PROTECTING HOMEOWNERS AND PRESERVING AFFORDABLE HOUSING: HOW NEW YORK CITY'S THIRD PARTY TRANSFER PROGRAM CAN BE REFORMED TO BETTER SERVE BOTH ENDS

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I. INTRODUCTION

As in many other localities, New York City's taxation of real property is its most significant source of revenue, representing 31 percent in 2017.[1] Consequently, every state has laws authorizing municipalities to sell tax-delinquent properties through tax lien foreclosures in order to collect unpaid municipal arrears.[2] Generally, a taxing authority places a lien on a property when taxes are unpaid, and in some cases, other municipal property charges go unpaid for a statutorily designated period.[3] In most jurisdictions, a municipality will enforce the lien itself or, more commonly, sell the lien to a private purchaser.[4] Whether a government or private third party, the lienholder will assess interest and fees on the taxpayer and, if the balance of the lien goes unpaid for a period of time, acquire the property through tax lien foreclosure.[5]

The importance of property tax revenue to municipal budgets makes tax collection the primary motivation for tax foreclosures. In

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1 N.Y.C. INDEP. BUDGET OFF., UNDERSTANDING NEW YORK CITY'S BUDGET: A GUIDE 11 (2021), https://www.ibo.nyc.ny.us/iboreports/understandingthebudget.pdf. Other local governments rely even more heavily on property tax revenue, with such taxes accounting for 46.5 percent of local government revenues nationwide in 2017. U.S. CENSUS BUREAU, *2017 State & Local Gov't Finance Datasets and Tables*, https://www.census.gov/data/datasets/2017/econ/local/public-use-datasets.html.

2 Caroline Enright, Note, *Someone to Lien On: Privatization of Delinquent Property Tax Liens and Tax Sale Surplus in Massachusetts*, 61 B.C. L. REV. 667, 669 (2020).

3 *Id.*; James Saintsing, Note, *Constitutional Law—Tax Sales: Notice to Interested Parties*, 62 N.C. L. REV. 1091, 1091 (1984).

4 Frank S. Alexander, *Tax Liens, Tax Sales, and Due Process*, 75 IND. L.J. 747, 772 (2000); Enright, *supra* note 2, at 669. There is much variation in the tax enforcement schemes employed by jurisdictions throughout the country. Alexander, *supra*, at 772–74.

5 *Id.*

cities facing housing affordability crises, however, the creation and preservation of affordable housing is another critical interest served by the use of tax foreclosures. The cost of living in cities like New York continues to displace all but the most affluent residents.[6] In an effort to reverse this trend, many municipalities have implemented programs aimed at creating affordable housing for low- and moderate-income residents.[7] Vacant and distressed properties provide appealing opportunities for localities looking to increase their affordable housing stock. Accordingly, tax foreclosure offers a readymade solution to an increasingly dire problem.

Unfortunately, the use of tax foreclosures can also exacerbate the affordability crises by stripping affected property owners of a source of wealth that can help promote social mobility and ultimately reduce displacement. In some jurisdictions, lienholders take full title to a property through tax foreclosure without owing the original homeowner anything, unlike regular residential foreclosures, where the homeowner automatically receives any surplus funds after the sale.[8] Moreover, many affordable housing initiatives that benefit from the infusion of tax foreclosed properties fail to provide permanent affordability,[9] further problematizing the use of tax foreclosure as a sound avenue for affordable housing development.

Therefore, it is critical municipalities strike the right balance in crafting their tax enforcement schemes to ensure they sufficiently protect homeowners and—when it is necessary to foreclose—that affected properties are funneled into affordable housing programs that ensure permanent affordability. Some models provide promise in this area; land banks, mutual housing associations (MHAs), limited equity cooperatives, and community land trusts (CLTs) create and preserve affordable housing while providing opportunities for low- and moderate-income residents to build wealth through ownership.[10] For example, in some areas of the country, land banks acquire tax foreclosed properties, clear liens, and sell them to CLTs.[11] The CLTs, in turn,

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[6] Julie Gilgoff, Note, *Local Responses to Today's Affordable Housing Crisis: Permanently Affordable Housing Models*, 20 CUNY L. REV. 587, 588 (2017).

