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TEACHING AN OLD POLICY NEW TRICKS: THE 421-A TAX PROGRAM AND THE FLAWS OF TRICKLE-DOWN HOUSING

*Seth B. Cohen**

INTRODUCTION

In his 1890 tenement housing exposé *How The Other Half Lives*, journalist and photographer Jacob Riis remarked:

> There are three effective ways of dealing with the tenements: By law. By remodeling and making the most out of the old houses. By building new, model tenements. Private enterprise . . . [m]ust do the lion's share under these last two heads . . . [but t]he State may have to bring down the rents . . . [b]y assuming the right to regulate them . . . .[1]

Despite decades of legislation, the challenge of affordable housing remains a hallmark of living for New York City ("City") residents who earn low-income wages.[2] Riis' concerns over housing

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[1] JACOB RIIS, HOW THE OTHER HALF LIVES 223–24 (Courier Dover Publications 1971) (1890), *available at* http://www.yale.edu/amstud/inforev/riis/chap25.html.

[2] Various state and federal programs have different definitions of "low-income." The federal government generally defines "low-income" as 80% or less of the Area Median Income ("AMI"). Public Health and Welfare Act § 10, 42 U.S.C. § 12704 (1994). The AMI for the New York City area is currently

were mainly those of overcrowding and substandard conditions.[3] Today, though, unaffordability is the chief concern for housing advocates.[4] Statistics demonstrate the sobering fact of the City's high cost of living: At the most general level, New York City ("City") is ranked 9th highest in a nationwide survey of monthly rental costs ($909 per month), but a substantial portion of the population has difficulty paying their rental bill because the City's median household income is only $43,434.[5] Additionally, more than half of City households spend over 30% of their income on housing,[6] but for renters, the situation is even more serious; almost one-third of all City families that rent their homes spend over 50% of their income solely on housing.[7] For those earning low-income wages, the problem is only intensified: among this group of renters,

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$70,900 for a four-person family; low-income for a four-person family is approximately $56,700. *See* DEP'T OF HOUS. & URBAN DEV., FY2006 NEW YORK INCOME LIMITS 1, http://www.huduser.org/Datasets/IL/IL06/ny_fy2006.pdf [hereinafter HUD, NEW YORK].

[3] *See* RIIS, *supra* note 1, at 1.

[4] *See, e.g.*, HOUSING HERE AND NOW, LOSING GROUND: HOW MIDDLE CLASS, WORKING AND POOR NEW YORKERS ARE BEING PRICED OUT 5 (2007), *available at* http://www.newyorkisourhome.org/LosingGroundReport.pdf. ("There is no doubt that New York City is in the midst of a housing affordability crisis."); OFFICE OF THE NEW YORK CITY COMPTROLLER, POLICY BRIEF: OVERVIEW OF SECTION 421-A HOUSING SUBSIDY DISTRIBUTION 2 (2006), *available at* http://www.comptroller.nyc.gov/press/pdfs/05-23-06_policy_brief_421a.pdf. [hereinafter COMPTROLLER, OVERVIEW] ("New York faces a very serious housing affordability crisis.").

[5] NEW YORK CITY RENT GUIDELINES BD., 2007 INCOME AND AFFORDABILITY STUDY 6 (2007), *available at* http://www.housingnyc.com/downloads/research/pdf_reports/ia07.pdf.

[6] THE CITY OF NEW YORK, PLANYC REPORT 18, *available at* http://www.nyc.gov/html/planyc2030/downloads/pdf/report_housing.pdf [hereinafter PLANYC]. "The generally accepted definition of affordability is for a household to pay no more than 30 percent of its annual income on housing." *See* Housing and Urban Development, Community Planning & Development, Affordable Housing, http://www.hud.gov/offices/cpd/affordablehousing (last visted Apr. 14, 2008).

[7] DR. MOON WHA LEE, NEW YORK CITY DEP'T OF HOUS. PRES. & DEV., SELECTED FINDINGS OF THE 2005 NEW YORK CITY HOUSING AND VACANCY SURVEY 7 (2005), *available at* http://www.housingnyc.com/downloads/research/hvs05/05summary.pdf.

the majority of their income is devoted to paying rent.[8]

Population projections predict an additional 1.2 million New Yorkers by 2025.[9] The City has estimated that an additional 172,000 units of housing, "above the 210,000 already in development, planned, or being preserved[,]" will be needed just to meet the demand.[10] However, given the current robust housing market in the City[11] and a rapidly shrinking number of available affordable apartments,[12] the affordable housing crisis will only continue to get worse without government intervention.

Scholars have identified four basic reasons for national or local governments to support subsidization of housing rather than relying on a deregulated housing market:[13] First, housing is a "basic

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[8] AMY ARMSTRONG ET AL., FURMAN CTR. FOR REAL ESTATE & URBAN POL'Y, STATE OF NEW YORK CITY'S HOUSING AND NEIGHBORHOODS 2006, at 36 (2006), *available at* http://furmancenter.nyu.edu/SOC2006.htm [hereinafter FURMAN, HOUSING] (noting that the median rent burden for unsubsidized low-income renters was 50.4% in 2005).

[9] COMPTROLLER, OVERVIEW, *supra* note 4, at 1. The predicted growth is largely attributable to continued immigration to the City as well as increased rates of reproduction. Sam Roberts, *Coming Soon, 9 Million Stories in the Crowded City*, N.Y. TIMES, Feb. 19, 2006, § 1, at 33.

[10] Ken Fisher, *Complex Policy Choices In Managing Growth*, N.Y. L.J., Jan. 16, 2007, § 8, col. 1.

[11] COMPTROLLER, OVERVIEW, *supra* note 4, at 1 ("The number of new housing permits . . . has grown steadily and dramatically [and a] Citywide surge in market rate housing construction has been accompanied by large increases in residential . . . property values."). No doubt, the City is unique in this regard, as much of the rest of the country is experiencing a housing market slump and the market in the City has reached a plateau as of late. Diana Cardwell & Ray Rivera, *Long Robust, Gains in New York City Property Values Start to Flatten Out*, N.Y. TIMES, Jan. 16, 2008, at B1. These predictions are based on an assumption that the demand for housing in the City will continue to rise.

[12] PLANYC, *supra* note 6 ("According to the Furman Center, the number of apartments affordable to low- and moderate-income New Yorkers shrank by 205,000 units between 2002 and 2005."). This decline in affordable rentals was attributed to several factors, including a construction industry lagging behind a growing population, immigration, and the fact that "much of the new housing has been for people with higher incomes, and most of it has been for sale, not for rent." Janny Scott, *Housing Tighter for New Yorkers of Moderate Pay*, N.Y. TIMES, June 16, 2006, at A1.

[13] J. Peter Byrne & Michael Diamond, *Affordable Housing, Land Tenure*

human need" that society is morally obliged to help provide;[14] second, subsidizing decent affordable housing is a better option than simply providing public money to eligible recipients;[15] third, the negative externalities on society that come with inadequate housing are mitigated by subsidization; and fourth, the market alone will not provide adequate affordable housing.[16]

The City is no stranger to these rationales for providing public housing, having long leveraged the law to provide better housing opportunities for the poor.[17] In fact, the City championed the "nation's first tenement laws, [its] first comprehensive zoning ordinance, and [created] its first public housing project."[18] Congress eventually followed the City's initiative when it enacted the Public Housing Act of 1937[19] and the Housing Act of 1949, which declared "a national policy of 'a decent home and a suitable living environment for every American family.'"[20] In the face of federal budget reductions for housing programs,[21] however, the heavy lifting of "housing assistance now is accomplished primarily through a variety of indirect subsidies moving through state and

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and Urban Policy: The Matrix Revealed, 34 FORDHAM URB. L.J. 527, 529–30 (2007).

[14] *Id.* at 530. The authors note the essential nature of housing as a shelter against the elements and as a social "center of . . . family life." *Id.*

[15] *Id*. Byrne and Diamond note a variety of paternalistic reasons for their claim, including: mistrust in simply giving recipients public money to use; creation of a durable community asset; benefits to the dependents of the recipients; indirect positive affects to the recipient, and the ability for beneficiaries to put money toward other needs such as education and health. *Id.*

[16] *Id.* at 530–31. Echoing Jacob Riis, the authors point to such negative externalities as crime and disease. *Id.* at 530. Given ever-rising costs in producing and preserving housing, the market will naturally tend to favor wealthier individuals in order to offset the production cost and profit from housing development. *Id.* at 531.

[17] FURMAN CTR. FOR REAL ESTATE & URBAN POL'Y, HOUSING POLICY IN NEW YORK CITY: A BRIEF HISTORY 1 (2006), *available at* http://www.furmancenter.nyu.edu/publications/documents/NYChousingpolicybrief1.pdf.

[18] *Id.*

[19] Byrne & Diamond, *supra* note 13, at 543.

[20] *Id.*

[21] *Id.*

local governments and private developers."[22]

By harnessing federal, state, and local resources, the City has demonstrated its commitment to ensure affordable housing development and preservation.[23] As part of an ambitious 10-year plan, the City aims to "[p]reserve 73,000 units of affordable housing for 220,000 New Yorkers, [including those] where subsidies are set to expire in the near future[,] and [c]reate 92,000 units of affordable housing for 280,000 New Yorkers."[24] Over the next ten years, it has been estimated that the City will use $3.2 billion of its own funds to renovate distressed buildings, provide $500 million in tax-exempt bonds to create and maintain low- and moderate-income housing, and administer over $1 billion in federal funds to provide funds for housing cost vouchers, low-income housing tax credits, and other programs.[25] The high levels of affordable housing the City is pledging to create or preserve, coupled with significant amounts of money being directed toward the problem, demonstrate that the City is serious about affordable housing.

Another non-traditional (and little-analyzed) method that New York State has used to try to foster affordable housing production in the City is to entice private developers with tax incentives for building such units, thus integrating Riis' propositions.[26] These tax incentives, named for the Section 421-a of the New York Real Property Tax Law provision that establishes them, have come to be known as the 421-a program.[27]

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[22] *Id.*

[23] NEW YORK CITY DEP'T OF HOUS. PRES. & DEV., THE NEW HOUSING MARKETPLACE: CREATING HOUSING FOR THE NEXT GENERATION 17 (2004), *available at* http://www.nyc.gov/html/hpd/downloads/pdf/10yearHMplan.pdf.

[24] *Id.* at 3.

[25] PRATT CTR. FOR COMMUNITY DEV., INCREASING HOUSING OPPORTUNITY IN NEW YORK CITY: THE CASE FOR INCLUSIONARY HOUSING 39 (2006), *available at* http://www.prattcenter.net/pubs/izreport.pdf [hereinafter PRATT, INCLUSIONARY].

[26] *See* RIIS, *supra* note 1, at 223–24. Generally speaking, the 421-a program was started in 1971 and now grants real-estate developers tax exemptions on their property in exchange for creating certain levels of affordable-housing. *See infra* Parts I and II.

[27] N.Y. REAL PROP. TAX LAW § 421-a (McKinney 2007).

In August 2007, the 421-a program was reauthorized with several new amendments.[28] The revised program took effect on December 28, 2007, and will be reexamined in 2010.[29] On his approval, former Governor Eliot Spitzer announced that the new legislation "[w]ill . . . [m]ore effectively promote the construction of affordable housing in the neighborhoods that need it most . . . [and] will build on our efforts to solve the housing crisis that has pushed too many working New Yorkers out of the middle class and prevented those struggling . . . from economic security."[30]

As evidenced by the former Governor's remarks, three objectives drive the 421-a program.[31] Two objectives, "decent shelter" and "wealth creation" for recipients in the form of lower rent and retained earnings, remain explicit programmatic objectives; implicit in the program, though, is a third objective: the "efficient use of public funds" in terms of balancing the costs, financial and otherwise, to the public with the benefits.[32] Supporters laud the new measures as providing vital and innovative tools to increase the availability of affordable units and meet the increasing demand.[33] Critics, however, question the efficacy of the tax abatement program altogether and cast the new law as nothing but a giveaway to developers at the public's expense.[34]

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[28] Press Release, Governor Elliot Spitzer, Governor Spitzer Signs Bill to Reform NYC Tax Exemption for Housing Development (Aug. 24, 2007), *available at* http://www.ny.gov/governor/press/0824072.html [hereinafter Spitzer].

[29] "As required by State law, the changes [made by the City] will go into effect one year from the effective date of the legislation." Press Release, Mayor Michael Bloomberg, Mayor Bloomberg Will Sign Compromise Bill to Reform 421-a Tax Incentive Program Into Law (Dec. 20, 2006), *available at* http://www.nyc.gov/html/hpd/html/pr2006/pr-12-20-06.shtml.

[30] Spitzer, *supra* note 28.

[31] Byrne & Diamond, *supra* note 13, at 531 ("[There are] eight possible objectives of subsidized housing . . . : 1) decent shelter; 2) wealth creation; 3) social integration; 4) urban vitality; 5) civic engagement; 6) training; 7) institution building; and 8) efficient use of public funds.").

[32] *Id.*

[33] *See* Spitzer, *supra* note 28.

[34] *See, e.g.*, PRATT CTR. FOR COMMUNITY DEV., UNDERSTANDING THE NYC "421-A" PROPERTY TAX EXEMPTION PROGRAM 6, *available at*

This Note will examine the 421-a program, its intended effects, and whether the new measures are indeed crafted to increase the availability of affordable housing and meet the increasing demand more effectively. Part I presents a history of 421-a legislation, discusses its evolution over the past four decades, and outlines what it has accomplished. Part II explores the newly passed legislation and compares the previous version of 421-a to the current one. Finally, Part III analyzes the efficacy of the new program in light of its policy goals. Ultimately, this Note will argue that while the amended 421-a program contains positive substantive changes, it nevertheless fails to effectively promote *affordable* housing construction and instead continues to grant incentives for *any* housing construction.

Other City programs that advance affordable housing notwithstanding, the 421-a program in a large part retains its original 1985 framework and its focus on creating incentives for developers. As a result, scarce public funds will continue to be used inefficiently: limited "decent shelter" will be constructed, and "wealth creation"[35] for families earning low-income will necessarily continue to be hampered. Further, the inherent tensions[36] and tradeoffs between the program's twin goals of housing development and affordable housing construction, as well as between its three policy objectives—decent shelter, wealth creation, and efficient use of public funds—will continue to undermine the very policies the program purports to serve. These programmatic imbalances will prevent the 421-a program from becoming a truly powerful and forward-looking affordable housing creation mechanism.

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http://www.habitatnyc.org/pdf/advocate/Pratt421a.pdf [hereinafter PRATT, UNDERSTANDING]. While the new amendments build on the 421-a program, these and other critics nevertheless contend that more stringent requirements regarding affordable housing creation should, and could, have been adopted without harming the City's real estate market. *See infra* Part II.

[35] Byrne and Diamond define housing subsidies as "wealth creation" because they "aim to alleviate poverty [by] transferring resources to the recipient in the form of less expensive housing rather than cash." Byrne & Diamond, *supra* note 13, at 541.

[36] Byrne & Diamond, *supra* note 13, at 561 ("[T]ensions among goals of decent housing and other social benefits are endemic in subsidized housing.").

I. HISTORY OF THE 421-A PROGRAM TO 2006

A. The 421-a Program: 1971-1985

1. Context and Legislation

As originally conceived, the 421-a program had nothing to do with enhancing affordable housing opportunities.[37] When Mayor John Lindsay received state legislative approval of the first 421-a provision in 1971,[38] New York City was a vastly different place than it is today. The City was experiencing a weak housing market and was in the midst of a fiscal crisis.[39] It had recently lost close to 90,000 jobs.[40] In addition, 1970 marked the beginning of a decade-long population decline that would see more than 10% of its seven million residents flee.[41] Mayor Lindsay's 421-a program was

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[37] *See* N.Y. REAL PROP. TAX LAW § 421-a (McKinney 1971) (amended 2007). No mention of affordable housing is made in the original legislation.

[38] NEW YORK CITY DEP'T OF HOUS. PRES. & DEV., RECOMMENDATIONS OF THE 421-A TASK FORCE 1 (2006), *available at* http://www.nyc.gov/html/hpd/downloads/pdf/421ataskforcereporfinal4.pdf [hereinafter HPD, TASK FORCE]. The City's power to enact local law is "derived from the New York State Constitution, Article IX, as implemented by, and spelled out in, the Municipal Home Rule Law." However, a local law related to a "state concern" such as housing may not be adopted unless "authorized specifically by the Municipal Home Rule Law . . . or unless the State Legislature has specifically granted such power to the City." NEW YORK STATE DEP'T OF STATE, REVISING CITY CHARTERS IN NEW YORK STATE 3 (2006), *available at* http://www.celdf.org/NewYorkHomeRuleandMunicipalGovernment/tabid/295/Default.aspx (follow "Revising City Charters" hyperlink) [hereinafter DOS, REVISING].

[39] PRATT CTR. FOR COMMUNITY DEV., REFORMING NEW YORK CITY'S 421-a PROPERTY TAX EXEMPTION PROGRAM: SUBSIDIZE AFFORDABLE HOMES, NOT LUXURY DEVELOPMENT 2 (2006), *available at* http://www.prattcenter.net/pubs/PrattCenter-NY421-aReport.pdf [hereinafter PRATT, SUBSIDIZE].

