.6]	0.80 [-1.8, 2.3]
	Without possessory judgment		26 days		0.41 [-5.7, 2.4]
No conditions of disrepair**	With possessory judgment	37.6 days	42 days	—	—
	Without possessory judgment		24 days		—

* One of two “meritorious claim” groups among all nonpayment of rent cases

** “No meritorious claim” group

3. Discussion

This research is the first to address the possibility that tenants with meritorious warranty of habitability claims are benefiting from the claim by achieving favorable case outcomes other than rent abatements. It effectively rules out this possibility. While tenants with open code violations in their units were slightly more likely to avoid possessory judgments as compared with tenants without warranty claims, this difference was small and not statistically significant. Moreover, such tenants still “paid” for this avoidance of the judgment with a shorter repayment period, equal to that awarded to tenants without warranty claims who also avoided a possessory judgment. The achieved benefit was therefore minimal.

These findings, together with the rent abatement findings, indicate that the vast majority of tenants with meritorious warranty of habitability claims did not receive any material benefit from the claim. The small percentage of tenants who received rent abatements indeed comprised the *only* tenants with meritorious warranty claims who benefited from the law at all. In other words, between 2.35 and 9 percent of all tenants who should have been able to invoke the law were able to successfully do so. The warranty of habitability did not provide any benefit at all to approximately 91 to 97 percent of tenants who appeared to satisfy the elements of the claim.

C. Question 3: Does the Warranty of Habitability Serve as an Effective Tool to Hold Landlords Accountable for Making Needed Repairs?

It is possible that although most tenants are unable to successfully invoke the warranty to achieve rent abatements or other beneficial outcomes in their eviction cases, they are effectively using the law as a tool to compel landlords to perform needed repairs. The settlement agreements in slightly over half of all nonpayment of rent cases included an order obligating the landlord to make substantial repairs, which would seem to indicate that the law is being used in this way. Yet the fact that the settlement agreement included such an obligation does not necessarily mean that the landlord complied with it and made the repairs.

The data do not allow for conclusions to be drawn regarding the extent to which repairs were ever completed once they were ordered in settlement agreements. However, cases that have multiple settlement agreements provide insight into the extent to which repair orders are followed. Cases result in more than one settlement agreement when a tenant fails to comply with the repayment terms set forth in the initial settlement agreement.³⁰ The landlord then takes the next step toward eviction, and either the landlord or the tenant will bring the case back to court.³¹ The parties will then enter into a new settlement agreement, typically a repayment agreement.³² If appropriate, that agreement will again include an order for the landlord to make any necessary repairs.

30. In theory, a case could also have multiple settlement agreements because the landlord failed to make the ordered repairs and the tenant brought the case back to court on that basis. However, virtually none of the cases included in either sample involved multiple settlement agreements for this reason.

31. If the initial settlement agreement includes a possessory judgment for the landlord, the landlord's next step toward eviction will be to issue a warrant of eviction. The tenant will then have to file an order to show cause to bring the case back to court. If the initial settlement agreement does not include a possessory judgment for the landlord, the landlord's next step toward eviction will be to file a motion in court seeking a judgment and issuance of a warrant of eviction. This motion will bring the case back to court.

32. In some cases, either or both of the parties will choose to go before the judge for a hearing rather than enter into a new settlement agreement. Such cases were excluded from the analysis described in this section.

Among cases that have (1) repairs ordered in the initial settlement agreement, and (2) a subsequent settlement agreement entered into after the “access dates” included in the initial settlement agreement, the frequency with which the same repairs are included in a subsequent settlement agreement provides some indication of the extent to which repair orders are followed. Specifically, where a case has two or more settlement agreements and the first agreement included an order for the landlord to make repairs, the fact that the same repairs are ordered in a subsequent settlement agreement (entered into after the access dates for repairs in the first agreement have passed) strongly suggests that the landlord did not comply with the initial repair order. Conversely, where a case has two or more settlement agreements and the first agreement included an order for the landlord to make repairs, the fact that the same repairs are *not* ordered in a subsequent agreement (entered into after the access dates for repairs in the first agreement have passed) strongly suggests that the landlord complied with the initial repair order. Thus, the frequency of each outcome was calculated to determine the extent to which landlords comply with repair orders included in settlement agreements. The findings indicate that repair orders were not complied with in nearly three-quarters of all cases where the data allow for this analysis.

Two other case activities serve as additional indicators of the extent to which the warranty of habitability is effectively used to improve housing quality within eviction cases: the frequency with which judges order Housing Code inspections, and the frequency with which judges access Housing Code enforcement records. As described in Part II.B, judges presiding over nonpayment of rent eviction cases have broad authority to order the Housing Code enforcement agency to perform an inspection of the unit. This authority is significant because it allows judges to use the information they gather through eviction cases regarding conditions to trigger a parallel enforcement system. Where a tenant reports that she does not have heat, for example, the judge’s order of a Housing Code inspection means that if the tenant’s report is accurate, the Housing Code enforcement agency will initiate its own action against the landlord to ensure the repair is made. The landlord’s obligation to repair thus will no longer be tied to the eviction case, nor will it depend on the tenant’s ability or willingness to enforce the judge’s repair order.

Judges also have the ability to access Code enforcement records, which include the history of complaints, inspections, and violations issued within the prior year. The ability to obtain these records is significant because it means that the judge has access to external, objective information about the conditions of the tenant’s unit, which, as Professor Franzese argues, should help promote enforcement of the warranty of habitability.³³ The availability of the database also means that a judge can easily know whether the

33. See Franzese, Gorin & Guzik, *supra* note 2, at 27.

Housing Code enforcement agency is already aware of the conditions in the tenant's unit. A judge who is concerned about a tenant's report of serious conditions of disrepair can know whether it is worth ordering a Code inspection, or whether doing so would be duplicative because the agency is already involved. In other words, this integration should help encourage judges' appropriate use of their authority to order Housing Code inspections.

Despite the integration of the Code enforcement and Housing Court systems, the data show that judges rarely use these tools to enforce the warranty and advance repairs in the tenant's unit. The full results of the analyses are reported and described below.

1. All nonpayment of rent cases

In nonpayment of rent cases in which substantial repair orders were included in the original settlement agreement and the parties entered into a subsequent settlement agreement after the access dates in the original settlement agreement had passed, the subsequent agreement included the same repair obligations 72 percent of the time.³⁴ Judges invoked their authority to order a Housing Code inspection in only 1.2 percent of all nonpayment of rent cases. Perhaps even more striking, such an inspection was ordered in only 0.4 percent of cases in which substantial repairs were included in the settlement agreement where there were no open Housing Code violations at the time of case filing or complaints made to the Code enforcement agency within six months prior to the filing.

2. Violation cases

In violation cases in which substantial repair orders were included in the original settlement agreement and the parties entered into a subsequent settlement agreement after the access dates in the original agreement had passed, the subsequent agreement included the same repair obligations 80 percent of the time. Judges invoked their authority to order a Housing Code inspection in only 1.8 percent of all violation cases. At the same time, there is little evidence that judges were aware of open Housing Code violations in the unit. A printout of the online record of the Code enforcement history of the unit was included in the case file in only 5.7 percent of cases, even though there were open Code violations in every case included in this dataset.³⁵

3. Discussion

These findings strongly suggest that the warranty of habitability is not serving as an effective tool to compel the performance of needed repairs.

34. It is not possible to tell from the data the extent to which repairs are not performed when the tenant does not provide access on the agreed-upon dates.

35. Records of Housing Code violations are accessible through a centralized public online database.

In the overwhelming majority of cases in which repairs were ordered in settlement agreements, it appears that landlords did not in fact follow through on their obligations. To be sure, it is unknown to what extent landlords later complied with their obligations even though they did not comply on the scheduled access dates. However, the fact that between 72 and 80 percent of repairs appeared to have not been performed on the scheduled access dates strongly suggests that landlord's repair obligations are not being effectively enforced in the course of nonpayment of rent eviction cases.

The findings also indicate that judges rarely utilized the tools available to them to hold landlords accountable for needed repairs. Judges invoked their authority to order Housing Code inspections in only a tiny fraction of cases, despite tenants' frequent reporting of serious conditions of disrepair. Had they done so, they would have triggered an overlapping enforcement system that should have then provided an additional layer of landlord accountability. Thus, even if the Housing Court judges were not able to unilaterally enforce habitability laws, they would have activated a system that perhaps could do so more effectively. However, judges did not follow this path.

Judges also rarely took advantage of the opportunity to learn the Housing Code enforcement history at the unit. In the violation dataset, judges accessed the Code enforcement history only 5.7 percent of the time. Thus, nearly 95 percent of the time that there were code violations at the unit, the judge was likely unaware of this fact (or did not have up-to-date information regarding which violations were still outstanding and which had been cleared). This finding further indicates that judges' failure to frequently order Housing Code inspections was not simply a response to their awareness that the Code enforcement agency was already involved with the unit. Rather, the finding suggests that judges generally are not aware of code violations that exist in tenants' units, and yet still decline to order code inspections when tenants report defective conditions.

D. Question 4: Is the Warranty of Habitability Operationalization Gap Simply a Result of the Lack of Legal Representation?

The data showed that legal representation substantially affected tenants' ability to benefit from the warranty of habitability. Represented tenants with meritorious warranty of habitability claims were at least nine times more likely than unrepresented tenants with meritorious claims to receive a rent abatement.³⁶ Except where there were open code violations in the unit, unrepresented tenants virtually never received abatements when they had

36. The length of repayment periods and the rate of possessory judgments were not compared because the sample size among represented tenants was too small to obtain results with statistical significance.

meritorious claims. Approximately one in four represented tenants, meanwhile, received abatements when they had meritorious claims, whether identified based on either of the two sets of criteria in the “all nonpayment cases” dataset or the presence of open code violations. These findings strongly suggest that the lack of legal representation is an important contributor to the operationalization gap that has been detected.

However, the findings also show that the lack of legal representation does not fully account for the operationalization gap. Although rent abatements were much more frequent where tenants had legal counsel, rent abatements were not the norm in meritorious claim cases *even among cases in which the tenant was represented*. Most represented tenants—approximately three-quarters—with meritorious warranty of habitability claims did not receive rent abatements, even when they had open code violations in their units. These findings suggest that factors beyond the lack of access to counsel are also responsible for the operationalization gap.

1. All nonpayment cases

Pearson’s chi-squared tests were performed to test for differences in the rate of rent abatements among represented and unrepresented tenants with meritorious warranty claims. The results revealed that for tenants with the same evidence of conditions of disrepair, there were substantial and statistically significant differences in abatement outcomes based on representation status. Where substantial repairs were included in the first settlement agreement, the abatement rate was 27 percent for represented tenants compared with 0 percent for unrepresented tenants. Where substantial repairs were included in multiple settlement agreements and repairs were asserted in the Answer, the abatement rate was 30 percent for represented tenants compared with 0 percent for unrepresented tenants. The full statistical results are reported in Table 6 below.

2. Violation cases

Pearson’s chi-squared tests were also performed to test for differences in the rate of rent abatements among represented and unrepresented tenants with meritorious warranty claims, where merit is indicated by open code violations. The results showed that where there were open Class B or Class C violations at the unit at the time of case filing, the abatement rate was 27 percent for represented tenants compared with 3 percent for unrepresented tenants, and that this difference was statistically significant. Thus, legal representation had a demonstrated positive effect on the ability of tenants to successfully invoke the warranty of habitability. This finding is consistent with the finding in the “all nonpayment cases” dataset, which likewise showed that representation affected tenants’ likelihood of benefiting from the warranty. The full statistical results are reported in Table 6 below.

Table 6: Abatement Rates in Represented Versus Unrepresented Cases

Evidence of conditions of disrepairs	Abatement rate in represented cases	Abatement rate in unrepresented cases	P-value
Substantial repairs in settlement agreement*	27%	0%	0.003
Substantial repairs in multiple settlement agreements and repairs in Answer*	30%	0%	0.003
Violation cases	27%	3%	0.003
(No conditions of disrepair)**	(0%)	(0%)	—

* One of two “meritorious claim” groups among all nonpayment of rent cases

** “No meritorious claim” group

3. Discussion

The findings show that legal representation substantially affects a tenant’s likelihood of receiving a rent abatement when he or she has a meritorious warranty of habitability claim. Strikingly, they demonstrate that the warranty of habitability is all but inaccessible to tenants without counsel who appear to satisfy the elements of the claim but who do not have open code violations at their units. Tenants are simply unable to reap the benefit of the claim prescribed by the law on paper—a rent abatement—when they are unrepresented. Represented tenants with the same evidence of conditions of disrepair have a one-in-four or one-in-three chance of receiving a rent abatement. The warranty is slightly more useful to unrepresented tenants where there are open code violations in the unit, with 3 percent receiving rent abatements. However, the impact of representation is still extremely significant. Represented tenants are *nine times as likely* to receive a rent abatement as compared to unrepresented tenants who have the same number and classifications of open code violations at their units. Representation, in short, dramatically affects the ability of tenants to benefit from the warranty of habitability.

At the same time, these findings indicate that representation does not fully account for the operationalization gap in the warranty of habitability. At most, between one-quarter and one-third of represented tenants with meritorious warranty of habitability claims receive rent abatements. This means that at least two-thirds of tenants with meritorious warranty claims do not benefit from the claim despite having legal representation.

III. Implications of the Findings for Our Understanding of the Warranty of Habitability and Access to Justice

The findings of this study reshape our understanding of the effectiveness of the warranty of habitability. The findings provide the most conclusive

evidence to date that there is a large operationalization gap in the law. Prior research sounded the alarm that the law was likely ineffective, but left open the possibility that the low usage rate simply reflected a low rate of tenants with meritorious claims. It also left open the possibility that tenants were leveraging their meritorious claims to achieve other types of favorable outcomes in their cases. This study addressed these methodological shortcomings by specifically measuring the size of the gap between tenants who have meritorious warranty claims and those who benefit from the law. It also took into account the possibility that tenants with meritorious claims were forgoing rent abatements—the relief explicitly provided under the law—in favor of other benefits in their cases. The results together showed that more than 90 percent of tenants with meritorious claims did not benefit from the warranty at all. The results further revealed that tenants were unable to use the law as a tool to secure needed repairs. While judges often ordered landlords to perform repairs, the data shows that landlords evaded compliance with the orders nearly three-quarters of the time. These findings strongly indicate that the warranty of habitability suffers from a major operationalization gap.

The results of this study are especially significant because they upend the traditional wisdom about the driving forces behind the warranty's ineffectiveness. Almost all of the existing scholarship on the warranty of habitability to date has attributed its failures to the barriers imposed by restrictive substantive doctrines and the lack of access to counsel. The findings here show that those explanations are inadequate. First, the study found that tenants' claims have a low rate of effectiveness even where the law is unencumbered by restrictive substantive doctrines. New York's warranty of habitability laws lack onerous notice, good faith withholding, or rent escrow requirements—indeed, tenants face few formal hurdles to assertion of the claim. Existing scholarship would suggest that this backdrop would translate into widespread use of the claim.³⁷ Yet the study found that in fact very few tenants with meritorious claims actually benefited from the law.

It certainly may be the case that even fewer tenants benefit from the warranty of habitability where restrictive doctrines exist. However, the findings of this study demonstrate that these doctrines cannot, without more, explain the low usage rates of the law. This result has serious implications for policymakers. Proposals for legal reforms to the warranty of habitability, particularly those put forth by scholars and advocates in recent years, have focused primarily on the rollback of these restrictive doctrines.³⁸ The findings suggest that those reforms are unlikely to result in widespread effectiveness of the law.

37. See Franzese, Gorin & Guzik, *supra* note 2, at 34; Super, *supra* note 5, at 434–36; Tokarz & Schmook, *supra* note 5, at 178.

38. See Super, *supra* note 5, at 458–60; Franzese, Gorin & Guzik, *supra* note 2, at 31–34.

The study's findings also disrupt our understandings and assumptions about the role of legal representation in the effectiveness of the warranty of habitability. While the data showed unambiguously that representation mattered, it also revealed that the lack of tenant representation did not account for the majority of the warranty of habitability's operationalization gap. This finding has important implications for future research and policy. In 2017, shortly after the period for which the data in this study was collected, New York City became the first jurisdiction in the United States to enact legislation establishing universal access to counsel for low-income tenants in eviction proceedings.³⁹ Other jurisdictions quickly followed suit: in 2018, a San Francisco ballot initiative established the right to counsel for all tenants in eviction cases, and Newark, New Jersey passed an ordinance guaranteeing representation to tenants under 200 percent of the federal poverty line.⁴⁰ A number of motivations underlie these initiatives, among them that the provision of counsel would lead to stronger outcomes for tenants and greater enforcement of existing protections.⁴¹

While only a comprehensive and rigorous evaluation of the implementation of the laws will show their effects, the findings in this study suggest that they will likely enhance usage of the warranty of habitability for tenants with meritorious claims. In this regard, the study's findings lend support to scholars' contentions that the lack of access to counsel acts as a barrier to the effectiveness of the warranty of habitability.⁴² They also bolster existing views that expanded access to counsel will improve outcomes for tenants. However, the results indicate that the provision of legal

39. See VICKI BEEN, NICOLE SUMMERS & JESSICA YAGER, IMPLEMENTING NEW YORK CITY'S UNIVERSAL ACCESS TO COUNSEL PROGRAM: LESSONS FOR OTHER JURISDICTIONS *2 (NYU Furman Center, Dec. 11, 2018), <https://furmancenter.org/research/publication/implementing-new-york-city8217s-universal-access-to-counsel-program-lessons> [<https://perma.cc/L686-6L62>] [hereinafter FURMAN CENTER REPORT].

40. See Laura Waxmann, *Tenant Advocacy Groups Set to Receive Funding Under 'Right to Counsel' Program*, S.F. EXAMINER (Nov 28, 2018), <https://www.sfexaminer.com/tenant-advocacy-groups-set-to-receive-funding-under-right-to-counsel-program> [<https://perma.cc/HDG6-BKH5>]; Jared Brey, *Tenants' Right to Counsel on the Move, Next Stop Newark*, NEXT CITY (Jan. 10, 2019), <https://nextcity.org/daily/entry/tenants-right-to-counsel-on-the-move-next-stop-newark> [<https://perma.cc/PWD7-9S9H>]. Other jurisdictions have also introduced or piloted legislation to create similar policies, including Boston, Philadelphia, Los Angeles, and Washington, D.C.; see also FURMAN CENTER REPORT, *supra* note 39, at *2; City of Boston, Mayor Walsh Announces 2019 Housing Security, Economic Mobility Legislative Agenda (Jan 7, 2019), <https://www.boston.gov/news/mayor-walsh-announces-2019-housing-security-economic-mobility-legislative-agenda> [<https://perma.cc/8CU9-6Z2T>].

41. See FURMAN CENTER REPORT, *supra* note 39, at *3–6.

42. See Franzese, Gorin & Guzik, *supra* note 2, at 13; Cotton, *supra* note 3, at 84; *id.* at 86–87. *But see* Bezdek, *supra* note 2, at 538 n.16 (arguing against a solution involving access to counsel because it is “parentalistic [sic] and it lets us off the hook for our parts in the charade of legal entitlement and rights vindication”).

representation likely will not, on its own, be enough to expand the benefits of the warranty of habitability to all—or even *most*—tenants with meritorious claims. The study showed that among tenants with meritorious claims who had legal representation, 75 percent did not benefit from the claim. Thus, while universal access to counsel is likely to improve the effectiveness of the warranty, it is unlikely to serve as a cure-all.

The findings also cast doubt on the argument that the warranty's ineffectiveness is attributable in part to the inaccessibility of Housing Code records. Professor Franzese has argued that in many jurisdictions, judges are without the tools to effectively enforce the warranty of habitability because there is no centralized and publicly available code violation database.⁴³ Unfortunately, the findings here strongly indicate that the mere existence of such a system is not, without more, a cure-all for improving the usage of the warranty. Judges in New York City have precisely the tools Franzese identified—indeed, Franzese points to New York City's integrated system as a model for other jurisdictions to follow—but the data show that judges rarely took advantage of them.⁴⁴

These conclusions signal that current understandings of the barriers to use of the warranty of habitability are incomplete. The empirical findings demonstrate that existing theories for the law's ineffectiveness are insufficient. While the data show that some of the identified barriers, such as lack of access to counsel, certainly contribute to the claim's underuse, they also show that these barriers cannot account for the scope of the underuse.

IV. Conclusion

Nearly fifty years ago, the U.S. Court of Appeals for the District of Columbia Circuit declared that the warranty of habitability was implied in all residential leases. Proponents hailed the development as a revolution in tenants' rights. Professor Myron Moskowitz, writing in the *California Law Review* shortly after the first jurisdictions adopted the doctrine, predicted that by giving tenants the power to enforce laws prohibiting substandard housing, the courts' rulings would spur improvements to the quality of housing, particularly that enjoyed by low-income tenants in urban settings.⁴⁵ The law would do so "not merely by adding to the number of enforcers," but by allowing enforcement to be driven by those most

43. See Franzese, Gorin & Guzik, *supra* note 2, at 37.

44. These findings suggest that a more tightly structured system for integrating eviction case adjudication with code enforcement records, like that proposed by Professor Mary Marsh Zulack, may be needed to ensure that judges in fact take advantage of the availability of code enforcement records. See Mary Marsh Zulack, *If You Prompt Them, They Will Rule: The Warranty of Habitability Meets New Court Information Systems*, 40 JOHN MARSHALL L. REV. 425, 449–53 (2007).

45. See Myron Moskowitz, *The Implied Warranty of Habitability: A New Doctrine Raising New Issues*, 62 CAL. L. REV. 1444, 1504 (1974).

affected.⁴⁶ Yet this study demonstrates that tenants overwhelmingly do not benefit from the warranty even when they are likely to have meritorious claims, *and* even when they have legal representation.

These conclusions signal strongly that more quantitative and qualitative research is needed to identify procedural and/or substantive barriers to the claim's usage beyond those identified by the existing scholarship. Preliminary qualitative and legal research conducted in conjunction with the quantitative research presented here suggests that nondiscretionary cure period rules severely restrict the use of the warranty. Until 2019,⁴⁷ New York had a nondiscretionary cure period rule, codified at New York RPAPL § 747-a but commonly known as the *Five-Day Rule*, which provided that if a landlord has obtained a judgment in a nonpayment eviction proceeding and "more than five days has elapsed," then "the court shall not grant a stay of the issuance or execution of any warrant of eviction" until the tenant has paid the amount of the judgment.⁴⁸ In the context of the warranty of habitability, the effect of this statute was that where a tenant is awarded a rent abatement at trial due to the landlord's breach of the warranty of habitability, unless the rent abatement was for 100 percent of the arrears, the tenant would be required to pay the balance of the rent owed within 5 days in order to avoid eviction.

Statutes like the Five-Day Rule are quite common across jurisdictions, yet have received virtually no scholarly attention in discussions of the effectiveness of the warranty of habitability. At least seven other states have equivalent rules providing for very short, nondiscretionary cure periods upon a finding of rent owed to the landlord.⁴⁹ The cure periods established in these states range from 3 to 10 days.⁵⁰ Even worse, at least thirty states provide tenants no cure rights at all.⁵¹ Thus, in these jurisdictions,

46. *Id.* at 1503.