[7] *Id.* at 588–89.

[8] *See* Enright, *supra* note 2, at 669.

[9] Gilgoff, *supra* note 6, at 589.

[10] *See infra* Part V.

[11] KATHARINE NELSON & DAVID TROUTT, RUTGERS CTR. ON L., INEQ. & METRO. EQUITY, LAND BANKS AS INSTRUMENTS OF EQUITABLE GROWTH: CLiME'S RECOMMENDATIONS TO THE CITY OF NEWARK 1–3 (2020), https://static1.squarespace.com/static/5b996f553917ee5e584

separate the ownership rights of a home from the land on which it sits, allowing the property to be sold to residents at a reduced cost.[12]

Given the great complexity and variety of property tax enforcement schemes employed by state and local governments throughout the country,[13] this Comment focuses narrowly on the City of New York's Third Party Transfer ("TPT") program to highlight the common problems caused by municipalities' use of tax foreclosures. Importantly, the TPT program is but a piece of the City of New York's tax enforcement strategy. Its history, purpose, and impact, however, are a useful case study for understanding both the promise and problems of municipalities' use of tax foreclosure. In particular, by analyzing and critiquing TPT, this Comment seeks to provide a framework for other localities trying to combat the dual problems of property tax delinquency and affordable housing shortages.

Part II provides an overview of New York's use of tax foreclosures to combat widespread housing disinvestment and abandonment. It highlights the concerns underlying the City's tax foreclosure efforts, as well as the problems caused by this practice. Part III explains the TPT process and examines the program's impact on New York City residents today. Part IV considers what about the TPT program works and what does not. Finally, Part V recommends reforms the New York City Council should enact to better tailor the TPT program to the important goal of preserving permanently affordable housing while also preserving homeownership opportunities in communities of color. Additionally, it outlines how government can use land banks, CLTs, and MHAs to better serve communities at risk of losing equity and being displaced when a municipality uses tax foreclosures to create and preserve affordable housing.

Notably, the New York housing market is unique.[14] But other large cities are running into similarly high costs of living.[15] As the economic fallout of the global coronavirus pandemic exacerbates property tax

ba742/t/5f87599557745c26fdce52dd/1602705815216/Updated+CLiME+-+Land+Banks+Best+Practices+and+Recs+kln.pdf.

[12] *Id.* at 3.

[13] *See* Alexander, *supra* note 4, at 770.

[14] Several characteristics unique to New York City explain the widespread abandonment that gave rise to the City's use of tax foreclosures: (1) an unusual dependence on rental housing; (2) a propensity for undertaking large-scale public housing development projects; and (3) rent regulation and its attendant turbulence amidst countervailing political pressures. Frank Braconi, *In Re In Rem: Innovation and Expediency in New York's Housing Policy*, *in* HOUSING AND COMMUNITY DEVELOPMENT IN NEW YORK CITY: FACING THE FUTURE 95 (Michael H. Shill ed., 1999).

[15] *See* Gilgoff, *supra* note 6, at 588.

delinquency and distress problems in more localities, New York's approach, coupled with the recommendations contained herein, offers a useful model for cities to proactively address two critical needs: property tax compliance and the preservation of safe, affordable housing.