[40] Emanuel Perlmutter, *Metropolitan Area Loses 88,000 Jobs in a Year*, N.Y. TIMES, May 11, 1971, at A1.

[41] OFFICE OF THE NEW YORK STATE COMPTROLLER, POPULATION TRENDS IN NEW YORK STATE'S CITIES 7 (2004), *available at* http://www.osc.state.ny.

intended as an opt-in program for developers to stimulate construction during an economic recession by promoting new construction of *any* multi-family housing developments through the use of tax abatements to developers, regardless of whether they were affordable or market-rate.[42]

Specifically, new residential construction of multi-family homes on vacant or underutilized land was granted a full "tax exemption on the increased value during the period of construction and for 10 years thereafter."[43] For example, a developer who purchased property for $1 million and developed a building worth $10 million on the land would only be taxed on the $1 million initial investment and not on the $9 million in improvements.[44] One stipulation of the 421-a program, however, provided benefits to the public as well: 421-a residential units had to be leased at 85% of market-rate rents and were subject to rent stabilization for the duration of the exemption.[45] As a result, apartments in a building developed under the 421-a program could only be leased at a

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us/localgov/pubs/research/pop_trends.pdf.

[42] HPD, TASK FORCE, *supra* note 38, at 1 ("421-a was initially established in an environment of declining property values and a dearth of development activity. The incentive was intended to stimulate new development during a period of slow housing production and declining population citywide."). The program was not mandatory; if a developer determined that it was a better business decision to build without taking advantage of the 421-a tax incentive, they could still do so.

[43] CITIZENS HOUSING AND PLANNING COUNCIL, A PROPOSAL TO ENHANCE TAX AND ZONING INCENTIVES FOR NEW HOUSING PRODUCTION 5 (2002), *available at* http://www.chpcny.org/pdf/taxincent.pdf [hereinafter CHPC, ENHANCE]. One generic example of underutilized land is an office or apartment building that is only at 50% capacity and, as such, is not being used as efficiently as possible. Jeremy Miller, *Filling New York's 'Vacancies'*, GOTHAM GAZETTE, Jan. 7, 2008, *available at* http://www.gothamgazette.com/article/issueoftheweek/20080107/200/2394.

[44] NEW YORK CITY INDEP. BUDGET OFFICE, IBO FISCAL BRIEF, WORTH THE COST? EVALUATING THE 421-A PROPERTY TAX EXEMPTION 2 (2003), *available at* http://www.ibo.nyc.ny.us/iboreports/421aTaxFiscalBrief.pdf [hereinafter IBO, FISCAL].

[45] *Id.* at 5. Rent stabilization refers to rent being frozen at a specific amount for the duration of the tax exemption. *See infra* notes 106–15 and accompanying text.

maximum of 85% of the full market value of the apartment.[46]

While the original 1971 version of the 421-a program was not intended to be an engine for affordable housing, it had one implicit objective similar to that of later versions of the program that were explicitly focused on affordable housing: the efficient use of public funds by the balancing of interests involved.[47] The original 421-a program attempted to create more housing in the City and energize the economy, while at the same time foregoing a certain amount of tax revenue that would otherwise be collected for public use.[48]

2. *Tax Abatements and Exemptions*

The use of tax abatements (taxes that are incrementally scaled in) and exemptions (complete tax avoidance) as motivators for economic development is relatively straightforward: with reduced or entirely avoided taxes, a significant portion of the costs associated with developing and managing the property will be offset, thus inducing developers to build.[49] Tax exemptions remove all tax liability for a given period, while tax abatements encourage housing production by "providing a declining exemption on the new value that is created" by the development.[50]

Under a tax abatement (or "partial tax exemption") scheme, the

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[46] N.Y. REAL PROP. TAX LAW § 421-a(1) (McKinney 1971) (amended 2007) ("Rents to be charged upon initial occupancy . . . shall be at least fifteen percent less than the rents prevailing for comparable [units].").

[47] *See* Byrne & Diamond, *supra* note 13, at 531.

[48] *See* PRATT, UNDERSTANDING, *supra* note 34, at 4.

[49] Indeed, tax incentives "have long been a tool to both redistribute wealth and to inhibit uses or behavior that the government seeks to suppress." *The Future of Section 421-a of the Real Property Tax Law and Affordable Housing Development: Public Hearing on REAL PROP. TAX LAW § 421-a Before the Assembl. Standing Comm. on Housing*, 2007 Leg., 230th Sess. 146 (N.Y. 2007) [hereinafter *Public Hearing*] (statement of Jerilyn Perine, Executive Director of the Citizens Housing and Planning Council) (on file with the author).

[50] New York City Department of Finance, Tax Reduction & Rebate Programs, http://home2.nyc.gov/html/dof/html/property/property_tax_reduc_tax reductions.shtml (last visited Mar. 16, 2008). Thus, by matching such tax "credits" against tax liabilities, a developer's overall property tax is reduced. *Id.*

taxes that a developer must pay are slowly phased in over a number of years.[51] Abatements are then another way to "ensure that a property owner's costs are not increased as a result of the improvements by deferring the increased property taxes which result from improvement-related increases in property values."[52]

B. 1985–2006: Affordable Housing Production as a Concurrent Goal of 421-a

Between 1971 and 1984, approximately 200,000 new housing units were created in the City;[53] nine percent of those, or 18,000 apartments, were financed under the 421-a exemption.[54] Notwithstanding the rather limited use of 421-a, there was a growing consensus that the costs were outweighing the benefits, rendering the program inefficient.[55] First and foremost was the concern that the tax exemption program was unjustifiably advantageous to luxury developers and that communities in Northern Manhattan and the outer boroughs were not benefiting enough under the law.[56] In response, the New York State Legislature endorsed a 1985 City Council proposal that transformed the program, thereby grafting another policy goal to the program's original objective.[57]

No longer would 421-a simply encourage new housing construction in the City; now, it would also "ensure that a portion

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[51] *Id.* ("[The 421-a program provides] a declining exemption on the new value created by the improvement.").

[52] Melvyn R. Durchslag, *Property Tax Abatement For Low-Income Housing: An Idea Whose Time May Never Arrive*, 30 HARV. J. ON LEGIS., 367–69 (1993).

[53] *See* NEW YORK CITY RENT GUIDELINES BD., 2007 HOUSING SUPPLY REPORT 14 (2007), *available at* www.housingnyc.com/downloads/research/pdf_reports/07HSR.pdf [hereinafter 2007 HSR].

[54] Under IBO calculations, 421-a has helped finance construction of 87,000 apartments since 1971. Since 1985, roughly 69,000 units were created under 421-a. Thus, between 1971 and 1985, 18,000 units were created under the program. *See* IBO, FISCAL, *supra* note 44, at 1, 4.

[55] *See* PRATT, UNDERSTANDING, *supra* note 34, at 4.

[56] CHPC, ENHANCE, *supra* note 43, at 5.

[57] *Id.*

of new[, multifamily] housing [would] be 'affordable' to low- and moderate-income New Yorkers."[58] As a result, 421-a encapsulated two more objectives traditionally seen in affordable housing programs—decent shelter (i.e., new or updated apartments), and wealth creation (i.e., a reduced rent burden), that would be specifically targeted at families earning low-income wages.[59]

1. Defining "Affordable" Housing and "Low-Income": Area Median Income

One of the priorities the post-1985 421-a statute advances is *affordable* housing production for individuals and families earning *low-income*.[60] These essential terms, though, are defined in various ways depending on the particular policy goals of a given program. Both federal and local determinations of what is "affordable" for a given locale rely in part on equations involving Area Median Income ("AMI"), which is calculated by the United States Department of Housing of Urban Development.[61] AMI represents the median income for a geographic region over a given year,[62] and is used to set maximum income limits for various affordable housing programs.[63]

The use and reliance on AMI in the calculations of affordability will depend on programmatic policy goals. For instance, the federal government defines "affordable" rent as that which does "not exceed 30[%] of the adjusted income of a family [of four] whose income equals 65[%] of the [AMI] for the area."[64] By contrast, the

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[58] IBO, FISCAL, *supra* note 44, at 2.

[59] Byrne & Diamond, *supra* note 13, at 531.

[60] IBO, FISCAL, *supra* note 44, at 2.

[61] DEP'T OF HOUS. & URBAN DEV., FY2007 HUD INCOME LIMITS BRIEFING MATERIAL 15 (2007), *available at* http://www.huduser.org/datasets/il/il07/IncomeLimitsBriefingMaterial.pdf [hereinafter HUD, INCOME].

[62] *Id.* at 8–9.

[63] IBO, FISCAL, *supra* note 44, at 2–3. This includes the negotiated certificates developers can elect to purchase through the 421-a program and the base rents for on-site affordable housing. *Id.*

[64] Cranston-Gonzalez National Affordable Housing Act, 42 U.S.C. § 12745(a)(1)(A)(ii) (2000).

City[65] ultimately defined affordable rent for a family of four as not exceeding 30% of 80% AMI, resulting in less eligible recipients than the traditional federal definition would have allowed because of a higher income threshold.[66]

While the AMI appears to be a straightforward calculation, the geographic area that it considers has a substantial impact on the resulting definition of affordability.[67] Significantly, the geographic region that is used to calculate the City's AMI includes not only the five boroughs that comprise the City, but also wealthier surrounding counties including Nassau, Suffolk, Putnam and Richmond.[68] This boosts the stated AMI for the New York metropolitan area to $70,900,[69] even though in the true median income in the five boroughs is only $43,434, and even less depending on particular boroughs or neighborhoods within boroughs.[70]

This HUD-defined AMI is a controlling variable in the 421-a program.[71] Since HUD's AMI calculation is crucial in determining

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[65] The 421-a program did not specifically define affordability in the law. The pre-2007 statute merely stated that within certain boundaries, tax incentives would be granted only if "twenty percent of the units [were] affordable to families of low and moderate income." N.Y. REAL PROP. TAX LAW § 421-a(2) (McKinney 2005); NEW YORK CITY, CODE § 11-245(b)(2) (2006).

[66] *See* IBO, FISCAL, *supra* note 44, at 3 ("[F]or the affordable units built in 80/20 projects . . . incomes cannot exceed 80 percent of the area median income, and rent is set at 30 percent of that ceiling.").

[67] *See generally*, N.Y. REAL PROP. TAX LAW § 421-a (McKinney 2007). For instance, section (7)(c)(i) states that "not less than twenty percent of the units . . . must . . . be affordable to . . . families whose incomes . . . do not exceed sixty percent of the *area median incomes* . . . ." (emphasis added). The current 421-a statute contains many such references to area median income. § 421-a.

[68] DEP'T OF HOUS. & URBAN DEV., FY2007 AREA DEFINITIONS REPORT 30 (2007), http://www.huduser.org/datasets/il/il07/Area_Definitions_Report.pdf.

[69] HUD currently calculates the AMI for the New York City metropolitan area as $70,900 for a family of four. HUD, NEW YORK, *supra* note 2.

[70] FURMAN, HOUSING, *supra* note 8, at 3.

[71] *See, e.g.*, N.Y. REAL PROP. TAX LAW § 421-a(1)(a)(ii)(C)(b) (McKinney 1985) (amended 2007) (providing that tax exemptions were not available within certain areas unless the Department of Housing Preservation and Development, which used the HUD-defined AMI as its benchmark "had certified that twenty

the maximum allowable income a family can make and still be eligible for 421-a rent stabilized apartments, the HUD definition of "low-income" becomes a fundamental variable as well.[72] HUD defines "low-income households" as those households that do not earn more than 80% of the median family income for a four-person family.[73] Thus, "low-income" for the City, and for the 421-a program, is currently calculated to be $56,700.[74] As noted above, though, this low-income calculation inaccurately reflects the reality in the City because it takes into account wealthier surrounding areas.

2. *The 421-a Program: 1985-2006*

Two substantive elements particularly distinguished the 1985 law and its subsequent amendments from the original 421-a plan and illustrated the Legislature's shift from merely encouraging market rate housing projects to specifically stimulating affordable development. First was the creation of the Geographic Exclusion Area ("exclusion zone"), an area within which developers seeking to build had to meet additional requirements tied to affordable housing production in order to be eligible for a tax benefit.[75] Second was the correlation of the duration of the tax exemption to specific

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percent of the units [would] be affordable to families of low and moderate income").

[72] *Id.* The same holds true for more recent versions of the 421-a program. *See, e.g.*, N.Y. REAL PROP. TAX LAW § 421-a(7)(c)(1) (McKinney 2007) ("[Providing no tax incentives in certain areas unless] twenty percent of the units in the multiple dwelling must . . . be affordable to and occupied or available for occupancy by individuals or families whose incomes at the time of initial occupancy do not exceed sixty percent of the area median incomes adjusted for family size . . . .").

[73] HUD, INCOME, *supra* note 61, at 1.

[74] "Very-low-income" is defined as not exceeding 50% of the AMI. HUD, INCOME, *supra* note 61, at 1. Given the City AMI, "very low-income" is currently $35,450 for a family of four. HUD, NEW YORK, *supra* note 2, at 1.

[75] N.Y. REAL PROP. TAX LAW § 421-a(7) (McKinney 2007) ("[B]enefits of this section shall not be available for new multiple dwellings located in a geographic exclusion area . . . unless they comply with the provisions of this subdivision . . . .").

area, thereby creating greater incentives for developers to develop housing in certain locations over others.[76]

a. Geographic Exclusion Area—On-Site Development or Negotiable Certificates

To ensure that developers did not simply develop under the 421-a program in areas with the highest market-rate value, legislators sectioned off an area within which developers could not take advantage of 421-a "as-of-right," referred to as the "exclusion zone."[77] Certain restrictions were applied to developers looking to build within that area to ensure that any developments in the exclusion zone would add a net benefit to the goal of affordable housing. The exclusion zone encompassed approximately the middle portion of Manhattan and was comprised of neighborhoods that were traditionally strong housing markets in the City.[78] The exclusion zone was roughly circumscribed by Ninety-Sixth Street as the northern boundary, Fourteenth Street as the southeastern boundary, and Houston Street as the southwestern boundary.[79]

Outside the exclusion zone, developers were still granted tax incentives as-of-right—whether or not they built affordable housing units—and rent was generally set by the market-rate for the area.[80] Within the exclusion zone, though, developers were no longer granted benefits "as-of-right," but instead had to meet one of two conditions in order to take advantage of the tax benefits: either

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[76] Between 1985 and 2006, the New York State Legislature made several technical revisions to the 421-a program. However, the basic framework of the law remained largely unchanged. Where substantive changes were made post-1985, those changes will be addressed. *See* CHPC, ENHANCE, *supra* note 43, at 5.

[77] *See* N.Y. REAL PROP. TAX LAW § 421-a(7) (McKinney 2007).

[78] HPD, TASK FORCE, *supra* note 38, at 2.

[79] Department of Housing Preservation and Development 421-a Geographic Exclusion Zone Map, *available at* www.nyc.gov/html/hpd/downloads/pdf/421a-GEA-Final.pdf (last visited Apr. 14, 2008) [hereinafter GEA Map].

[80] HPD, TASK FORCE, *supra* note 38, at 2. Areas outside of the exclusion zone were not as potentially lucrative as areas within the zone given market-rates for the middle section of Manhattan were generally higher than that of upper Manhattan and the outer boroughs. *Id.*

designating one-fifth of on-site units as affordable for individuals and families earning low-income wages,[81] or contributing to affordable housing elsewhere by purchasing negotiable certificates from off-site affordable housing developers, in effect "buying" the tax incentive.[82] Since the total amount of subsidies a developer could accumulate was unlimited,[83] an exclusion zone developer could hypothetically accumulate enough certificates to completely offset their development.[84]

Under the first, on-site option, developers building under 421-a had to set aside 20% of the units in the development to families earning no more than $56,700.[85] Additionally, developers could only charge $17,010 per year in rent for those affordable units.[86] Under the second, negotiable certificate option,[87] market-rate developers seeking to build only market-rate units within the exclusion zone could purchase transferable real estate tax abatement certificates from affordable housing developers building outside the exclusion zone.[88] This negotiable certificate option allowed market-rate developers within the exclusion zone to indirectly increase the City's affordable housing stock by financing the construction of affordable housing units in other parts of the City, outside the

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[81] This conditional incentive is also known as an "80/20" market-rate/affordable-rate mix; 20% of the units must be marketed to those earning low-income wages, while the other 80% can be market-rate. PRATT, SUBSIDIZE, *supra* note 39, at 3. Slightly different conditions apply to the Greenpoint-Williamsburg exclusion areas. HPD, TASK FORCE, *supra* note 38, at 4.

[82] IBO, FISCAL, *supra* note 44, at 3.

[83] COMPTROLLER, OVERVIEW, *supra* note 4, at 3.

[84] *See* HPD, TASK FORCE, *supra* note 38, at 6.

[85] This $56,700 benchmark currently represents 80% AMI. N.Y. REAL PROP. TAX LAW § 421-a(2)(b) (McKinney 2005); HUD, NEW YORK, *supra* note 2, at 1.

[86] *See* IBO, FISCAL, *supra* note 44, at 3. Yearly rent was limited to $17,010 in those affordable units because the yearly rent could not exceed 30% of the low-income threshold of $56,700. *Id.*

[87] This program is known as the Affordable Housing Program ("AHP"). NEW YORK CITY DEP'T OF HOUS. PRES. & DEV., OVERVIEW OF 421-A PROGRAMS (2006), *available at* http://www.nyc.gov/html/hpd/downloads/pdf/421aoverviewtfreport.pdf [hereinafter HPD, OVERVIEW].