47. All cases included in this study were from 2016. See *supra* Part I.

48. N.Y. REAL PROP. LAW § 747-a (1997), repealed by L2019, ch. 36, pt. M, § 18 (effective June 14, 2019).

49. See CAL. CIV. PROC. CODE § 1174.2(a) (five-day cure period which judge has no authority to extend); 25 DEL. CODE ANN. § 5716 (ten-day cure period if "good faith dispute" caused the nonpayment); MASS. GEN. LAWS ANN. ch. 239, § 8A (seven-day nondiscretionary cure period); MICH. COMP. LAWS ANN. § 600.5744(4) (nondiscretionary ten-day cure period); N.M. STAT. ANN. § 47-8-33.E(2) (three-day nondiscretionary cure period so long as tenant complies with requirements of state's rent withholding statute); 12 OKLA. STAT. ANN. § 1148.10B.B (three-day nondiscretionary period conditional upon tenant's compliance with certain notice requirements); WASH. REV. CODE ANN. § 59.18.410 (five-day nondiscretionary cure period).

50. See *infra* note 51.

51. See ALA. CODE ANN. § 35-9A-461(e); ALA. RULE CIV. P 62(a), 62(dc); ALASKA STAT. ANN. §§ 34.03.190, 34.03.220(b); ARIZ. REV. STAT. § 12-1178.C; COLO. REV. STAT. ANN. § 13-40-122; GA. CODE ANN. § 44-7-53; HAW. REV. STAT. §§ 666-11, 666-14; IDAHO CODE § 6-316; 735 ILL. COMP. STAT. 5/9-209; IND. CODE ANN. § 32-31-1-6; IOWA CODE § 562A.27; KAN. STAT. ANN. § 58-2561; KY. REV. ANN. STAT. § 383.240; LA. CIV. CODE ANN. § 2704; MD.

if at the conclusion of trial the judge determines that the tenant owes one dollar of rent or more, the tenant has no opportunity to satisfy the balance and will face near-immediate eviction. This outcome is the same even if the tenant has withheld rent for defective conditions in good faith and/or the court has awarded the tenant a partial rent abatement for the landlord's violation of the warranty of habitability.

These restrictive cure rules significantly increase the risks of taking a nonpayment of rent case to trial for the purpose of securing a rent abatement. As shown by the data here, repayment agreements will almost always provide tenants more than 10 days to repay the arrears.⁵² That longer period of time is often necessary for tenants to save up enough money to pay down the balance, or to seek out and obtain charitable assistance. Thus, in jurisdictions with nondiscretionary cure periods, tenants are unwise to take a case to trial unless they are in possession of or have ready access to the balance of the arrears (whatever the amount of that balance may be, as determined by the judge). In jurisdictions with no cure rights, tenants who take their case to trial must be confident that the amount of the rent abatement will exceed the amount of rent owed.

Because cure period restrictions affect tenants' risks of taking a case to trial for the purpose of achieving a rent abatement, they also limit tenants' abilities to negotiate a rent abatement in a settlement agreement. In jurisdictions with nondiscretionary cure rules, tenants who do not possess the amount of money likely to represent the remainder of the arrears are unable to successfully negotiate a rent abatement because they cannot make good on the threat of taking the case to trial. Similarly, in jurisdictions with no cure rights, tenants have little leverage to negotiate a rent abatement because landlords know that tenants are unlikely to take their case to trial: if any amount of rent is found to be owed—that is, if the rent abatement is any less than the full value of the arrears—the tenant will be evicted.

Additional research should also explore whether the ineffectiveness of the warranty of habitability is attributable to non doctrinal factors such as court culture or imbalances of power. Preliminary qualitative research

REAL PROP. CODE ANN. § 8-401(e)(1); MINN. STAT. §§ 504B.291, 504B.285; MISS. CODE ANN. §§ 11-25-23, 89-7-41; MO. REV. STAT. § 535.020; MONT. CODE ANN. § 70-24-427; NEB. REV. STAT. § 76-1446; NEV. REV. STAT. ANN. § 40.414; N.H. REV. STAT. ANN. § 540.14; N.J. STAT. ANN. § 2A:42-92; N.C. GEN. STAT. § 42-26; N.D. CENT. CODE § 47-32-01; OHIO REV. CODE ANN. § 1923.13; OR. REV. STAT. §§ 105.145, 105.161; 68 PA. CONS. STAT. ANN. § 250.503; R.I. GEN. LAWS § 34-18-51; S.D. CODIFIED LAWS § 21-16-1 *et seq.*; TENN. CODE ANN. §§ 29-18-126, 66-28-501; TEX. RULE CIV. P. 509, 510; TEX. PROP. CODE §§ 92.056, 92.0561, 92.056; UTAH CODE ANN. §§ 57-22-5, 57-22-6, 78B-6-808, 78B-6-811; VA. CODE ANN. § 55.1-1251; W. VA. CODE §§ 37-6-8, 37-6-19; WIS. STAT. § 799.44; WYO. STAT. ANN. §§ 1-21-1008, 1-21-1206(d).

52. The average length of the repayment period among all nonpayment of rent cases (in the "all nonpayment of rent cases" dataset) was 38.6 days. See *supra* Part II.B.1. There was no statistically significant difference between the length of the repayment period in "meritorious claim" cases and "no meritorious claim" cases.

conducted in conjunction with the quantitative research presented here suggests that a debt collection culture of the housing courts may play a significant role.⁵³ Some tenants described the Housing Court culture as treating landlords' rights to collect rent more seriously than tenants' rights to adequate housing. Tenants reported numerous instances of failed efforts to hold their landlords accountable for property conditions, which occurred simultaneously while they were being held responsible for their rental obligations. According to tenants' accounts, their efforts failed not because their claims were invalid or because they were unfamiliar with the proper legal procedures, but because judges did not want to entertain them.

Further research should be conducted into both of these—as well as many other—possible explanations for the limits of the law.

53. See also Bezdek, *supra* note 2, at 569 (qualitatively describing nonpayment of rent proceedings and calling them “scene[s] . . . of debt collection”).

The Great “Yes in My Back Yard” (YIMBY) Movement: Driven by the Gig Economy

Dwight Merriam

I. Exclusion.....	58
II. The Affordability Problem	59
III. The Relationship of Housing Cost and Income	60
IV. The End of Single-Family Zoning?	61
V. Accessory Dwelling Units (ADUs)	62
VI. YIMBY Planning and Examples from California and Oregon.....	64
VII. YIMBY in the Cities	66
A. Seattle	66
B. Minneapolis	67
C. Concord, New Hampshire	68
VIII. The Gig Economy—Why YIMBY Can Yield Extraordinary Results	69
A. The Ridesharing Revolution	70
B. Goods and Services	70
C. Sharing the Roof over Our Heads	71
D. ADUs as Part of the Gig Economy	72
IX. A Connecticut Example of How the Gig Economy Might Work.....	72
X. Wrapping up	73

NIMBY, Not in My Back Yard, made its way into our lexicon in 1980 and is defined by *Merriam-Webster* as “opposition to the locating of something considered undesirable (such as a prison or incinerator) in one’s neighborhood.”¹ We have all heard of LULUs, Locally Unwanted Land Uses. More recently, we have learned of BANANA, Build Absolutely Nothing Anywhere Near Anyone. For those who embrace NIMBY and

Dwight Merriam is a lawyer and planner in Connecticut. www.dwightmerriam.com. He is past President of the American Institute of Certified Planners, a Fellow of AICP, a Fellow the American College of Real Estate Lawyers, a Counselor of Real Estate, and the Connecticut Member of Owners’ Counsel of America. He has published thirteen books, including co-editing *Rathkopf’s The Law of Zoning and Planning*. He holds a BA (cum laude), University of Massachusetts; MRP, University of North Carolina; and JD, Yale Law School. This article draws on several op-ed pieces and longer treatments for the American Planning Association and the American College of Real Estate Lawyers written over the last three years.

1. NIMBY, MERRIAM-WEBSTER DICTIONARY (2020), <https://www.merriam-webster.com/dictionary/NIMBY>.

BANANA, there is the catchy moniker CAVE, Citizens Against Virtually Everything, and DUDE, Developer Under Delusions of Entitlement.²

Most of the NIMBY challenges arise out of attempts to increase residential density and to provide more affordable housing. The fear is that the loss of single-family zoning or the development of a more inclusive housing stock will change the character of existing neighborhoods. The NIMBY opposition is often couched in terms of adverse impacts on the value of existing properties, but the not-so-hidden agenda in many cases is one of class and racial exclusion. Single-family zoning is inherently exclusionary, as are redlining and racially restrictive covenants, no longer enforceable, but other private restrictions requiring large, expensive homes are still very much with us.³

An emerging counter-movement is YIMBY, Yes in My Back Yard, driven by grassroots citizens groups pressuring their state and local governments to develop plans and regulations that will make their communities affordable and thereby truly diverse and inclusive. What are governments doing in response to this demand, and what are the legal issues in implementation? First, some background.

I. Exclusion

In recent years, in addition to acknowledging the economic class and racist effects of planning and zoning, there has been an increasing realization that the households excluded through NIMBY opposition are often not all that different than those households that were able to purchase or rent homes in the past, but cannot now because of the lack of affordable owner-occupied and rental housing.

Indeed, some of those who have been excluded include the children of families in those neighborhoods, children who are now grown up and want to live there, but cannot find affordable housing. Some of the excluded households include single parents with their children. Among the excluded are divorced parents, empty nesters, retirees, widows, and widowers.

From 1960 to 2020, single-person households more than doubled from 13% to 28% of all household types.⁴ With the changing demographics in

2. Ric Stephens, *From NIMBYs to DUDES: The Wacky World of Planerese*, PLANETIZEN (July 26, 2005), <https://www.planetizen.com/node/152>. The author's long list is worth looking at; it will bring a smile to all of you who have done battle in these trenches.

3. For an interesting way to overcome NIMBY exclusion, see T. Iglesias, *Managing Local Opposition to Affordable Housing: A New Approach to NIMBY*, 12 J. AFFORDABLE Hous. Cmty. Dev. 78 (2002), <https://ssrn.com/abstract=1018536> (recommending "Managing Local Opposition" combining proactive planning by the developer with legal strategies, community organizing and public relations strategies).

4. Alicia Vanorman & Linda A. Jaconson, *U.S. Household Composition Shifts as the Population Grows Older; More Young Adults Live with Parents*, POPULATION RES. BUREAU (Feb. 12, 2020), <https://www.prb.org/u-s-household-composition-shifts-as-the-population-grows>

this country, including smaller and smaller household sizes,⁵ in just two or three decades the predominant household type may well be the single person. Already today, 60% and more of the households in some European and North American cities are single persons.⁶ Our housing stock is not serving us well. Attitudes are changing. People are beginning to realize that something must be done to open up opportunities for all types of households, and for people across a wide range of economic means.

The fact is, in many of our developed communities with the housing stock dating back decades, that housing is now physically, functionally, and economically obsolescent. The single-family, detached home on a large lot, designed and built many decades ago for the typical American household of the “Ozzie and Harriet”⁷ and “Father Knows Best”⁸ era, simply does not fit the households of today.

II. The Affordability Problem

No one questions the nationwide problem of housing affordability. According to the National Association of Homebuilders/Wells Fargo Housing Opportunity Index, housing affordability was last at its best seven years ago when 80% of homes were “affordable” based on a typical household’s income and housing costs.⁹ Then, things went downhill. Income growth was slow, at least for those who needed it the most. And housing costs went up.

The top “One Percenters” from 1979 to 2016 enjoyed a 226% increase in their income.¹⁰ But slide down to that great middle quintile, that is the 50% right in the middle between the top 25% and the bottom 25%, and their

-older-more-young-adults-live-with-parents; see U.S. CENSUS BUREAU, UNMARRIED AND SINGLE AMERICANS WEEK: SEPT. 17–23, 2017 (Aug. 16, 2017), <https://www.census.gov/newsroom/facts-for-features/2017/single-americans-week.html>.

5. But see Richard Frey, *The Number of People in the Average U.S. Household Is Going up for the First Time in over 160 Years*, PEW RESEARCH CENTER (Oct. 2, 2019), <https://www.pewresearch.org/fact-tank/2019/10/01/the-number-of-people-in-the-average-u-s-household-is-going-up-for-the-first-time-in-over-160-years>.

6. K. D. M. Snell, *The Rise of Living Alone and Loneliness in History*, 42 SOC. HIST. 2 (2017), <https://doi.org/10.1080/03071022.2017.1256093>.

7. *The Adventures of Ozzie and Harriet* (television series 1952–1966), IMDB (undated), <https://www.imdb.com/title/tt0044230>.

8. *Father Knows Best* (television series 1954–1960), IMDB (undated), https://www.imdb.com/title/tt0046600/?ref_=fn_al_tt_1.

9. NAT’L ASS’N HOME BUILDERS, HOUSING OPPORTUNITY INDEX (HOI) (undated), <https://www.nahb.org/News-and-Economics/Housing-Economics/Indices/Housing-Opportunity-Index>.

10. David Wessel, *Who Are the Rich and How Might We Tax Them More?* POLICY 2020 BROOKINGS (Oct. 15, 2019), <https://www.brookings.edu/policy2020/votervital/who-are-the-rich-and-how-might-we-tax-them-more>.

income growth rate from 1970 to 2018 was a meager 49%.¹¹ The rich people got richer almost five times faster.

People have to have a place to live. Given this housing economics squeeze play of slow income growth pitted against the rapid increase in housing costs, families were forced to spend a greater percentage of their income on housing. The old rule of thumb has been, as the Department of Housing and Urban Development acknowledges, that we should not spend more than 30% of our income on housing.¹² Today, 12 million households (that's over 30 million Americans) spend more than 50% of their incomes on housing.¹³

III. The Relationship of Housing Cost and Income

To tell you how bad it can be, take Miami, Florida, the country's least affordable city to live in after Santa Cruz, California.¹⁴ But you say, how can affordability be a problem in Miami where housing is less than half as expensive as Santa Cruz, 43% of the cost to be precise?¹⁵ The answer, sadly, is that Miami's household income is among lowest of the 10 least affordable cities in the entire country.¹⁶ Households in Santa Cruz spend 30% of their income, on average, on housing; in Miami, it is virtually the same at 29.7%. Remember, averages are just that, so that half the people are rent burdened, paying more than 30% of their income on housing. For people just entering the Miami market where prices have been escalating, it is worse. Starting teachers living alone are spending 51.7% of their income on housing.¹⁷ FreddieMac ranks Miami as the most rent-burdened metro area in the country.¹⁸ The problem made clear in Miami, and seen elsewhere, is the interrelationship between rising housing costs driven by increased market demand, particularly from those entering the market, and low household incomes.

11. Juliana Horowitz, Ruth Igielnik & Rakesh Kochhar, *Most Americans Say There Is Too Much Economic Inequality in the U.S., but Fewer Than Half Call It a Top Priority*, PEW RES. CTR. (Jan. 9, 2020), <https://www.pewsocialtrends.org/2020/01/09/trends-in-income-and-wealth-inequality>.

12. *Rental Burdens: Rethinking Affordability Measures*, PD&R EDGE, HUD USER (undated), https://www.huduser.gov/portal/pdredge/pdr_edge_featd_article_092214.html.

13. *Affordable Housing*, HUD (2020), https://www.hud.gov/program_offices/comm_planning/affordablehousing.

14. Jessica Guerin, *These Are the Least Affordable U.S. Housing Markets*, HW+ (Feb. 12, 2019), <https://www.housingwire.com/articles/48168-these-are-the-least-affordable-us-housing-markets>.

15. *Id.*

16. *Id.*

17. Matthew Speakman, *Starting Salaries for Teachers Don't Pay the Rent*, ZILLOW (Aug. 27, 2019), <https://www.zillow.com/research/teacher-salaries-rent-costs-25275>.

18. *Rental Burden by Metro*, FREDDIEMAC (Apr. 2019), https://mf.freddiemac.com/docs/rental_burden_by_metro.pdf.

Ways exist to reverse this trend and solve the problem. We cannot do much about income, except to encourage economic development and work hard for social equity. And, of course, there are housing subsidies, such as the Housing Choice Voucher Program,¹⁹ and other ideas, like the negative income tax²⁰ and universal basic income²¹ that would put more buying power in the hands of lower income households.

As to housing cost, driving that figure down can be done by mandating²² or incentivizing²³ developers to provide affordable units. An even better way to lower the cost is to stimulate supply by easing development restrictions so that builders will build more, and get the work done expeditiously.²⁴

IV. The End of Single-Family Zoning?

In the face of the crushing problems of affordability and exclusion, we are beginning to question what is called “single-family zoning.” There is a move afoot to allow denser, smaller housing units, to be retrofitted into those neighborhoods of old. The issue has come front and center with the most recent edition of the *Journal of the American Planning Association* featuring several articles on the so called “end of single-family zoning.”²⁵

19. Housing Act of 1937, 42 U.S.C. § 1437f(8); *see also* Housing Choice Vouchers Fact Sheet, HUD.gov (undated), https://www.hud.gov/topics/housing_choice_voucher_program_section_8.

20. Rebecca Linke, *Negative Income Tax, Explained*, MIT MGMT. (Feb. 7, 2018), <https://mitsloan.mit.edu/ideas-made-to-matter/negative-income-tax-explained>.

21. Nathan Heller, *Who Really Stands to Win from Universal Basic Income?*, NEW YORKER (July 2, 2018), <https://www.newyorker.com/magazine/2018/07/09/who-really-stands-to-win-from-universal-basic-income>.

22. *See, e.g.*, City of Seattle, *Housing Affordability and Livability, Mandatory Housing Affordability (MHA)* (2020), <https://www.seattle.gov/hala/about/mandatory-housing-affordability-mha>.

23. *See, e.g.*, City of Flagstaff, *Incentive Policy for Affordable Housing*, Housing Flagstaff (Oct. 2009), https://www.mayorsinnovation.org/images/uploads/pdf/13_-_Incentive_Policy_for_Affordable_Housing.pdf; GROUNDED SOLUTIONS NETWORK, *INCLUSIONARY ZONING* (2019), <https://inclusionaryhousing.org/designing-a-policy/land-dedication-incentives>; Tim Iglesias, *Framing Inclusionary Zoning: Exploring the Legality of Local Inclusionary Zoning and Its Potential to Meet Affordable Housing Needs*, 36 ZONING & PLANNING L. REP. (2013), <https://ssrn.com/abstract=2470018>.

24. *Regulatory Barriers and Affordable Housing: Problems and Solutions, Exploring the Current State of Knowledge on the Impact of Regulations on Housing Supply, and States Reduce Regulatory Barriers for Affordable Housing*, HUD OFFICE OF POLICY DEVELOPMENT AND RESEARCH (PD&R), EVIDENCE MATTERS (Spring 2018), <https://www.huduser.gov/portal/periodicals/em/spring18/index.html>.

25. Michael Manville, Paavo Monkkonen & Michael Lens, *It's Time to End Single-Family Zoning*, 86 J. AM. PLANNING ASS'N 106 (2020); Jake Wegmann, *Death to Single-Family Zoning . . . and New Life to the Missing Middle*, 86 J. AM. PLANNING ASS'N 113 (2020); Paul Mogush & Heather Worthington, *The View from Minneapolis: Comments on “Death to Single-Family Zoning” and “It's Time to End Single-Family Zoning,”* 86 J. AM. PLANNING ASS'N 120

When *JAPA* devotes this much space to a debate, you can be sure that it is now mainstream for planning. We are just beginning to see the emergence of widespread adoption of Yes in My BackYard (YIMBY) initiatives, evidenced by the increasing acceptance of accessory dwelling units (ADUs). Predictably, there will be developed a large body of literature on the experience.

V. Accessory Dwelling Units (ADUs)

There is no easy fix to affordability and inclusion. When considering Miami and the other places similarly situated, the problem seems intractable. To make any progress many techniques must be orchestrated, including public investment in infrastructure, public housing construction, tax policy, better regulation making more development as of right and subject to streamlined approval processes, economic development for better paid employment, . . . and the list goes on. But, believe it or not, one very little, simple initiative can quickly increase the housing supply, provide smaller, more efficient homes, improve the economic situation for many present homeowners, and require not a nickel of government money. That sounds like a late-night television commercial for something to cure baldness or getting that flat tummy you always wanted. For the moment, accept as a matter of faith that a significant part of the solution is to allow ADUs as-of-right in single-family zones.

The American Planning Association describes the ADU as “a smaller, independent residential dwelling unit located on the same lot as a stand-alone (i.e., detached) single-family home.” They may be attached to the existing home, they might be developed within the existing home by carving up some of the space, perhaps the largely unused second or third floor of the big, old house that is now physically, functionally, and economically obsolescent for the small households we have today.²⁶ Or they may be part of a separate building, such as over the garage or as a freestanding unit placed in the rear yard.

(2020); Glen Searle & Peter Phibbs, *Ending Single-Family Zoning: Is There a Plan B?*, 86 J. AM. PLANNING ASS'N 121 (2020); Anaid Yerena, *Not a Matter of Choice: Eliminating Single-Family Zoning*, 86 J. AM. PLANNING ASS'N 122 (2020); Arnab Chakraborty, *Calls to End All Single-Family Zoning Need More Scrutiny*, 86 J. AM. PLANNING ASS'N 123 (2020); Lane Kendig, *Eliminating Existing Single-Family Zoning Is a Mistake*, 86 J. AM. PLANNING ASS'N 124 (2020); Gerritt Knaap & Nicholas Finio (2020) *Though Rumors of Its Demise Might Be Exaggerated . . .*, 86 J. AM. PLANNING ASS'N 125 (2020); Michael Manville, Paavo Monkkonen & Michael Lens, *Last Thoughts from Manville, Monkkonen, and Lens*, 86 J. AM. PLANNING ASS'N 127 (2020); Jacob Wegmann, *Last Thoughts from Wegmann*, 86 J. AM. PLANNING ASS'N 128 (2020).

26. This is the second time you have read that phrase “physically, functionally, and economically obsolescent,” and you will again; I repeat it as the mantra for the disconnect between our housing stock and current and expected demographics that will get no better with time and must be addressed.

Sometimes these units are called, pejoratively, “granny flats” or “mother-in-law apartments,” or elderly cottage housing opportunities (ECHO). No need to disparage granny or your mother-in-law or those of a certain maturity, so use the term ADU. People who want to stay in town but cannot afford to rent or to buy a home are great potential occupants. So are the young singles and couples, and the empty nesters, and the divorced parents living alone who want to stay close to their children. And, of course, there is that most important demographic in terms of the need for these units: the baby boomers, retired or easing into retirement, downsizing, trimming their expenses, and wanting to live near family and friends, but unwilling or unable to buy the only housing available. Not every older person dreams of living in an age fifty-five and older community, independent,²⁷ or assisted living. Most want to age in place. According to the American Association of Retired Persons (AARP)—and who would know better—87 percent of those over sixty-five want to stay in their current home and community when they retire.

The advantage of ADUs is that they capitalize on the existing infrastructure. No new land is required, and the utilities are readily accessible. The benefits include creating a smaller and more affordable unit for households that otherwise could not find or afford housing. They provide an additional income stream for the owner of the existing house, and often they allow an elderly person to age in place by giving them some income, needed companionship, and social interaction.

The ADU is the key element of the YIMBY movement taking hold across the country to create more, generally smaller, units in areas of lower density. To be clear, the term ADU need not be limited to smaller units. Some planners may be critical of small ADUs failing to provide the need for family housing. There are two responses to that.

First, that larger physically, functionally, and economically obsolescent 1960’s era split-level ranch, faux colonial, or classic cape might be the unit that is rented to the new family, while the happy empty nesters move to their just-constructed, handsomely appointed, fully accessible, single-level, new nest in their own backyard where they once played with their children. The new family that moves into the house—affordable by reason of the fact that the mortgage was paid off years ago and now serving as a cash cow for the couple who raised their family in it back 30 or more years—could well be that family that never could have afforded the move to this neighborhood with great schools had it not been for the ADU program that created a new unit on that same lot and opened up the opportunity.