II. NEW YORK CITY'S HISTORICAL EFFORTS TO CURB DISINVESTMENT AND ABANDONMENT THROUGH IN REM FORECLOSURE

Paul Saunders lives in a three-story brownstone in the rapidly gentrifying Crown Heights neighborhood of Brooklyn, NY.[16] His septuagenarian parents purchased the home nearly forty years ago at a time when Mr. Saunders remembers "not even being able to walk safely down [the] block. . . ."[17] Today, however, the neighborhood is "prosperous" and "things are happening."[18]

The Saunders' home, and the many brownstones surrounding it, are some of the most sought-after properties in all of New York City. In just the ten-year period from 2006–2016, Brooklyn experienced the biggest surge in home prices in the City, with the average home value increasing fifty percent.[19] In November 2017, the Saunders' home appraised for over $1.2 million,[20] a far cry from the $75,000 buyers paid for Crown Heights properties in 1984 (about $206,342 in inflation-

16 *See Taking Stock: A Look into the Third Party Transfer Program in Modern Day New York: Hearing Before the Comms. on Hous. & Bldgs. and Oversight & Investigations*, 2018–21 N.Y.C. Council 15 (July 22, 2019) [hereinafter *TPT Hearing*] (statement of Paul Saunders), https://legistar.council.nyc.gov/View.ashx?M=F&ID=7562120&GUID=CD27B123-D36B-4910-A18C-CDFED1A6229F; Stephen Witt, *City Caught Trying to Grab Senior Citizen's Brownstone*, POLITICS NY (Sept. 17, 2018), https://politicsny.com/2018/09/17/1217-dean-street/.

17 *TPT Hearing*, *supra* note 16, at 22–23.

18 *Id.* at 23.

19 Robert Demeter, *Was Buying an NYC Home a Good Investment During the Past Decade?*, PROPERTYSHARK (May 7, 2018), https://www.propertyshark.com/Real-Estate-Reports/2018/05/07/was-buying-an-nyc-home-a-good-investment-during-the-past-decade/.

20 Stephen Witt & Kelly Mena, *City Sits on Brownstone as Elderly Woman Waits on Bated Breath*, POLITICS NY (Oct. 26, 2018), https://politicsny.com/2018/10/26/city-sits-on-brownstone-as-elderly-woman-waits-on-bated-breath/.

adjusted dollars).[21] Overall home prices in New York City had increased by 250 percent from 1974 to 2006.[22]

Considering this profound increase in equity, you can imagine the Saunders shock when, in September 2018, they discovered a notice posted on their door from the City of New York, indicating ownership of their property had been transferred to a local developer.[23] Having just visited the City's Department of Finance (DOF) mere months before and made a payment to ensure the property was up to date on outstanding taxes, the Saunders were understandably distraught.[24] Prior to the September notice of transfer and following Mr. Saunders's visit to the DOF, he had received several notices indicating the fully paid-off, $1.2 million home was slated to be foreclosed on for an outstanding municipal water bill of $3,792.20.[25] Unbeknownst to the Saunders and to the representatives they spoke with at both the DOF and the Department of Environmental Protection, which handles water charges in the City, their home had been swept up in a little known program administered by the Department of Housing Preservation and Development (HPD) called Third Party Transfer (TPT).[26] New York initiated the TPT program to encourage property tax compliance and preserve its affordable housing stock.[27]

In order to understand why the City adopted the TPT program, it is helpful to understand the state of housing in New York prior to the program's creation. Much of the housing landscape in 1980s New York mirrored the neighborhood surrounding the Saunders' Crown Heights home. During the 1960s and 1970s, many New York City neighborhoods

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[21] Michael Decourcy Hinds, *Resale-Home Prices: Up and Rising*, N.Y. TIMES (Jan. 22, 1984), https://www.nytimes.com/1984/01/22/realestate/resale-home-prices-up-and-rising.html. The inflation-adjusted figures were calculated using the Consumer Price Index (CPI) Inflation Calculator on the U.S. Bureau of Labor Statistics website, and converting CPI data from August 1984 (the month the Saunders purchased their Crown Heights home) to March 2022 figures, which was the latest available CPI data at the time the author used the calculator. *CPI Inflation Calculator*, U.S. BUREAU OF LAB. STAT., https://www.bls.gov/data/inflation_calculator.htm (last visited Apr. 21, 2022).