[88] *See* HPD, TASK FORCE, *supra* note 38, at 4.

exclusion zone.[89]

Affordable housing developers outside of the exclusion zone used the proceeds of the certificate sales to generate construction capital for their own projects.[90] The number of certificates a market-rate developer could obtain from an affordable housing developer was dictated by the particular AMI ceiling for the particular affordable housing project.[91] In return for helping to fund affordable housing projects outside the exclusion zone, each purchased certificate allowed a market-rate developer to receive the benefits of the tax incentives provided by the 421-a program on one new, market-rate apartment within the exclusion zone, without being impeded by rent regulations.[92] Over the life of the tax abatement, the certificate was "worth, on average, over $100,000 in . . . tax benefits to [the developer for] each market-rate unit in the exclusion zone."[93] In this way, developers derived benefits not only from abated property taxes, but also from higher-fetched rental prices because they did not have to set aside on-site affordable units.[94]

Given the lucrative market inside the exclusion zone, many market-rate real estate developers decried this innovation in particular because they saw it as encroaching on their assumed as-

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[89] *Id.*

[90] *See* PRATT, SUBSIDIZE, *supra* note 39, at 4; IBO, FISCAL, *supra* note 44, at 2–3.

[91] Non-exclusion area units rented to families earning 60% AMI ($42,540) yielded five certificates for market-rate developers, whereas units rented to families earning between 60% and 100% AMI yielded only four certificates. HPD, OVERVIEW, *supra* note 87.

[92] HPD, TASK FORCE, *supra* note 38, at 8. Essentially, each certificate bought by the market-rate developer permitted him to develop one market-rate unit within the exclusion zone while still receiving the tax benefits under 421-a. Market-rate developers had the opportunity to purchase varying amounts of certificates depending on the type of affordable housing that was being indirectly financed. *Id.*

[93] *Id.* "The certificate program thus leverages only between 15% and 20% of the value of the tax benefit for affordable housing." *Id.* at 8.

[94] Peter Iverson, *Linking 421a to Low-Income Housing*, N.Y. TIMES, Dec. 17, 1989, § 10, at 1.

of-right ability to develop.[95] Before the 1985 amendments were enacted, the President of the Real Estate Board of New York fretted, "Almost no rental buildings would be constructed [under the plan because it will] stop what little rental housing is being produced . . . . Almost all the rental housing being produced is within the [proposed exclusion zone]."[96]

Nevertheless, the exclusion zone provision was approved. Because the vast majority of all 421-a subsidies were provided to high-end developments below 96th Street, "the city need[ed] to focus its attention on how to encourage [low-income unit] construction . . . . There [were] huge areas in the other boroughs that need[ed] housing" and an exclusion zone was able to help meet that need.[97] Indeed, the exclusionary zone gained favor as it continued, enough so that almost twenty years later, it was further expanded to include other quickly gentrifying areas such as the Greenpoint-Williamsburg waterfront in Brooklyn and Hudson Yards.[98]

b. Duration of Tax Incentives Correlated to Geographic Area

In addition to the creation of the exclusion zone, the post-1985 amendments also extended the duration of the tax incentive period, but the length of the additional period would depend on the section of the City in which construction occurred.[99] These provisions

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[95] The developers' basic contention was that the exclusion zone under 421-a would necessarily "dampen development if they reduce developer return expectations below certain thresholds so that developers choose to abstain from building or are unable to obtain financing to permit development." JERRY J. SALAMA, MICHAEL H. SCHILL & JONATHAN SPRINGER, FURMAN CTR. FOR REAL ESTATE & URBAN POL'Y, REDUCING THE COST OF NEW HOUSING CONSTRUCTION IN NEW YORK CITY: 2005 UPDATE, at 100 (2005), *available at* http://furmancenter.nyu.edu/CREUP_Papers/cost_study_2005/CostStudy_intro.html.

[96] The Week In Review, *A Debate; The Controversy Over Tax Breaks*, N.Y. TIMES, Oct. 21 1984, § 4, at 6.

[97] *Id.* (quoting Ruth Messinger, City Council Member).

[98] HPD, TASK FORCE, *supra* note 38, at 4.

[99] *See*, *e.g.*, N.Y. REAL PROP. TAX LAW §§ 421-a(1)(a)(ii)(C); 421-a(1)(a)(iii)(C) (McKinney 1985) (providing for various exemption periods

effectively encouraged developers to develop more general housing in the outer boroughs in exchange for longer extended tax-exempt periods in order to recoup more of their initial development money.[100]

Specifically, inside the exclusion zone, developers building 20% affordable housing units on-site would receive a twenty-year abatement.[101] Those developers who chose instead to build market-rate units within the exclusion zone and purchase off-site negotiable certificates would receive a shorter, ten-year abatement.[102] However, those builders outside of the exclusion zone would reap even more benefits. In most of the rest of the City, including areas north of 110th Street in Manhattan, the Bronx, Brooklyn,[103] Queens or Staten Island, developers would receive a fifteen-year as-of-right tax abatement for *any* housing construction.[104] Further, if developers included 20% affordable housing units north of 110th Street or in the outer boroughs, they were eligible for an extended twenty-five year tax abatement.[105]

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depending on the location of the development).

[100] *Id.*

[101] N.Y. REAL PROP. TAX LAW § 421-a(2)(a)(iv) (McKinney 2005); PRATT, SUBSIDIZE, *supra* note 39, at 4. This created an all-or-nothing incentive for developers in that they could only take advantage of the 421-a tax exemption by building 20% affordable housing.

[102] N.Y. REAL PROP. TAX LAW § 421-a(2)(a)(i) (McKinney 2005); PRATT, SUBSIDIZE, *supra* note 39, at 2.

[103] N.Y. REAL PROP. TAX LAW § 421-a(2)(a)(ii) (McKinney 2005). With the exception of the Greenpoint-Williamsburg waterfront. PRATT, SUBSIDIZE, *supra* note 39, at 4.

[104] N.Y. REAL PROP. TAX LAW § 421-a(2)(a)(iii) (McKinney 2005); PRATT, SUBSIDIZE, *supra* note 39, at 4. The loopholes inherent in the negotiable certificate system, *see infra* notes 125–36 and accompanying text, created a situation where developers were able to take advantage of tax benefits without significantly increasing the stock of affordable housing. Although the system likely could have been revised to be made effective, it was nevertheless cut from the 421-a program in 2007. *See infra* notes 190–200 and accompanying text.

[105] PRATT, SUBSIDIZE, *supra* note 39, at 4.

c. Rent Stabilization

While the goal of the post-1985 amendments was to increase affordable housing in the City, the amendments did nothing to regulate the pricing of permanent housing.[106] Rentals, however, were stringently regulated: all initial rents for rental units built within the exemption period, whether affordable or not, were based on area market-value.[107] To ensure that eligible families could afford monthly rent, affordable units within the exclusion zone were further regulated so that rents could not exceed 30% of 80% AMI.[108] For example, if rent for a market-rate apartment in the exclusion zone was $3,000 per month, or $36,000 per year, then rent for a 421-a affordable unit in the same zone could not exceed 30% of the low-income threshold ($56,700, representing 80% AMI), or $1,417 per month.

After the end of the tax abatement period, developers had more freedom to increase rent for market-rate units than for the affordable units.[109] As tax abatements were slowly being phased out, developers were allowed to increase rent on market-rate units by 2.2% each year.[110] Once any given developer lost his tax incentive, however, and had to begin paying increased taxes, rent was no longer stabilized by the government, and could immediately rise to actual market rate.[111]

While affordable units were more protected even after a developer exhausted their tax incentive period, they were not wholly insulated from increased rent.[112] Developers were free to incrementally increase the rent of affordable units to market rate

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[106] *Id*. Specifically, there were no limits on the price for those purchasing apartments in newly built condominiums or co-ops. *Id.*

[107] CHPC, ENHANCE, *supra* note 43, at 10.

[108] *Id.*

[109] IBO, FISCAL, *supra* note 44, at 2 ("As exemptions expire, rents may rise to market rates.").

[110] CHPC, ENHANCE, *supra* note 43, at 10.

[111] *Id.*

[112] *See* IBO, FISCAL, *supra* note 44, at 2 ("[U]nits designated as affordable remain rent stabilized for at least 20 years, [but] rents may only be increased to market rates upon vacancy.").

only after the given tax exemption ran its course—and the length of the rent stabilization was dependent on the occupants of such apartments.[113] Specifically, if the unit was built after Fiscal Year 1985 had started, rent stabilization "continue[d] until the end of the last lease signed while the benefit period was in effect."[114] If the unit was built before Fiscal Year 1985, though, rent stabilization "continue[d] until the first vacancy occurs after the expiration of the tax benefits, even if the vacancy occurs long after the tax benefits have expired."[115]

4. *Gauging 421-a's Accomplishments: 1985–2006*

While the goals of the revised 421-a plan were ambitious, the lack of any systematic data regarding the outcomes of the 421-a program makes it difficult to evaluate its effects from 1985 to 2006.[116] Based on the available information, however, it appears that while the program certainly encouraged new housing production in general, it was not as successful in accomplishing its second, more crucial goal of providing additional affordable housing.

a. *Overall New Housing Production*

Between 1985 and 2006, approximately 260,500 housing units were developed throughout the City.[117] Of these new units, approximately 92,000, or 35%, were built under the various 421-a

[113] *See* New York City Rent Guidelines Board, http://www.housingnyc.com/html/resources/zip.html (last visited Apr. 14, 2008). For example, if an affordable unit was built in 1988 in an area with a 20-year tax abatement period, rent was frozen until 2008 plus any additional time that was created by a lease signed within that abatement period. As soon as the lease ended, though, the developer was permitted to incrementally increase the rent to 2008 market-rate prices. As a result, the families living in such apartments at the end of a tax abatement period would experience rising rent. *See id.*

[114] *Id.*

[115] *Id.*

[116] *See* PRATT, INCLUSIONARY, *supra* note 25, at 39.

[117] *See* 2007 HSR, *supra* note 53, at 14. This figure represents a sizeable increase in the housing stock of the City. *Id.*

programs; the other 65% were built without utilizing the program.[118] Developers choose not to build under 421-a for various reasons. Oftentimes, they were ineligible under the program because of where, or what, they were building.[119] Others simply chose not to build under 421-a for economic reasons.[120] While it is impossible to determine how many developers would have built in the absence of the program, the program's maximum effectiveness in terms of sheer unit creation reached its peak in 1988.[121] Subsequent effectiveness fell substantially in the late-1980s and 1990s, largely in part to a declining real estate market in the City.[122] Although this trend reversed and there was considerable rejuvenation in both the housing market in general and in 421-a development specifically in the late 1990s and early 2000s,[123] the program was once again on the decline by 2005.[124]

b. Affordable Housing Creation

Of the 92,000 units created under 421-a, only a small fraction of these were found to be affordable.[125] One study found that between 1985 and 2002, "only 8% (4,905) of the . . . units

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[118] *See id.* at 16.

[119] PRATT, SUBSIDIZE, *supra* note 39, at 7. For example, if a developer was only building market-rate units in the exclusion zone and was not interested in the negotiable certificate program, or if a developer was building a parking lot, they each would not be eligible for incentives under the 421-a program. *Id.*

[120] *Id.* For example, a developer could determine that he could make more money simply from charging market-rate rents than from receiving tax benefits for setting aside affordable units or purchasing negotiable certificates.

[121] NEW YORK CITY RENT GUIDELINES BD., 1997 HOUSING SUPPLY REPORT 4 (1997), *available at* http://www.housingnyc.com/downloads/research/pdf_reports/97hsr.pdf.

[122] NEW YORK CITY RENT GUIDELINES BD., RENT STABILIZED HOUSING IN NEW YORK CITY: A SUMMARY OF RENT GUIDELINES BOARD RESEARCH 64 (1991), *available at* http://www.housingnyc.com/downloads/research/pdf_reports/91book.pdf.

[123] 2007 HSR, *supra* note 53, at 13.

[124] *Id.* at 16.

[125] *See* 2007 HSR, *supra* note 53, at 14; PRATT, SUBSIDIZE, *supra* note 39, at 6.

subsidized through the 10-, 15- or 20-year 421-a programs . . . were affordable to low-or moderate-income families."[126] Even those "affordable units" created under the program were still out of reach for many financially limited families given the program's definitions and calculations of affordability.[127] Moreover, the difficulty of ensuring affordable unit creation may be explained by the availability and prevalence of negotiable certificates, as well as loopholes in the program that worked to the advantage of developers.[128]

Within the exclusion zone, developers were much more likely to purchase negotiable certificates than to designate 20% of their on-site units affordable.[129] Choosing otherwise would have in effect limited the rent in those units, and thus driven down profit. The certificates allowed developers to maximize profits by charging market-rate rents in all units while still benefiting from a 10-year tax exemption on some of their units.[130] As sound as these business decisions may have been, however, they hardly increased the City's affordable housing stock in a substantive way. While some 28,000 market rate units built within the exclusion zone benefited from a 10-year 421-a exemption from 1985 to 2006, only approximately 5,500 affordable housing units were created outside the exclusion zone with the revenue generated from purchased negotiable certificates.[131]

Moreover, there was simply more business incentive for market-rate developers. The benefits that market-rate developers gained, as opposed to those for off-site affordable-housing

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[126] PRATT, SUBSIDIZE, *supra* note 39, at 6. "Insufficient data is available on the 25-year exemption to determine affordability." *Id.*

[127] *See supra* notes 60–74 and accompanying text.

[128] *See* HPD, TASK FORCE, *supra* note 38, at 8 ("[Negotiable certificates narrowed] participation in the affordable housing market and [led to a less] efficient allocation of limited resources.").

[129] Indeed, in 2005, the 80/20 program created 2,100 affordable housing units in the exclusion zone, while almost 7,700 units were created outside the exclusion zone with negotiable certificates. COMPTROLLER, OVERVIEW, *supra* note 4, at 3–4.

[130] *See* PRATT, SUBSIDIZE, *supra* note 39, at 5.

[131] HPD, TASK FORCE, *supra* note 38, at 8.

developers, were highly skewed. Market-rate developers stood to realize five to ten times more benefits for simply purchasing negotiable certificates than any off-site affordable-housing developers could gain in terms of raising capital; prices for the certificates ranged from $11,000 to $20,000,[132] yet in practice, one certificate was "worth, on average, over $100,000 in . . . tax benefits to [the developer for] each market-rate unit in" the exclusion zone."[133] As a result, the certificate program in fact only generated approximately one-fifth of the total value of the tax benefit to affordable housing projects.[134]

While the majority of developers within the exclusionary zone therefore preferred to take advantage of the certification option, some developers chose instead to receive 20-year tax incentives by designating 20% of on-site units as affordable: from 1992 to 2003, 6,782 units were created in the exclusion zone under this plan.[135] Nevertheless, the choice between on-site units or off-site financing often came down to simple economics: since "market rents [often] exceed[ed] the allowable rent for affordable units, even including the property tax exemption" for the entire project, it usually made more business sense to opt for financing off-site affordable housing.[136]

c. 421-a Unit and Subsidy Concentration

Further issues with 421-a are illustrated by the concentration of units in Manhattan built under the program. This concentration of units also resulted in a concentration of benefits to one borough. While a concentration of units is not necessarily harmful, it was decidedly not beneficial to those living in the outer boroughs.[137]

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[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] *See* IBO, FISCAL, *supra* note 44, at 3–4.

[136] *Id.* at 4.

[137] The disproportionate distribution of benefits was arguably detrimental to the outer boroughs because the 421-a program did not provide a comparable amount of units or value of tax benefits to those living in the outer boroughs. *See* COMPTROLLER, OVERVIEW, *supra* note 4, at 3.

From 1985 to 2002, projects in Manhattan accounted for 53% (36,668) of the total number of all units, affordable and market-rate, built under 421-a, with the other 47% distributed throughout the other four boroughs.[138] By 2005, Manhattan developments had received "78% of all 421-a benefits but accounted for only 48% of units that received 421-a benefits."[139] Put simply, Manhattan developers were receiving the lion's share of tax benefits under the program, even though their developments were disproportionately market-rate developments. Moreover, since developers could benefit from unlimited levels of 421-a tax incentives, 421-a developments in Manhattan also received the largest yearly 421-a subsidies, including some as high as $160,000 per unit.[140] This trend was not only due to higher land costs in Manhattan relative to the other boroughs, but more importantly because the tax incentives were being used to subsidize large luxury units.[141] The outer boroughs, in contrast, saw only a fraction of subsidies as compared to Manhattan, and far fewer units were created in the outer boroughs as well.[142]

Outside of the exclusion zone, 421-a developments were mostly found to be concentrated in areas with rapidly growing populations, increasingly affluent socio-economic populations, or where there were "strong residential real estate markets"—or combinations of the above.[143] Thus, while certain select pockets in

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[138] Queens realized 20% (13,909); Brooklyn realized 13%; (9,018); Staten Island realized 7.8% (5,405); and the Bronx realized only 5.5% (3,906). IBO, FISCAL, *supra* note 44, at 4.

[139] COMPTROLLER, OVERVIEW, *supra* note 4, at 2.