Second, as to making sure there is some family housing in the mix, one need only think way back to Montgomery County, Maryland’s pioneering Moderately-Priced Dwelling Unit (MPDU) program begun almost a

27. AARP, *WHAT IS LIVABLE? COMMUNITY PREFERENCES OF OLDER ADULTS* (Apr. 2014), <https://www.aarp.org/livable-communities/info-2014/aarp-ppi-survey-what-makes-a-community-livable.html>.

half-century ago and producing over 15,000 MPDUs as of 2017,²⁸ to see how a regulation might ensure some family housing in the mix. The MPDU program mandates a certain percentage of moderately priced units in new developments. The same could be done with ADUs. A certain percentage of ADUs would either have to be tied to the larger, original dwelling unit being reserved for rental to others or the creation of an ADU of a minimum size and number of bedrooms. Economic incentives, such as ad valorem property tax abatements, might be offered for the larger family-ready ADUs. It seems likely that ADUs will generate more tax revenue than the burden that they impose on the local government, given that the road and utility infrastructure will remain largely unchanged.

VI. YIMBY Planning and Examples from California and Oregon

First, YIMBY requires planning. Nearly all states require some form of local planning. This is the “mandatory planning doctrine.”²⁹ It is good to have planning, but essential to any effective YIMBY initiative is the “consistency doctrine” requiring that local regulations and land-use decisions be consistent with the plan.³⁰ Unfortunately, only thirteen states have clear consistency requirements,³¹ so in most states to have a definitive path forward to implementing a YIMBY plan the states or the local governments will need to expressly provide that local plans, regulations, and decisions be consistent with the plans as adopted.

California is one of the consistency states and may have the oldest YIMBY-style law. The Housing Accountability Act dating to 1982 expedites local approvals to encourage more infilling.³² It begins with a declaration of the critical need for affordable housing and then mandates approval of certain affordable housing projects if the local government has not met its fair share obligation for such housing as incorporated in the housing element of its plan. As good as this model appears to be, there has been

28. Montgomery, Cty., MD, Dep’t of Housing & Community Affs., History of the MPDU Program (2020), https://www.montgomerycountymd.gov/DHCA/housing/singlefamily/mpdu/history_law.html.

29. See, e.g., *West v. McDonald*, CA No. 06-6625, at 20 (R.I. Super. Ct. Aug. 7, 2008), <https://www.courts.ri.gov/Courts/DecisionsOrders/West%20v.%20McDonald%20FINAL%20DRAFT%208.6.08.pdf#search=mcdonald> (“Although action of adopting a Comprehensive Plan is mandatory, for all municipalities must design and implement such a plan, the act of conforming the existing ordinances to it within exactly 18 months is not.”).

30. See, e.g., *Fasano v. Bd. of Cty. Comm’rs*, 507 P.2d 23 (Or. 1973).

31. Stuart Meck, *The Legislative Requirement That Zoning and Land Use Controls Be Consistent with an Independently Adopted Local Comprehensive Plan: A Model Statute*, 3 WASH. U. J. L. & POL’Y 295 (2000), https://openscholarship.wustl.edu/law_journal_law_policy/vol3/iss1/11; STUART MECK & AM. PLANNING ASS’N, *GROWING SMART LEGISLATIVE GUIDEBOOK* (Jan. 2002), https://planning-org-uploaded-media.s3.amazonaws.com/publication/download_pdf/Growing-Smart-Legislative-Guidebook.pdf.

32. CAL. GOV’T CODE § 65589.5.

much criticism that it has proved ineffective. California Governor Newsom threatened to withhold transportation funds from local governments not meeting their housing goals.³³ Importantly, the California Assembly amended the law effective January 1, 2020, to take away the tricks local government used to stymie ADU production.³⁴ There are useful takeaways in this corrective legislation for everyone else who wants to promote ADUs as part of their YIMBY initiative.³⁵

Plans are not enough. Substantial government subsidies and investment are required to make significant advances in the housing supply. Building affordable housing costs money, lots of it, \$330,000 per unit in California. Governor Newsom proposed spending more than \$2 billion to help build 3.5 million units in the next seven years, more money apparently than any California governor has every proposed.³⁶

Oregon is the first, and so far the only state in the country, to similarly mandate as a matter of state law that lots in many areas may be developed as of right with two, three, and even four units, and, in some instances, with “cottage clusters.”³⁷ The law is described in the house bill summary:

Requires cities with population greater than 10,000 or within Metro to allow duplexes in lands zoned for single-family dwellings within urban growth boundary. Requires Metro counties and cities and cities with population greater than 25,000 to allow middle housing in lands zoned for residential uses within urban growth boundary. Requires Land Conservation and Development Commission to draft model ordinances. Requires cities and counties to amend their comprehensive plan and land use regulations to conform with requirements or to directly apply model ordinance developed by commission.³⁸

33. Laura Bliss, *California’s New Governor Would Punish Cities over Affordable Housing*, CITYLAB (Jan. 11, 2019), <https://www.citylab.com/transportation/2019/01/gavin-newsom-housing-reform-transportation-budget-homeless/580192>.

34. CAL. DEP’T OF HOUSING & CMTY. DEV., ACCESSORY DWELLING UNITS (ADUs) AND JUNIOR ACCESSORY DWELLING UNITS (JADUs) (2020), <https://www.hcd.ca.gov/policy-research/AccessoryDwellingUnits.shtml>.

35. Anne Wyatt, *ADUs to the Rescue?*, AM. PLANNING ASS’N MAG. (Feb. 2020).

36. Matt Levin, *It’s a Big Deal: Newsom’s Housing Budget, Explained*, CALMATTERS (Jan. 10, 2019), <https://calmatters.org/articles/blog/newsom-housing-budget-big-deal-california>.

37. Laura Bliss, *Oregon’s Single-Family Zoning Ban Was a ‘Long Time Coming,’* CITYLAB (July 2, 2019), <https://www.citylab.com/equity/2019/07/oregon-single-family-zoning-reform-yimby-affordable-housing/593137>; Christian Britschgi, *Oregon Becomes First State to Ditch Single-Family Zoning*, REASON (July 1, 2019), <https://reason.com/2019/07/01/oregon-becomes-first-state-to-ditch-single-family-zoning>.

38. H.R. 2001, 2019 Leg., Reg. Sess. (Or. 2019) (relating to housing, and declaring an emergency), <https://olis.leg.state.or.us/liz/2019R1/Downloads/MeasureDocument/HB2001/Enrolled>; see also AMIE FENDERSOSA, HB 2001 A, STAFF MEASURE SUMMARY (80th Or. Leg. Apr. 8, 2019), <https://olis.leg.state.or.us/liz/2019R1/Downloads/MeasureAnalysisDocument/48758>.

According to a website claiming the term as its name, “Missing Middle Housing is a range of multi-unit or clustered housing types—compatible in scale with detached single-family homes—that help meet the growing demand for walkable urban living.”³⁹ “Middle housing” in the Oregon law means duplexes, triplexes, quadplexes, cottage clusters, and townhouses.

In recognizing Oregon, we should not overlook Vermont, which has long provided for ADUs as of right:

Except for flood hazard and fluvial erosion area bylaws adopted pursuant to section 4424 of this title, no bylaw shall have the effect of excluding as a permitted use one accessory dwelling unit that is located within or appurtenant to an owner-occupied single-family dwelling. An accessory dwelling unit means an efficiency or one-bedroom apartment that is clearly subordinate to a single-family dwelling, and has facilities and provisions for independent living, including sleeping, food preparation, and sanitation. . . .⁴⁰

VII. YIMBY in the Cities⁴¹

A. Seattle

Seattle, which has 75% of its land limited to single-family homes, committed itself to greater density by opening up about 6% of that land area to higher density housing.⁴² That percentage does not sound like much, but it is for a place like Seattle with such a deep-seated tradition of exclusively

39. DANIEL PAROLEK, MISSING MIDDLE HOUSING (forthcoming 2020), <https://missingmiddlehousing.com>.

40. STATE OF VERMONT, DEP’ OF COM. & CMTY. DEV., ACCESSORY DWELLING UNITS (2020) (citing 24 VT. STAT. ANN. § 4412 (E)), <https://accd.vermont.gov/housing/planning/adu>; see also VT. STAT. ANN. tit. 24, § 4412 (2012).

41. Please excuse a personal observation. My first book, co-edited with my friends David Brower and Philip Tegeler, was *Inclusionary Zoning Moves Downtown*, published by the American Planning Association (APA) in 1984, <https://www.worldcat.org/title/inclusionary-zoning-moves-downtown/oclc/14411486>. Paul Davidoff, “an urban planning scholar and Civil Rights activist who fought to insure poor and working-class families a meaningful voice within urban planning and policy-making processes,” <https://pauldavidoff.com/life-and-legacy/#who>, was terminally ill. APA gave us some money to pull together a conference in tribute to his life’s work. He and a fabulous group of friends and scholars gathered together in New York City for a conference, and the papers were published in this labor of love. The efforts of the many produced a wonderful book. I look back now coming up on four decades later and never imagined we would eventually have a YIMBY movement in my lifetime. I wished Paul were here to witness this progress. His work contributed to it. He told me that he wished that he had done more to produce more housing of all types (in addition to his important work in opening up the suburbs), apparently with the belief that the “trickle down” would help those seeking more affordable housing. The YIMBY movement may do just that.

42. Philip Kiefer, *Here Comes the Neighborhood*, GRIST (May 21, 2019), <https://grist.org/article/seattle-zoning-density-minneapolis-2040>. The ordinance is City of Seattle, *LEG Accessory Dwelling Units ORD* (Apr. 13, 2016), <http://seattle.legistar.com/View.ashx?M=F&ID=7332825&GUID=E1055D33-C4B8-43A7-8533-BC0467C83CB2>.

single-family zoning. The ordinance allows two ADUs on one lot, eliminates off-street parking, and increases ADU size from 800 to 1,000 square feet, along with a modest increase in height and some changes to the floor area ratio (FAR) for a house on a lot.

B. Minneapolis

The YIMBY leader is Minneapolis with its amended 2040 Plan⁴³ permitting, as of right, three dwelling units on all lots zoned for single-family use. The objective is to increase the stock of less expensive, affordable housing, particularly in the most desirable neighborhoods. The city did not need a state plan to tell it to do this. What it needed and fortunately had, in abundance, were citizen supporters driving the process, as the Brookings Institution has reported.⁴⁴

There is much we can learn from the dramatic and truly unprecedented action taken by Minneapolis in its plan approved by the Metro Council. The city is upfront about its land use pattern of racial segregation and has forthrightly traced its origins back to the express racial discrimination embodied in racially restrictive covenants supported by zoning and public infrastructure decisions. In February 2019, *MinnPost* published an article entitled “With covenants, racism was written into Minneapolis housing. The scars are still visible,” detailing the history.⁴⁵

At a presentation by a member of the city’s planning staff in October 2019 at the Fall Meeting of the American Bar Association’s State and Local Government Law Section, there was the most frank and open acknowledgment of the failure of public policy I have ever heard. They pull no punches on this issue of racial land use patterns in Minneapolis. Everyone I spoke with is totally focused on making it right. Mayor Jacob Frey is a strong leader, and his great leadership has been critically important.

The very first goal of the 1100-page comprehensive plan is this:

1. Eliminate disparities: In 2040, Minneapolis will see all communities fully thrive regardless of race, ethnicity, gender, country of origin, religion, or zip code having eliminated deep-rooted disparities in wealth, opportunity, housing, safety, and health.

43. WELCOME TO MINNEAPOLIS 2040: THE CITY’S COMPREHENSIVE PLAN (undated), <https://minneapolis2040.com>.

44. Jenny Schuetz, *Minneapolis 2040: The Most Wonderful Plan of the Year*, BROOKINGS INST. (Dec. 12, 2018), <https://www.brookings.edu/blog/the-avenue/2018/12/12/minneapolis-2040-the-most-wonderful-plan-of-the-year>.

45. Greta Kaul, *With Covenants, Racism Was Written into Minneapolis Housing. The Scars Are Still Visible*, MINNPOST (Feb. 22, 2019), <https://www.minnpost.com/metro/2019/02/with-covenants-racism-was-written-into-minneapolis-housing-the-scars-are-still-visible>; Kathleen McCormick, *Rezoning History: Influential Minneapolis Policy Shift Links Affordability, Equity*, LINCOLN INST. (Jan. 16, 2020), <https://www.lincolnst.edu/publications/articles/2020-01-rezoning-history-minneapolis-policy-shift-links-affordability-equity>.

The Brookings Institution described the plan in an article entitled “Minneapolis 2040: The most wonderful plan of the year.”⁴⁶ The plan will build more housing by allowing as of right in-fill development in existing neighborhoods built-out under current zoning, build housing that is less expensive by enabling large houses to be subdivided into multiple units, and build that less expensive housing in the better neighborhoods.

What is the key? What could one city, totally committed to making access to housing open and equal for all, possibly do in one fell swoop?

Minneapolis takes a three-part approach: 1) Increase building heights and densities for residential development near transit and employment centers; 2) Abolish parking requirements, as Hartford, Connecticut, and other places, like Seattle, as noted, have so appropriately done.

And 3)? Minneapolis has decided that, as of right in all single-family zones, a property may be developed with duplexes or triplexes. This allows tripling the density in areas already developed, piggybacking on the sunk cost of the infrastructure. It is like getting free land and free utility hook-ups and no cost for streets, sidewalks, and other infrastructure. It is all right there already. And when existing buildings are carved up, say a 3,000 square foot house converted to three 1,000-square foot apartments, there is no cost for the foundation and building envelope.

C. Concord, New Hampshire

Concord, population 43,412. Why consider it here, right after the widely touted Minneapolis plan? Because it is an example of how deeply invasive the YIMBY movement is becoming. Code Studio, the Texas-based consulting firm, has come up with a new zoning code promoting ADUs.⁴⁷ “Detached, attached or divided units” are listed in the Table of Principal Uses as permitted in all residential zones and in all but two others.⁴⁸ The current regulations require the ADUs to be attached.

46. Schuetz, *supra* note 44.

47. Leah Willingham, *Proposed Concord Zoning Code Aims to Make It Easier to Build In-Law and Multi-Family Units*, CONCORD MONITOR (Feb. 16, 2020), <https://www.concordmonitor.com/Concord-undergoing-massive-code-reform-30965253>.

48. City of Concord Zoning Ordinance Draft (Feb. 7, 2020), https://www.concordnh.gov/DocumentCenter/View/14793/ConcordNEXT_Phase1DraftOrdinance?bidId=. Another small town example is Nags Head, North Carolina, population 2,904, which is apparently considering ADUs. Town of Nags Head Planning Board, Minutes (Apr. 16, 2019), <http://nagsheadnc.gov/AgendaCenter/ViewFile/Item/1438?fileID=2786> (“The Comprehensive Plan references that accessory dwellings are commonly subordinate in size to a main dwelling and can provide housing for workers and also for family members who need care but wish to have independent living quarters; and further that maid’s quarters were commonly constructed as accessory dwelling units to the cottages in the Nags Head Historic Cottage Row, and that the concept could be reestablished to address several needs including accommodations for seasonal, year-round residents, and the town’s aging population.”); *see also id.* (noting draft ordinance, amending the Code of Ordinances, “WHEREAS, the Town of Nags Head 2017 Comprehensive Plan encourages

VIII. The Gig Economy—Why YIMBY Can Yield Extraordinary Results

All the other attempts at inclusionary zoning have not done much. They help, and they can be made better, but we are getting nowhere fast. Mandatory and incentivized inclusionary zoning has not produced the needed housing.

What sets the YIMBY movement apart from everything else we have tried thus far is that it is based on as-of-right ADUs and harnesses the extraordinary power of the gig economy. Take in that last part, “harnesses the extraordinary power of the gig economy.” The gig economy is all around us, pervasive, yet largely unrecognized for its impact, and particularly in how as-of-right ADUs are squarely within that economy.

The familiar Airbnb short-term rental (STR), and ridesharing, exemplified by Uber and Lyft, are part and parcel of the gig economy. The gig economy, as described in a *Forbes* article, is

a term that refers to the increased tendency for businesses to hire independent contractors and short-term workers, and the increased availability of workers for these short-term arrangements. Due in part to the popularity of the internet (and with it, the capability for remote work) and in part due to the nature of new apps like Uber and Airbnb (which give more power to independent contractors and open up new opportunities for gig-based work), the gig economy has flourished in recent years.⁴⁹

The power of independent contractors is all about economics, just as the keystone to President Bill Clinton’s 1992 campaign, now a snowclone,⁵⁰ was the slogan James Carville dreamed up: “It’s the economy, stupid.” For all of us in the world of real estate today, thanks to the entirely new perspective brought to us by the Millennials, who have a much different relationship with things and owning than prior generations had, our theme must now be: “It’s the sharing economy, stupid.” It is also called collaborative consumption and the peer economy. More than half of the Millennials have used sharing services. It is permeating our daily lives in many ways.

This new ethic about our relationship to all manner of objects, to transportation, to where we bed down, and even to other people, has taken us away from owning and exclusively using, to not owning, not possessing, and not using alone. While our focus here is on ADUs, it helps to see where

accessory dwellings in appropriate locations, noting that such units may be a means to address affordable housing and diversify available accommodations. . . .”).

49. Larry Alton, *Why the Gig Economy Is the Best and Worst Development for Workers Under 30*, *FORBES* (Jan. 24, 2018), <https://www.forbes.com/sites/larryalton/2018/01/24/why-the-gig-economy-is-the-best-and-worst-development-for-workers-under-30/#129e0f006d76>, see also Nathan Heller, *Is the Gig Economy Working?*, *NEW YORKER* (Jan. 15, 2017), <https://www.newyorker.com/magazine/2017/05/15/is-the-gig-economy-working>.

50. Greta Thunberg, *INSTAGRAM* (Feb. 1, 2019), <https://www.instagram.com/p/BtWYyfOhoPe>.

ADUs fit the larger context. ADUs are about sharing our property and thus are part of the gig economy.

A. *The Ridesharing Revolution*

The sharing economy in three broad spheres: transportation, goods and services, and housing. Transportation may be the most obvious and most pervasive. Millennials own fewer automobiles than other age cohorts. The AAA Foundation for Traffic Safety reports that Millennials purchased almost 30 percent fewer cars from 2007 to 2011. Why? Because they use short-term car rentals, public transportation, and ridesharing. They are less likely to get drivers licenses. The attitude shift away from driving has been remarkable, as reported in a comprehensive study in 2014.⁵¹

Ridesharing as a generic term encompasses short-term rentals, making your car available to others, sharing rides, and driving or riding in the Uber-style taxi-like service. Instead of owning a car, you can rent one on a short-term basis from Zipcar,⁵² in scores of cities all across the country, from Moscow, Idaho to Biddeford, Maine to Miami. Why own a car when you can conveniently pick one up curbside and use it for a short term?

AAA saw the light and developed its own ridesharing program, Gig Car share.⁵³ It is a one-way car-sharing service, with a start-up in San Francisco. Users can take a car one-way in the region and drop it off in a so-called HomeZone.⁵⁴

B. *Goods and Services*

The gig economy has even been extended to enable private contractors to rent their underutilized heavy equipment to others,⁵⁵ putting that private capital to work without any investment by others, just as a homeowner does in putting their private capital to work creating an ADU on property they own.

Services are a major part of the gig economy, and always have been. We associate the word “gig” with a one-night jazz performance musical performance in the 1920s. Even before that, the term referred to work:

51. TONY DUTZIK ET AL., U.S. PIRG EDUC. FUND, MILLENNIALS IN MOTION: CHANGING TRAVEL HABITS OF YOUNG AMERICANS AND THE IMPLICATIONS FOR PUBLIC POLICY (Oct. 2014), <https://uspig.org/sites/pirg/files/reports/Millennials%20in%20Motion%20USPIRG.pdf>.

52. ZIPCAR INC., <https://www2.zipcar.com> (last visited Apr. 24, 2020). Zipcar, Inc. is <https://www2.zipcar.coa> subsidiary of Avis Budget Group.

53. GIG CAR SHARE, <https://gigcarshare.com> (last visited Apr. 24, 2020).

54. Michael Joe Murphy, *End of the Road for Car Ownership? It Starts with AAA's Car-Sharing*, ORLANDO SENTINEL (June 8, 2017), <http://www.orlandosentinel.com/opinion/os-ed-future-without-cars-begins-with-car-sharing-aaa-interview-20170608-story.html>; *GIG Car Share Comes to Sacramento*, AAA.COM (Apr. 23, 2019), <https://calstate.aaa.com/via/car/gig-car-sharing-sacramento>.

55. Dozr, #DirtStories, www.linkedin.com/company/dozr (last visited Apr. 24, 2020).

“What’s your game?” The Property Man’s tone was unpleasant. “I’m champion paper tearer of the West,” said Charlie. “I pass,” said the Property Man. “What kind o’ gig is that?”

— Helen Green, *The Maison de Shine: More Stories of the Actors’ Boarding House*, 1908⁵⁶

Crowdspring is a good example of service sharing. It works with over 220,000 designers around the world who freelance to create everything from business logos to book covers. The Crowdspring customers say what they are looking for, the designers pitch their concepts, and they connect.⁵⁷ Those 220,000 designers are independent contractors contributing their own “capital” in their ideas.

C. *Sharing the Roof over Our Heads*

That brings us to the gig economy subject matter of greatest interest as to ADUs and the YIMBY movement—the sharing of space. Maybe it began with the sale of timeshares in the United States in 1974. The fractional interests proved difficult to sell. Short-term vacation rentals emerged as a better way for linking property owners with vacationers through companies like HomeAway and its numerous related entities, claiming over 2 million listings in 190 countries.⁵⁸ FlipKey, part of TripAdvisor Rentals, has 830,000 properties in 190 countries, and does much the same.⁵⁹

But Airbnb goes beyond vacation rentals. You can rent a room for a night, a whole house, an apartment for your exclusive use for a week, a British castle (Airbnb says it has 1,400+ castles), a teepee for \$45/night,⁶⁰ an igloo,⁶¹ a caboose,⁶² or a treehouse in the Santa Cruz mountains of California (\$149 a night),⁶³ if you wish. Maybe try a hippy hut in New Jersey at \$74 a night.⁶⁴ You can even use Airbnb to store your luggage near JFK/LGA.⁶⁵

56. *Words We’re Watching: ‘Gig Economy,’* MERRIAM-WEBSTER, INC. (Apr. 2019), <https://www.merriam-webster.com/words-at-play/gig-economy-use-origin-phrase>.

57. CROWDSPRING, [HTTPS://WWW.CROWDSPRING.COM](https://www.crowdspring.com) (last visited Apr. 24, 2020).

58. HOMEAWAY, www.homeaway.com (last visited Apr. 24, 2020).

59. FLIPKEY, www.flipkey.com (last visited Apr. 24, 2020).

60. AIRBNB, INC., www.airbnb.com/rooms/4615980 (last visited Apr. 24, 2020) (“Tipi Retreat”).

61. AIRBNB, INC., www.airbnb.com/rooms/9386477 (last visited Apr. 24, 2020) (“Snow igloo”).

62. AIRBNB, INC., www.airbnb.com/rooms/7846081 (last visited Apr. 24, 2020) (“The Lil’ Red Caboose”).

63. AIRBNB, INC., https://www.airbnb.com/rooms/153903?source_impression_id=p3_1582057628_tGqOWfnX2QCqior (last visited Apr. 24, 2020) (“Redwood Treehouse Santa Cruz Mtns.”).

64. AIRBNB, INC., https://www.airbnb.com/rooms/32214425?source_impression_id=p3_1582057858_PlWsgf5j5oF7Lt21 (last visited Apr. 24, 2020) (“Hippy Hut Near Six Flags/Belmar Beach/New Hope”).