[22] N.Y.U. FURMAN CTR., STATE OF NEW YORK CITY'S HOUSING AND NEIGHBORHOODS 6, 9 (2008), https://furmancenter.org/files/sotc/State_of_the_City_2008.pdf.

[23] *See TPT Hearing*, *supra* note 16, at 15–18.

[24] *Id.*

[25] *See id.* at 8–9 (statement of Council Member Robert E. Cornegy, Jr.); Stephen Witt & Kelly Mena, *Cornegy Pushes Back Against De Blasio Plan to Seize More Private Properties*, POLITICS NY (Jan. 11, 2019), https://politicsny.com/2019/01/11/cornegy-pushes-back-against-de-blasio-plan-to-seize-more-private-properties/.

[26] *See TPT Hearing*, *supra* note 16, at 18.

[27] *Id.* at 28–29 (statement of Louise Carroll, Comm'r, N.Y.C. Dep't of Hous. Pres. & Dev.).

experienced impoverishment and depopulation, which in turn contributed to widespread housing abandonment.[28]

A. *Taking Control*

The widespread abandonment of buildings throughout New York City raised two important concerns: it threatened the stock of safe, habitable housing affordable to low-income New Yorkers, and it compromised the City's property tax base.[29] Accordingly, the City accelerated its use of *in rem* foreclosure actions to take control of abandoned buildings by targeting those that had fallen behind on property taxes.[30] In 1976, the City enacted Local Law 45, which shortened the amount of time municipal arrears on a multi-family building had to be outstanding before the City could initiate a foreclosure proceeding from three years to one.[31] The hope was that this shorter timeline would encourage more tax compliance or at least allow the City to intervene before buildings deteriorated completely.[32]

This accelerated foreclosure had the effect of accelerating abandonment. Unable to keep up with maintenance costs and taxes, building owners increasingly abandoned buildings to avoid being subject to legal action.[33] Even buildings the City was able to resell often wound up being repossessed after lapsing into tax and mortgage arrears.[34] In response, the City declared a moratorium on residential building sales in 1978.[35] The increased number of foreclosures, coupled with an inability to sell, quickly made the City its own biggest landlord.[36]

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[28] Christopher J. Allred, *Breaking the Cycle of Abandonment: Using a Tax Enforcement Tool to Return Distressed Properties to Sound Private Ownership*, PIONEER INST. 1–3 (2000), https://pioneerinstitute.org/download/2000-better-government-competition.

[29] *Id.*

[30] *Id.* Typically, a court must enter a judgment of foreclosure in order for a municipality to foreclose on a property in satisfaction of outstanding property taxes or other municipal arrears. The court enters an *in rem* judgment against the property itself, which allows a municipality to take the property, and evict whoever lives there. Because the court enters judgment only against the property, the municipality is not able to sue the property owner for money. Instead the property itself satisfies any outstanding debt. *See* Alexander, *supra* note 4, at 764–65.

[31] Braconi, *supra* note 14, at 97.

[32] *Id.*

[33] *Id.* at 98.

[34] *Id.*

[35] *Id.*

[36] JOHN C. LIU, N.Y.C. COMPTROLLER, THE NEW YORK CITY TAX LIEN SALE: HISTORY AND IMPACT 3 (2012), https://comptroller.nyc.gov/wp-content/uploads/documents/NYC_TaxLienReport_v8.pdf. By 1994, the City of New York was responsible for the management of 5,458 buildings representing 51,672 units. Allred, *supra* note 28, at 2–3. Many other

B. *Disposition: Pre-1993 Strategies to Reduce the Number of Buildings Owned by New York City*

During its heightened use of *in rem* foreclosure as its primary tax enforcement mechanism, the City developed several core disposition strategies to try to prevent a proliferation of troubled buildings under its management: tenant ownership, local nonprofit ownership, and private for-profit ownership.[37]

One ambitious strategy pursued by the City was to transfer ownership of abandoned buildings to tenants. Through HPD's Tenant Interim Lease (TIL) program, which started in 1978, tenants of abandoned buildings subject to *in rem* foreclosure proceedings could petition HPD to take over ownership and management of their building.[38] If enough tenants signed a resolution seeking ownership, they would be charged with managing the building for a trial period of eleven months, with technical assistance and training from a nonprofit contracted with HPD for those purposes.[39] If the City deemed the management successful, HPD would sell the building to a Housing Development Fund Corporation (HDFC) for $250 per dwelling unit.