[140] *Id*. at 3 ("[P]er unit savings [in Trump World Tower] ranged as high as $160,000" and that such "deeply-subsidized [luxury] units had a market value of $4.2 billion.").

[141] *Id.* at 2.

[142] *Id.* at 2–3. For example, in 2005, Manhattan received 78% ($2,069,495,023) of the total 421-a exemption benefits for that year—almost four times that of the other boroughs combined. In contrast, Brooklyn received the second-largest total 421-a exemption benefits—a mere 9% ($238,216,222). Queens, the Bronx, and Staten Island combined only received 13% of the benefits ($331,711,530). *Id.*

[143] Such areas included: Flushing, Queens, Greenpoint-Willimsburg, Brooklyn and Brighton Beach, Brooklyn. *Id.* at 3.

the outer boroughs benefited, low-income neighborhoods and the outer boroughs on the whole saw little increase in affordable housing under the 421-a program.[144] Indeed, at least one commentator mused that the program was "far from trailblazing" and was "merely gilding a well-traveled road."[145]

d. Average Base Rent Under 421-a

Yet another exposed flaw of the 421-a program was the fact that "affordable" apartments under 421-a were not always affordable to those the law intended to target. While there is scant data as to the extent of "affordability" of apartments built under 421-a, one study estimated the average rents for a one-bedroom 421-a apartment built over a three-year span, 1999 through 2001.[146] In the year of the study, AMI for the City was $62,800; low-income (80% AMI) was $50,250.[147] The study showed that in Manhattan (primarily in the exclusion zone), the average initial base monthly rent for a 421-a market-rate one-bedroom apartment built within that timeframe was $3,172.[148] Assuming a household spends 30% of its annual income on rent, this translates in to a "necessary annual income" of $126,864—225% above the AMI.[149] Indeed, since four out of five apartments built in the exclusion zone could be rented at market rate, these expensive apartments represented the vast majority of those receiving subsidies in the exclusion zone under 421-a.[150] In essence, even though some affordable units were created within the exclusion zone or through

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[144] *Id.*

[145] PRATT, SUBSIDIZE, *supra* note 39, at 9. The contention was that the 421-a program was in fact benefiting and encouraging a continued increase in market-rate housing rather than promoting affordable housing. *Id.*

[146] *See* IBO, FISCAL, *supra* note 44, at 5.

[147] DEP'T OF HOUS. & URBAN DEV., HUD INCOME LIMITS 2002, at 1 (2002), *available at* http://www.huduser.org/intercept.asp?loc=/Datasets/IL/FMR02/hud02ny.pdf [hereinafter HUD INCOME LIMITS 2002].

[148] IBO, FISCAL, *supra* note 44, at 5.

[149] *Id.*

[150] Only 20%, or 1 out of 5, on-site units were required to be affordable in order to receive the 20-year exemption. *See* N.Y. REAL PROP. TAX LAW § 421-a(2)(a)(iv) (McKinney 2005) (amended 2007).

negotiable certificates, the program essentially ensured that developers could maximize their profits by seeking market-rate rents while simultaneously receiving tax benefits.[151]

Given the $50,250 low-income threshold at the time of the study, monthly rent in a 421-a low-income apartment in Manhattan was approximately $1,256.[152] This monthly rent would translate to a necessary annual income of $50,240—99% AMI. In short, these apartments would only be affordable for a family earning AMI, not to those families earning 80% AMI, let alone less than that. Moreover, since at most only one out of five exclusion zone 421-a apartments had such reduced rents, exclusion zone units such as these were likely few and far between.[153]

Outside the exclusion zone under the 15- and 25-year exemptions, average rents for 421-a apartments were substantially lower.[154] Even here, though, they were rarely affordable for families earning low income given that the initial rents were tied to the market rate for the area.[155] As a result, the outer boroughs also generally showed that the program touted to create significant affordable housing was not living up to its potential. In Brooklyn,

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[151] *See* PRATT, UNDERSTANDING, *supra* note 34, at 4 (noting that the 421-a program has only created a small amount of subsidized housing while 421-a benefits have "covered the boom of market-rate, luxury buildings in lower Manhattan . . . downtown Brooklyn, and Long Island City with little or no affordable units").

[152] This approximate rent was found by making the following calculations: 30% of 80% AMI ($50,250) = $15,075; as divided over 12 months = $1,256.25. *See* IBO, FISCAL, *supra* note 44, at 5; HUD INCOME LIMITS 2002, *supra* note 147, at 1.

[153] IBO, FISCAL, *supra* note 44, at 3. As data for 2002 shows, 10,879 units received tax exemptions within the exclusion zone in Manhattan under 421-a; 4,097 units received 10-year exemptions (i.e., through negotiable certificates); 6,782 received 20-year exemptions. *Id.* Assuming that none of the 10-year exempt units were renting at "affordable" rates, and developers only designated the statutory minimum of 20% of their 20-year exempt units as "affordable," only 1,356 (12%) of these units were developed as affordable apartments. *See id.*

[154] This is because market rates for areas outside of the central core of Manhattan are lower. *See* NEW YORK CITY RENT GUIDELINES BD., 2007 INCOME AND EXPENSE STUDY 7 (2007), *available at* http://www.housingnyc.com/downloads/research/pdf_reports/ie07.pdf.

[155] *See* IBO, FISCAL, *supra* note 44, at 5.

the average monthly rent for a 421-a subsidized unit ($2,077) translated into a necessary annual income of 147% AMI; the same apartment in Queens required a necessary annual income of 85% AMI.[156] Since these units fall outside of the exclusion zone, there was no requirement that any be affordable to families earning low-income wages, even though developers nevertheless benefited from the tax abatements.[157] Only in the Bronx did average 421-a apartment rent prices even come close to being affordable—the average monthly 421-a apartment rent was $477, or 34% of the necessary annual income.[158] Since market rates still determined the rent for 421-a units, many apartments were out of range for precisely those that the program was purportedly designed to benefit.

e. Cost to Taxpayers of the 421-a Program (Tax Expenditure)

As noted above, the basic economic principle behind the 421-a program is that a developer receives a tax exemption for every unit or building created under the program.[159] The other side of this coin, though, is that the City foregoes what yearly property taxes it otherwise would have collected for every unit built under 421-a.[160] From 2001 through 2006, 421-a subsidies cost the City nearly $1.5 billion in tax expenditures.[161] In 2006 alone, 421-a subsidies cost the City over $500 million in unrealized property taxes, resulting in the largest real estate tax expenditure program that year.[162] Given the amount of benefits developers were receiving as

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[156] *Id.*

[157] *See* N.Y. REAL PROP. TAX LAW § 421-a(2)(a)(ii) (McKinney 2005) (any project in the outer boroughs is eligible for an as-of-right 15-year exemption).

[158] *Id.*

[159] *See supra* notes 37–48 and accompanying text.

[160] *Id.*

[161] *See* THE CITY OF NEW YORK DEP'T OF FIN. OFFICE OF TAX POL'Y, ANNUAL REPORTS ON TAX EXPENDITURES FISCAL YEARS 2001 THROUGH 2007, *available at* http://home2.nyc.gov/html/dof/html/pub/pub_reports_other_tax.shtml.

[162] Approximately 75,800 apartments received tax subsidies under the program in 2006. THE CITY OF NEW YORK DEP'T OF FIN. OFFICE OF TAX

compared to the amount of affordable housing produced, questions gradually began to emerge as to whether the costs of the program were outweighing the benefits, and, if so, how to best revise the program in order to realign it with its goals.

II. AMENDING THE 421-A PROGRAM: ENACTED LEGISLATION IN 2007

In light of the City's burgeoning population, strong housing market, and the need for more affordable housing for families earning low-income wages, it became apparent that the 421-a program had to change.[163] Public funds were still being used inefficiently.[164] Wealth was being created, though not necessarily for the intended recipients of the program.[165] While more housing was indeed being created, the second policy goal of 421-a—providing affordable housing—was still out of reach, and accordingly, the need for an overhaul of the 421-a program became evident by 2006.[166]

A. Proposals for Change—Four Perspectives

Recognizing this need, Mayor Bloomberg assembled a task force in early 2006 to explore potential options for reforming the program.[167] Around the same time, several housing advocacy not-for-profit organizations simultaneously began to independently lobby for progressive proposals to the 421-a program in hopes of influencing the pending City legislation.

POL'Y, ANNUAL REPORT ON TAX EXPENDITURES FISCAL YEAR 2007, at 20–21 (2007), *available at* http://home2.nyc.gov/html/dof/html/pdf/07pdf/ter_2007_final_rev12-28-07.pdf.

[163] *See* HPD, TASK FORCE, *supra* note 38, at 1 ("[T]he environment for housing development has changed dramatically. Our robust housing market provides an historic opportunity to strengthen the connection between the 421-a program and the development of affordable housing.").

[164] *See supra* notes 132–45, 159–61 and accompanying text.

[165] *See supra* notes 146–58 and accompanying text.

[166] Byrne & Diamond, *supra* note 13, at 531.

[167] HPD, TASK FORCE, *supra* note 38, at 1.

1. *Citizens Housing and Planning Council of New York*

One such organization was the Citizens Housing and Planning Council of New York ("CHPC"). For several years, CHPC[168] had called for a variety of substantive changes to the 421-a program and to zoning laws in general in order to spur affordable housing creation.[169] CHPC contended that requiring, at minimum, 20% of on-site apartments in the exclusion zone be affordable created an inflexible system that failed to persuade developers to provide anything more than 20% because developers stood to gain no extra benefit.[170] Moreover, CHPC argued that a freeze on eligibility requirements for on-site exclusion zone affordable apartments at "no more than 80%" AMI prevented developers from "tap[ping] the huge market [of] households earning above 80% [AMI] but below what is necessary to rent new market-rate apartments."[171] Instead, CHPC recommended creating a more adaptable program by instituting a "sliding scale of set-aside percentages and tenant [income] eligibility limits."[172] In effect, this change would encourage developers to build more affordable housing units

[168] Citizens Housing and Planning Council "is a non-profit policy research organization dedicated to improving housing and neighborhood conditions through cooperative efforts of the public and private sectors." Citizens Housing and Planning Council, http://www.chpcny.org/ (last visited, Apr. 14, 2008).

[169] The Inclusionary Housing Program "combines a zoning floor area bonus with a variety of housing subsidy programs to create powerful incentives for the development and preservation of affordable housing. Developers [must] devote at least 20 percent of their residential floor area to [permanently affordable] housing" to maximize the incentives under the program. Int. 487, Dec. 11, 2006. http://webdocs.nyccouncil.info/attachments/75428.htm (last visited Apr. 14. 2008) (citing NEW YORK CITY DEP'T OF CITY PLANNING, NEW YORK CITY ZONING: INCLUSIONARY HOUSING PROGRAM, *available at* http://home.nyc.gov/html/dcp/html/zone/zh_inclu_housing.shtml).

[170] CHPC, ENHANCE, *supra* note 43, at 8.

[171] *Id.* While there is no specific data to show exactly how many families fall into this range, data shows that approximately 820,000 City families fall into the census income bands between $50,000 and $99,000. US Census Bureau, American Factfinder 2006 for New York City, http://factfinder.census.gov (type "New York City" in City/Town/Zip box, follow the "show more" hyperlink next to Economic Characteristics) (last visited Apr. 14, 2008).

[172] CHPC, ENHANCE, *supra* note 43, at 8.

because it would reward developers with more tax incentives if they chose to build over the statutory floor of 20%.[173]

2. *Housing Here and Now*

In a similarly progressive vein, Housing Here and Now ("HHN")[174] called for the exclusion zone to be expanded to encompass the entire City, thus revoking any as-of-right tax incentives for developers and instead obligating developers to provide on-site affordable low- and moderate-income housing if they wanted tax incentives.[175] Moreover, the coalition called for "at least 30% of the units [to] be affordable for families earning up to 50% of area median income."[176] Under this proposal, not only would more affordable units be created, but more of those units would effectively go to families who earned less money.[177] Furthermore, HHN urged that any developers who declined to build *any* affordable housing would have their taxes directed to the

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[173] *Id*. For example, the CHPC-proposed scale would allow developers electing to create 40% of their units as affordable units would be permitted to increase the maximum average household income of renters up from 100% to 120%. As a result, while more affordable units would be created, developers could recoup the cost by renting other units to those with higher incomes. *Id.*

[174] Housing Here and Now is a "coalition of affordable housing groups, labor unions, AIDS activists, churches and community groups [who] have joined together to demand that our leaders guarantee housing for ALL New Yorkers." Housing Here and Now, http://www.housinghereandnow.org (last visited Apr. 14, 2008).

[175] HOUSING HERE AND NOW, RECOMMENDATIONS FOR REFORM OF THE 421-A PROGRAM (2006), *available at* http://www.housinghereandnow.org/policy_421a.html (click on link below "421-a Housing Here and Now Recommendations (July 26, 2006)").

[176] *Id.*

[177] This is because more units would be available for those families earning less than $35,450. *See id.* HHN also advocated for incentives for developers who dedicated 100% of their units to affordable housing for families earning moderate-income. *Id.* A "moderate-income" family is generally defined as one that earns between 80% and 120% AMI, which currently equates to between $56,720 and $85,080. *See* COMMUNITY PLANNING BD. 12, AFFORDABLE HOUSING DEFINED, AFFORDABLE RENT CALCULATIONS (2006), *available at* http://cd12-plan.net/Documents/AffordableHousingDefined.pdf.

City's Affordable Housing Fund, and that developers would be required to pay building service workers prevailing wages if they received tax incentives under the program.[178]

3. Pratt Center For Community Development and Habitat For Humanity

Other organizations that became involved in the advisory process for the revamping of 421-a included the Pratt Center for Community Development[179] and Habitat For Humanity New York City (referred to jointly as "Pratt"), which partnered together to provide a recommendation report.[180] While the two groups did not initially suggest their own proposed reforms, they nevertheless mapped out the overarching issues that the Mayor's task force should consider.[181] Pratt predicted that the Task Force would take on important questions like whether to set a maximum cap on benefits that developers could receive for any project, and whether it would be more effective to expand the exclusion zone or do away with it altogether by requiring all new building projects in the City to set aside a certain number of affordable units.[182] Further, Pratt

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[178] *Id.* The Affordable Housing Fund, *see infra* notes 201–15 and accompanying text, is a fund solely dedicated to financing the construction of affordable housing stock. Prevailing wages, *see infra* notes 256–63 and accompanying text, refers to the wages that maintenance workers in 421-a buildings receive. The 421-a program as envisioned by CHPC, would not only ensure that developers opting out of the 421-a program were indirectly promoting affordable housing through their City property taxes, but also that families earning moderate income were not also priced out of the City. Additionally, CHPC's proposal sought to spread the benefits of the 421-a program to those actually working in 421-a subsidized buildings. *Id.*

[179] Pratt Center for Community Development "works for a more just, equitable, and sustainable city for all New Yorkers, by empowering communities to plan for and realize their futures." Pratt Center for Community Development, About Pratt Center, http://www.prattcenter.net/about.php (last visited Apr. 14, 2008). PCCD partnered with Habitat For Humanity on this recommendation paper.

[180] PRATT, SUBSIDIZE, *supra* note 39.

[181] PRATT, SUBSIDIZE, *supra* note 39, at 9–10.

[182] *Id.* Indeed, the Task Force duly took up these questions, determining that the exclusion zone should be expanded, not removed completely, and that

focused on whether the off-site negotiable certificates program should be abolished, or if it would be better to keep and enhance the existing program by setting higher minimum prices for certificates and creating more oversight for these private transactions.[183]

4. Mayor Bloomberg's 421-a Task Force

Reflected in the ultimate recommendations of Mayor Bloomberg's 421-a Task Force were aspects of the Pratt, CHPC and HHN proposals outlined above.[184] The Task Force determined that the best route was to institute several substantive changes to jumpstart the affordable housing prong of the program.[185] The most significant of these recommendations included: 1) expanding the exclusion zone to include specific areas in Brooklyn and Queens that were exhibiting rapidly growing populations and increasingly affluent socio-economic areas;[186] 2) limiting 421-a eligibility only to projects with at least six units;[187] 3) eliminating the negotiable certificate program and replacing it with a dedicated affordable housing fund;[188] and 4) capping the "total amount of tax benefits that any market rate unit" could receive in a development that did not contain on-site affordable housing (i.e., developments inside of the exclusion zone).[189]

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there should be a maximum level for tax benefits a developer could receive. *See infra* notes 184–89 and accompanying text.

[183] *Id.*

[184] *See infra* notes 168–83 and accompanying text.

[185] *See* HPD, TASK FORCE, *supra* note 38, at 2–3.

[186] GEA Map, *supra* note 79.

[187] HPD, TASK FORCE, *supra* note 38, at 2–3, 4, 6–8. Limiting tax incentives to buildings with more than 6 units effectively prevents developers from building small-scale developments and receiving 421-a tax benefits; this decision, however, all but forecloses the possibility for small developers to take advantage of the 421-a program.

[188] *Id.* The Affordable Housing Fund is a fund solely dedicated to financing the construction of affordable housing stock. *See infra* notes 201–15 and accompanying text.

[189] *Id.* In turn, developers in the exclusion zone could not obtain large numbers of negotiable certificates unlike previous developers such as Donald

B. City Council Compromises

Bloomberg's recommendations were formally introduced to the City Council in early December 2006.[190] However forward-looking the proposed reforms may have been, some City Council members nevertheless viewed them with criticism as not being sufficiently progressive.[191] Eventually, three other competing proposals emerged as options for determining new contours for the program.