65. AIRBNB, INC., <https://www.airbnb.com/things-to-do/places/265460> (last visited Apr. 24, 2020) (“Schwartz Luggage Storage NYC”).

The company, originally “AirBed & Breakfast,” was founded in 2008 by Brian Chesky, Joe Gebbia, and later Nathan Blecharczyk. It began when Chesky and Gebbia, to help pay their rent, rented sleeping accommodations on three air mattresses in their San Francisco apartment living room and made breakfast for the guests. The company is now worth \$3 billion and joins the ranks of the rest of the great ideas that we all note with “I wished I had thought of that.”⁶⁶

D. ADUs as Part of the Gig Economy

What has made ridesharing and STRs so fabulously successful? First, they require little capital expenditures. The cars are there. They are owned by the drivers who are just putting what they typically already own to greater use. The beds and bedrooms and whole house rentals are there. They are owned by the “hosts.”

The ADUs are much the same. The land, the utility connections, the buildings themselves, if an ADU is created internally, are all there, all paid for or financed. The land and the buildings are underutilized, just like the parked car that becomes the Uber vehicle and grandma’s former first-floor suite overlooking the garden that is now going for \$150/night to weekend Airbnb guests. The enormous leverage of the ground-up, homeowner-invested production of ADUs is exactly what has made the gig economy such a powerful force in transportation and short-term rentals. Most people who see ADUs as just another zoning twist miss that point. It is not just another zoning tool. It has all the pent-up potential of the other sectors of the gig economy. If we let the market loose, the effect may well be transformative.

IX. A Connecticut Example of How the Gig Economy Might Work

Connecticut’s Affordable Housing Land Use Appeals statute, Section 8-30g, enables the override of local zoning for affordable housing. It has been on the books for three decades, and a recent article reports the tally to date to be “about 5,000 affordable homes and more than 10,000 additional modestly priced, market rate apartments and homes as part of mixed-income developments.”⁶⁷ These are typically larger developments because they need the staying power for long, expensive legal battles that can go on for more than a decade. In Westport, an 8-30g battle has been fought since 2005, 14 years without a final decision.⁶⁸

66. Trevir Nath, *How Airbnb Makes Money*, INVESTOPEDIA (Mar. 30, 2020), www.investopedia.com/articles/investing/112414/how-airbnb-makes-money.asp.

67. Sean Ghio, *The Facts About State’s Affordable Housing Statute*, CT MIRROR (July 21, 2017), <https://ctmirror.org/category/ct-viewpoints/the-facts-about-states-affordable-housing-statute>.

68. Jacqueline Rabe Thomas, *Separated by Design: How Some of America’s Richest Towns Fight Affordable Housing* (May 22, 2019), <https://ctmirror.org/2019/05/22/separated-by-design-how-some-of-americas-richest-towns-fight-affordable-housing>.

The late Professor Terry J. Tondro of the University of Connecticut School of Law was co-chair of the Blue Ribbon Commission on Housing, with Anita Baxter, the First Selectwoman of New Hartford.⁶⁹ He has acknowledged that the Affordable Housing Land Use Appeals statute was toney Fairfield County-centric and that one of its three purposes was to provide executive housing there: “Many large corporations have offices there, and were finding it difficult to lure executives to their headquarters because of the high-cost of living in the county.”⁷⁰ Two other purposes that he cited were providing more affordable housing generally and insuring that children when they grew up could afford to live in the towns where they were raised.

According to the U.S. Census, there are 891,596 single detached housing units in Connecticut, out of a total 1,521,123 units.⁷¹ If just 5% of those lot owners added a single unit and another 5% decided to add two units, Connecticut would have 44,579 and 89,159 units for a total of about 134,000 new housing units, most of them better sized and more affordable for the smaller households of today. The tremendous increase in supply would drive down housing prices across the board.

The Affordable Housing Land Use Appeals statute, as noted, has produced 5,000 units in 30 years; that is 167 units per year. The state had a slow start, and it takes years to get results, so generously triple that meager 167 to 500 units per year. With the Section 8-30g zoning override for affordable housing, it will take the state, even at 500 units per year, 268 years to replicate what the Minneapolis plan would provide with a very laid back 5% and 10% participation.

X. Wrapping up

The YIMBY movement is upon us, from the largest state to some of our smallest towns. It is the newest phenomenon of the gig economy, unrecognized as such by many, and promises to let loose a wave of mom-and-pop homegrown new housing that will adaptively repurpose the physically, functionally, and economically obsolescent housing stock that is underutilized, open up housing opportunities for small and large households, assist in sustainability by densifying our ill-planned suburban neighborhoods, allow people to age in place with more economic security, and help us keep our adult children in town by giving them new places to live. Think of it

69. Terry J. Tondro, *Connecticut's Affordable Housing Appeals Statute: After Years of Hope, Why Only Middle Results?*, 23 W. NEW ENG. L. REV. 115 (2001–2002),

<https://digitalcommons.law.wne.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1161&context=lawreview>.

70. *Id.* at 116.

71. UNITED STATES CENSUS BUREAU, EXPLORE CENSUS DATA (undated), https://data.census.gov/cedsci/table?q=connecticut%20Housing&g=0400000U509&tid=ACSDP1Y2018.DP04&t=Housing&cid=DP04_0001E&vintage=2018 (search for “Connecticut Housing”).

not as the end of single-family zoning but of the dawn of an age of affordability, housing choice, diversity, and inclusion. The YIMBY movement is not the end all for the problems that we must surmount, but it may serve us well. It takes grassroots support and political will. Does your state, your city or town, and you have that?

New York’s Housing Stability and Tenant Protection Act of 2019: What Lawyers Must Know

Gerald Lebovits, John S. Lansden & Damon P. Howard

I. Comparison of Old Law and Current Law	77
II. HSTPA and Rent Regulation.....	93
A. The End of the Sunset Provision; the Expansion of Rent Stabilization	93
B. Fewer Stabilized Apartments Will Be Deregulated: Luxury Deregulation and Vacancy Increases Have Been Eliminated; Coop and Condo Conversions Will Be Rare	95
C. Preferential Rents.....	98
D. Investment in Building Improvements (IAs and MCIs).....	99
1. Background and History	99
2. Changes Under the 2019 Law	99
E. Reactions from Landlords and Tenants	100
F. Overcharge Penalties Are Steeper; The “Safe Harbor” Provision Has Been Abolished.....	102
III. HSTPA and Landlord-Tenant Law and Procedure.....	107
A. Security Deposits And Prepaid Rent Are Limited to One Month’s Rent	107
B. The Retaliatory Eviction Presumption Has Been Expanded.....	109
C. Blacklists Have Been Banned	111
D. Notice Is Now Required to Raise the Rent for Unregulated Apartments; New Time Periods to Terminate Month-to-Month Tenancies	112
E. Expanded Tenants’ Protections and Amendments to the RPAPL Increase Pauses Before, During, and After Eviction Proceedings.....	113
1. Pauses Getting to Court.....	113
2. Pauses in Court.....	115
3. Pauses at the Close of Eviction Proceedings	117
4. Residential Landlords Now Have a Duty to Mitigate	119
5. Landlords May Be Less Willing to Settle Garden-Variety Cases.....	120
6. Cooperatives: The Unwillingly Protected.....	122
IV. Conclusion: <i>De Facto</i> Rent Regulation for Fair Market Tenants, Unending Pauses Predicted for Housing Courts—Landlords Warn of Dire Consequences and Financial Ruin for Small Landlords; Tenants Call it a Step in the Right Direction	122

On June 14, 2019, in response to a housing shortage that has spanned more than half a century, New York's Housing Stability and Tenant Protection Act of 2019 (HSTPA) became law. HSTPA will bring about broad and sweeping changes to the laws governing many forms of housing across New York. HSTPA's proponents argue that it is a long overdue strengthening of tenant protections, following years of landlord abuse. HSTPA's detractors argue that it will, among many other things, have a chilling effect on real estate development, curtail residential property owners' incentives to improve their buildings, impoverish small landlords, and exacerbate New York's housing shortage.

We take no position on HSTPA's economic, moral, or political attributes or virtues, but instead discuss HSTPA's substantive and procedural provisions and how the new legislation will affect landlord-tenant litigation statewide.

Below in Part I is a chart comparing and summarizing the old law and the current law. Parts II and III analyze HSTPA and its impact on landlord-tenant litigation, explain the practical effects that it might have on landlords and tenants, note interpretations from the courts and attorneys for both landlords and tenants in their attempt to navigate this new sea of law, and anticipate what landlords and tenants will do in light of HSTPA.

This article is an updated version of a series of articles, reprinted with permission from the *New York State Bar Association Journal*, September/October 2019 (Vol. 91, No. 7), November 2019 (Vol. 91, No. 8), and December 2019 (Vol. 91, No. 9), published by the New York State Bar Association, Albany, NY 12207.

Hon. Gerald Lebovits, an acting Supreme Court justice in New York County, teaches landlord-tenant law at Fordham University School of Law. Hon. John S. Lansden is the Supervising Judge of the New York City Civil Court, Housing Part, Queens County. Damon P. Howard is a partner at Ephron Mandel & Howard in New York City. Justice Lebovits and Mr. Howard have co-authored at all twelve editions of the State Bar's text *Residential Landlord-Tenant Law and Procedure*.

I. Comparison of Old Law and Current Law

Changes to Rent Regulation

<i>Area of Law</i>	Old Law	2019 Law
Expiration Provisions	Rent regulation expired every 4 to 8 years to allow State legislature to determine whether a housing emergency (vacancy 5% or less) continued to exist.	<ul style="list-style-type: none"> • Rent-control and rent-stabilization sunset provisions eliminated. • Effective 6/14/19.
Luxury Deregulation NYC Admin. Code §§ 26-504.2 & 26-504.3	High-Rent Vacancy Deregulation: permitted deregulation of a regulated apartment vacated with a legal rent at or above a certain threshold, most recently \$2774.76. Once deregulated, market rent could be charged. High Income-High Rent Deregulation: permitted high-income deregulation by NYS Division of Housing and Community Renewal (DHCR) order if the apartment was occupied by persons having a total income in excess of \$200,000 for the two preceding years and the rent was \$2774.76 or higher.	<ul style="list-style-type: none"> • Luxury deregulation (both high-rent and high-income & high-rent) now abolished. • Clean-up bill clarifies that any unit lawfully deregulated before 6/14/19 shall remain deregulated; also provides that 421-a buildings are governed by the law in effect before 6/14/19 and remain deregulated. • Ensures that all units regulated as of 6/14/19 will remain regulated. • Effective 6/14/19.

Area of Law	Old Law	2019 Law
<p>Rent Increases for Building Improvements</p> <p>NYC Admin. Code §§ 26-511(3) & 26-511.4, 26-511(6), 26-405.1</p>	<p><i>Individual Apartment Improvements (IAIs)</i>; permanent monthly rent increases equal to 1/40th of the cost of apartment improvements in buildings with 35 or fewer apartments and 1/60th in buildings with 36 or more apartments; DHCR approval was not necessary; tenant consent required only if the apartment was occupied.</p>	<ul style="list-style-type: none"> • Increase revised to 1/168 (≤35 units) and 1/180 (>35 units). • IAIs now temporary will be removed 30 years from date increase became effective. • DHCR must notify owners and occupants that IAI increase will expire. • Only 3 IAIs over 15 years permitted, for total aggregate cost of \$15,000. • The most a landlord may increase the rent with IAIs is \$89 for buildings with fewer than 35 units and \$83 for buildings with more than 35 units. • DHCR to promulgate guidelines and create a centralized IAI documentation electronic database. • For IAIs in occupied units, tenant must give informed consent on a DHCR form. The form must be in one of the six primary languages (other than English), as determined by the U.S. Census Bureau. • To charge for IAIs, landlord must remove from apartment all hazardous (“B”) or immediately hazardous (“C”) violations. • Clean-up bill clarifies that 15-year period and \$15,000 cap on 3 IAIs start with first IAI after 6/14/19. • Costs must be “reasonable and verifiable modification or increase in dwelling space, furniture, furnishings or equipment.” • Increase in rent is aggregate over 15 years. • Work performed by an independent contractor who is licensed; no relationship with landlord. • Photographs to be taken before and after work is done; photos/records must be kept permanently. • Effective 6/14/19.
<p><i>Major Capital Improvements (MCIs)</i>; permanent rent increases based on actual cost of building improvements, apportioned among building’s tenants on a per-room basis and amortized over 8 years for buildings with 35 or fewer apartments and 9 years for 36 or more apartments; annual rent increases were capped at 6% in NYC and 15% in the rest of the state; owners had to apply for DHCR approval; there was a temporary retroactive component for application processing time.</p>	<p><i>Major Capital Improvements (MCIs)</i>; permanent rent increases based on actual cost of building improvements, apportioned among building’s tenants on a per-room basis and amortized over 8 years for buildings with 35 or fewer apartments and 9 years for 36 or more apartments; annual rent increases were capped at 6% in NYC and 15% in the rest of the state; owners had to apply for DHCR approval; there was a temporary retroactive component for application processing time.</p>	<ul style="list-style-type: none"> • Annual cap decreased from 6% to 2%. • Amortization period extended to 12 years if ≤35 units and to 12 ½ years if >35 units. • Retroactive component: MCIs approved 6/16/12–6/16/19 may not exceed 2% cap starting 9/1/19 for any tenant in occupancy on the date of the MCI order. • MCI increase now temporary; will be removed 30 years after effective date. • DHCR required to set a schedule of “reasonable costs.” • DHCR must send notice to landlord and all tenants 60 days before end of temporary MCI. Notice shall include the initial approved improvement increase and the total amount to be removed. • MCIs are work essential for preservation, energy efficiency, functionality, or infrastructure of the entire building. • Amount of MCI must be reduced by the amount of any government grant given to help pay for improvements and by any insurance payments that compensate for improvement costs. • Collection of MCI starts on the first day of the month at least 60 days after notice to tenant of the increase. • MCIs not permitted in buildings with 35% or fewer regulated units. • Application requires additional and more detailed documentation; DHCR to audit 25% of MCIs. • No MCI if there are outstanding hazardous or immediately hazardous violations. • Eliminates retroactive portion of MCI. • Independent contractors must perform work. • Effective 6/14/19.

<i>Area of Law</i>	Old Law	2019 Law
<p>Rent Increases During Vacancies NYC ADMIN. Code § 26-510(f)</p>	<p><i>Vacancy Increase:</i> increase of 20% for a 2-year vacancy lease, and 20% minus the difference between applicable 2-year and 1-year renewal lease guidelines for a 1-year vacancy lease.</p> <p><i>Longevity Bonus:</i> additional vacancy increase equal to 0.6% for each year since the last vacancy increase if more than 8 years had passed since the last vacancy increase.</p> <p>These increases were in addition to any NYC Rent Guidelines Board (RGB)-approved increase.</p>	<ul style="list-style-type: none"> • Vacancy increases repealed. • Longevity bonus repealed. • RGB may not adopt vacancy or rent adjustment without legislature's approval. • RGB may not establish rent adjustment or allow any increase that does not apply to all regulated apartments equally. All rent increases are the same regardless whether for a renewal or a vacancy lease. • Effective 6/14/19.
<p>Rent Stabilization Coverage</p>	<p>Rent stabilization was in effect in NYC, parts of Nassau, Rockland, and Westchester Counties; and Buffalo and other upstate cities.</p>	<ul style="list-style-type: none"> • Rent stabilization available statewide to any municipality with less than 5% vacancy and a population of less than a million where local legislature determines that a housing emergency exists. Same criteria for coverage as within NYC. • DHCR to reconstitute an RGB outside NYC. • Effective 6/14/19.
<p>Rent Overcharge Claims, Treble Damages, Records Requirements, Choice of Forum NYC ADMIN. Code § 26-516(a), N.Y. CIVIL PRACTICE LAW & RULES (CPLR) 213-a</p>	<p>Overcharge claims limited to 4-year period before filing of claim; subject to exceptions like fraud; determination of legal rent limited to 4-year lookback period; landlord required to maintain rent records for 4 years; treble damages imposable for 2-year period before filing of claim if overcharge was willful, but not based solely on failure to file rent registrations; and safe-harbor exception, which allowed the landlord to refund any overcharge, plus interest, and reduce the rent before time to answer complaint expired.</p> <p>Permitted late registrations to avoid overcharge liability.</p>	<ul style="list-style-type: none"> • 6-year statute of limitations on overcharge claims; but CPLR amended to permit filing of claim at any time; applicable to any proceeding/application pending as of 6/14/19. • Overcharge penalties limited to 6 years preceding the complaint. • No limitation on lookback period to determine legal rent; all available rent history may be examined if “reasonably necessary”; unexplained rental increases can make registrations “unreliable”; base rent is last “reliable” registration filed 6 years or more prior to complaint; certain common law exceptions to the statute of limitations set by Rent Stabilization Code written into law. • Treble-damages period extended to 6 years; no longer defense that overcharge was based on untimely registration. • No safe harbor; treble damages may be imposed even if owner refunds overcharge. • Attorney fees and costs must be imposed if landlord is found to have overcharged a tenant (discretionary under prior law). • Record-keeping obligation extended to 6 years, but no limitation on look-back period to determine legal rent. • Evidence of improvements should not be discarded; new law mentions useful life provisions, which can be as many as 25 years. Failure to maintain records permits DHCR or court to consider evidence of overcharge beyond 6 years. • Although DHCR and the courts shared concurrent jurisdiction under the prior law, the new law gives the tenant the choice of forum.

<i>Area of Law</i>	Old Law	2019 Law
<p>Preferential Rents NYC ADMIN. CODE § 26-511(14)</p>	<p>Landlords could charge a “preferential” rent that was less than the legal rent; landlord could rescind preferential rent during renewal unless lease provided otherwise.</p>	<ul style="list-style-type: none"> • Owners may charge only the preferential rent, subject to applicable RGB rates and any other applicable rent increase, when the tenant vacates, the preferential rent can be rescinded if warranty of habitability issues did not cause the vacancy. • Subject to limited exception for buildings subject to a regulatory agreement (<i>i.e.</i>, federal housing projects). Effective 6/14/19, but applies to any tenant subject to a lease on or after the effective date or that is entitled to receive a renewal or vacancy lease on or after that date. • Effective 6/14/19.
<p>Recovery of Regulated Apartments for Owner’s Use NYC ADMIN. CODE §§ 26-511(b), 26-408(1)</p>	<p>Rent-regulated apartment(s) could be recovered if the owner or owner’s immediate family intended in good faith to occupy apartment(s) as their primary residence.</p>	<ul style="list-style-type: none"> • Only one apartment may be recovered. • Landlord must have “immediate and compelling necessity” to recover apartment. • Owner or immediate family must occupy apartment for 3 years after recovery. • New cause of action is created for damages and declaratory and injunctive relief based on owner’s fraudulent statement regarding proposed use of apartment; clean-up bill clarifies that this exists only when tenant was required to surrender the premises under owner’s own-use provision. • Unless owner can provide an equivalent or superior housing accommodation at same or lower stabilized rent in an area closely proximate to subject unit, owner is precluded from recovering a unit when any member of the household lawfully occupying unit has 15 or more years’ (previously 20 years) tenancy; is 62 years old or older; or has a permanent anatomical, physiological, or psychological condition that prevents “substantial gainful employment.” • Effective 6/14/19. Applies to any tenant in occupancy on this date.
<p>Non-Profit Exemption from Rent Stabilization</p>	<p>Non-profits operated for charitable or educational purposes exempt from rent stabilization.</p>	<ul style="list-style-type: none"> • Non-profits operating programs for those who are or were homeless or at risk of homelessness no longer exempt from rent stabilization. • Existing occupants are deemed tenants, and the legal rent is set at the next renewal to the legal rent of the prior tenant, plus applicable RGB increases. • Clean-up bill excludes from the exemption premises owned or operated by a hospital or other charitable organization operated on an exclusive not-for-profit basis. • Effective 6/14/19.
<p>Rent Increases for Rent Controlled Tenants NYC ADMIN. CODE §§ 26-405(a)(5), 26-407.1</p>	<p>Maximum collectible rent for rent-controlled tenants could not be increased by more than 7.5%/year; separate fuel cost adjustment was available based on changes in heating fuel cost.</p>	<ul style="list-style-type: none"> • Annual increases lesser of 7.5% and average of the last 5 years of RGB 1-year renewal increases. • Fuel cost pass-along eliminated. • Effective 6/14/19.

Changes to the Real Property Law

Area of Law	Old Law	2019 Law
<p>Notice Prior to Expiration of Lease and of Rent Increase</p> <p>N.Y. REAL PROPERTY LAW (RPL) §§ 226-c, 232-a, 232-b</p>	<p>Month-to-month tenancies could be terminated with service of 30-day notice; no notice requirement at expiration of ordinary lease or if renewal conditioned on increase in rent.</p>	<ul style="list-style-type: none"> • Landlords must notify tenants if the lease will not be renewed <i>or</i> if rent will be increased by 5% or more. • Amount of notice depends on length of occupancy or lease term: <ul style="list-style-type: none"> —Occupancy <1 year or lease term ≤1 year→30 days' notice. —Occupancy >1 year <2 years, lease term ≥1 year <2 years→60 days' notice. —Occupancy >2 years or lease term ≥2 years→90 days' notice. • Notice must specify vacate date. • Applies statewide to non-regulated residences; applies to all tenancies, even one-family homes; inapplicable to non-leasing license relationships. • If notice not given, tenancy continues on same terms until notice is given and required time passes. • In NYC, termination notice requires Real Property Actions and Proceedings Law (RPAPL) 735 service; outside NYC, or for commercial tenant, landlord's service method is unclear: RPAPL 735 service is not referenced. • Under prior and current law, tenant need not give notice before vacating. • RPL § 232-b amended to provide that monthly or month-to-month tenancies outside NYC may be terminated by either commercial landlord or any tenant on 30 days' notice. • Effective 10/12/19.

Area of Law	Old Law	2019 Law
<p>Duty to Mitigate Damages by Renting Apartment</p> <p>RPL § 227-e</p>	<p>Landlords were not obligated to mitigate damages. The apartment could have been left vacant, and tenant would have been liable for rent through end of term.</p>	<ul style="list-style-type: none"> • Landlord must in good faith, according to landlord’s resources and abilities, take “reasonable and customary” steps to rent the apartment; residential only; commercial leases and licenses not affected. • Overrules <i>Holy Properties Ltd, L.P. v. Kenneth Cole Productions, Inc.</i>, 661 N.E.2d 694 (N.Y. 1995). • Lease provisions to the contrary are void as contrary to public policy. • The person seeking damages has the burden of proof. • Effective 6/14/19.
<p>Notice to Tenant of Failure to Pay Rent and Rent Receipts</p> <p>RPL § 235-e</p>	<p>Other than statutory 3-day rent demand, nothing required landlord to notify tenant that rent was not received.</p>	<ul style="list-style-type: none"> • Residential and possibly commercial tenants must be notified by certified mail within 5 days that rent was not received on the due date. • Tenant may raise as an affirmative defense to a nonpayment proceeding the failure to provide this notice. • Landlords must maintain records of cash receipts for at least 3 years; rent receipts must be provided upon tenant’s request or if rent is paid by cash or any form other than personal check. If payment made in person, receipt to be given immediately. If payment not made in person, receipt must be provided within 15 days. • Effective 6/14/19.