HDFCs were created under Article XI of the New York State Private Housing Finance Law.[40] To qualify as an HDFC, an entity must (1) offer low-income housing; (2) use all earnings for entity purposes; and (3) not use any net earnings of the entity for the benefit of an individual, firm, corporation, or association.[41] By 1996, more than 600 *in rem* buildings had been sold to tenants through the TIL program to be turned into HDFCs.[42] Unfortunately, many HDFCs have fallen into various states of disrepair due in part to some degree of mismanagement by

cities have found themselves in similar predicaments. For example, it was estimated that the City of Detroit's Land Bank Authority owned 68 percent of the more than 43,000 vacant homes in the City in 2018. Sarah Alvarez, *Real Estate is Hot in Detroit. But its Top Owner, the City, Isn't Selling.*, MICH. RADIO (Aug. 23, 2018, 10:17 AM), https://www.michiganradio.org/post/real-estate-hot-detroit-its-top-owner-city-isn-t-selling.

37 *See* Braconi, *supra* note 14, at 103–04.

38 *Id.* at 104; *see also TIL Tenant Associations*, N.Y.C. DEP'T. OF HOUSING PRES. & DEV., https://www1.nyc.gov/site/hpd/services-and-information/tenant-associations.page (last visited Apr. 21, 2022).

39 *See* SIEGEL TEITELBAUM & EVANS LLP, BROKEN PROMISE: NEW YORK CITY'S TENANT INTERIM LEASE PROGRAM AND THOSE LEFT BEHIND 13 (2017), http://stellp.com/TIL%20report.pdf.

40 N.Y. PRIV. HOUS. FIN. LAW § 573 (2020).

41 N.Y.C. COUNCIL, REP. OF THE COMM. ON HOUS. & BLDGS. (Apr. 26, 2018) [hereinafter HDFC REPORT], https://legistar.council.nyc.gov/View.ashx?M=F&ID=6216098&GUID=12E88E1E-7C5E-4673-986A-19E514A5668B.

42 Braconi, *supra* note 14, at 104.

irresponsible boards.[43] But much of the blame can and should be placed with the City, which over-assessed the value of TIL buildings, subjecting them to unmanageable tax burdens.[44] The City further tied tenants' hands by requiring 40 percent of the proceeds from any unit sales to be "returned" to the City.[45] Though many TIL buildings were in a state of disrepair when tenants acquired them, the majority are financially sound today.[46]

A second approach HPD employs to transfer *in rem* buildings is to contract a private nonprofit company, usually organized under Article XI of the State Private Housing Finance Law, to manage a cluster of buildings for a few years.[47] During that time, the nonprofit rehabilitates the building before selling it for a nominal sum or turning it over to a tenant cooperative.[48] Buildings turned over to nonprofits have faced similar problems to HDFCs. Due to extremely low initial rents, many have failed to keep pace with rising operating costs.[49]

The third, and most controversial strategy employed by HPD, is the disposition of city-owned buildings to private, for-profit developers.[50] Under the Private Ownership and Management Program (POMP), HPD contracted with private, for-profit developers to manage *in rem* buildings for a year.[51] During that year, the developers were in charge of repairing the building and removing code violations.[52] If HPD was satisfied with the building's management during that period, it would offer the developer an option to purchase the building for $2,500 per unit.[53] Buildings conveyed through POMP were placed under rent stabilization upon sale.[54] Many progressive advocates argued for-profit ownership was inconsistent with the provision of low-income

[43] *See* Nikita Stewart, *Under City Program, Renters-Turned-Homeowners Could Become Renters Again*, N.Y. TIMES (July 29, 2018), https://www.nytimes.com/2018/07/29/nyregion/co-op-low-income-nyc-rent.html.