The first competing proposal was offered by City Council Speaker Christine Quinn, which similarly called for eliminating the negotiable certificate program and excluded three-unit projects from obtaining exemptions.[192] Her proposal went further than Bloomberg's, however, by allowing four- and five-unit projects to remain qualified for exemption, calling for a comparatively expanded exclusion zone and establishing a committee to regularly review the exclusion zone boundaries.[193] Moreover, only those developers who devoted at least 20% *on-site* affordable housing to families earning no more than 80% AMI would be granted tax incentives.[194]

The second competing proposal was offered by Council Members Annabel Palma and David Yassky, which advocated for substantially simplifying the program by eliminating the exclusion zone and significantly ramping up benefits to families earning low-income wages.[195] Council Members Alan Gerson and Letitia James

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Trump who faced fewer obstacles before the task force's recommendations were implemented. *See supra* note 123 and accompanying text.

[190] Int. 472 (2006), *available at* http://webdocs.nyccouncil.info/attachments/75424.htm.

[191] Janny Scott, *Challenging a Tax Break for Housing Developers*, N.Y TIMES, Nov. 30, 2006, at B3 [hereinafter Scott, *Challenging*].

[192] Int. 486-A (2006), *available at* http://webdocs.nyccouncil.info/attachments/75471.htm.

[193] *Id.*

[194] No more than 5% of these affordable units had to be available to families earning between 60% to 80% AMI as calculated from the previous calendar year. *Id.*

[195] *Id.* Specifically, Palma and Yassky contended that both Bloomberg's and Quinn's proposals only "[slightly] narrow[ed] the tax break" and that "pure market rate development should be completely eliminat[ed]". Scott,

offered a final competing proposal.[196] Most significantly, their bill would have required developers to set aside 35% of on-site affordable housing in a development at 60% AMI in order to qualify for 421-a benefits.[197]

One of the major opponents to any changes in the 421-a program was, unsurprisingly, the President of the Real Estate Board of New York, Steven Spinola.[198] Spinola asserted that any new bill would " 'result in less production of housing, as well as less production of affordable housing' [and] that the changes would alter the economics of development in certain neighborhoods, limiting the incentive for developers to proceed with their projects there."[199] Spinola and others urged reform of the negotiable certificate program instead of abandoning it altogether.[200]

Challenging, *supra* note 191. Palma's proposal would "get rid of this loophole altogether" by completely eliminating the exclusion zone, thus compelling all developers within the City to build on-site affordable units. *Id.* The Palma/Yassky bill would not only have allowed projects with at least three units to qualify for incentives, but also would have compelled developers seeking 421-a tax incentives anywhere in the City to reserve at least 30% on-site units as affordable. Int. 490 (2006), *available at* http://webdocs.nyccouncil.info/attachments/75430.htm. This three-unit proposition would have allowed smaller developers to take advantage of the 421-a tax incentives. Moreover, these units could only be made available to families earning no more than 50% AMI ($35,450 for a family of four). *Id.* Lowering the eligibility level to 50% AMI would arguably have realigned the program to benefit those families who were most disadvantaged. Indeed, as compared to the previous proposals, the Palma/Yassky recommendations were arguably more akin to the most progressive proposals of the affordable housing advocates. *See supra* notes 133–36, 139–40 and accompanying text.

[196] Int. 487 (2006), *available at* http://webdocs.nyccouncil.info/attachments/75428.htm.

[197] *Id.* Like the Palma/Yassky proposal, the Gerson/James proposal would have significantly raised the conditions for developers to meet before they could obtain tax benefits under the program by increasing the required amount of on-site affordable housing and lowering the income threshold.

[198] *See* Janny Scott, *In Overhaul, City Seeks to Expand Lower Cost Units*, N.Y. TIMES, Dec. 21, 2006, at A1 [hereinafter Scott, *Overhaul*].

[199] *Id.*

[200] Matthew Schuerman, *Mayor Faces Pitched Battle Over Breaks for Developers*, N.Y. OBSERVER, Sept. 24, 2006, http://www.observer.com/node/52713. REBNY only took a lobbying role in negotiations over the City

C. City Council Legislation—Local Law 58

Ultimately, the City Council overwhelmingly approved the bulk of Quinn's proposal in Local Law 58 in December 2006.[201] The Law included an expanded exclusion zone, mandated on-site affordable housing units, and elimination of certain "of right" tax incentives. First, the exclusion zone was expanded into certain gentrifying areas in Brooklyn and Queens,[202] and a boundary review commission was created in order to assess the zone map every other year.[203] Moreover, within the zone, at least 20% of units were mandated to be "on site" affordable units; i.e., "situated within the building or buildings for which benefits . . . are being granted."[204] As before, such units were eligible only for families earning no more than 80% AMI.[205] Outside of the exclusion zone, 25-year as-of-right tax incentives were eliminated unless the projects provided on-site affordable units or were built under certain other government affordable housing programs.[206]

In addition to the on-site mandate and the elimination of the 25-year as-of-right exemptions, several other elements of the 421-a program were altered. Most importantly, certain projects were precluded from receiving tax benefits, an Affordable Housing Fund was established, and market-rate rentals had tax benefit caps.[207] Specifically, the City Council determined that only buildings with four or more units would receive tax incentives, thus precluding two- or three-unit projects from getting such benefits and ensuring that developments benefiting from the tax incentives would

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Council bill.

[201] Scott, *Overhaul*, *supra* note 198. The measure for Local Law 58 passed by a vote of 44 to 5. Mayor Bloomberg endorsed Quinn's proposal as well. *Id.*

[202] NEW YORK CITY, CODE §§ 11-245(a)(2–4) (2007).

[203] NEW YORK CITY, CODE §§ 11-245.1(a–d) (2007).

[204] NEW YORK CITY, CODE § 11-245(b-1) (2007).

[205] NEW YORK CITY, CODE § 11-245(b-2) (2007).

[206] DEP'T OF HOUS. PRES. & DEV., 421-A LEGISLATION OVERVIEW AND FAQ 1 (2007), *available at* http://home.nyc.gov/html/hpd/downloads/pdf/421a-FAQ.pdf [hereinafter HPD, FAQ].

[207] *See* NEW YORK CITY, CODE §§ 11-245(b); 11-245.1-a (2007); NEW YORK CITY, CHARTER § 1805 (2007).

advantage more low-income families.[208]

The Affordable Housing Fund that Mayor Bloomberg had proposed[209] in effect replaced the negotiable certificate system, creating a different alternate means for financing affordable housing development. The major goals of the Fund is to 1) direct affordable housing funds to specific neighborhoods with the highest percentage of "poor" households; 2) finance projects that would create affordable housing; and 3) finance projects where developers agree to preserve levels of affordability past the duration of tax abatement.[210] Additionally, in order to combat the deep subsidization of luxury developments, the local law set a ceiling on the maximum tax incentives that any market-rate unit could receive at $65,000 per unit.[211]

Upon passing Local Law 58, Speaker Quinn pledged that "[t]he bill will create even more affordable housing, encourage development in communities where it is still needed and protect taxpayer dollars from over-subsidizing new luxury development."[212] Even those who had introduced competing bills voted for Quinn's plan.[213] Councilmember Palma recognized its significance, musing, "We need to look at this piece of legislation[] and look at the significant improvements [from the previous program]."[214] Yassky similarly observed that the law "[would] result in more affordable housing and [would] eliminat[e] some of the most egregious disparities in the property tax."[215]

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[208] NEW YORK CITY, CODE § 11-245.1-b(c) (2007).

[209] NEW YORK CITY, CHARTER § 1805 (2007).

[210] NEW YORK CITY, CHARTER § 1805(4)(a–c) (2007).

[211] HPD, FAQ, *supra* note 206, at 2. Indeed, prior versions of the 421-a program allowed for unlimited tax incentives, which allowed for high-end luxury developers to cash in. The exemption cap will certainly help to curb this phenomenon. *See supra* notes 138–42 and accompanying text.

[212] Scott, *Overhaul*, *supra* note 198.

[213] *Id.*

[214] Josh Burd & Gail Robinson, *Tax Breaks For Affordable Housing*, GOTHAM GAZETTE, Dec. 21, 2006, *available at* http://www.gothamgazette.com/article/searchlight/20061221/203/2067.

[215] *Id.*

D. The New 421-a Program: 2007–2010

The 421-a program amendments by the City Council had to clear one more hurdle to become law.[216] In New York state, a local law related to a "state concern" such as housing may not be unilaterally adopted unless "authorized specifically [by the State Legislature] . . . or unless the State Legislature has specifically granted such power to the City."[217] Thus, while the State Legislature had the authority to simply rubber stamp Local Law 58, it also had the ability to modify it prior to enactment.[218] The task of shepherding the bill through the State Legislature and reauthorizing the tax incentives fell primarily to the Chairman of the Housing and Buildings Committee and representative for the 53rd Assembly District in Brooklyn,[219] Assemblyman Vito Lopez.[220]

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[216] DOS, REVISING, *supra* note 38, at 3.

[217] *Id.*

[218] *See id.*

[219] The 53rd Assembly District encompasses sections of Williamsburg and Bushwick and is currently a lesson in socio-economic contradictions. The NYU Furman Center for Real Estate and Urban Policy describes Williamsburg's housing market as having "consistently high numbers of new certificates of occupancy . . . . [P]rices continue to rise rapidly and the district now has the 3rd highest rate of price appreciation in the City for 2–4 unit buildings." FURMAN, HOUSING, *supra* note 8, at 58. Breaking with trends, Williamsburg "has seen rates of subprime refinance lending decline steadily in recent years [and] median household incomes increased significantly in the district since 2002." FURMAN, HOUSING, *supra* note 8, at 58. In contrast, Bushwick's housing market is described as "exhibit[ing] somewhat divergent trends. On the one hand, the neighborhood has benefited from high rates of price appreciation . . . . [but] almost half of all new home purchase and refinance loans . . . are subprime, and Bushwick suffers from consistently high rates of foreclosure. Bushwick also has the highest rate of serious housing code violations in the City . . . ." *Id.* at 61.

[220] As an Assemblyman for the State Legislature, Lopez was not involved in the process at the City Council level. *See* Matthew Schuerman, *Grinding Sausage Late at Night: Albany Reforms 421a Program*, N.Y. OBSERVER, June 26, 2007, *available at* http://www.observer.com/2007/grinding-sausage-late-night-albany-reforms-421a-program ("[T]he program, scheduled to expire at the end of this year, needed state reauthorization before the City Council's changes took effect. That's where Mr. Lopez came in.").

1. Opening Moves in the State Legislature

Initially, it appeared that Lopez was poised to tighten the program's requirements even more by restricting income eligibility levels to 60% AMI (down from the City Council's 80% AMI level), mandating that at least 30% of on-site units be affordable (up from 20%),[221] and expanding the exclusion zone across the entire City.[222] Indeed, these modifications would not only have shifted the demographic the program was aiming to serve, but also would have made developers create more affordable housing in order to receive the tax incentives.[223]

Lopez also questioned the method of pegging 421-a affordability levels to the regional AMI calculation.[224] While the HUD-defined AMI for the entire City is currently $70,900, the true AMI in Queens is closer to $49,000, and the AMI in Brooklyn is only $37,000.[225] As Lopez succinctly observed, "AMI in Bushwick is [only] $22,000. Regional AMI is a joke." To Lopez, the "need [for moderate-income housing was] great but it shouldn't be at the expense of people in Bushwick or Williamsburg."[226]

In response to Lopez's lofty ambitions of further restricting the program, pro-development critics, including the Real Estate Board of New York, argued that including middle-income families

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[221] *See* Atlantic Yards Report, http://atlanticyardsreport.blogspot.com (June 20, 2007, 6:29 EST).

[222] Shane Miller, *City Reformed It, But State Must Approve It*, QUEENS LEDGER, Mar 22, 2007, *available at* http://www.queensledger.com/StoryDisplay.asp?PID=1&NewsStoryID=5470 ("Lopez, as well as affordable housing advocates, have been critical of the city's proposal, arguing that the city shouldn't subsidize market-rate housing, and that the entire city should be an exclusion zone.").

[223] *See supra* note 195 and accompanying text regarding Int. 490.

[224] Atlantic Yards Report, *supra* note 221. "The big dilemma we have, with federal government getting out of public housing and Section 8 [housing vouchers], it puts a real burden on the underclass, people who earn $15,000, $18,000 a year. Affordable—it's a relative thing" because AMI is calculated on a region-wide level. *Id.*

[225] *Id.*

[226] Atlantic Yards Report, *supra* note 221.

in the affordable housing calculation was necessary, and that any further restrictions beyond Local Law 58's program modifications would stifle all development in the City.[227] In light of Lopez's proposed changes, even the Real Estate Board of New York turned to back the City Council bill, as did parties from the other side—including some affordable housing advocates who feared that Lopez's proposals would encumber smaller developers too much.[228]

2. *The Outcome of Negotiations–A Revised 421-a Program*

In the end, the New York State Legislature endorsed many sections of Local Law 58, including eliminating the negotiable certificate program and 25-year as-of-right benefits, creating the Affordable Housing Fund, and capping the maximum amount of incentives a project was eligible to receive.[229] Notwithstanding the strong indications from Lopez that the Legislature wanted significantly stronger 421-a reforms, what eventually emerged was legislation that melded the City Council's law with parts of Lopez's vision, a compromise to ensure passage of the bills.[230]

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[227] As the Commissioner for the City's Department of Housing Preservation and Development asserted, "We agree we need low-income housing, but we need more middle-income housing. . . ." *Id.* Critics who claimed that revisions to 421-a would stifle development essentially used the same threat that they had in 1985—that any additional limitations on development in the City would scare off any further development. *See supra,* note 96 and accompanying text.

[228] *See id.*

[229] *See generally,* N.Y. REAL PROP. TAX LAW § 421-a (McKinney 2007).

[230] Three Assembly Bills (A.) and one Senate Bill (S.) form the framework for the changes to the program: A. 4408; A. 9293; A. 9305; and S. 6446. *See* A. 4408-A, 2007 Leg., 230th Sess. (N.Y. 2007); A. 9293, 2007 Leg., 230th Sess. (N.Y. 2007); A. 9305, 2007 Leg., 230th Sess. (N.Y. 2007); S. 6446, 2008 Leg., 230th Sess. (N.Y. 2008).

a. Exclusion Zone Expansion

Although the Legislature declined to adopt a City-wide expansion of the exclusion zone, it did greatly extend the zone to more neighborhoods than were proposed by the City Council, more than doubling the areas in the City where the 421-a laws affirmatively apply.[231] In these areas, developers are now obligated to create at least 20% on-site affordable housing if they wish to build there and can no longer opt for negotiable certificates instead.[232] Outside of the zone, however, there is still no mandate to create affordable units, and market-rate units rent level is still determined by the prevailing rates in the area.[233] As explained by Lopez,

> What we've done is expanded those 421-a zones to fifteen more communities, eight more than the City Council excluded. [Many] people strongly objected to the [broader] City-wide [proposal] because they didn't want to use the concept of tax benefits as a way of mandating affordability. [In turn, the zone, once only in Manhattan, was expanded such that now] every borough has a program. [Community

[231] N.Y. REAL PROP. TAX LAW §§ 421-a(7)(a)(ii); 421-a(11) (McKinney 2007); A. 4408-A §§ 11(A-B), 2007 Leg., 230th Sess. (N.Y. 2007). *See also* Rachel Nielsen, *Developers Incentives: Now With More Caveats*, CITY LIMITS, Aug. 27, 2007, *available at* http://www.citylimits.org/content/articles/viewarticle.cfm?article_id=3395. In addition to the original Manhattan and Greenpoint-Williamsburg zones, the new exclusion zone areas include: all of Manhattan; portions of Claremont and Crotona Park in the Bronx; Downtown Brooklyn as well as parts of Red Hook, Sunset Park, East Williamsburg, Bushwick, East New York, Crown Heights, Weeksville, Highland Park, Ocean Hill, Prospect Heights, Carroll Gardens, Cobble Hill, Boerum Hill, and Park Slope; sections of Long Island City, Astoria, Woodside, Jackson Heights, and the East River Waterfront in Queens; and, sections of St. George, Stapleton, New Brighton, and Port Richmond in Staten Island. HPD, FAQ, *supra* note 206, at 1. *See* GEA Map, *supra* note 79.

[232] N.Y. REAL PROP. TAX LAW § 421-a(7)(f) (McKinney 2007).

[233] *See* NEW YORK CITY LOCAL LAW No. 58 §§ 1-2 (2006); N.Y. REAL PROP. TAX LAW § 421-a(11) (McKinney 2007), which legislate the exclusion zones. Outside of these areas, though, there is no mandated affordability restriction.