Area of Law	Old Law	2019 Law
<p>Attorney Fees, Other Non-Rent Fees, Rental Application Fees</p> <p>RPL §§ 234, 238-a</p>	<p>If a residential lease provided for landlord's right to recover attorney fees, a reciprocal right was implied at law in tenant's favor. DHCR has discretion to award attorney fees.</p>	<ul style="list-style-type: none"> • Attorney fees may not be recovered on a default judgment. (See the new limitation on attorney fees in RPAPL 702, discussed below.) • Limits non-rent fees for rental application to lesser of actual cost of background checks and credit checks or \$20 (whichever is less). • To collect the fees for credit or background checks, landlord must provide the potential tenant a copy of the credit or background check and a receipt from the entity conducting the check. • The fee is waived if tenant provides a copy of a credit or background check conducted within the past 30 days. • Landlord is entitled to a late fee of the lesser of \$50 or 5% of the monthly rent. • Tenant has a minimum 5-day grace period to pay rent. • Effective 6/14/19.

Area of Law	Old Law	2019 Law
<p>Retaliatory Eviction</p> <p>RPL § 223-b</p>	<p>Landlords were prohibited from taking action to bring holdover proceeding to evict tenant in retaliation for tenant complaint of violation of health or safety law to enforcement agency, tenant taking action to enforce rights under the lease or at law, or tenant’s participation in tenant organization. Rebuttable presumption that eviction was retaliatory if within 6 months of protected tenant actions.</p>	<ul style="list-style-type: none"> • Protected tenant actions that create presumption of retaliation now includes complaint of breach of habitability to landlord or agent or to prohibit changes to the terms of tenancy. • Rebuttable presumption extended to 1 year of a good-faith complaint. • Presumption now applies to non-payment proceedings, not merely holdovers. • Potential retaliatory action now includes offering a new lease with an “unreasonable” rent increase. • Landlord may be required to offer a new lease or lease renewal for a term of up to 1 year. • Tenant entitled to attorney fees in civil action for retaliatory eviction. • Effective 6/14/19.
<p>Tenant Blacklists</p> <p>RPL § 227-f; JUD. LAW § 212</p>	<p>Public (including court) records were used to compile blacklists” of tenants who have had court proceedings against them. Landlords used these records to screen rental applications, regardless whether there was a legitimate basis for the proceeding.</p>	<ul style="list-style-type: none"> • A rental application may not be refused on the basis of a past or present landlord-tenant action or summary proceeding under RPAPL Art. 7. • A rebuttable presumption is created against a landlord that denies rental after having requested information from a tenant screening bureau or otherwise inspected court records. • Landlord has the burden to provide an alternate reason that tenancy was rejected. • Attorney General has enforcement power; no private cause of action. • Civil penalties between \$500 and \$1000 for each violation. • The Unified Court System may not sell residential-tenancy or eviction data. • Effective 6/14/19.

Changes to the Real Property Actions and Proceedings Law

Area of Law	Old Law	2019 Law
<p>Nonpayment Proceedings RPAPL 711(2), RPAPL 732(1), 732(3)</p>	<p>Landlord had to make demand to pay rent 3 days before starting nonpayment proceeding. Oral demands were permitted, but, if written, demand must have been served. Tenants had 5 days to answer.</p>	<ul style="list-style-type: none"> • Oral rent demands no longer permitted. • 14-day written rent demand required; must be served under RPAPL 735. • Landlords may not seek arrears from a surviving spouse, surviving issue, or distributee. Landlord's remedy is solely against estate of the decedent; only post-mortem (not money) judgment may be obtained against the estate. • RPAPL 711: "No tenant or lawful occupant of a dwelling or housing accommodation shall be removed from possession except in a special proceeding." • Tenants have 10 days to answer or will be in default in a nonpayment proceeding. • Court has discretion to grant up to a 5-day stay of the issuance of a warrant post-trial, subject to discretionary stay of up to 1 year under RPAPL 753, discussed below. • Expands rights of occupants who might be in possession after tenant's death; warrant of eviction against the estate of decedent due to nonpayment of rent will not permit landlord to evict occupant in possession; in this case, landlord must commence separate holdover proceeding to evict occupant and regain possession of apartment. • Residential under RPAPL 711(2); residential and commercial under RPAPL 732(1), (2), and (3). • RPAPL 711(2) effective 6/14/19. RPAPL 732 effective 7/14/19.
<p>Timing in Nonpayment Proceedings RPAPL 732(1), 732(3)</p>	<p>Tenants had 5 days to answer.</p>	<ul style="list-style-type: none"> • Tenants have 10 days to answer or be in default in a nonpayment proceeding. • Court has discretion to grant up to a 5-day stay of the issuance of a warrant post-trial or post-answer default, subject to discretionary stay of up to 1 year under RPAPL 753, discussed below. • Effective 7/14/19.

<p>Right to Pay Prior to Hearing RPAPL 731(4)</p>	<p>Law not codified.</p>	<ul style="list-style-type: none"> • If full amount of rent is paid before hearing on the petition, landlord must accept payment, and the proceeding must be dismissed. • Applies to residential and probably commercial tenancies. • Effective 6/14/19.
<p>Rent Defined to Exclude Fees RPAPL 702</p>	<p>A residential lease could include provisions for “added” or “additional” rents, such as late and legal fees. A petitioner was able to seek such rent in a summary nonpayment or holdover proceeding. A rent-regulated tenant was subject to a money judgment but not a possessory judgment for not paying additional rent. A non-regulated tenant was liable for both a money and possessory judgment for such rent.</p>	<ul style="list-style-type: none"> • Residential rent defined narrowly to include only amount charged in consideration for the “use and occupation” of the space. • “No fees, charges or penalties other than rent may be sought in a summary proceeding.” • Applies to residential but not commercial proceedings. • Effective 6/14/19.
<p>Timing of Holdover Proceedings RPAPL 733(1), 743</p>	<p>Service of a holdover petition must have been made at least 5 and not more than 12 days before the first court appearance. If petition was served at least 8 days before initial return date, tenant had 3 days to answer.</p>	<ul style="list-style-type: none"> • Service of a holdover petition must be made at least 10 and not more than 17 days before the first court appearance. • Tenant must answer the petition orally or writing at the first court appearance. RPAPL 743 is amended to eliminate the requirement that an answer be made at least 3 days before the petition returnable/to be heard. • Applies to residential and commercial proceedings. • RPAPL 733 effective 6/14/19. RPAPL 743 effective 7/14/19.

<p>Rent Deposits and Motions for Use and Occupancy During Pending Occupancy Proceedings RPAPL 745</p>	<p>After two adjournments by tenant, or 30 days day after the first court appearance, upon landlord's application, court could direct tenant to deposit any rent or use and occupancy accrued since the petition was served, subject to limited defenses that could be raised at an immediate hearing. If tenant failed to pay, court could dismiss tenant's defenses and counterclaims and grant judgment for landlord. Standard for adjournment was a maximum of 10 days.</p>	<ul style="list-style-type: none"> • Rent-deposit orders are now discretionary. • Application cannot be made until 60 days after the parties' first court appearance or 2 adjournment requests solely by tenant; only days attributable to respondent's adjournment requests are counted. • Oral applications for a rent deposit no longer sufficient. • When 2 adjournments or 60 days are attributable to respondent, and petitioner files a written motion for rent deposit or use and occupancy, court may order a deposit of rent or use and occupancy, but only for sums of rent or use and occupancy that accrued after the date of the order. • Unrepresented tenant's first request to obtain counsel does not count as an adjournment or as part of the 60 days in determining if application for rent deposit timely. • Hearing now "as soon as practicable"; minimum 14-day adjournment for trial given to either party unless both sides and court agree to shorter adjournment; court has the sole discretion to grant a second or subsequent request for adjournment. • Tenant can defend against a rent-deposit order by establishing one of the following: (a) the petitioner is not a proper party to the suit; (b) actual, partial, or constructive eviction, and respondent has vacated; (c) defense based on Social Services Law § 143b; (d) defense of existing hazardous or immediately hazardous violations of the Housing Maintenance Code in respondent's unit or building common area; (e) colorable defense of overcharge; (f) lack of personal jurisdiction; and (g) unit violates building's certificate of occupancy or is illegal under Multiple Dwelling Law. • Failure to pay use and occupancy or deposit rent may not result in dismissing any of respondent's defenses or counterclaims. • Only penalty for failure to comply with a rent deposit order is that, at the court's discretion, an immediate trial may be ordered, but the tenant's time to deposit may be extended for good cause. • Effective 7/14/19.
--	---	---

<p>Judgments; stays RPAPL 747-a</p>	<p>“In the city of New York, in any non-payment summary proceeding in which the respondent has appeared and the petitioner has obtained a judgment pursuant to section seven hundred forty-seven of this article and more than five days has elapsed, the court shall not grant a stay of the issuance or execution of any warrant of eviction nor stay the re-letting of the premises unless the respondent shall have either established to the satisfaction of the court by a sworn statement and documentary proof that the judgment amount was paid to the petitioner prior to the execution of the warrant or the respondent has deposited the full amount of such judgment with the clerk of the court.”</p>	<ul style="list-style-type: none">• Repealed.
--	---	---

<p>The Warrant of Eviction and the Marshal's Notice RPAPL 749(1), 749(2)</p>	<p>Upon issuance of a final judgment of possession, court would issue a warrant of eviction, but court did not specify timing of execution. Marshal had to give at least 72 hours' notice before the eviction.</p> <p>Issuance of warrant canceled the lease and annulled the landlord-tenant relationship, depriving court of the power to vacate the warrant for good cause.</p>	<ul style="list-style-type: none"> • Warrant of eviction must state the earliest date the eviction can occur. • The marshal must give at least 14 days' notice prior to eviction; warrant may be executed only on a business day from Monday through Friday. • Issuance of warrant no longer cancels landlord-tenant relationship. • If tenant tenders or deposits all the rent due any time before warrant of eviction is expected, warrant in a nonpayment case is vacated unless landlord can establish that tenant withheld the rent in bad faith. • Court may, for good cause, stay or vacate a warrant, stay re-letting or renovation of premises for a reasonable period of time, and restore tenant to possession; nothing may deprive court from power to stay, vacate, or restore tenant to possession of premises after execution of warrant. • Warrant may remove only "persons named in the proceeding." • Applies to commercial and residential proceedings. • Effective 6/14/19.
---	--	---

<p>Post-Trial Stay RPAPL 751(4), 753(1), 753(3), RPAPL 753(4)</p>	<p>In NYC holdover proceedings, courts could stay issuance and execution of warrant for up to 6 months, except if landlord intended to demolish the building.</p> <p>In holdover proceedings based on a lease violation, tenants were given automatic 10-day stay to cure breach.</p>	<ul style="list-style-type: none"> • In both nonpayment and holdover proceedings, courts statewide have discretion to grant an occupant a stay of up to 1 year; the demolition exception is abolished; there is an exception to court’s discretion if the proceeding is based on objectionable conduct or if landlord can establish that occupant is objectionable. • Factors court may consider when granting a stay, or deciding the length of a stay, to determine whether an eviction would cause extreme hardship if stay was not granted: (a) serious ill health; (b) significant exacerbation of ongoing condition; (c) child’s enrollment in local school; and (d) any other extenuating life circumstances affecting ability of applicant or family to relocate and maintain quality of life. • Court shall consider any substantial hardship on landlord in determining whether to grant the stay and in setting the stay’s length and other terms. • Automatic cure period under RPAPL 753(4) for breach-of-lease provision extended from 10 to 30 days. • If lessee (tenant) is removed from the leased premises after a foreclosure or tax foreclosure, proceeding must be sealed, and all records of the proceedings must be kept confidential. RPAPL 757. • To effect these changes, RPAPL 751(4), which limited stays outside NYC, is repealed. • Effective 6/14/19.
<p>Unlawful Eviction RPAPL 768</p>	<p>Illegal, except by court proceeding, to evict residential occupant who had occupied space for at least 30 days or entered into a lease.</p>	<ul style="list-style-type: none"> • Unlawful evictions are punishable as a Class A misdemeanor carrying civil penalties from \$1000 to \$10,000 per violation. • Definition of conduct constituting unlawful eviction is expanded to (a) using or threatening force; (b) interfering or intended to interfere with ability to use dwelling; (c) engaging or threatening to engage in any conduct that prevents or is intended to prevent occupant from lawful occupancy or to induce lawful occupant’s vacatur. • Owner required to restore person unlawfully removed. • Applies statewide. • Effective 6/14/19.

Changes to the General Obligations Law: Security Deposits

Area of Law	Old Law	2019 Law
<p>Limits on Security Deposits and Prepaid Rent</p> <p>N.Y. GEN. OBLIG. LAW (GOL) § 7-108(1-a)</p>	<p>Rent-stabilized tenants were not required to deposit or advance more than 1 month's rent as security deposit; no limits on security deposits or prepaid rent for market tenants.</p>	<ul style="list-style-type: none"> • Tenants in rent-stabilized and unregulated units may not be required to deposit more than 1 month's rent as security deposit. • Abolishes prepaid rent advances. No more first and last month's rent accepted or required at beginning of tenancy.
<p>Inspection of Premises, Return of Security Deposit</p> <p>GOL § 7-108(1-a)(c)-(e)</p>	<p>A security deposit had to be returned within a "reasonable time." Law did not specify time.</p>	<ul style="list-style-type: none"> • After lease is signed but before occupancy begins, landlord must offer tenant an opportunity to inspect apartment (with landlord present). After the inspection, the parties must enter into a written agreement attesting to the condition of the apartment and noting any defect or damage. The agreement is admissible as evidence of the condition of the premises at the beginning of the occupancy only in actions related to returning the security deposit and not for warranty of habitability. • Upon tenant's notice of intent to vacate, landlord must conduct exit walk-thru no more than 2 weeks and no less than one week before the surrender. Landlord must give 48 hours' written notice of inspection. Tenant may be present. After inspection, landlord must give itemized statement specifying repairs and cleaning that shall be the basis of any security-deposit deduction. Tenant may cure any condition before tenancy ends. • Landlord has 14 days from tenant's vacatur to return security and an itemized statement if any portion of the deposit is retained for nonpayment of rent, nonpayment of utility charges, damage caused by tenant beyond wear and tear and moving, or storage of tenant's belongings. • If landlord fails to provide itemization or deposit within 14 days, landlord forfeits right to retain any portion of security deposit. • The security deposit cannot be withheld based on a claim of wear and tear, attorneys' fees, late fees, additional rent, or other miscellaneous charges. • The itemized statement must specify any repairs or cleaning that shall be the basis of any deduction from the security deposit. Tenant may cure any condition before tenancy ends. • In an action disputing the amount of any security deposit retained, landlord has burden to justify retaining any portion of the deposit. • Willful violation subject to punitive damages up to twice the amount of the deposit. • Effective 6/14/19.

Changes to the General Business Law: CO-OP and Condo Conversions

Area of Law	Old Law	2019 Law
<p>Conversion to Cooperative and Condominium Ownership</p> <p>N.Y. GEN. BUS. LAW (GBL) § 352-eeee</p>	<p>Although seldomly used, the law permitted conversion based on an eviction plan. In a non-eviction plan, at least 15% of tenants in residence must have agreed to buy before the conversion was effective.</p>	<ul style="list-style-type: none"> • The eviction option is eliminated. • For a non-eviction conversion to be effective, at least 51% of tenants in residence must agree to purchase. • Tenants in occupancy have 90-day exclusive right to purchase and 6-month right of first refusal. • Holders of unsold shares and unsold units may lose ability to seek MCIs for capital improvements. To qualify for an MCI, building must be 35% rent regulated. • Eligible senior citizens or disabled persons who do not purchase may not be subject to unreasonable rent increases or evicted during their occupancy except for nonpayment of rent, illegal use or occupancy of the premises, failure to provide reasonable access, or a similar tenant breach of obligations to dwelling-unit owner. • Eligible senior citizens/disabled persons who reside in units subject to government regulation remain subject thereto. • Rights granted to eligible senior citizens/disabled persons under the plan may not be abrogated or reduced. • Coop plan offeror has 30 days from receipt of the form from occupant claiming to be a senior citizen or disabled to challenge the claim. Dispute brought before the Attorney General, who has 30 days to make a determination. The determination is subject to CPLR Art. 78 review if filed within 30 days of Attorney General’s determination. Absent fraud, this is the sole method to resolve. • NYC only. • Effective 6/14/19.
<p>Manufactured Homes</p>		<ul style="list-style-type: none"> • Regulates rent-to-own contracts, including changes in use to the underlying land, and provides for tenant protections, including a bill of rights. Caps rent increases at 3% unless landlord can show hardship; then the cap is 6%. • Applies only to one housing community in NYC, on Staten Island. • Effective 7/14/19.

II. HSTPA and Rent Regulation

Most see HSTPA's passage on June 14, 2019, as a tectonic shift in New York rent regulation and landlord-tenant law and procedure, a shift that alters the balance of power between landlords and tenants. But the agreement ends there. Reception to the new law has varied among the different factions, ranging from triumphant celebration to apocalyptic prediction.

Rent regulation has a long history in New York. Early rent controls were born out of the post-WWI housing crisis. President Franklin Roosevelt revived them during WWII. The current rent-stabilization system began in 1969. It has compounded in complexity with each successive wave of legislation as power has changed hands in Albany. Those unfamiliar with the tangled history of New York's rent laws can be forgiven for not understanding the furor surrounding their newest addition. The new law has introduced legal questions that will generate litigation for years. While historic in its scale, the language of the Act of 2019 is sometimes unclear. A federal lawsuit that claims that the new law violates the U.S. Constitution has already been filed in the United States District Court for Eastern District of New York.¹ The authors take no position in the debate that has sprung up around the Act of 2019, but present both sides' positions vigorously for context and clarity and to shed light on some of the new law's ambiguities and possible consequences.

A. The End of the Sunset Provision; the Expansion of Rent Stabilization

A hallmark of New York's rent regulation is that it always included a sunset provision, a date by which the Legislature must renew the rent laws to prevent their expiration. Each time the laws neared expiration, stakeholders in this perennial struggle had an opportunity to convince lawmakers that the housing emergency has improved or that the laws should be revisited and tightened or loosened in response to economic and societal influences. For landlords, the repeal of the sunset provision with HSTPA's passage ruptures a safety feature of the rent regulation system. Landlord advocates contend that tenants have set fire to the house and then pulled the ladder up after themselves. For tenants, repeal of the sunset provision eliminates a perpetual, existential threat to rent regulation and is justified by New York's long-lasting shortage of affordable housing. For many tenant advocates, the sunset provision allowed landlords to water down protections in each renewal by leveraging tenants' fear that the law would not be renewed. The sunset provision allowed the rent laws to ebb and flow over time with changing housing conditions (but mostly, in 1993 and 1997, with legislation that favored landlords). The repeal of the sunset provision means that the laws will remain at a historical high-water mark, until the next political consensus among the Senate, Assembly, and the Governor.

1. Comm. Hous. Improv. Prog., Rent Stabilization Assoc. of N.Y.C., Inc. v. City of New York, No. 1:19-cv-04087-MKB-RLM (E.D.N.Y. 2019).

Every three years, however, the New York City Council will revisit whether a housing emergency still exists.

Although rent-stabilization coverage was previously limited to New York City and some localities in Nassau, Rockland, and Westchester counties, Albany concluded in its legislative findings that, due to a reduced availability of federal subsidies, shortage of housing accommodations, increased cost of construction, and other inflationary factors, people not protected by rent stabilization are “being charged excessive and unwarranted rents and rent increases.”² “To prevent speculative, unwarranted and abnormal increases in rent,” the new law extends stabilization coverage to all New York State counties where local legislatures determine that an emergency exists. Critics view an expansion of rent stabilization as overreaching and unnecessary. One pragmatic weakness that has been cited is that the expansion of rent stabilization will be overseen by local boards, appointed by the New York State Division of Housing and Community Renewal (DHCR) and that DHCR might lack the resources and staff to oversee these fledgling boards in implementing complex rent-stabilization laws. New York’s new rent law appears to be just the first in a wave of rent-control regulations gathering on both the East and West coasts. In February, Oregon became the first state to enact statewide rent-control measures. California was fast on its heels with a rent-control law limiting rent increases to five percent plus inflation. Washington State, as well as cities like Philadelphia, Chicago, Providence, and Denver, are considering similar protections.

A rash of studies and articles have challenged rent control’s rationale. A 2018 *New York Times* article reported that “economists from both the left and right are in almost universal agreement that rent control makes housing problems worse in the long run.”³ The *Washington Post* concurred with a September 21, 2019, editorial, “*The Economists Are Right: Rent Control Is Bad*,” arguing that “[t]he economists are right, and the populists are wrong.

Rent-control laws can be good for some privileged beneficiaries, who are often not the people who really need help. But they are bad for many others.”⁴ The pragmatic counterargument from rent-stabilized tenants, more than a million strong in New York City alone, is that for those who have a rent-stabilized apartment, the limitations on rent and prohibitions on being evicted without just cause are a matter of survival.

Housing is one of the few essential needs in which the immediacy of the government remedy does not match the urgency of the need. In the case of health care or food, government solutions like Medicaid and food-assistance programs provide a solution today. For housing, government

2. Housing Stability and Tenant Protection Act of 2019 (HSTPA), pt. G, sec. 2.

3. Conor Dougherty, *Why Rent Control Is a Lightning Rod*, N.Y. TIMES, Oct. 13, 2018, at B2.

4. *The Economists Are Right: Rent Control Is Bad*, WASH. POST (Sept. 21, 2019), https://www.washingtonpost.com/opinions/rent-control-is-back-and-thats-bad/2019/09/21/31abb05c-dbdb-11e9-a688-303693fb4b0b_story.html.

options like homeless shelters and years-long waiting lists for housing and vouchers can be dire. Academics might have the luxury of advocating policies that ease the underlying housing shortage. But tenant advocates reject this approach on the principle that the perfect is the enemy of good. And while not all renters might ultimately benefit from regulation, it has the benefit of providing a solution now to millions of people, including many who vote. With rent regulation, the Legislature can provide a ready-made policy solution, with the rare satisfaction in politics of providing immediate results, all without raising taxes.

B. Fewer Stabilized Apartments Will Be Deregulated: Luxury Deregulation and Vacancy Increases Have Been Eliminated; Coop and Condo Conversions Will Be Rare

In 1993, the rent laws were amended to include high-rent and high-income deregulation (luxury deregulation) provisions, permitting apartments with rents above a certain threshold (\$2,774.76 under the prior law) to be removed from rent stabilization when they become vacant or the tenants' annual income rose by a certain amount (\$200,000 under the prior law). Since 1997, landlords have also benefitted from a 20% rent increase during vacancies, as well as a longevity bonus of 0.6% a year if there had not been a vacancy for eight or more years. The new law abolishes luxury deregulation and eliminates both these increases based on vacancies. It also expressly bars the New York City Rent Guidelines Board (RGB) from adopting vacancy increases.

Tenants praise the elimination of luxury deregulation, which they have long criticized as a loophole that fueled tenant harassment by unscrupulous landlords trying to obtain prized vacancies and which led to the loss of an estimated 170,000 rent-regulated apartments. Tenants further view the elimination of vacancy increases as removing a significant financial motivation for high tenant turnover, susceptible to abuse and contrary to the aims of rent stabilization. Without vacancy increases, though, landlords in some instances might find it difficult to justify incurring the fees and expenses of eviction proceedings, even for nuisance tenants, illegal subtenants, or tenants who use a regulated apartment as a pied-à-terre.

Rarely will landlords under HSTPA pay occupants cash for keys to move. Landlords point out that to the extent that stabilization laws are premised on a housing shortage, evictions enforce the law and create vacancies. Because fewer evictions will mean fewer vacancies, the upshot will, landlord advocates suggest, exacerbate the housing shortage that stabilization was meant to prevent. Landlords also contend that, far from being a loophole, luxury deregulation and vacancy increases were lawfully baked into the system's economics. Landlords and lenders have relied on these provisions for a quarter century in buying, financing, and operating stabilized buildings.