> Boards] picked areas that were prime for gentrification [in order] to slow it down [and to] be inclusive of working class people.[234]

b. New Income Eligibility Restrictions

In line with the City Council's law and Lopez's goals, the eligibility level for the 20% on-site affordable housing units built within the expanded exclusion zone was modified; now, income levels are dependent on whether other government subsidies are involved in the project.[235] Developers within the zone seeking 421-a benefits who build a project without any government assistance are obligated to reserve at least 20% of their units as affordable for families earning 60% AMI. However if those developers build a project with at least twenty-five units and receive "substantial assistance of grants, loans or subsidies from any federal, state or local agency," they are allowed to raise the income eligibility level of the affordable units to an average of 90% AMI.[236] Developers with substantial government assistance who build a project with less than twenty-five units can set income eligibility for the 20% affordable units at no more than 120% AMI.[237]

Under the non-government assistance option, the target demographic has shifted downward, thereby allowing more families earning lower incomes to qualify for affordable units under the program.[238] Whereas under prior versions of the law, only families

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[234] Interview with Vito Lopez, Assemblyman for the 53rd Assembly District, in Brooklyn, N.Y. (Oct. 25, 2007).

[235] N.Y. REAL PROP. TAX LAW § 421-a(7)(c) (McKinney 2007), *amended by* S. 6446 § 1, 2008 Leg., 230th Sess. (N.Y. 2008).

[236] N.Y. REAL PROP. TAX LAW § 421-a(7)(c) (McKinney 2007), *amended by* S. 6446 § 1, 2008 Leg., 230th Sess. (N.Y. 2008).

[237] N.Y. REAL PROP. TAX LAW § 421-a(7)(c) (McKinney 2007), *amended by* S. 6446 § 1, 2008 Leg., 230th Sess. (N.Y. 2008).

[238] *Compare* N.Y. REAL PROP. TAX LAW § 421-a(7)(c)(i) (McKinney 2007) ("[Rent in affordable units must be affordable to] families whose incomes at the time of initial occupancy do not exceed sixty percent [AMI] . . . ."), *with* N.Y. REAL PROP. TAX LAW §§ 421-a(2)(a)(ii)(C), 421-a(2)(a)(iii)(D), 421-a(2)(a)(iv)(A) (McKinney 2005) ("[Rent in affordable units must] be affordable to families of *low . . . income* [as set by the local housing agency].").

making up to $56,700 would qualify for an on-site affordable housing unit in a new building within the exclusion zone, that same family would no longer be eligible—income is currently capped at $42,540 for non-government assisted developments.[239]

The government assistance option, though, effectively increases the average income eligibility level with respect to the affordable units, from $56,700 (80% AMI) to an average of $63,810 (90% AMI).[240] This provision permits developers increased flexibility to determine income eligibility levels for affordable units.[241] For instance, a developer of an 80-unit project within the exclusion zone that finances a project with substantial government assistance could obtain 421-a tax benefits by setting aside ten units for families earning $42,540 (60% AMI) and ten units for families earning $85,080 (120% AMI). As a result, families earning less are more likely to be shut out of affordable apartments under this option simply because developers are permitted to seek renters with higher incomes.[242]

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[239] *See* N.Y. REAL PROP. TAX LAW § 421-a(7)(c)(ii)(A) (McKinney 2007), *amended by* S. 6446 § 1, 2008 Leg., 230th Sess. (N.Y. 2008).

[240] N.Y. REAL PROP. TAX LAW § 421-a(7)(c)(ii)(A) (McKinney 2007), *amended by* S. 6446 § 1, 2008 Leg., 230th Sess. (N.Y. 2008).

[241] *Compare* N.Y. REAL PROP. TAX LAW § 421-a(7)(c)(i) (McKinney 2007), *amended by* S. 6446 § 1, 2008 Leg., 230th Sess. (N.Y. 2008) ("[T]wenty percent of the units [must be affordable to] families whose incomes . . . do not exceed [60% AMI]."), *with* N.Y. REAL PROP. TAX LAW § 421-a(7)(c)(ii)(A) (McKinney 2007), *amended by* S. 6446 § 1, 2008 Leg., 230th Sess. (N.Y. 2008) ("[If construction] is carried out with substantial assistance of grants, loans or subsidies from any federal, state or local agency . . . twenty percent of the units [must be affordable to] families whose incomes . . . do not exceed [120% AMI] and, where the multiple dwelling contains more than twenty-five units, do not exceed an average of [90% AMI] . . . .").

[242] *Id.* Regrettably, a developer building with government assistance can entirely circumvent families earning incomes in the lower ranges and still meet the requirement to obtain tax benefits. For example, a developer building a 20-unit project could set aside four units at $85,080 (120% AMI) and satisfy the provision. N.Y. REAL PROP. TAX LAW § 421-a(7)(c)(i) (McKinney 2007), *amended by* S. 6446 § 1, 2008 Leg., 230th Sess. (N.Y. 2008). Similarly, a developer building a 100-unit project could meet the provision simply by setting aside twenty units at $63,810, which equates to an average of 90% AMI. N.Y. REAL PROP. TAX LAW § 421-a(7)(c)(ii)(A) (McKinney 2007), *amended by*

Contrary to initial indications, the HUD-defined AMI was wholly preserved in the new version of the 421-a program.[243] It was argued that the State Legislature lacked authority to narrow the scope to the desired neighborhood or even City level because the regional AMI calculations are a "federal standard that's used across the country [and the] federal government picks those areas and . . . applies them."[244] Without the apparent authority to restructure AMI itself, proponents of setting the level at 60% AMI asserted that the move would effectively create the same outcome by expanding affordable housing to families earning incomes lower than prior versions of the program.[245] As a result, the AMI level was effectively modified in an attempt to achieve the same outcome as shifting to a more localized AMI calculation—targeting families earning incomes at the lowest levels. That said, the substantial government assistance option only seems to partially target such families because developers can spread income levels for affordable units across a wider, and wealthier, spectrum.[246]

c. Extended Rent Stabilization Period

The new 421-a amendments also stabilize the rents for affordable units for thirty-five years[247] even though the tax incentives for developers expire at least ten years before that time.[248] This provision significantly lengthens the period of rent

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S. 6446 § 1, 2008 Leg., 230th Sess. (N.Y. 2008).

[243] *See generally*, N.Y. REAL PROP. TAX LAW § 421-a (McKinney 2007) ("area median income" cited throughout).

[244] *Public Hearing*, *supra* note 49, at 54–55 (statement of Shaun Donnovan, HPD Commissioner).

[245] *Public Hearing*, *supra* note 49, at 59 (statement of Hakeem Jeffries, Assemblyman for the 57th Assembly District).

[246] N.Y. REAL PROP. TAX LAW §421-a(7)(c)(ii)(A) (McKinney 2007), *amended by* S. 6446 § 1, 2008 Leg., 230th Sess. (N.Y. 2008). This provision allows for affordable units to be, on average, 90% AMI for buildings with 25 units or more. *Id.*

[247] N.Y. REAL PROP. TAX LAW § 421-a(7)(b) (McKinney 2007), *as amended by* S. 6446 § 2, 2008 Leg., 230th Sess. (N.Y. 2008).

[248] N.Y. REAL PROP. TAX LAW §§ 421-a(2)(a)(ii), 421-a(2)(a)(iv)

stabilization; in the past, rent stabilization simply ended when the tax incentive period ended.[249] "Prior to this," Lopez observed, "only the Mitchell-Lama [affordable housing] program had a longer [rent stabilization] period of twenty-five years."[250] As a result, developers receiving 421-a tax benefits may not increase the rent for almost double the amount of time that they could before.[251] This will create additional wealth for families earning low-income wages in the form of reduced rent burdens over time.[252]

d. Community Preference Provision

Also included in the finalized amendments is a provision demonstrating strong preference for those currently living in neighborhoods with new 421-a construction to have preferential treatment for housing instead of simply being priced out of the area.[253] Now, within the expanded exclusion zone, "residents of the local community shall have priority for the purchase or rental of fifty percent of the affordable units."[254] As Lopez has explained, "if you build 100 units in Bushwick, twenty of the units [must be designated] affordable. Half [of those, or ten units] must come from community. You sort of become a stakeholder if you live in the community,"[255] and this provision works to retain some of those stakeholders in the neighborhood by ensuring some units are set aside for pre-existing community members.

(McKinney 2007).

[249] *See* N.Y. REAL PROP. TAX LAW § 421-a(2)(f) (McKinney 2005).

[250] Interview with Vito Lopez, *supra* note 234.

[251] *Compare* N.Y. REAL PROP. TAX LAW § 421-a(2)(f) (McKinney 2005), *with* N.Y. REAL PROP. TAX LAW § 421-a(7)(b) (McKinney 2007), *as amended by* S. 6446 § 2, 2008 Leg., 230th Sess. (N.Y. 2008).

[252] *See supra* note 13 and accompanying text.

[253] N.Y. REAL PROP. TAX LAW §§ 421-a(2)(a)(ii), 421-a(2)(a)(iv) (McKinney 2007).

[254] N.Y. REAL PROP. TAX LAW § 421-a(6)(d) (McKinney 2007). It is important to note that there is no oversight mechanism created by the new legislation. It is unclear how exactly the City will monitor and enforce this community preference ideal.

[255] Interview with Vito Lopez, *supra* note 234.

e. Prevailing Wage Preservation

An important and novel addition to the 421-a program was in the area of wages for building service employees working in buildings receiving 421-a tax incentives.[256] Aside from of the program's focus on affordable housing, an associated concern was that "while 80[%] of building service workers across the City earn a prevailing wage, only 50[%] of such workers at buildings receiving 421-a benefits do."[257] As City Comptroller William Thompson described this divergence, "I think it is wrong for taxpayers to assist projects like these where workers earn wages that are barely livable."[258]

Section 8(b) of the new 421-a provides that in buildings with fifty or more units, "all building service employees employed at the building . . . shall receive the applicable prevailing wage for the duration of the building's tax exemption."[259] Under this provision, all "building service employees" working in 421-a buildings must be paid the prevailing wage for that specific type of work.[260] As a previous study determined, a "prevailing wage requirement [will] boost the annual wages with benefits included for a building service

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[256] *See* N.Y. REAL PROP. TAX LAW § 421-a(8)(b) (McKinney 2007).

[257] NEW YORK CITY COMPTROLLER'S OFFICE, TESTIMONY BEFORE THE NEW YORK STATE ASSEMBLY COMMITTEES ON REAL PROPERTY TAXATION AND HOUSING REGARDING THE RPTL SECTION 421-A INCENTIVE PROGRAM 3 (2006), *available at* http://www.comptroller.nyc.gov/press/testimonies/Jun08-06-Testimony_Before_The_NewYorkState_Assembly421a.pdf.

[258] *Id*.

[259] N.Y. REAL PROP. TAX LAW § 421-a(8)(b) (McKinney 2007). The prevailing wage provisions do not apply in buildings with less than 50 units, or in buildings where at initial occupancy at least 50% of the units are deemed affordable to families earning less than 125% AMI ($88,625). N.Y. REAL PROP. TAX LAW § 421-a(8)(c) (McKinney 2007).

[260] "Building service employees" are defined broadly as "any person who is regularly employed at a building who performs work in connection with the care or maintenance of such building." N.Y. REAL PROP. TAX LAW § 421-a(8)(a)(i) (McKinney 2007). This may include "watchman, guard, doorman, building cleaner, porter, handyman, janitor, gardener, groundskeeper, elevator operator and starter, and window cleaner." § 421-a(8)(a)(i). "Prevailing wages" refers to the going in-state wage rate for building service employees working in different capacities. *See* N.Y. REAL PROP. TAX LAW § 421-a(8)(a)(ii) (McKinney 2007).

worker from approximately $36,500 to over $47,400 [in order to] cover basic [family] needs such as food, housing and child care."[261]

As Lopez explained, "We [have] created a precedent for prevailing wages. We fought for fifty units; the City wanted 100 units." Notably, the City's 100-unit proposal, "would have [only] created 350 prevailing wage jobs . . . . [S]ince most of the [421-a] buildings [range from] 60–80 units, they all would have been exempt [from the] prevailing wage provision."[262] Instead, "[at the fifty unit level,] we will create 1,500 prevailing wage jobs . . . ."[263]

f. Disparate Treatment for One Developer

Shortly before the amendments were ready to be voted upon, one extra provision was added to the new state legislation.[264] The provision initially stated in part that:

> [A] project that includes at least twenty-five hundred dwelling units . . . shall be eligible for benefits . . . notwithstanding paragraph (f) of subdivision seven of this section if *in the aggregate* twenty percent of the units . . . are affordable to . . . families [whose average] incomes do not exceed . . . *seventy* percent of the area median incomes."[265]

In effect, this section operated to create a significant loophole around the on-site and income eligibility provisions placed on exclusion zone developments elsewhere in the bill.[266]

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[261] Marnie McGregor, *Testimony Before the NYC Council Housing and Building Committee On Prevailing Wage Legislation*, Apr. 22, 2005, *available at* http://www.prattcenter.net/test-prevailwage.php.

[262] Interview with Vito Lopez, *supra* note 234.

[263] *Id.*

[264] Ariella Cohen, *Earlier report: Assemblyman gives Ratner a clause for celebration*, BROOKLYN PAPER, June 30, 2007, *available at* http://www.brooklynpaper.com/stories/30/26/30_26bruceboost.html [hereinafter Cohen, *Earlier*].

[265] N.Y. REAL PROP. TAX LAW § 421-a(13) (McKinney 2007) (emphasis added).

[266] N.Y. REAL PROP. TAX LAW § 421-a(2)(f) (McKinney 2007); N.Y. REAL PROP. TAX LAW § 421-a(7)(c)(1) (McKinney 2007).

Instead of on-site affordable housing, this section only required affordable housing "in the aggregate" over the project.[267] By contrast to other developments that did not fit under this extra provision, the addition of these three words allowed a project falling under this provision to obtain tax incentives for the entire project, even if affordable units were only in some of the project's buildings.[268] This creates the potential for a sprawling, largely market-rate unit project, with a segregated section for affordable units, ultimately benefiting those with higher incomes (as well as the developer).[269]

Further complicating matters, income eligibility levels for a project under this provision were loosened to 70% AMI, up from 60% AMI for all other similarly situated developments.[270] In turn, rents could be 10% higher in an applicable development than in other 421-a developments.[271] As a result, the tax exemptions could have been worth as much as $300 million in real estate tax exemptions and increased rent to a developer whose project fit the provision.[272]

Interestingly, special interests appear to be involved in this dramatic new change to the 421-a amendments. Given the specific wording of the above section, this special exemption only applies to one large, high-profile development project already considered controversial by some due to its comparative size,[273] public cost,[274]

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[267] N.Y. REAL PROP. TAX LAW § 421-a(13) (McKinney 2007).

[268] *Id.*

[269] *Id.* This provision would also logically lead to socio-economic segregation within the project as well. *See id.*

[270] *Compare* N.Y. REAL PROP. TAX LAW § 421-a(7)(c) (McKinney 2007), *with* N.Y. REAL PROP. TAX LAW § 421-a(13) (McKinney 2007).

[271] *Compare* N.Y. REAL PROP. TAX LAW § 421-a(7)(c) (McKinney 2007), *with* N.Y. REAL PROP. TAX LAW § 421-a(13) (McKinney 2007).

[272] Ariella Cohen, *Bloomy slams "Ratner carve-out,"* BROOKLYN PAPER, June 29, 2007, *available at* http://www.brooklynpaper.com/stories/30/26/30_26ratnerbloomy.html [hereinafter Cohen, *Bloomy*].

[273] When completed, Atlantic Yards will be comprised of a "basketball arena and 16 towers containing 6,860 apartments on 22 acres in Prospect Heights . . . ." David Lombino, *Pressure Mounts to Curb the Size of Atlantic Yards*, N.Y. SUN, Aug. 29, 2006, at 1. Renowned architect Frank Gehry is also planning the project. Cohen, *Earlier, supra* note 264.

potential environmental impact,[275] and its use of eminent domain to secure land for construction:[276] the Atlantic Yards Project under development in Prospect Heights, Brooklyn by Forest City Ratner Companies.[277]

Surely, Lopez later downplayed charges of favoritism by claiming that the provision was not the real concern of critics. According to Lopez, Ratner "really wasn't the issue, the real issue was income [levels to determine affordability] and [the expansion of] geographical areas, but the smokescreen was Ratner because it [was] a hot item."[278] Nevertheless, some former allies and supporters of the bill thought otherwise. The reaction to what was soon dubbed the "Ratner Carve Out" was swift and full of indignation.[279] For instance, Assemblyman Hakeem Jeffries, a one-time supporter of the Atlantic Yards project, declared that a "tax break available only to the developer, was 'offensive' because it promoted 'economic segregation.'"[280] Mayor Bloomberg asserted

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[274] *See* Atlantic Yards Report, http://atlanticyardsreport.blogspot.com (July 25, 2007, 06:53 EST) ("The state gave $100 million. The city gave $200 million. They waived the ULURP process. You don't have to comply with the zoning requirements, so you can build ten, 15, 20 stories higher than anybody else, making additional money."); Atlantic Yards Report, http:// atlanticyardsreport.blogspot.com (Oct. 20, 2007, 06:37 EST).

[275] Atlantic Yards Report, http://atlanticyardsreport.blogspot.com (Sept. 29, 2006, 06:50 EST).

[276] Atlantic Yards Report, http://atlanticyardsreport.blogspot.com (Nov. 10, 2007, 06:42 EST).

[277] *See* Matthew Schuerman, *421a Bill Gives Special Treatment to Atlantic Yards*, N.Y. OBSERVER, June 20, 2007, *available at* http://www.observer.com/2007/421a-bill-gives-special-treatment-atlantic-yards ("The one exception [to the new amendments] . . . can mean only one thing: Atlantic Yards.").

[278] In fact, Lopez received over $6,000 in campaign contributions in his latest re-election bid for his Assembly seat from Michael Ratner and Karen Ranucci, brother and sister-in law of Forest City Ratner Companies' CEO Bruce Ratner. Cohen, *Earlier, supra* note 264. However, in light of the complexity and breadth of the law's legislative history and full circumstances of its passage, it is hard to conclude that such a small sum directed to one candidate was the entire, or even primary, impetus for inserting the provision.

[279] *Id.*

[280] Assemblyman Jeffries went on to state, "enough subsidy has already been given to this developer. There's absolutely no reason to treat this project

that the carve-out would "hurt the very people that everybody talks about helping and gives some tax breaks to a developer that doesn't need them and which we didn't have to do."[281]

In the face of this mounting pressure, the extent of the Ratner carve-out was revised. While the income level for affordable units within the Atlantic Yards project remained at the higher threshold of 70% AMI, two conditions now applied as a stop-gap compromise, with the promise of further revisions in a subsequent amendment: the project's tax-exempt period was reduced, and affordable units were mandated to be built concurrently with market-rate units.[282] Thus, the 421-a amendments passed unanimously and the bill was signed into law.[283] In his approval message, Governor Spitzer cautioned that while he "share[d] the Legislature's desire to accelerate affordable housing production and slow . . . gentrification[, he] also share[d] New York City's concerns about the impact of these three bills . . . on the level of subsidies for the Atlantic Yards project." Spitzer continued, "Fortunately, the Legislature has agreed to further amend these

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any more favorably than any other project that's being built." Atlantic Yards Report, *supra* note 274.

[281] Mayor Bloomberg added that he could "only hope that the Governor stands up and vetoes" the bill. Cohen, *Bloomy, supra* note 272. "Even Bertha Lewis of [the community reform organization] ACORN, a Ratner ally who is contractually barred from saying anything negative about the project, said that a state tax reform bill that exempted Ratner—and only Ratner—was 'bad public policy.'" Editorial, *The Ratner Clause*, BROOKLYN PAPER, June 30, 2007, *available at* http://www.brooklynpaper.com/stories/30/26/30_26editorial.html.

[282] *See* N.Y. REAL PROP. TAX LAW § 421-a(13) (McKinney 2007), *amended by* A. 9293 § 6, 2007 Leg., 230th Sess. (N.Y. 2007) (mandating that buildings with on-site affordable housing shall be eligible, provided that 20% of the units in any given building "are affordable to and occupied or available for occupancy by individuals or families the average of whose incomes at the time of initial occupancy do not exceed [70% AMI]"); Governor Spitzer, Approval Memorandum No. 40 Chapters 618, 619, 620, Memorandum filed with Assembly Bill Number 4408-A (2007), *available at* http://public.leginfo.state.ny.us/menugetf.cgi (type "A4408" in "Bill number" box, follow "Approval No. 40 of 2007" hyperlink).

[283] *See* Assembly Voting Record, A.9293, *available at* http://assembly.state.ny.us/leg/?bn=a9293 (last visited Apr. 14. 2008).

three bills with swift passage of . . . A.9373/S.6446."[284]

A.9373/S.6446 was ultimately passed in early 2008.[285] In many ways, the amendment directly responded to the concerns of those who had opposed the Ratner Carve Out: affordability levels within Atlantic Yards are now mandated to be exactly the same as for other developers working with other sources of government funding, i.e., 20% of units affordable at an average of 90% AMI.[286] Further, affordable units are required to be available in the same buildings as market-rate apartments, precluding the possibility that those units would be segregated to certain buildings within the larger development.[287] Additionally, certain amounts of affordable units now must be built during each phase of construction, which ensures that affordable units will be built as construction progresses rather than just towards the conclusion of the project.[288]

A closer reading of the new amendment, however, still evinces special interests at work. Those buildings within Atlantic Yards that contain 20% affordable units are eligible for twenty-five years of tax benefits.[289] Astoundingly, buildings within Atlantic Yards

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[284] Governor Spitzer, Approval Memorandum No. 40 Chapters 618, 619, 620, Memorandum filed with Assembly Bill Number 4408-A (2007), *available at* http://public.leginfo.state.ny.us/menugetf.cgi (type A4408 in "Bill number" box, follow "Approval No. 40 of 2007" hyperlink).

[285] S. 6446 § 7, 2008 Leg., 230th Sess. (N.Y. 2008).

[286] S. 6446 § 7.

[287] *Compare* N.Y. REAL PROP. TAX LAW § 421-a(13) (McKinney 2007) ("[Benefits granted] if in the aggregate twenty percent of the units in such development are affordable to . . . families whose incomes . . . do not exceed [60% AMI]."), *with* S. 6446 § 7, 2008 Leg., 230th Sess. (N.Y. 2008) ("[Benefits granted if affordable housing requirements are met] in the aggregate for each successive fifteen hundred units of the project rather than for each multiple dwelling containing such fifteen hundred units and in the aggregate for the entire project rather than for each multiple dwelling in the project.").

[288] N.Y. REAL PROP. TAX LAW § 421-a(13)(a)(iv) (McKinney 2007), *amended by* S. 6446 § 7, 2008 Leg., 230th Sess. (N.Y. 2008) ("[Benefits only go to] units in which, in the aggregate *for each successive fifteen hundred units of the project rather than for each multiple dwelling containing such fifteen hundred units* and in the aggregate for the entire project rather than for each multiple dwelling in the project.") (emphasis added).

[289] N.Y. REAL PROP. TAX LAW § 421-a(13) (McKinney 2007), *amended by* S. 6446 § 7, 2008 Leg., 230th Sess. (N.Y. 2008) ("The period of tax

that do not meet this 20% affordability mandate are nevertheless eligible to receive tax benefits for fifteen years. As a result, while other developers are barred from receiving this fifteen-year tax benefit if they do not meet 421-a requirements, those portions of Atlantic Yards that do not comply with this provision are still entitled to receive tax such benefits.[290] This extra period essentially translates into hundreds of millions of dollars for Ratner that other developers are simply not eligible for.[291]

III. ANALYSIS OF THE 421-A PROGRAM AMENDMENTS

"The original bill [I proposed was] my overall goal," reflected Assemblyman Lopez, "[but] the reality was I could have stopped [affordable] housing totally by having the bill vetoed and then there would be nothing . . . . There is a role for the tax breaks, but not at the expense of affordable housing."[292] Even with legislative compromises, there is little doubt that the amendments expand the commitment to affordable housing when compared to prior versions of the law. The new 421-a program decidedly points toward a greater equalization of the existing disparities between the program's twin goals of housing development and affordable housing construction[293] and among its three policy objectives of decent shelter, wealth creation, and efficient use of public funds.[294] The exclusion zone has been expanded to encompass more neighborhoods, mandating on-site affordable units in more locations across the City and curbing runaway profits for market-rate

benefits awarded to such multiple dwelling shall be the same as the period of tax benefits awarded under clause (A) of subparagraph (iii) of paragraph (a) of subdivision two of this section," but parts of the project that do not meet general requirements can still receive benefits that are "the same as the period of tax benefits awarded under clause (A) of subparagraph (ii) of paragraph (a) of subdivision two of this section.").

[290] Atlantic Yards Report, http://atlanticyardsreport.blogspot.com (Aug. 11, 2007, 06:25 EST).

[291] *Id.*

[292] Interview with Vito Lopez, *supra* note 234.

[293] CHPC, ENHANCE, *supra* note 43, at 5.

[294] *See* Byrne & Diamond, *supra* note 13, at 531.

developers.[295] In a similar vein, the negotiable certificate program has been eliminated in lieu of requiring on-site affordable units.[296]

Further, the eligibility levels with respect to AMI have been somewhat reduced, thus ensuring that the program is more directly tailored to help New Yorkers with lower income levels.[297] This target population now has a greater opportunity to retain more of their earnings as affordable housing will allow them to pay closer to 30% of their income toward housing, instead of the 40-50% or more that many did under the previous version of the program.[298] As an additional wealth creation facet of the new 421-a program, the prevailing wage provision will arguably help to ensure that these employees earn comparable wages.[299] The amended program will thus be useful in enabling the City to realize Mayor Bloomberg's plan to "create and preserve 165,000 units of

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[295] *See* N.Y. REAL PROP. TAX LAW §§ 421-a(11); 421-a (7)(f); 421-a (9)(c) (McKinney 2007).

[296] *See* N.Y. REAL PROP. TAX LAW § 421-a(7)(f) (McKinney 2007).

[297] N.Y. REAL PROP. TAX LAW § 421-a(7)(c)(ii) (McKinney 2007), *amended by* S. 6446 § 1, 2008 Leg., 230th Sess. (N.Y. 2008).

[298] *Compare* N.Y. REAL PROP. TAX LAW § 421-a(7)(c) (McKinney 2007), *amended by* S. 6446 § 1, 2008 Leg., 230th Sess. (N.Y. 2008) (providing tax benefits either if 20% of units are rented to families earning 60% AMI, or, if the developer finances the project with government assistance, if 20% of units are rented to families earning an average of 90% AMI), *with* N.Y. REAL PROP. TAX LAW § 421-a(2)(a)(ii) (McKinney 2005) (providing tax benefits if 20% of units are rented to families earning 80% AMI). The extra savings for these families comes from the fact that the base rent for affordable units is now, under the non-government assistance option, 30% of 60% AMI ($12,762), instead of 30% of 80% AMI ($17,016). No doubt, though, this change comes with a cost, as eligibility to those earning over the 60% limit is eliminated, thus precluding those families earning more than $42,540 from obtaining affordable housing under this particular program. *See id.* Further, the option for developers to finance projects through government assistance arguably leaves families earning low-income wages in a worse off position than they were under the old version of the program. N.Y. REAL PROP. TAX LAW § 421-a(7)(c) (McKinney 2007), *amended by* S. 6446 § 1, 2008 Leg., 230th Sess. (N.Y. 2008). Under this provision, developers are permitted to seek families earning on average $63,810 (90% AMI). *See supra* notes 235–42 and accompanying text.

[299] *See* N.Y. REAL PROP. TAX LAW § 421-a(8) (McKinney 2007).

affordable housing" for 500,000 New Yorkers by 2013."[300]

Notwithstanding these improvements, the new legislation begs the same fundamental question as before in light of the dramatic changes in the City's economic vitality over the past 35 years, the current landscape of the City's real estate market, and the program's lackluster track record relative to affordable housing:[301] whether the program's trade-off of uncollected tax revenues for increased affordable housing construction is now an optimal one. Touting the legislation's comparative improvements skirts the issue; such assertions are hardly conclusive that the amendments actually ensure effective use of public funds in the best manner possible or even to a meaningful extent.

A. Decent Shelter

1. No Quantifiable Performance Targets

One way to examine 421-a's impact is by focusing on the amount of affordable units created under the program for a given period of time. Such analysis in the past has taken three factors into account: 1) the number of affordable units built under the program; 2) the total number of units built under the program; and 3) the total number of units built City-wide.[302] This method is a straightforward way of showing how much "decent shelter" the program provides.[303]

One reason that previous attempts to measure the effectiveness of the 421-a program have been so complicated is that there were no specific performance metrics to serve as benchmarks for whether or not the program was effective.[304] Unfortunately, the

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[300] NYC DEP'T OF HOUS. PRES. & DEV., THE NEW HOUSING MARKETPLACE: CREATING HOUSING FOR THE NEXT GENERATION, *supra* note 23, at 3.

[301] *See supra* notes 116–62 and accompanying text.

[302] IBO, FISCAL, *supra* note 44, at 4.

[303] Byrne & Diamond, *supra* note 13, at 532.

[304] *Compare* N.Y. REAL PROP. TAX LAW § 421-a(10)(a) (McKinney 2007) (outlining monitoring procedures for the program, but no specific goals or

new legislation does not address this basic problem. When asked what successful results for the 421-a program would look like, Assemblyman Lopez replied, "You will find thousands of units that have 20% [on-site affordable housing units]."[305] This response, coupled with legislative silence as to a quantitative goal,[306] illustrates the lack of any specific, publicly defined benchmarks or methodologies for which to meaningfully weigh results. In a data-oriented era of accountability, a program that stands to cost the public so much money but lacks adequate tools to measure it is difficult to defend.

Absent quantifiable performance targets, it is, and will continue to be, virtually impossible to determine whether the 421-a program is efficient. As long as some indeterminate amount of affordable housing is built, supporters of the program will publicize the program's success, and opponents will claim that the program is a failure. Such *post hoc* rationalization prevents politicians, and the public, from accurately measuring the program's success; it only fosters unfocused and ultimately unsupported debate on whether the number of affordable units built exceeded, met, or fell short of expectations. Unless and until there are clear performance goals, it will also continue to remain unclear whether the program is meeting expectations in terms of efficiently using public funds.[307]

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benchmarks), *with* UNITED STATES OFFICE OF MGMT. & BUDGET, THE FEDERAL GOVERNMENT IS RESULTS-ORIENTED, A REPORT TO FEDERAL EMPLOYEES 1 (2004) [hereinafter A REPORT TO FEDERAL EMPLOYEES] ("[T]o be results-oriented, managers must ask themselves if the programs they administer are achieving the desired result at an acceptable cost. If the answer is "no" or "we don't know," they must do something about it, such as *clearly define the desired outcomes* . . . [and] develop aggressive timeframes for taking action . . . .") (emphasis added).

[305] Interview with Vito Lopez, *supra* note 234.

[306] *See generally*, N.Y. REAL PROP. TAX LAW §421-a (McKinney 2007); NEW YORK CITY, CODE § 11-245.1(d) (2007). No quantifiable goals exist in either the state or the local law.

[307] *See* A REPORT TO FEDERAL EMPLOYEES *supra* note 304, at 1.

2. *A Weak Yet Rigid Market/Affordable Mix Mandate*

The modified 421-a program continues to promote a rigid policy that imposes a strict building-mix percentage of affordable-housing to market-rate-apartments with no flexibility. Significantly, maintaining the 80% market/20% affordable mix makes it impossible to maximize the potential to create decent and affordable shelter as compared to other proposals advanced by affordable housing advocates and some members of the City Council.[308] Approximately 92,000 units were built under 421-a between 1985 and 2006; roughly 4,900 of these were deemed affordable.[309] Given the on-site provision now in place, if another 92,000 units were hypothetically built under new program, 18,400 (20%) affordable units would be produced.[310]

By contrast, a more forceful program that mandated 30% affordable units within the exclusion zone would produce 27,600 affordable units. Alternatively, even a flexible tax incentive program that provided developers with increased incentives for developing over the minimum standard of 20% would have likely yielded more than 18,400 units.[311] Instead, the new program eschews both more stringent and more flexible standards, opting instead for the identical, unyielding 80% to 20% mix of market- and affordable-rate units as before. In failing to reflect either of the alternative options, the legislation essentially precludes the possibility that developers might tailor their projects to include more affordable units.[312]

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[308] *See supra* notes 133–36, 139–40, 152–53, 155–56 and accompanying text.

[309] *See* 2007 HSR, *supra* note 53, at 16.

[310] *See* N.Y. REAL PROP. TAX LAW § 421-a(7)(f) (McKinney 2007) (mandating on-site units in order to receive 421-a tax benefits).

[311] *See* CHPC, ENHANCE, *supra* note 43, at 8–9.

[312] *Id.* For example, allowing developers the flexibility to increase the proportion of affordable units to 40% in exchange for increasing the maximum allowable household income of renters could result in higher levels of affordable housing while simultaneously allowing developers to maintain their profit margins.

3. *An Unfunded Affordable Housing Fund?*

On its face, the addition of an Affordable Housing Fund sounds like a fair replacement for a negotiable certificate program that benefited market-rate developers far more than off-site affordable housing developers. According to Councilmember Yassky, though, the Fund is "nothing but smoke and mirrors" and is "utterly without substance."[313] "The City already spends fair amount on affordable housing,"[314] Yassky pointed out, "and this [supposedly new] commitment only means that the City will spend at least this—[absolutely] not $400 million over and above what we already spend. Where is the additional $400 million?"[315] Indeed, there is no additional funding; the Fund merely re-commits funds for affordable housing that were already earmarked for promoting affordable housing.[316]

Moreover, not only has the money not yet been allocated according to the criteria outlined above,[317] but also there is no statutory timeline in which the money in such a Fund would be spent or replenished.[318] For instance, if money from the Fund is stretched out over many years, the amount of affordable units built from the Fund in a given year could be less than what could be built using negotiable certificates. Alternatively, if a large portion of the Fund is initially used on a limited group of affordable housing projects, there is nothing to assure that there will continue to be

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[313] Telephone Interview with David Yassky, New York City Council Member for the 33rd Council District, in Manhattan, N.Y. (Nov. 16, 2007).

[314] *Id.* Such HPD-administered programs that promote affordable housing include the Section 8 Program; Mitchell-Lama Housing; Low Income Housing Tax Credits; and the Low Income Affordable Marketplace Program. *See* Department of Housing Preservation and Development Home Page, http://www.nyc.gov/html/hpd (last visited Apr. 14, 2008).

[315] Telephone Interview with David Yassky, s*upra* note 313.

[316] NEW YORK CITY, CHARTER § 1805(1-2) (2006). ("[T]he commissioner shall be authorized to establish or cause to be established an affordable housing trust fund . . . such fund may be established through agreement with a public benefit corporation authorized pursuant to the private housing finance law to finance the development and rehabilitation of affordable housing.").