Like the mix of affordable housing provided with tax incentives like the 421-a program, in which owners can offset decreased rents from affordable housing with revenue from market apartments, luxury deregulation

permits owners to make owning stabilized buildings a viable investment. Landlords argue that protecting “luxury” apartments and “high income” tenants runs contrary to the policy objectives of the rent law: that abolishing luxury deregulation permits the possibility of a tenant with a \$1M annual income living in a \$10,000/month rent-stabilized apartment. Rent stabilization was intended in part to protect the most vulnerable from being dislocated from their homes. But, landlords opine, eliminating high-income deregulation does not further this purpose because it permits tenants whose incomes afford them many housing options to occupy the limited stabilized housing available.

Considered separately from tenant income, however, the fact that an apartment has high rent is perhaps an unreliable indicator that the people occupying the apartment do not need the protections of rent stabilization. A \$3,500/month, 3-bedroom apartment might be occupied by families or roommates pooling their resources. But this logic might falter, for example, with a tenant occupying a \$4,000 per month 1-bedroom rent-stabilized apartment. Tenants respond that this is a rare example, far from representative of the stabilized housing stock. Factual disputes of this nature would be more readily resolved by more granular data on the housing stock within the stabilization system, so that the Legislature—and potential developers of residential housing—can determine whether supply matches demand and calibrate their decisions accordingly. HSTPA calls for greater DHCR reporting requirements, such as statistical data on the number of regulated units by county, the number of units with preferential rents, and the number of overcharge complaints processed and granted. HSTPA does not call for more particularized information regarding, for example, the number, and average rent, of 3-bedroom apartments. Thus, whether \$4,000 per month one-bedroom stabilized apartments are more like exotic birds or common pigeons might go unanswered unless the Legislature imposes even greater reporting requirements.

Although HSTPA abolished the 20% vacancy and the longevity increases, it remains unclear whether a “renewal” increase is permitted for a vacancy lease. DHCR guidance since HSTPA’s enactment provides that “[w]hen a tenant signs a vacancy lease, they can choose between a 1- or 2-year option and the allowable increase is set by the local rent guidelines board.⁵ Landlords that choose to follow DHCR’s guidance, however, worry that they do so at their peril. Those familiar with the landmark *Roberts v. Tishman Speyer Props. L.P.*⁶ and the ensuing tempest of litigation that followed in its wake need no reminding that courts are willing to overrule DHCR guidance. Historically, owners have also been able to exempt stabilized apartments from rent stabilization as part of the General Business Law’s condominium

5. DHCR Fact Sheet #26, Guide to Rent Increases for Rent Stabilized Apartments 2 (Oct. 2019), <https://rentguidelinesboard.cityofnewyork.us/wp-content/uploads/2019/08/2019-IE.pdf>.

6. *Roberts v. Tishman Speyer Props. L.*, 13 N.Y.3d 270, 918 N.E.2d 900 (2009).

and co-operative conversion process. The new law imposes significant limitations on this process, eliminating the eviction-plan option and increasing the purchasing percentage required for non-eviction plans from 15% to 51%. The co-op/condo exemption was viewed as exacerbating the housing crisis by allowing the conversion of affordable housing to apartments that few can afford. But this exemption gave some regulated tenants the option of home ownership and a greater voice in how their buildings are operated. Attaining the requisite 51% will be extremely difficult, foreclosing to some regulated tenants this route to home ownership.

In an apparent attempt to reduce any confusion surrounding the status of units deregulated before HSTPA, the new law provides that apartments lawfully deregulated before to June 14, 2019, will remain deregulated. The law is unclear, however, about how to determine the date of deregulation. In the case of apartments claimed to be luxury deregulated based on a high-rent vacancy, for example, it is unclear whether the triggering event is the date of the vacancy by the last stabilized tenant, the date of completion of any renovations necessary to raise the rent to the requisite threshold for deregulation, or the date of the first fair-market lease. The stakes are high for landlords and tenants alike; these questions will be litigated. HSTPA removes many options for landlords to deregulate or raise rents for stabilized apartments. But it has not closed all avenues to realize these objectives.

Enterprising landlords will now consider substantial rehabilitation, which permits the exemption from rent stabilization of an entire building if 75% of building-wide and individual apartment systems have been replaced in a building in a substandard or seriously deteriorated condition. Similarly, landlords might apply for a demolition eviction, which permits recovering an unlimited number of stabilized apartments if the landlord seeks in good faith to demolish them to build a new building. Vacancy increases and increases based on capital improvements (discussed below) are no longer on the table for landlords. But the "first-rent rule" might still be used to raise legal rents by an unlimited amount if the perimeter walls of the apartment have been substantially altered.⁷ Landlords might also raise economic infeasibility as a defense to a Housing Part repair proceeding;⁸ try to convert units or buildings to and from commercial use; and apply to DHCR for an "alternative hardship" increase if they do not maintain an annual gross building rental income exceeding operating expenses by 5%. Under the inexorable pull of profits, landlords will test the outer boundaries of all legal options to maximize rent.

7. See, e.g., *In re 300 W. 49th St. Assocs. v. N.Y.S. Div. of Hous. & Cmty. Renewal*, 212 A.D.2d 250, 253, 629 N.Y.S.2d 194 (1995).

8. See Gerald Lebovits & Deborah E. Fisher, *HP Proceedings: The Tenuous Nature of the Economic-Infeasibility Defense*, 1 LANDLORD-TENANT PRAC. REP. 1 (Oct. 2000), works.bepress.com/gerald_lebovits/70.

C. Preferential Rents

Preferential rents, in which a tenant is charged a rent lower than the legal rent, are widespread in New York City. When a landlord cannot find a tenant willing to pay the full legal rent for an apartment, landlords often charge a lower, or preferential, rent to avoid losing rent while the apartment remains vacant. Under the prior law, landlords could preserve the right to charge the higher legal rent when the lease expired, provided that the first lease in which the preferential rent was charged allowed the landlord to eliminate the preferential rent at lease expiration.

Preferential rents have long provoked the ire of tenant advocates, who believe that preferential rents have allowed landlords to raise rents by hundreds of dollars in some cases, even as the RGB has set historically low renewal rates in recent years, sometimes forcing out tenants who did not understand the preferential rent or appreciate its temporary nature. Tenants also argue that landlords used preferential rents to mask wrongdoing, allowing them improperly to hike the legal rent while avoiding tenant overcharge challenges. After four years, the landlord could rescind the preferential rent, force the tenant out, and in some cases even deregulate the apartment—and any improper increase would be beyond the statute of limitations. Landlords dispute these contentions, arguing that preferential rents allow them simply to charge a lower rent than what they are legally permitted to charge and that the tenants' argument calls for higher rents for stabilized tenants. HSTPA now makes preferential rents permanent while tenants remain in their apartment. All rent increases for lease renewals must be based on the preferential rent.⁹ If an apartment becomes vacant, the landlord may charge a higher, legal regulated rent to the incoming tenant. Once the tenant with the preferential rent moves out, the landlord need no longer offer a preferential rent. Still, some landlords will prefer to leave apartments vacant than to re-lease them indefinitely below the legal rent to which they are entitled. This phenomenon is already widespread in the commercial context, where many storefronts remain empty as landlords avoid committing to long-term leases while they hold out for a tenant willing to pay a higher rent. Landlords warn that the resulting warehousing of stabilized apartments will worsen the housing shortage. Tenants respond that preferential rents are not philanthropic: landlords offer them because they serve the landlord's own economic interest. These economic interests will, tenants say, dictate that landlords continue to offer lower preferential rents rather than lose rent while apartments sit vacant. One criticism that both landlords and tenants level at HSTPA's preferential-rent provisions is that the new law is unclear about whether the limitations on preferential rent apply to lease-renewal offers made before HSTPA was enacted but which are effective after June 14, 2019.

9. HSTPA provides an exception to this new rule for buildings (1) subject to rent stabilization by virtue of a regulatory agreement with a government agency and (2) which receive federal project-based rental assistance.

D. Investment in Building Improvements (IAIs and MCIs)

1. Background and History

The former rent regulations provided financial incentives for landlords to improve rent regulated buildings, which in many cases are many decades old, by allowing them to recoup the cost of improvements and for a return on investment in the form of permanent rent increases. The law provided for investment in the building in the form of Major Capital Improvements (MCIs) and, in apartments, as Individual Apartment Improvements (IAIs).

These capital expenditure provisions were available in New York City's first rent-stabilization code, which were drafted by a real-estate industry group in 1969 and were later enacted into state law in 1993,¹⁰ as lawmakers grappled with an epidemic of neglected and derelict buildings abandoned by landlords in the 1970s and 1980s, even as rental vacancy rates consistently hovered below 3%.¹¹ MCIs' rent increases are based on the actual cost of the improvement, often an installation of new equipment servicing the entire building, such as a new boiler or plumbing; repairs to old equipment do not qualify. Owners must apply to DHCR for approval for MCIs, and, if approved, the rent increases are apportioned among the building's tenants on a per-room basis. Prior to the recent changes, owners of smaller buildings with 35 or fewer apartments could recoup their MCI costs over an eight-year amortization period, and owners of larger buildings with 36 or more apartments were given a nine-year amortization period. Annual rent increases were capped at 6% in New York City and 15% in the rest of the state.

No prior application or approval was necessary for an IAI (unlike for MCI rent increases), and tenant consent to the improvements was required only if the apartment was occupied. Owners could increase the monthly rent by 1/40th of the cost of the improvements in buildings with 35 or fewer apartments and 1/60th in buildings with 36 or more apartments. Tenant advocates note, though, that however severely the new law restricts recoupment, the old law allowed a landlord to recoup costs quickly and then continually earn profit by allowing it to be collected again each month and to collect it in multiples by allowing it to be added to the legal rent, upon which increases were taken.

2. Changes Under the 2019 Law

Under the new law, the recoupment periods for MCIs have been lengthened to 12 and 12 ½ years, respectively; a 2% annual cap has been imposed; and the rent increases are now temporary and must be removed from the rent after 30 years. There is also an element of retroactivity: The 2% cap is made effective to MCI orders granted as early as June 16, 2012. DHCR is required to establish a schedule of reasonable MCI costs and more stringent

10. Rent Regulation Reform Act of 1993 (L. 1993, ch. 253).

11. Figures cited are according to U.S. Census Bureau Housing and Vacancy Surveys conducted in New York City.

rules for improvements, such as excluding cosmetic improvements, imposing energy efficiency requirements, and not permitting MCI in buildings with 35% or fewer rent regulated tenants. DHCR is now directed to inspect and audit 25% of MCI applications.

The new law caps the cost and number of IAIs for the first time, permitting no more than three separate IAIs, with a total aggregate cost of no more than \$15,000.00, within a 15-year period. HSTPA also reduces the increases to 1/168th and 1/180th, respectively.¹² Like MCI increases, IAI rent increases are now temporary; they must be removed from the rent after 30 years. Additionally, owners may raise the rent only if they first remove all hazardous and immediately hazardous violations in the apartment or the building, depending on which increase is sought.

E. Reactions from Landlords and Tenants

Tenant groups and advocates argue that MCI and IAI programs undermine the rent-regulation system—that, at best, IAIs encourage unnecessary or cosmetic improvements that gentrify communities but do not ameliorate the housing crisis. At worst, tenant groups argue, they reward fraud, as landlords take exorbitant rent increases with no oversight over the work or the validity of costs beyond the tenants themselves, who might not know or understand their rights. An additional tenant concern is that landlords use these increases to deregulate stabilized apartments and thus decrease the already scarce affordable housing stock. Similarly, tenants argue that although DHCR approval is required for MCIs, the agency lacks the personnel to do more than rubber-stamp MCIs; that MCIs are for building essentials that should be provided as part of the rent tenants already pay; and that the resulting building-wide rent increases have caused the very hardship and dislocation of tenants and families that rent regulation is intended to prevent.

For example, if the rent for a two-bedroom apartment in a 30-unit building is \$2,000 and the landlord performs \$15,000 in qualifying IAIs while the apartment is vacant, the rent can be raised \$375 to \$2375 (and the apartment could also be removed from rent stabilization at the next vacancy). Tenants argue that a \$375 increase (and for lower-income and rent-burdened tenants, even smaller increases) in the rent represents a hardship, representing a nearly 20% increase in the rent, placing it out of reach to a large swath of people who could otherwise have afforded a \$2000 apartment, and that the rent revenue from stabilized buildings is already a sufficient profit motive without additional rent increases for capital expenditures. According to the RGB's 2019 Income and Expense Study, the profits of the owners of stabilized apartments have increased for 13 consecutive years, reaching

12. IAIs must also be performed by a licensed contractor, and any outstanding hazardous or immediately hazardous violations must be cleared to be eligible for an IAI rent increase. IAIs still do not require prior DHCR approval. DHCR must establish, by June 14, 2020, a centralized electronic retention system to document IAIs.

an all-time average high of \$540 per month from apartment leases in 2017.¹³ Landlords counter that far from reforming the MCI and IAI programs, the new law eviscerates these programs, discouraging landlords from making desperately needed capital infusions into stabilized buildings that can be upward of a century old. Investment in stabilized buildings will be economically unsustainable, landlord groups contend, because landlords will be forced to wait as long as 12.5 years to recoup the cost of MCIs and as long as 15 years for IAIs. Landlords argue that they are already obligated to perform ordinary maintenance and repairs, with no increase in rent, as these were already excluded from IAIs and MCIs, and that they are operating buildings at a loss as the RGB-approved renewal increases since 2015 have hit a 50-year low, with a 1.5% increase for 1-year renewals recently approved by the RGB, despite the RGB's own data reflecting that costs increased by 4.9%.

Landlords caution that the changes to the MCI and IAI programs will trigger a downward spiral of declining property values and dilapidated buildings. The rent stabilization laws do not require that landlords lease stabilized apartments, and some of New York's largest landlords have already threatened to warehouse vacant rent-stabilized apartments because, they allege, HSTPA has limited the profit they can collect from these units. Landlords also cry foul that the retroactive element of the 2% cap unjustly penalizes landlords who relied on then-existing law. They point out that it can already take years for DHCR to decide an MCI application and that HSTPA's approach will delay the process only further, making it even less likely that improvements to the housing stock will be made in the future.

Turning again to the example of the 2-bedroom apartment above, the landlord in a 15-year period could perform no more than \$15,000.00 in improvements, with the landlord's only incentive being a maximum rent increase of \$89.29. At best, it will take an owner 14 years to recoup its costs. Tenant advocates argue (we have heard) that a landlord's return on an investment under the old law was 30% but that even a 1/168th recoupment still amounts to a 7% annual return. For landlord and tenant alike, the amendments to the IAI provisions have created a number of open questions. For example, because rent increases based on IAIs are now temporary, it is unclear whether any IAI increase should be included in the base rent when renewal increases are calculated. Additionally, significant ambiguity remains about the effective date of the new IAI provisions. The Clean Up Bill attempts to clarify the issue by stating that the cap on IAIs applies to the first IAI after June 14, 2019. But it remains unclear whether the costs of improvements already incurred for an apartment in mid-renovation on June 14, 2019, would be counted toward the \$15,000.00 cap or grandfathered in under the prior law.

13. New York City Rent Guidelines Bd, 2019 Income and Expense Study (Apr. 4, 2019), <https://rentguidelinesboard.cityofnewyork.us/wp-content/uploads/2019/08/2019-IE.pdf>.

HSTPA also does not clarify the timing of the requirement that all hazardous and immediately hazardous violations be cleared for an MCI application to be granted. That could be interpreted to require dismissal of the application or simply a delay while the landlord addresses the violation. HSTPA calls for greater scrutiny and DHCR oversight over MCIs and IAIs, including provisions requiring that DHCR set a schedule of costs for MCIs and audit 25% of applications to confirm that the work was completed. HSTPA further requires that all IAIs be reported to DHCR and maintained in a “centralized electronic retention system” so they can be tracked. DHCR must establish systems and guidance for landlords. The New York City Housing Court will ensure that Housing Maintenance Code (and other health-and-safety codes) issues are properly adjudicated and that the warranty of habitability is maintained. Yet neither the Code nor the warranty requires a landlord to provide new fixtures or appliances. Some landlords will not hazard the risk of investing in renovations and new equipment while compliance with the IAI and MCI provisions of rent stabilization remains an uncertain proposition. One potential effect of this part of HSTPA, say landlord advocates, is that it will create a disparity between modern, unregulated housing and older, regulated housing—a market-wide equivalent of the “poor doors” prevalent for low-income residents of luxury buildings.

F. Overcharge Penalties Are Steeper; The “Safe Harbor” Provision Has Been Abolished

A defining feature of the stabilization laws is that DHCR does not, under ordinary circumstances, play an active role in approving or supervising the rents registrations that landlords must file annually. Instead, the stabilization system relies on tenants to exercise their right to file an overcharge claim within the statute of limitations, either as an overcharge complaint before the DHCR, in a plenary overcharge action, or as a defense in a nonpayment or to use and occupancy in a holdover proceeding. The rent-stabilization laws also penalized unscrupulous landlords by allowing tenants to collect treble damages going back two years if the overcharge was found willful. Landlords did not have to defend the rents charged indefinitely. DHCR and the courts were not permitted to examine the rent history beyond four years, subject to exceptions like fraud. Landlords also had “safe harbor” from treble damages if, within the landlord’s time to answer an overcharge claim, the landlord refunded any overcharge and adjusted the rent.

The new law extends the statute of limitations on overcharge claims from four to six years and increases the treble-damages period from two to six years.¹⁴ This extension dramatically increases a landlord’s potential liability for rent overcharges. Although the statute previously made treble

14. As the First Department decided on October 1, 2019, “The Rent Stabilization Code requires that a ‘base date’ be established for calculating the legal regulated rent for an apartment (see 9 N.Y.C.R.R. 2522.6(b)(2)). Generally, the legal regulated rent is the rent registered with . . . [DHCR] for the apartment six years before the overcharge proceeding

damages discretionary, HSTPA provides that treble damages are now mandatory if the overcharge is found to be willful. Similarly, awarding attorney fees, costs, and interest are non-discretionary if a landlord is found to have overcharged a tenant.

The four-year lookback period had become riddled with exceptions even before HSTPA went into effect. But not only does the new law eliminate the lookback period altogether, it directs the court or DHCR to consider all available rent history “reasonably necessary” to their determination. The prior law required owners to maintain their records for four years, moreover, and the new law extends this time period to six years and requires that records of MCI and IAIs be kept indefinitely. An owner’s failure to maintain records triggers an unlimited lookback period.

The safe-harbor provision has also been eliminated, and, for the first time, treble damages might be imposed on a landlord whose rent is proper and whose only failure was not properly filing a rent registration. Under prior law, tenants had the option of filing an overcharge complaint with DHCR or in court. In practice, many courts would rely on the doctrine of primary jurisdiction to relegate these claims to DHCR, where the time to process a complaint can take years. The new law allows tenants to choose their forum and forbids a court to interfere with that choice.

Tenants applaud these changes as long overdue, arguing not only that the existing system of enforcement, which provides for minimal oversight,¹⁵ allows the fox to guard the henhouse, but also that steep penalties are an indispensable deterrent to landlord abuse. Owners condemn the new measures as unjustly punitive, arguing that they cast such a wide net that even unintentional overcharges, based on a misunderstanding of bafflingly complex laws, could meet with harsh sanctions. They also argue that owners that wish to return an unintentional overcharge must do so at significant risk since the safe-harbor exception has been eliminated. Landlords further warn that rent stabilized buildings with problematic or even incomplete rent histories could become toxic assets, avoided by purchasers and lenders alike, given the uncertain potential liability and the high costs of reviewing decades of (sometimes unavailable) rent histories.

On both sides of the fence, the new law has created confusion regarding overcharge claims. The rent-overcharge provisions expressly apply to any claims pending or filed on and after June 14, 2019. In some cases, though, overcharge claims have been pending in DHCR for years. While some courts have held that HSTPA does not extend the statute of limitations for Fair Market Rent Appeals,¹ DHCR has already notified the parties in some pending overcharge cases that pre-date the recent changes to the law that

was commenced (CPLR 213-a).” *Simpson v. 16–26 E. 105, LLC*, 110 N.Y.S.3d 404, 418 n.1 (App. Div. 2019) (discussing HSTPA).

15. DHCR’s Tenant Protection Unit performs audits and investigations to ensure compliance with the rent regulations, but only a small percentage of stabilized units receive that oversight.

they must provide records going back six years. Owners argue that this works an injustice, penalizing them for DHCR's delay and retroactively expanding their liability; that the new law does not increase DHCR's obligation to review or approve landlords' registrations but instead focuses on penalizing imperfection. Landlords fear that HSTPA makes them strictly liable for any deviation from the registration process and rewards tenants even if they are no worse off than if the landlord had complied with the requirements.

Nevertheless, in the wake of HSTPA, many courts have enforced HSTPA in pending overcharge claims over landlords' objections. In *3440 Broadway BCR LLC v. Greenfield*,¹⁶ the Housing Court found that HSTPA applies in a pending nonpayment proceeding and that the statute of limitations or prior case law requiring a showing of fraud did not limit the tenant's discovery request for documents going back 18 years. In *699 Venture Corp. v. Zuniga*,¹⁷ Housing Court relied on HSTPA to grant discovery going back 23 years, although, since 1997, the law required only that records be kept going back four years. The Housing Court determined that, considered together, HSTPA and the amended CPLR 213-a indicate the Legislature's intention that courts and the DHCR review the entire rent history, if necessary, to find the most reliable rent registration.¹⁸ In *Arnold v. 4-6 Bleeker St. LLC*, the Supreme Court had already determined that the Rent Stabilization Law protected the tenants and that the default formula would determine any overcharge, but the court now held that HSTPA mandates that the overcharge calculations be amended to include six years for both overcharge and treble-damages claims.¹⁹ In *560-568 Audubon Tenants Assoc. v. 560-568 Audubon Realty LLC*, the Supreme Court, New York County, on renewal, vacated its prior decision dismissing the complaint and finding that DHCR was better suited than the courts to determine rent-regulation issues, because the action was pending on appeal and HSTPA changed the law relating to primary jurisdiction.²⁰

In one case, the Housing Court invoked HSTPA's expanded lookback period to re-open a case a year after it was settled by so-ordered stipulation, based on a claim that the rent records were unreliable.²¹ In *Fuentes v. Kwik Realty LLC*, however, which the First Department decided after HST-

16. *3440 Broadway BCR LLC v. Greenfield*, 117 N.Y.S.3d 462 (Civ. Ct., N.Y. Cty. 2019).

17. *699 Venture Corp. v. Zuniga*, 105 N.Y.S.3d 806 (Civ. Ct., Bronx Cty. 2019).

18. *Id.* at 811.

19. *Arnold v. 4-6 Bleeker St. LLC*, 2019 N.Y. slip op. 32453(U) (Sup. Ct., N.Y. Cty. 2019).

20. *560-568 Audubon Tenants Ass'n v. 560-568 Audubon Realty, LLC*, 110 N.Y.S.3d 280 (Sup. Ct. 2019) (HSTPA "not only overrules case law holding that DHCR has primary jurisdiction over rent overcharge claims . . . , but it affords tenants their choice of forum. Consequently, as plaintiffs have chosen to have their rent overcharge claims brought in this court, their action may not be dismissed in favor of the claims being heard by DHCR." (citation omitted)).

21. *See, e.g., 3505 Bway Owner LLC v. McNeely*, 2020 WL 425653 (Civ. Ct. N.Y. Cty. 2020).

PA's enactment, the court applied the four-year statute of limitations and the prior law in excusing the landlord's failure to maintain records of an IAI, because "there is no requirement under the statute that such records be maintained indefinitely."²²

A number of Housing Court decisions also limited HSTPA's application and declined to reopen cases already decided.²³ The issue of retroactivity appeared to have been put to rest in *Dugan v. London Terrace Gardens, L.P.*,²⁴ decided in mid-September 2019 by the First Department, less than two months after its decision in *Kwik Realty*. The Court determined that the tenants' overcharge claims should be deemed "pending" under HSTPA and that the expanded statute of limitations should be applied, even though the tenants were granted partial summary judgment on their claims in 2017.²⁵ The First Department in *Dugan* also denied the owner's claim that applying HSTPA violated due process, noting that the Legislature expressly applied HSTPA to pending claims, giving it "an exceedingly strong presumption of constitutionality."²⁶

But on April 2, 2020, the Court of Appeals issued *Regina Metropolitan Co., LLC v. DHCR*, a historic set of decisions in four consolidated cases concerning rent overcharges to rent-stabilized tenants.²⁷ The issue on appeal in *Regina* was the appropriate method for calculating the overcharge liability for apartments improperly removed from rent stabilization during the receipt of J-51 tax benefits, an issue that has been the focus of much litigation since such deregulation was ruled illegal in *Roberts v. Tishman Speyer Properties*.²⁸ When leave was granted to the Court of Appeals, a four-year lookback period applied to overcharge claims absent a showing of fraud, landlords were not required to maintain records beyond this four-year period, and treble damages were limited to a two-year period. However, HSTPA was enacted during the pendency of the appeals, and the tenants argued that the plain language of HSTPA, which provides that it "shall take effect immediately and shall apply to any claims pending or filed on or after the effective date," requires that the expanded six-year statute of limitations and treble-damages period be applied to the their overcharge claims.²⁹ Also at issue was a provision of HSTPA that permits tenants to challenge the entire rental history for an apartment, notwithstanding the

22. *Fuentes v. Kwik Realty LLC*, 106 N.Y.S.3d 306 309 (1st Dep't 2019).

23. *See, e.g.*, 400 E. 58 Owner LLC v. Hernsson, 2019 N.Y. slip op. 50967(U) (Civ. Ct., N.Y. Cty. 2019); *Jefferson LLC v. Antonio*, 108 N.Y.S.3d 314 (Civ. Ct. Kings Cty. 2019). In both cases, the tenant's overcharge claim was dismissed before June 14, 2019. The tenants later sought to reopen their cases after HSTPA's passage. Both courts denied the motions.

24. *Dugan v. London Terrace Gardens*, 177 A.D.3d 1 (N.Y. App. Div. 2019).

25. *Id.* at 8.

26. *Id.* at 10.

27. *In re Regina Metro Co. v. New York State Div. of Hous. & Community Renewal*, Nos. 1, 2, 3, 4, 2020 N.Y. slip op. 02127 (N.Y. 2020) (per curiam).

28. *Roberts v. Tishman Speyer Props., L.P.*, 918 N.E.2d 900 (N.Y. 2009).

29. Housing Stability and Tenant Protection Act of 2019, pt. F, § 7.

four-year record-keeping requirements under the prior law. The landlords countered that, applied retroactively, the expanded liability for overcharge claims under HSTPA is unfair and contrary to fundamental notions of substantial justice under the Due Process Clause.³⁰

A presumption of constitutionality applies to legislation. But a newly enacted law must be supported by “a legitimate legislative purpose furthered by rational means” if its retroactive application is to comport with the requirements of due process.³¹ There must be a “persuasive reason” for the “potentially harsh” impact of retroactivity.³² In reviewing HSTPA’s constitutionality, the *Regina* Court noted that the retroactive period is significant, limited only by the length of the apartment’s rental history, which can go back decades.³³ This potentially large period of retroactivity “upends owners’ expectation of repose relating to conduct that may have occurred many years prior to the recovery period.”³⁴ The Court in *Regina* opined that landlords who reasonably relied on the previous laws to discard records more than four years old would be prejudiced by the retroactive application of HSTPA because those same records would be needed to demonstrate the legality of prior rent increases and that any overcharge was not willful.³⁵ Thus, landlords could be liable under HSTPA for purported historical overcharges that were once supported by documentation.³⁶ Additionally, if a landlord is unable to justify all rental increases, HSTPA provides that treble damages are mandatory for the entire six-year recovery period.³⁷

The Court of Appeals found that, applied retroactively, the enlarged liability imposed by HSTPA impaired real-property rights by diminishing or possibly eliminating the constitutionally protected return on investment that landlords had realized in the past on their property.³⁸ The court concluded that the HSTPA of 2019 did much more than require a party to shoulder a new payment obligation going forward and that there was no indication that the Legislature considered the harsh and destabilizing effect on owners’ settled expectations, much less that they had a rational justification for that result.³⁹ The Court held that the rational-basis standard had not been satisfied and that HSTPA’s overcharge calculation and treble-damages provisions could not be applied retroactively; the overcharges claims had to be decided under the law in effect when the overcharges occurred.² But the Court made it clear that there was no issue with

30. *Roberts*, 918 N.E.2d at 905 n.2.

31. *Regina*, 2020 NY slip op. at *14.

32. *Id.*

33. *Id.* at *3.

34. *Id.* at *15.

35. *Id.*

36. *Id.*

37. *Id.* at *9.

38. *Id.* at *12.

39. *Id.* at *17.

the prospective application of HSTPA's overcharge and treble damages provisions.⁴⁰ It is possible that the Legislature will attempt to address the due process issues noted in *Regina* by amending HSTPA to provide that the potentially harsh consequences of retroactive application are expressly contemplated by the Legislature and are necessary to achieve the legislative objectives of HSTPA. In the meantime, however, the *Regina* decision will lift the cloud that has dampened the market for rent-regulated building since HSTPA was enacted.

III. HSTPA and Landlord-Tenant Law and Procedure

Historically, changes in New York landlord-tenant law focused on the rent-regulation scheme, and much of the clamor surrounding HSTPA has focused on the rent-regulation changes discussed in Part II. Only here and there did the Legislature amend laws pertaining to unregulated units or to adjudication of eviction action and proceedings. HSTPA has changed that history, enacting sweeping and structural changes that are equally deserving of attention, from security deposits to the day-to-day procedures of eviction proceedings and plenary actions in upstate and downstate New York. To the tenants' benefit and the landlords' burden, the Legislature has amended many parts of the Real Property Law (RPL), the Real Property Actions and Proceedings Law (RPAPL), and the General Obligations Law (GOL), starting with how tenancies are created and ending with how tenants may be restored to possession after eviction.

A. Security Deposits And Prepaid Rent Are Limited to One Month's Rent

Although security deposits have long been limited to one month's rent for rent-stabilized tenants, HSTPA amended the GOL effective June 14, 2019, to extend this limit to unregulated tenants statewide. The practice of requiring prepaid rent, typically as the "first and last months' rent," is now prohibited. The broad language of the new limitation includes "advances" as well as deposits. Some landlords argue, however, that with the word "or" in GOL § 7-108 referring to "deposit or advance," first and last months' rent are still allowed, because it is payment for current use and occupancy. The amended GOL now also provides for a mandatory inspection procedure. Landlords must give tenants an opportunity to inspect the premises before they take occupancy. The parties "shall" then execute a written agreement noting any conditions. The law limits the admissibility of this agreement to a tenant's action to recover a security deposit and only as evidence of conditions at the start of the tenancy. Tenants may not use the agreement to establish the existence of violations in an HP (repair) proceeding or to assert a warranty-of-habitability breach in a nonpayment proceeding. Similarly, a landlord may not use the agreement to impeach a tenant's testimony at an abatement hearing asserting a habitability breach. A landlord must again notify the tenant of the right to inspect the premises with the landlord 1-2

40. *Id.*

weeks before the tenant vacates. For a landlord to retain any portion of the security deposit, the landlord must, after the vacatur inspection, give the tenant an itemized statement specifying any repairs or cleaning needed to give the tenant an opportunity to cure the conditions.

Under the former law, landlords had to return a security deposit within a “reasonable time,” meaning a month or two. The law now provides that if any portion of the security deposit is retained, the landlord must provide (1) an itemized statement of the claimed conditions within 14 days after the tenant vacates and (2) any remaining portion of the deposit. A landlord that fails to comply forfeits any claim to the deposit.⁴¹ The new law also narrows what may be withheld from the deposit to include “reasonable” costs due to nonpayment of rent or utility charges, damage beyond ordinary wear and tear, and moving and storage of the tenant’s belongings. Notably excluded are additional rents such as late and legal fees. Landlords have the burden of proof to justify their retention of a security deposit, and the GOL now provides for punitive damages of up to twice the amount of the deposit for any willful violation of its provisions. These changes are welcomed by tenants, who have long flooded the halls of small-claims courts with complaints that their landlords wrongly withheld their security deposits or inflated and fabricated repair costs to retain their deposits. But prospective tenants with no or poor credit history, newcomers to New York, and students enrolled in New York’s many universities might be collateral damage of the new laws. Landlords might be unwilling to rent to them without the additional protection of an increased deposit or prepaid rent. Business reasons often deter landlords from accepting a guarantor rather than security deposits and prepaid rent. Landlords are already testing alternative security measures, such as requiring that tenants provide a bond to ensure payment of rent and a guarantor to pay an additional security deposit. DHCR has issued guidance since HSTPA’s passage prohibiting landlords from demanding that a guarantor “or any third party” pay more than one month’s security,⁴² but this guidance applies only to rent-stabilized tenants. Time will tell whether courts follow the DHCR’s lead in determining that the amended GOL prohibits using these security measures with unregulated tenants.

Landlords maintain that 14 days is too short to inspect the premises, prepare an itemized statement, and return any uncontested portion of a deposit. Landlords also argue that the inspection procedure is unworkable, because HSTPA requires that the landlord and tenant reach an agreement specifying conditions in the premises but provides no guidance about the

41. *See* *Asquith v. Redevelop Albany LLC*, 110 N.Y.S.3d 905 (City Ct., Albany Cty. 2019) (granting tenant’s claim for return of security deposit based on landlord’s failure to provide itemized statement within 14 days of vacatur).

42. N.Y. Div. Hous. & Cmty. Renewal, DHCR Fact Sheet #9 Renting an Apartment—Security Deposits and Other Charges (Oct. 2019), <https://hcr.ny.gov/system/files/documents/2019/10/fact-sheet-09.pdf>.

form or content of the agreement or how the parties can proceed if they cannot agree. The statute requires that the initial inspection occur after the lease is signed, thus binding the parties to a contentious landlord-relationship from its inception. Some landlords will try to avoid this dilemma by holding the inspection before the lease is executed, but that scheduling might cause tenants to avoid raising conditions, rather than risk having the landlord decide not to rent to them. Some landlords and tenants, we hear, are already contracting around GOL § 7-108(c) with language in which the tenant waives this inspection. Landlords also object that the penalties for violating the new law are not limited to failing to return a security deposit but also seem to apply to any lesser violation, such as scheduling the final inspection outside the statute's one-week window, because no distinction is made between security deposits and prepaid rent in imposing punitive damages; moreover, the potential liability could be high. In the case of a foreign resident, for example, in which a landlord requires a year's prepaid rent, this practice could result in liability equal to two years' rent. Under RPL § 235-e, once a tenancy is in effect, a tenant who demands rent receipts must get them. The receipt must include the date, amount paid, premises identified, and period covered. If the payment is made personally, the receipt must be given immediately. If the rent is paid in another manner, the receipt must be provided within 15 days. Once a receipt is demanded, the obligation to provide receipts continues for the life of the tenancy. Landlords must maintain records of cash payments for three years.

B. The Retaliatory Eviction Presumption Has Been Expanded

RPL § 223-b protects tenants exercising their right to complain to governmental agencies, enforce their lease rights, and join a tenants' organization. Before HSTPA, landlords who commenced a holdover proceeding against a tenant within six months of exercising these rights created a rebuttable presumption that the proceeding was commenced in retaliation for the tenant's action. HSTPA expands the scope and enforcement of RPL § 223-b, enlarging the time period during which the presumption applies from six months to a year and extending the presumption from holdover proceedings to nonpayment proceedings and also to "unreasonable" rent increases. Previously, the law covered only complaints of housing-code violations to enforcement agencies. HSTPA now covers habitability complaints, too. And tenant complaints are now protected if they are made to the landlord or its agent. Once a tenant raises a retaliatory-eviction claim, the landlord bears the burden of establishing a non-retaliatory motive for an eviction proceeding or raising rent. The prior law required simply that the landlord provide a "credible explanation." A landlord that fails to rebut the presumption of retaliation can be required to offer a new lease or lease renewal of up to a year with only a "reasonable" rent increase. Additionally, a landlord could be liable for attorney fees if the tenant seeks damages in a civil action.

Tenants applaud the extension of RPL § 223-b. They argue that the former statute assumed, incorrectly, that tenants, including those who do not speak English, were informed of their rights and somehow knew about governmental agencies tasked with enforcing their rights. The reality is that many tenants without heat or hot water know no option but complaining to a landlord. HSTPA now bars unscrupulous landlords from retaliating against these tenants. Similarly, tenants argue that by including complaints of the breach of the warranty of habitability, HSTPA recognized that although the Housing Maintenance Code establishes *minimum* housing standards, New York law affords tenants the broader assurance that the premises be “fit and habitable.”

Opponents of the new statute decry it as a capricious extension of RPL § 223-b that prevents one wrong by perpetrating another. Landlords argue that protections against unethical landlords are warranted but that HSTPA punishes landlords for exercising legitimate rights. By requiring a landlord to prove a non-retaliatory motive for a nonpayment proceeding, HSTPA rejects the notion that not paying rent is inherently a sufficiently non-retaliatory motive to commence a nonpayment proceeding. Landlords also believe that HSTPA will incentivize tenants to make frivolous habitability claims. Under the new law, a tenant might complain about a noisy refrigerator to immunize them against an eviction proceeding for a year. Because a landlord is not always notified of a tenant complaint to a governmental agency, particularly if the complaint does not result in a violation, landlords might also be saddled with a presumption of retaliation if it commences an unrelated eviction proceeding, even if the landlord had no knowledge of the complaint. Landlords argue against what they say is the inequity of a statute that permits a finding of retaliation without knowledge of the conduct against which the landlord is presumed to have retaliated. This inequity flows from an alleged double standard in the new law, which requires only a “good faith” complaint by a tenant, without mandating an equivalent inquiry into the landlord’s “good faith” intent in bringing the eviction proceeding *before* the presumption of retaliation attaches.

Ambiguities abound in the amended RPL § 223-b. The statute provides no guidance about how landlords may rebut the presumption or whether, in addition to the underlying basis for the eviction proceeding, a second non-retaliatory motive is required. It is also unclear what role the timing of the complaint plays in triggering the presumption of retaliation. Will the presumption apply if the tenant fails to pay rent or is guilty of objectionable conduct, but makes a habitability claim before the landlord can commence an eviction proceeding? By requiring only a “good-faith” complaint, the statute focuses on the tenant’s subjective intent in complaining without addressing whether the complaint is objectively valid. Tenants might believe, incorrectly but in good faith, that they are entitled to choose the paint color when the landlord repaints the apartment. Does the tenant nonetheless get the benefit of the presumption of retaliation if the landlord commences a nonpayment proceeding after the tenant withholds rent in objection to the paint color?

Finally, offering a new lease with an “unreasonable” rent increase is now a prohibited retaliation, but HSTPA does not specify a standard or whether the standard should be determined from the perspective of landlord or tenant. Tenants will argue that any increase be limited to a percentage of the current rent, but landlords will retort that it should be set by the market, even if it results in a large increase over the existing rent. The courts will grapple with the amended RPL § 223-b for years.

C. Blacklists Have Been Banned

The abusive use of so-called tenant blacklists in leasing practices has been widely publicized. Blacklists are lists of tenants named as respondents in Housing Court litigation. Landlords have used the lists to screen potential applicants.⁴³ These lists were often misleading; they provided minimal information about the proceeding or its outcome, including whether the tenant essentially prevailed or had a legitimate basis for litigating. Tenant advocates found these blacklists appalling because they came from data compiled and sold by the Unified Court System. HSTPA seeks to curb the use of blacklists by forbidding the denial of a rental application on the basis of past or present landlord-tenant actions or RPAPL Article 7 summary proceedings. A rebuttable presumption arises that HSTPA has been violated if a landlord seeks information from a tenant-screening website or inspects court records. The landlord has the burden to provide an alternative reason for rejecting a tenancy. HSTPA now also forbids the Unified Court System from selling residential tenancy and eviction data. While tenants' reception to the ban has been favorable, tenants are concerned that enforcement will be ineffective. New York's Attorney General has enforcement powers, and using a blacklist carries fines of between \$500 and \$1,000 per violation. But no private cause of action is available. Tenants worry that the AG's resources will be insufficient to stop what they believe is the widespread use of blacklists. Additionally, tenant advocates complain that blacklists will still apply out-of-state. In the meantime, landlords have voiced their concern that HSTPA has hamstrung them from filtering prospective tenants who have histories of objectionable behavior or who chronically fail to pay rent.

Landlords also argue that HSTPA blindfolds from examining information regarding potential threats or nuisances that tenants may pose to other tenants while exposing them to liability to other occupants if the tenant deals drugs from the apartment, throws loud parties late at night, sets fires in the building, or is hostile to neighbors. Furthermore, landlords argue that nothing is wrong in refusing a tenant based on past defaults in paying rent. To the extent that the blacklist ban addresses real abuses, landlords maintain that HSTPA has provided a remedy ill-fitted to the problem and

43. See, e.g., GERALD LEBOVITS, THE USE OF TENANT SCREENING REPORTS AND TENANT BLACKLISTING—2019, N.Y. St. Bar Ass'n (2019), https://works.bepress.com/gerald_lebovits/345.

that a better solution would have permitted using records of holdover proceedings if the tenant was evicted for objectionable conduct or a judgment was entered against a tenant in a nonpayment proceeding without a finding that the tenant was entitled to an abatement. HSTPA was intended to protect tenants involved in Housing Court disputes because they needed repairs. But its actual effect, landlords say, is to prevent them from considering court records showing that the tenant was evicted for illegal activity or other legitimate reasons.

*D. Notice Is Now Required to Raise the Rent for Unregulated Apartments;
New Time Periods to Terminate Month-to-Month Tenancies*

Prior to HSTPA, a month-to-month tenancy could be terminated with a 30-day notice. If a tenant held over at the end of a fair-market lease, a proceeding could be commenced without a predicate notice if no rent was accepted after the lease expired. HSTPA amends the RPL to require that if a residential landlord does not intend to renew a lease, or intends to raise the rent by 5% or more, the landlord must notify the tenant of the rent increase or vacate date. The notice required is determined by the length of the tenancy or occupancy: up to a year, the tenant must be given 30 days' notice; between a year and two years, the tenant must be given 60 days' notice; and two years or more, the tenant must be given 90 days' notice. If a landlord fails to provide the notice, the tenancy will continue on the same terms until the proper notice is given and the required time passes.

In New York City, delivery of the notice must be made by service under RPAPL 735.⁴⁴ HSTPA does not set forth a service requirement outside New York City, but some landlords will deem it prudent to effectuate RPAPL 735 service to avoid motion practice on the issue. Under current and prior law, New York City tenants are not required to provide written notice before vacating. Outside New York City, a tenant must give a month's notice to terminate a month-to-month tenancy, but the notice need not be in writing. The effective date for these provisions is October 12, 2019.

In *64 Van St, LLC v. Cuevas*, the tenant was given a 30-day notice to terminate, despite having been a tenant since 2007. The landlord argued that it acquired the building in 2019 and that the court should look at the length of the landlord-tenant relationship between the specific parties in determining the proper notice period. Housing Court held that the duration of the tenancy controls and dismissed the proceeding.⁴⁵ Similarly, in *Sukaj Group LLC v. Malleve*, the proceeding was dismissed after Housing

44. See N.Y. REAL. PROP. LAW § 232-a (noted after statute in Dan M. Blumenthal, *Practice Commentaries* (2018)).

45. *64 Van St, LLC, v. Cuevas*, Nio. L&T 68907/19, 2020 N.Y. slip op. 20079, 2020 WL 1239933 (Civ. Ct. Queens Cty. 2020).

Court found that the tenancy was more than two years old and, thus, that a 90-day notice should have been served instead of a 30-day notice.⁴⁶

Some landlords and tenants are using their right to contract to waive or modify RPL § 232-b with lease clauses allowing tenants to terminate their tenancies with at least two months' written notice. Landlords, particularly smaller landlords, complain that the new law forces them to choose between regaining an apartment and receiving rent. It is common for a tenant served with a termination notice not to pay rent. If a 90-day notice is required, the rent will not be paid for the next three months. Given HSTPA's other provisions, in which tenants have a right to adjourn a proceeding, it might be five months or more in some parts of New York before a landlord can seek a deposit of prospective rent. As to the five months not paid, a landlord might obtain a money judgment, but it might be from a judgment-proof tenant. Landlords will still be able to bring a nonpayment proceeding, but landlords argue that this adds to the burden and expense of removing tenants.

*E. Expanded Tenants' Protections and Amendments to the RPAPL Increase
Pauses Before, During, and After Eviction Proceedings*

1. Pauses Getting to Court

Changes to the RPL expand the notice requirements to terminate month-to-month tenancies and provide significant notice requirements for unregulated tenants. But HSTPA simultaneously passed comprehensive reforms to the RPAPL, the statutory authority governing summary eviction proceedings. The Legislature enacted these pauses (landlords might call them "delays") to prevent evictions or to slow them down — or at least to postpone the life-crushing consequences of an eviction. Before HSTPA, service of a holdover petition had to be made 5–12 days before the first court appearance. As amended, RPAPL 733 provides that holdover proceedings must be made returnable 10–17 days after the petition is served. Additionally, HSTPA eliminated the provision of RPAPL 733 that permitted a landlord in a holdover proceeding to demand an answer 3 days before the initial court date if the petition was served at least 8 days before the trial date. Landlords argue that this hollows out the operating assumption of summary proceedings. Although already rare in practice before HSTPA, the RPAPL provided that a summary proceeding could go to trial on the first court appearance. But the summary nature of a proceeding is undermined if the landlord does not have a meaningful opportunity to review the answer and prepare for trial. The practical effect is that tenants will receive an automatic adjournment of the first court appearance.

HSTPA has similarly enlarged time periods in nonpayment proceedings. Previously, if a tenant did not pay rent, RPAPL 711 required that the tenant be given a written three-day rent demand or an oral demand (an

46. Sukaj Grp. LLC v. Mallia, No. 47685/19, 66 Misc.3d 1223 (A) (N.Y. Civ. Ct. Bronx Cty. 2020).

oral demand did not have to give 3 days) before a landlord could commence a nonpayment proceeding. HSTPA amended RPAPL 711 to abolish oral rent demands and to increase the notice period for written rent demands to 14 days. HSTPA also amended RPL § 235-e to require that tenants be notified, by certified mail, if rent is not received within 5 days of the due date. If the landlord fails to serve this reminder notice before commencing a nonpayment proceeding, a tenant may raise that failure as an affirmative defense. RPAPL 732 has also been amended to increase from 5 to 10 days the time tenants have to answer a nonpayment proceeding. And if the tenant defaults in answering, the court still has the discretion to stay issuance of the warrant for 5 days.