[317] Interview with Vito Lopez, *supra* note 234.

[318] *See* NEW YORK CITY LOCAL LAW NO. 58 § 9 (2006).

money in the Fund in the future.[319]

The consequence of an unfunded Affordable Housing Fund is that the Fund will likely provide for little more than what was built through the negotiable certificate program.[320] This suggests that in addition to the Fund being under-funded, the money, if allocated, runs a high risk of being even *less* cost-efficient than the older version of the certificate program. According to Yassky, it may be better to either revise the negotiable certificate program so that developers are required to purchase a certain amount of off-site certificates if they chose to develop within the exclusion zone, or regulate the certificate system and enforce a substantially higher price.[321]

B. Wealth Creation

1. Setting Tax Incentives for Developers as the Default

Despite the substantive policy alterations to the 421-a program since 1971,[322] the underlying conceptual framework has not been significantly changed by any new legislation. The statute's default position still holds that real estate developers have a right to tax exemptions when building in the City.[323] This default position is

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[319] NEW YORK CITY LOCAL LAW No. 58 § 9. Absent from the law is any mechanism to replenish whatever money may be first established in the Fund, such as devoting property tax payments from developers who chose not to take advantage of 421-a to replenishing the Fund. NEW YORK CITY LOCAL LAW No. 58 § 9.

[320] Telephone Interview with David Yassky, *supra* note 313.

[321] *Id.* Indeed, Yassky's counter to the removal of the negotiable certificate program has merit only if the City devises a way to administer the negotiable certificate program, instead of allowing a private market to govern the sale and purchase of certificates.

[322] *See supra* notes 75–115 and accompanying text.

[323] N.Y. REAL PROP. TAX LAW § 421-a(7)(a)(ii) (McKinney 2007) (outlining the various "geographic exclusion areas" within the City). The continued existence of these exclusion areas—essentially sections of the City where developers must meet certain affordable housing obligations in order to receive tax benefits—shows that the default scenario for purposes of the 421-a

perhaps best evidenced by the so-called "exclusion zone"—only within its boundaries are developers excluded from receiving the as-of-right tax benefits unless they meet certain criteria.[324] Outside the zone, though, developers still receive benefits as-of-right.[325]

This illustrates a built-in fear that if the default position is shifted, developers will simply not build because profits will not be high enough.[326] However, the premise that tax incentives are necessary to entice developers to build in the City is flawed. Given the lack of housing in the City[327] and the constant, rapid population growth,[328] it appears equally likely, if not more so, that the market itself would generate development. As Assemblyman Lopez suggested, "because the growth in population is so high [and there is] limited land, [developers] will build no matter what."[329]

Indeed, the majority of buildings constructed between 1985 and 2006 were built outside of the 421-a program.[330] Given a more restrictive current program, it is unlikely that developers will now decide to build within the program.[331] Even if there were City-wide requirements for the use of 421-a, it is still quite likely that the potential profits to developers would be large enough that they would continue to build even without the tax incentive and with some provisions of affordability. In fact, some large cities, including Los Angeles and Seattle, demonstrate a more aggressive approach to affordable housing through their development policies

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program is still a situation where developers are granted tax benefits as-of-right.

[324] Interview with David Yassky, New York City Council Member for the 33rd Council District, in Manhattan, N.Y. (Oct. 5, 2007).

[325] *See* N.Y. REAL PROP. TAX LAW § 421-a(7)(a)(ii) (McKinney 2007). Since this section delineates areas where developers cannot receive tax benefits without providing affordable housing, the parts of the City not covered by this section are therefore still fair game for developers to receive benefits as-of-right, without meeting any affordable housing criteria, should they choose to develop there.

[326] *See supra* note 96 and accompanying text.

[327] *See supra* notes 8–9 and accompanying text.

[328] *See supra* note 8.

[329] Interview with Vito Lopez, *supra* note 234.

[330] *See* 2007 HSR, *supra* note 53, at 16.

[331] *See supra* notes 117–20 and accompanying text.

without hurting their housing markets.[332]

For example, in Los Angeles, California, there is no as-of-right tax exemption for new development, and it only applies "for 100% affordable housing development owned by not-for-profits."[333] Similarly, Seattle, Washington, statutorily compels developers to build between 20% and 30% affordable units across the city.[334] Neither of these cities has seen decreased development because of such aggressive approaches.[335] Subsequently, if developers in these cities do not need additional inducements to build housing, it is hard to justify 421-a on the basis of either general development or affordable housing.

2. *The Exclusion Zone's "Halo" Effect*

Along with leaving the 421-a program in the pro-developer default position, an additional concern implicit in the new amendments is the effect on neighborhoods that fall on the edge of the exclusion zone. Failing to enact a City-wide exclusion zone has another consequence with respect to wealth creation, albeit an unintended one. As a result of the exclusion boundaries, a "halo" on the outer edge of some areas[336] adjacent to the exclusion zone has formed, where developers, in addition to current landlords, are not bound by 421-a's mandates and so could ostensibly fetch increasingly higher market-rate rents due to gentrification.[337] In

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[332] PRATT, UNDERSTANDING, *supra* note 34, at 6.

[333] *Id.* As such, developers who develop market-rate units are simply not eligible for tax exemptions; the exemption is only available for not-for-profit developers who pledge that *all* of the units in a project will be affordable. *Id.*

[334] *Id.*

[335] *Id.*

[336] *See supra* note 204 and accompanying text. Some of these areas experiencing this "halo" effect include sections of Williamsburg and Greenpoint in Brooklyn and Long Island City in Queens.

[337] *See* N.Y. REAL PROP. TAX LAW § 421-a(7)(a)(ii) (McKinney 2007); *See also* Laura Wolf-Powers, Pratt Center for Community Development, *Why Job-killing Rezonings Don't Make Sense: A Response to the Manhattan Institute*, June 2005, http://www.prattcenter.net/pol-response.php ("[In the context of the Greenpoint-Williamsburg rezoning process,] the spillover effects of new market-rate development in any particular such neighborhood are difficult to estimate,

turn, long-time community residents in these areas face the prospect of being forced out of their neighborhoods even though the purpose of 421-a is to help families earning low-and moderate-incomes.[338] To be sure, it is one thing to provide affordable housing, but quite another to mandate that developers should be precluded from increased housing for more new people in the City. That said, incentivizing such development by allowing developers to take advantage of tax benefits and high rents in these areas stands in direct contradiction to the goals of the 421-a program.[339]

As Assemblyman Lopez explained, the Legislature "picked areas that were being gentrified [to be included in the zone], parts of Williamsburg [for example]. Right now, as-of-right, they get a tax break right next door" in an area adjacent to the exclusion zone due to the lack of affordability provisions for areas nearby the exclusion zone.[340] "They rent [apartments for] $3000, $4000, $5000 a month all throughout Williamsburg. Over 25 years, [developers] are getting up to $100 million [in tax incentives], and I think that is outrageous. It is really maximizing profits versus coming back with a decent return."[341]

While the exclusion zones mandate affordability standards, the edges of the zones do just the opposite. Developments within the Williamsburg-Greenpoint exclusion zone, for instance, force drastic change on the out-of-zone waterfront, encouraging robust development which is not restricted by 421-a, and further stands to adversely affect the upland areas of Williamsburg and Greenpoint as well, which are quickly becoming more and more populated with new and wealthier residents.[342] Martin Needelman, the Project Director of Brooklyn Legal Services Corporation A, observed, "As more market-rate housing becomes available on the waterfront, current upland landlords are looking to maximize their profits,"

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but . . . the city's Environmental Impact Statement projected that 2,510 people could be subject to secondary displacement, a figure that activists on the ground critiqued as far too low.").

[338] *See supra* note 30 and accompanying text.

[339] *Id.*

[340] Interview with Vito Lopez, *supra* note 234.

[341] *Id.*

[342] *See supra* notes 143–45 and accompanying text.

even if it means pressuring existing long-term low-income tenants to move out of their apartments at the conclusion of their leases, or using similar schemes to force them out before their lease is up.[343] "This is a situation where supply is actually driving demand. Waves of émigrés from Manhattan" are willing and able to pay more than what residents of low- or moderate-income housing can afford, and developers and landlords are similarly willing and able to increase their profit margin by driving up rents on non-421-a buildings within the exclusion zone, as well as on buildings just outside of the zone.[344] "These tactics," said Needelman, "combined with the rise of new market rate housing in the area, threaten the availability of real affordable housing" and the viability of the diverse community that has lived there for years.[345]

3. *Ill-Fitted AMI Calculation As Reflected By Atlantic Yards*

As with the preservation of as-of-right tax benefits for developers and the economic externalities created by the exclusion zone, the special provisions for Atlantic Yards evince an intent of the 421-a program that is not squarely in line with the rhetoric of affordable housing. Special giveaways to individual developers only undercut the program's benefits to working-class families because they reveal the program itself to be a tool designed to disproportionately advantage developers, however superficially modified.

While the amended Ratner Clause alone is problematic, it is also equally symptomatic of a larger problem—the use of HUD's regional AMI calculation, which includes many wealthier sections of the metropolitan area and thus artificially boosts AMI for the entire City.[346] It may be difficult to decouple the City's program from HUD's regional AMI calculation,[347] but the federal

[343] Telephone Interview with Martin Needleman, Project Director, Brooklyn Legal Services Corporation A, in Brooklyn, N.Y. (July 3, 2007).

[344] *Id.*

[345] *Id.*

[346] *See supra* notes 60–74 and accompanying text.

[347] *Public Hearing*, *supra* note 49, at 55 (statement of Shaun Donnovan, HPD Commissioner).

government does not require the 421-a program to follow any national guidelines because it is not financed by federal money.[348] Narrowing the scope of the AMI to a City-wide level ($43,434)[349] or even a neighborhood-by-neighborhood level seems entirely plausible.[350] Without any change in the scope of the AMI calculation, though, the program remains poorly tailored to the actual City-wide AMI, not to mention AMI at a borough or neighborhood level.[351]

Brooklyn residents are in fact some of the least-benefited by HUD's regional AMI calculation, as illustrated by the Atlantic Yards project. Because Brooklyn's AMI is currently at $37,000,[352] "only 40[%] (900) of the affordable units would be geared to average Brooklynites."[353] For those living in the shadow of the development, those numbers drop to a mere 24%—approximately 562 of the affordable units and 12% of the total rental units.[354] The reality is that Atlantic Yards is already being given many subsidies above and beyond 421-a.[355] It is questionable why Atlantic Yards

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[348] 421-a is a combination of state and local legislation, and no city or state funds are used because of the very nature of the program—the provision of tax benefits to developers, in the form of tax exemptions, who choose to work within the program's criteria. *See generally* N.Y. REAL PROP. TAX LAW § 421-a (McKinney 2007).

[349] *See supra* note 5 and accompanying text.

[350] One reason why it might be difficult to decouple the 421-a program from the HUD-defined AMI calculation is that portions of the program itself still contemplate substantial government financing. *See supra* notes 235–42 and accompanying text. As a result of this provision, developers receiving substantial federal funds for their development would have to meet both the HUD-defined AMI income level for the given federal program the developer was receiving subsidies from, as well as the 421-a program's standards. *Id.*; *see also supra* notes 60–74 and accompanying text. As an additional concern, it might also be difficult to determine the appropriate scope for the income-level calculation, i.e., whether to set affordability levels based on a City, borough, or neighborhood AMI.

[351] *See supra* notes 67–70 and accompanying text.

[352] Miller, *supra* note 222.

[353] Atlantic Yards Report, http://atlanticyardsreport.blogspot.com (July 25, 2006, 06:46 EST).

[354] *Id.*

[355] Atlantic Yards Report, http://atlanticyardsreport.blogspot.com (June 6,

should also get such additional, disproportionate and beneficial treatment under 421-a for so little in return.[356]

CONCLUSION

"The way the City is situated now, you don't need the 421-a program . . . . It is not like it was [in the 1970's when the City was] losing people. [Then, there were] tens of thousands of vacant lots and abandoned buildings. Now, the situation has changed—the

2007, 06:34 EST) ("[M]ore than half [of the financing for Atlantic Yards will] come either directly from the government or from government-assisted resources: $637.2 million in tax-free bonds to finance the arena; [$205] million from New York City; $100 million from New York State; and $1.4 billion in tax-free bonds to finance the affordable housing.").

[356] By digging deeper into the financing of Atlantic Yards, it becomes more apparent that the project will not enhance affordable housing as much as its promoters claim. Atlantic Yards will eventually receive subsidies not only from the 421-a program, but from a 50-30-20 mixed-income program as well. This 50-30-20 program is provided through the N.Y.C. Housing Development Corporation, an "issuer of bonds for multi-family affordable housing." N.Y.C. Housing Development Corporation, What is HDC?, http://www.nychdc.com/about/about.html (last visited Apr. 14, 2008); Atlantic Yards Report, *supra* note 353. Of the project's 4,500 rentals, 50% (2250) will be market-rate, 30% (1350) aimed at those earning middle-income, and 20% (900) aimed at those earning low-income. Five "housing income bands" comprise the 2,250 units considered affordable. 225 units at Band 1 (from 30% to 40% AMI), 675 units at Band 2 (41% to 50% AMI); 450 units at Band 3 (60% to 100% AMI); and 450 each at Band 4 (101% to 140% AMI) and Band 5 (from 141% to 160% AMI). It is curious that the 50% to 59% AMI range is completely absent from the income bands. Atlantic Yards Report, *supra* note 353. Atlantic Yards will also include some 2,360 condominiums. *Id.* Given that the income bands range from 30-40% AMI to 141-160% AMI, it is critical that relative to the City's current AMI of $70,900, only 1350 of these units (or 30% of the affordable units) will fall below this level; only 900 units (20%) will fall below the 60% AMI level required for all other projects receiving 421-a benefits. Approximately 1,112 (less than 25% of total units) will qualify under Atlantic Yards' inflated 70% requirement. *Id.* Since the income bands set a minimum and maximum income level, it is not difficult to imagine that the developer will choose to rent apartments to those families earning at the higher ends of these bands, thereby depressing even further the actual number of truly affordable apartments to be built.

dynamic changed."[357] As the bill's prime sponsor in the Legislature, Lopez's comment is particularly revealing and somewhat paradoxical. The market is unlikely to voluntarily provide affordable housing,[358] and it may very well be that the new legislation is better than none at all. Nevertheless, the amendments are too little, too late. Tax abatements for constructing market-rate housing are no longer necessary in today's City; developers will likely continue to build without extra incentives. As a result, 421-a will remain a relic of the past unless significant revisions are made. The program continues to misallocate public funds by giving away too much in tax incentives for not enough public benefit in return. Further, it only has an indirect expectation that affordable housing will trickle-down to those who need it instead of directly addressing the problem.

Rhetoric and political compromise aside, the fact that affordable housing does not play a more robust role in 421-a is problematic. Indirect promotion of affordable housing through tax incentives to developers, as provided in the new 421-a provisions, necessarily demonstrates that the program's goals lie elsewhere: in perpetuating a giveaway of public funds that would otherwise have been collected from developers. Despite the improvements in the revised 421-a program, it falls short in advancing affordable development because developers' profits are only marginally curtailed at the expense of significant unrealized public benefits.[359] In contrast to the three overarching policy goals the law purportedly advances—decent shelter, wealth creation, and efficient use of public funds—the results reflects an anemic and unjustifiable program that continues to put developers ahead of families earning low- and moderate-incomes. As a result, public funds continue to be used inefficiently because "decent shelter" provisions are not as sufficiently robust as they could have been, and "wealth creation" for families earning low-income continues to be trumped by deference to developers' profits.[360]

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[357] Interview with Vito Lopez, *supra* note 234.

[358] Byrne & Diamond, *supra* note 13, at 530–31.

[359] *See* Bradley Hope, *Tax Abatement Debate To Be Revived*, THE N.Y. SUN, Feb. 28, 2008, at 10.

[360] *See supra* notes 29–32 and accompanying text.

The City Council will have the first opportunity to reexamine elements of the 421-a program in December of 2008.[361] Assemblyman Lopez, the bill's prime sponsor, has indicated that he "would love to reevaluate in three years, to bring down the income [requirement for eligibility for affordable housing] and make it broader [more inclusive] than it is now. [His ultimate] objective is a City-wide 70/30 program, and to make the 30% affordability income level much lower."[362] The courage must be found to revise the 421-a program so that it truly delivers on its overarching premise and on what Jacob Riis maintained more than a century ago was one of the principal responsibilities of government in this critical area:[363] well-defined, progressive legislation to ensure the continued existence of affordable housing for the City's families earning low- and moderate-incomes.

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[361] *See* NEW YORK CITY, CODE § 11-245.1(d) (2007) (establishing a boundary review commission to determine exclusion zone boundaries in even-numbered years). Other sections of the 421-a program will expire in 2010. *See also* NEW YORK CITY LOCAL LAW No. 58 § 12 (2006).

[362] Interview with Vito Lopez, *supra* note 234. This would ostensibly be accomplished by: 1) modifying the mandatory market-affordable mix within the exclusion zone to reflect 70% market-rate units and 30% affordable units; and 2) maintaining the HUD-defined AMI as the benchmark for the program, but lowering the AMI from the current 60% limit. *Id.*

[363] *See supra* note 1 and accompanying text.