It is also unclear whether the rent demand must give the new “reminder” notice in. Until the courts resolve the matter, conservative landlord-side practitioners will conclude that they should do so (to avoid motion practice). The practical result is that a rent demand can be made no earlier than the fifth day after the rent is due. Assuming that rent is due on the first, this would be the sixth day. Under prior law, a landlord could make an oral rent demand and serve a nonpayment petition the next day. Now there will now likely be a nearly 3-week delay when the time to effect service is added to the 14 days’ notice required for a rent demand. Accounting for the additional 10 days a tenant has to answer the petition and, in New York City, the additional 3–8 days before the initial court appearance, another month’s rent will come due before the parties ever get to court. Landlords complain that every tenant knows without being reminded that rent is due on the first of the month and that a “reminder” notice serves no function other than to graft a mandatory five-day grace period onto every New York lease. Landlords also complain about the cost of the required mailings.

Landlord advocates additionally contend by requiring that notice be issued by a landlord or agent “authorized to receive rent,” HSTPA appears to preclude a landlord’s attorney from giving notice. Additionally, HSTPA is silent about whether a reminder must be sent each month that rent is late or whether a single reminder for a number of months of arrears will suffice.

Tenant advocates offer that lengthening the time necessary to commence a nonpayment proceeding gives tenants living paycheck to paycheck time to pay rent arrears and perhaps avoid a nonpayment proceeding altogether. If a tenant has difficulty paying rent, missing work to make a court appearance is counterproductive, too. The reminder notice further alerts tenants before a proceeding is started if their rent check was lost in the mail or received and not accounted for by the landlord’s managing agent.

Commercial landlords respond that these arguments might be relevant for residential tenants but have no bearing in the commercial context. They say that a reminder notice should not be required for a commercial tenant (and the statute does not state that the reminder is required only for residential tenants) and that although a residential tenant paying \$1,500 a month will benefit from a slower eviction process, the landlord of a commercial tenant paying \$150,000 a month should not be forced to wait until

\$300,000 in arrears accrues before their first court appearance. Landlords argue that this issue pervades much of HSTPA. Many policy objectives underlying the new laws are irrelevant to commercial tenants; businesses are less vulnerable to an imbalance in bargaining power, and evicting a business poses less of a societal concern than evicting a family. But HSTPA, business interests argue, fails in many instances to draw a meaningful distinction between residential and commercial matters. HSTPA has also opened the floodgates to competing interpretations by providing that the failure to give a rent-reminder notice may be raised as an affirmative defense but giving no guidance about its application or consequences. On its face, HSTPA suggests that the mere failure to remind a tenant of a pre-existing, contractual obligation waives forever the obligation to pay rent, a draconian result. It could also act as a procedural bar, much like a failure to make a proper rent demand will result in a dismissal of the proceeding without prejudice to a landlord's ability to recover rent once the reminder is given. Alternatively, the affirmative defense, if established, could result in the landlord's being barred from recovering rent in a summary proceeding, but the claim could be asserted in a plenary action. Some landlords, however, are positing that the New York State Legislature has not prohibited modifications to RPL § 235-e. They are using their right to contract to waive or modify that section.

Additionally, RPAPL § 711 previously provided that if (1) a tenant died during a term of the lease and the rent had not been paid, (2) no representative or person has taken occupancy, and (3) no administrator or executor had been appointed within three months of the tenant's death, a proceeding could be commenced against a surviving spouse or, if none, then a surviving issue or distributee. HSTPA provides that when a tenant dies, rent is not paid, and the apartment is occupied by a person with a claim of possession, a proceeding may be commenced naming the occupants of the apartment seeking a possessory judgment against the estate. Entry of the judgment shall be without prejudice to the occupants' possessory claims, and any warrant shall not be effective against the occupants. Any succession claim will be litigated in a holdover proceeding.

2. Pauses in Court

HSTPA has altered the pace of summary proceedings by reforming the limits and disincentives to adjournments. Before HSTPA, RPAPL 745 discouraged excessive adjournments. It provided that after two adjournments by the tenant, or 30 days, the court was required to direct a tenant to deposit rent or use and occupancy that had come due since the petition was served. While often disregarded in practice, the law also limited adjournments to a maximum of 10 days, except with the parties' consent. RPAPL 745 has been amended to provide that an application for a rent deposit cannot be made until a tenant's second request for an adjournment or until the proceeding has been on the calendar for 60 days, where no delay is attributable to a landlord. The 10-day limit for adjournments has been replaced with

a 14-day minimum. The first request for an adjournment by a respondent unrepresented by counsel does not count toward the 60-day limit, likely extending as a practical matter the minimum to 90 days or more. And although a court was required to grant use and occupancy under the prior law if the conditions were met, doing so is now discretionary.

Another change to RPAPL 745 that will generate pauses is that HSTPA has eliminated the practice of making an oral application for a rent deposit or use and occupancy. A written motion is now required. That mandate creates the potential for additional adjournments of the motion itself and to brief the motion, in addition to any time a court takes to decide the motion. Furthermore, rent-deposit orders are prospective, requiring payment only of rent and use and occupancy accruing after the order issues. The tenant may not be required to pay any rent already due or which accrues while the motion is pending.

A tenant or occupant can also defend against a rent deposit application by raising one of the following grounds or defenses: (1) the petitioner is not a proper party to the proceeding; (2) actual, partial, or constructive eviction if the tenant has vacated the premises; (3) a Social Services Law § 143-b (Spiegel Law) defense; (4) a hazardous or immediately hazardous Housing Maintenance Code violation in the apartment or the building's common areas; (5) a colorable rent-overcharge defense; (6) the apartment violates the certificate of occupancy or is illegal under the Multiple Dwelling Law or Housing Maintenance Code; or (7) the court lacks personal jurisdiction over the tenant or occupant.

The new law has greatly reduced, if not eliminated, the penalties for a respondent's failure to comply with a rent-deposit order. Under prior law, if the tenant failed to comply with a rent-deposit order, the court could dismiss the tenant's defenses and counterclaims and grant the landlord a money and even possessory judgment. Under HSTPA, a tenant's defenses or counterclaims are no longer stricken and no judgment may be granted. At the court's discretion, the tenant's time to comply may be extended for good cause, or the court may refer the matter for an "immediate" trial. Still, the urgency suggested by the word "immediate" is belied by HSTPA's statement that this means only that there will be no further adjournments at the respondent's sole request and that the case shall be assigned to a trial-ready part with the trial to commence "as soon as practicable."⁴⁷ In reality, the "immediate" trial might be held weeks or months later.

In setting the use and occupancy or rent to be paid, a court may not exceed the regulated rent or the tenant's share under a subsidy program (in effect or expired) unless the tenant has entered into a new agreement to pay the full rent. If the tenant or occupant is on a fixed income, the amount required to be deposited may not exceed 30% of income. Department of Social Services (DSS) and other government housing subsidies are not considered income under this section.

47. See, e.g., 151 Realty LLC v. Alava, 110 N.Y.S.3d 83, 840 (Civ. Ct., Bronx Cty. 2019).

Tenants welcome the amendments to RPAPL 745. They are necessary, they argue, because the prior law thwarted tenants' basic right to invoke the warranty of habitability and to withhold rent to compel urgent and necessary repairs to their apartments. The prior law was unjust, they argue, in that it required tenants exercising the right to withhold rent to begin paying rent soon after they began to withhold it, eliminating their only leverage to compel their landlords to fix uninhabitable apartments. Landlords maintain that RPAPL 745 has been eviscerated. They argue that the bar has been set too low for tenants, who are required only to show that the defense has been "properly" raised, and that the qualifying grounds to defeat a rent-deposit application now encompass nearly all the defenses that tenants typically raise. They contend, furthermore, that landlords have little reason to invoke

RPAPL 745. Even if a landlord gets a rent-deposit order after months and motion practice, HSTPA penalties will be insufficient to compel tenant compliance. Landlords also note that, although the amendments to RPAPL 745 are geared toward residential tenants, the amended RPAPL 745 conflates residential and commercial tenancies, arguably overlooking essential differences relevant to the law's core objectives. The nature of a commercial tenant's relationship to their commercial premises is different from the relationship residential tenants have to their homes, and commercial tenants need less protection. By not compelling commercial tenants to pay rent accruing during the pendency of a proceeding, HSTPA allows commercial tenants to weaponize summary proceedings against commercial landlords. Landlords emphasize the injustice of the Legislature's favoring the tenant's business interests over the landlord's business interests. Some landlords are positing that the Legislature has not prohibited modifications to RPAPL 745 and are modifying their leases accordingly. Whether these lease terms are valid remains to be seen.

3. Pauses at the Close of Eviction Proceedings

Under prior law, if a landlord won a holdover proceeding based on a lease breach against a New York City residential tenant, the tenant had an automatic stay for 10 days under RPAPL 753 to cure the breach. The courts were also empowered to stay the issuance of the warrant for up to 6 months. HSTPA revised RPAPL 753 to expand to 30 days the automatic post-trial period on breach-of-lease holdovers. It also doubled the length of the discretionary stay to one year and made it available for nonpayment proceedings across New York State.

In exercising its discretion to stay an eviction, the courts may now consider a number of factors, including health, exacerbation of an ongoing condition, a child's enrollment in school, and any other extenuating circumstance affecting the ability of the applicant or the applicant's family to relocate and maintain quality of life. In determining whether to grant the stay or in setting the length or other terms of the stay, a court is also required to consider any substantial hardship that the stay might impose

on the landlord. The prior law carved out exceptions to the court's authority to grant the stay if the landlord intended in good faith to demolish the building and build a new one, or if the landlord established that the occupant is objectionable. HSTPA eliminated the demolition exception, but the exception for objectionable occupants remains. The stay must be conditioned on payment of the amount that will come due during the stay, but HSTPA permits payment by installment. The prior iteration of RPAPL 753 made mandatory the payment of all rent unpaid before a stay could be granted. The amended RPAPL 753 makes this requirement discretionary.

Before HSTPA, the law did not address a tenant's payment of all or some portion of the rent on the disposition of a nonpayment proceeding. By conditioning a New York City stay on the respondent's payment or deposit of the judgment amount prior to execution of the warrant, however, RPAPL 747-a limited the courts' discretion in a nonpayment proceeding to stay issuance or execution of a warrant of eviction or re-letting the premises. HSTPA repealed RPAPL 747-a and enacted RPAPL 731(4), which provides that if a tenant pays the full amount of rent due to the landlord "prior to the hearing of the petition," the payment "shall be accepted by the landlord and renders moot the grounds on which the special proceeding was commenced."

Many landlords view this as codifying the practice in many courts. Courts generally dismissed these cases, or the parties discontinued them. Nonetheless, landlords question the application of the provision and whether it permits a tenant to make payment before the first court appearance or any later court appearance and whether a tenant must pay the petition amount or the amount that has accrued at the time of payment. That provision must also be considered in conjunction with the amendments to RPAPL 702, which redefines "residential rent" narrowly to exclude fees, charges, and other penalties.

Some argue that although HSTPA precludes a demand for attorney fees allegedly due prior to the proceeding, attorney fees incurred in connection with the proceeding itself are still recoverable. Others argue that because RPAPL 702 provides that "[n]o fees . . . other than rent may be sought in a summary proceeding," a landlord is relegated to a plenary action to recover its attorney fees. Some courts, we hear, allow attorney fees in a separate, nonpossessory money judgment. Other courts, we are told, believe that landlords may not seek attorney fees in a summary proceeding but that tenants may. Still other courts, we understand, believe that attorney fees may not be awarded as part of a claim or counterclaim but only when fashioning an equitable remedy to restore a tenancy after an eviction or in the context of sanctions. No published opinion has yet addressed these important questions. And RPAPL 702 provides that attorney fees may not be granted on a default judgment, even when a respondent is served personally. This aspect of HSTPA might lead landlords to eliminate from their leases the right of a prevailing party to collect attorney fees. It might also cause landlords to bring plenary ejectment actions, in which attorney fees may be sought and (for market tenancies) be part of a possessory judgment.

RPL § 238-a now limits late fees to 5% or \$50, whichever is less. Fees for background checks are limited to \$20 or the actual cost, whichever is less, and the landlord is required to give a tenant a copy of the background check and a receipt for payment and may not charge a fee for a background check if a tenant provides a copy of a background or credit check less than 30 days old. Controversies abound over this new rule, because background checks exceed \$20 and because the courts must resolve whether a third party like a real-estate broker may accept fees that a landlord may not accept.

Landlords fear that if a residential tenant can pay the rent sought in the petition after many court appearances and many months into the proceeding, and thereby avoid both eviction and any late fees, interest, or legal fees incurred by the landlord in prosecuting the proceeding, they will effectively become interest-free lenders to tenants. The inequity of the situation will be exacerbated if tenants successfully argue that RPAPL 731(4) requires that the tenant pay only the petition amount. That limitation would force landlords to commence another proceeding to recover rent arrears that accrued while the first proceeding was pending. Although the exclusion of attorney fees applies only to residential tenants, if a commercial tenant in a nonpayment proceeding pays rent under RPAPL 731(4), the landlord may lose its claim for attorney fees because the matter was not litigated to conclusion, such that the landlord can claim to be the prevailing party, a requirement to recover attorney fees.

Before HSTPA, RPAPL 749 provided that the issuance of a warrant of eviction operated to cancel the lease and annul the landlord-tenant relationship, depriving the court of the authority to vacate the warrant. The issuance of a warrant of eviction no longer annuls the tenancy. The court may, for good cause, stay or vacate a warrant, stay reletting or renovation, and restore a tenant to possession unless the landlord establishes that the tenant withheld in bad faith the rent due. And, profoundly, the new RPAPL now requires vacatur of the warrant if the tenant pays everything prior to execution. RPAPL 749 now also changes the marshal's notice of eviction from a 72-hour notice to a 14-day notice, thus giving tenants more time to move before an eviction and more time to file an order to show cause to stay an eviction.

4. Residential Landlords Now Have a Duty to Mitigate

Before HSTPA, landlords did not have an obligation to mitigate damages if a tenant broke the lease by vacating early. Following time-honored precedents like *Holy Properties Ltd., L.P. v. Kenneth Cole Productions, Inc.*,⁴⁸ New York courts permitted landlords to leave the apartment vacant for the remainder of the lease. The tenant would be liable for rent through the end of the term. HSTPA now provides in RPL § 227-e that landlords of residential units must "in good faith and according to the landlord's resources and abilities, take reasonable and customary efforts to rent the premises at

48. *Holy Props. v. Cole Prods.*, 661 N.E.2d 694 (N.Y. 1995).

fair market value or at the rate agreed to during the tenancy, whichever is lower.⁴⁹ Any lease provision to the contrary is void as against public policy.

Landlords and tenants speculate about the standard courts will apply to determine whether a landlord has exercised a “reasonable and customary effort.” With HSTPA’s recent passage, no frame of reference determines what constitutes a “customary” effort at mitigation. It is an open question whether a landlord must accept a prospective tenant’s first rent offer or whether it is reasonable to continue to market the property to obtain a higher rent if doing so will cause the apartment to remain unrented. In the case of rent-stabilized tenancies, it also remains to be seen whether, given that a preferential rent becomes the maximum rent that can be charged, it is reasonable for a landlord to delay renting an apartment to avoid becoming locked into a long-term tenancy at a reduced rate.

It is similarly unclear what impact a landlord’s failure to carry the burden of proving damages has on a tenant’s liability. A court could find that a landlord’s failure to carry the burden excuses the tenant from all liability, or the tenant could be excused from only that portion that accrued before the landlord re-rented the unit.

Landlords and tenants are divided on the fundamental fairness of RPL § 227-e. Landlords argue that HSTPA has turned the tables on a bedrock assumption negotiated into every residential New York lease for decades. The Court of Appeals made the case against a mitigation rule twenty-five years ago in *Holy Properties*, stating in that commercial case that “[p]arties who engage in transactions based on prevailing law must be able to rely on the stability of such precedents. . . . This is perhaps true in real property more than any other area of the law, where established precedents are not lightly to be set aside.”⁵⁰

Tenants point to the injustice of a tenant’s rent continuing to accrue each month even though the tenant is no longer in possession, while landlords need do nothing to reduce the tenant’s financial burden. At a time in New York when there is an affordability crisis, tenants say that the new mitigation rule advances New York’s overarching housing policy goals. The rent arrears owed to a prior landlord will make it even more difficult for a tenant already in financial distress to find housing. This perpetuates the cycle of dislocation whose elimination is central to HSTPA.

5. Landlords May Be Less Willing to Settle Garden-Variety Cases

Most landlord-tenant disputes are resolved through “hallway justice,” when the parties reach an agreement on settlement terms before the case reaches trial. This is often the parties’ pragmatic decision to avoid the cost, delay, and uncertainty of going to trial. Courts encourage settlements; they lack the resources to try every landlord-tenant case. An essential feature of many settlement agreements is that the tenant consents to a judgment of

49. NY REAL PROP. LAW § 227-e.

50. *Holy Props.*, 661 N.E.2d at 696.

possession and the issuance of a warrant of eviction to enforce the tenant's agreement to resolve the claimed default. This process allows the landlord promptly to recover possession if the tenant violates the terms of the agreement. Rather than go back to court on a motion to enforce the agreement, the landlord can notify the marshal of the default, and an eviction will be scheduled.

HSTPA, however, has revised RPAPL 749 to require that warrants state the first date on which an eviction can occur, with the result that the "pay out" stipulations used to resolve many nonpayment proceedings must now provide for execution of the warrant on the last payment date (or such earlier date specifically approved by the court), rather than the first payment date, as was the common practice. Under the new law, if the tenant fails to make an earlier payment, the landlord must return to the court to request enforcement of the agreement and accelerate execution of the warrant. It remains to be seen whether the increased costs and pauses in enforcing settlement agreements will discourage landlords from entering into these stipulations. And that will slow the rate of settlement and inundate court calendars. Given HSTPA, some courts outside New York City now allow a landlord's attorney to submit a letter, on notice to the tenants or their attorney, specifying the default, and then the court issues the judgment and warrant without further appearances. And the state court system is struggling to account for eviction dates for default judgments, for which no stipulation of settlement can provide an eviction date.

The revised RPAPL 749 also provides that a warrant permits eviction only of persons "named in the proceeding." In many cases, occupants' identities are unknown to the landlord and cannot be ascertained. That uncertainty has led to the nearly universal practice of naming a "John Doe" or "Doe #1" in a summary proceeding to account for unknown occupants or known but unnamed occupants. HSTPA's ramifications on the practice of naming "Doe" respondents is unclear — what will happen when a marshal or sheriff will evict name someone not named at all? — but landlords might now provide for heightened surveillance of the people entering and leaving their buildings so they can now name the occupants' children in the eviction petition and warrant. This process raises privacy concerns the Legislature did not intend.

To make sure that landlords comply with HSTPA, a new RPAPL 768 makes unlawful evictions a Class A misdemeanor throughout New York State. This rule carries a criminal connotation and civil penalties from \$1,000.00 to \$5,000.00 per violation. Conduct constituting an unlawful eviction includes using threatening force; interfering or intending to interfere with an ability to use the dwelling; and engaging or threatening to engage in any conduct that prevents or is intended to prevent an occupant from lawful occupancy or to induce vacatur of lawful occupant. If there is a determination that an unlawful eviction occurred, the occupant must be restored to possession.

6. Cooperatives: The Unwillingly Protected

Cooperatives have been among HSTPA's most vocal opponents, because HSTPA makes no distinction between tenants in a traditional landlord-tenant relationship and shareholders who are the proprietary lessees of apartments in which they have an ownership interest. Like other tenants, shareholders must get 30–90 days' notice under RPL § 226-c if the coop board intends to raise maintenance by more than 5%. A shareholder who fails to pay maintenance must be given a RPL § 235-e reminder notice. Failure to provide this notice gives rise to an affirmative defense for the shareholder, with all the open questions and issues associated with this new provision. If a shareholder fails to pay maintenance, the courts may grant a stay of eviction for up to a year, a potential hardship to buildings that rely on maintenance fees to pay a mortgage, real-estate taxes, and other expenses to maintain a building. Boards are also concerned that they might be limited by the maximum of 5% or \$50 for late fees under RPL § 238-a. Similarly, the automatic post-trial period under RPAPL 753 on breach-of-lease holdover proceedings applies to shareholders, extending the time period neighbors must deal with odors, noise, or dangerous or illegal conduct, even if management has been successful in proving that the shareholder's conduct is objectionable. And, like any other landlord, boards are now arguably unable to recover their attorney fees in a summary proceeding. Similarly, because of the new definition of "rent," many cooperatives will likely opt to revise their bylaws to remove additional rents unrecoverable in a summary proceeding under HSTPA. Moreover, coop disputes will be increasingly heard in Supreme Court ejectment actions (in which added rent and attorney fees may be sought) and *Pullman* actions (in which the court might enforce a board vote to evict a shareholder).⁵¹ Other provisions that seem likely to have been intended for traditional tenants, but which also cover cooperatives, include restrictions on taking more than one month's maintenance as a security deposit or requiring prepaid maintenance, both of which the amended GOL now prohibits.

IV. Conclusion: *De Facto* Rent Regulation for Fair Market Tenants, Unending Pauses Predicted for Housing Courts—Landlords Warn of Dire Consequences and Financial Ruin for Small Landlords; Tenants Call it a Step in the Right Direction

Many landlords claim that HSTPA's new laws, from the expanded notice requirements and the anti-retaliation provisions of RPL § 223-b to the courts' broad discretion to grant a stay of up to a year and the lengthy delays under the revised RPAPL, create a form of *de facto* rent regulation for unregulated apartments. The aggregate impact of the many pauses

51. 40 W. 67th St. v. Pullman, 790 N.E.2d 745 (N.Y. 2003); 13315 Owners Corp. v. Kennedy, 782 N.Y.S.2d 554 (Civ. Ct., N.Y. Cty. 2004); London Terrace Towers, Inc. v. Davis, 790 N.Y.S.2d 813 (Civ. Ct., N.Y. Cty. 2004).

HSTPA created is that many landlords will be unable to traverse a summary proceeding from commencement to warrant in less than a year. This, according to landlords, is an optimistic approximation when the court's nearly unlimited discretion to grant a year-long stay is factored in. HSTPA takes the pauses endemic to the system and makes it a defining, central feature of the eviction process itself.

In the past, the daunting prospect of late and legal fees, as well as a black mark next to the name of a tenant when renting in the future, deterred a tenant's capitalizing on systemic delays. These inherent safeguards have been swept away, landlords say. A tenant will likely face no late or legal fees, even if the tenant loses decisively in court after a protracted legal battle, and future landlords are now barred from basing leasing decisions on blacklists.

Institutional landlords may be able to withstand HSTPA's rules, but small landlords might not. Devastating consequences can befall small landlords deprived of rental income that they need to offset the financial burden of a mortgage, taxes, insurance, utilities, and the many costs of property ownership. Small landlords warn that the net effect of these laws will undermine the summary nature of summary proceedings. Summary proceedings were originally enacted to replace the common-law ejectment action, an expensive and dilatory proceeding that can lead to denials of justice. And whereas good-government advocates prefer simple, quick, and inexpensive litigation, landlord advocates worry that HSTPA has turned landlord-tenant litigation into an even more complex, time-consuming, and expensive debacle.

HSTPA's supporters, on the other hand, argue that a landlord will still be able to obtain a judgment for arrears owed, even if obtaining the judgment is postponed. With close to 70,000 homeless in New York City alone, two-thirds of whom are families, and the steady, year-by-year hemorrhaging of rent-stabilized apartments through deregulation, estimated to be approximately 170,000 to date, tenants believe that HSTPA's additional protections are a small but necessary bulwark against New York's housing-affordability crisis. Landlords respond that mitigating the housing affordability crisis is a worthwhile goal, but one that rests with the state of New York to achieve, and that HSTPA abdicates state responsibility for creating affordable housing. Landlords wonder whether the same concern shown for tenants' financial struggles will apply to them if they default on their mortgage. And, in response, tenants say that, some way, somehow, landlords will find a way to make money in New York real estate. They always have.