[44] Braconi, *supra* note 14, at 105.

[45] *Id.*

[46] HDFC COAL., PROPOSALS TO PRESERVE HDFC COOPERATION HOUSING: HDFC SHAREHOLDERS CAN LEAD THE WAY 1 (June 22, 2016), https://www.hdfccoalition.org/wp-content/uploads/2016/11/HDFC-Coalition-Position-Paper-Vers-5.1-JM-11.22.2016.pdf.

[47] Braconi, *supra* note 14, at 105.

[48] *Id.*

[49] *Id.* at 106.

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] Braconi, *supra* note 14, at 107.

[54] *Id.*

housing.[55] Furthermore, many criticized the continued presence of code violations in buildings that had been sold through POMP, as well as complaining of owners' overreliance on eviction proceedings to bring stability to rent rolls.[56]

The City's multifaceted disposition efforts failed to unload troubled buildings as fast as it was acquiring them through *in rem* foreclosures. By 1994, it still "owned and managed 5,458 buildings," most of which were dilapidated, multi-family buildings housing low-income individuals.[57] An assessment of the costs associated with the City's *in rem* stock revealed it spent an average of $2.2 million to acquire, "manage, repair, and sell each building."[58] In addition, the City lost an average of $209,000 in tax revenues per property.[59] Despite the City's substantial investment, many of the properties still had significant physical maintenance deficiencies.[60] And once New York courts began holding the City to the same standards as private landlords, continued ownership of these properties became an even greater liability.[61] Given the substantial capital outlay and the corresponding poor results, the City declared a moratorium on *in rem* foreclosures in 1993.[62] In an effort to improve the housing stock without having to rely on taking control of these properties, the City created the TPT program.[63]

C. *Third Party Transfer (TPT)*

In 1994, HPD convened a group of tax and housing policy experts to develop a better strategy to address the problem of tax delinquency while also addressing the capital needs of distressed residential properties.[64] "The group recommended the City sell the liens on all tax

[55] *Id.*

[56] *Id.* at 107–08.

[57] Allred, *supra* note 28, at 2.

[58] LIU, *supra* note 36, at 3.

[59] Allred, *supra* note 28, at 3.

[60] *Id.*

[61] *See* Lacks v. City of New York, 607 N.Y.S.2d 32, 33–34 (N.Y. App. Div. 1994) (holding the obligation to keep residential dwellings in good repair under New York Multiple Dwelling Law Section 78 applies equally to the City of New York in its capacity as owner of *in rem* residential dwellings); City of New York v. Rodriguez, 461 N.Y.S.2d 149, 152 (N.Y. App. Term 1983) (holding the implied warranty of habitability applied equally to City of New York as landlord as it does to private landlords).

[62] Allred, *supra* note 28, at 3.

[63] *Id.* at 4.

[64] *Id.* at 3.

delinquent properties."[65] Aware of the City's dire need for affordable housing,[66] however, the group knew selling liens would do nothing to improve conditions for tenants living in distressed buildings.[67] Accordingly, the group also recommended the City exempt distressed properties from the tax lien sale and instead transfer them to new ownership.[68] The new owners would then carry out the rehabilitation work with a combination of public and private financing.

In 1996, the City Council made two significant changes to New York's tax enforcement scheme. First, it reinstated the City's ability to sell tax liens, which would allow the City to recoup unpaid taxes faster and without the expense of taking control of buildings.[69] Second, "in order to improve and preserve housing affordable to low- to moderate-income households," the Council altered the City's *in rem* foreclosure process to allow it to transfer the title of foreclosed buildings to eligible third parties.[70] With this new authority, the City could foreclose on any property subject to municipal liens and transfer them to a third party to rehabilitate and manage as part of the City's affordable housing stock.[71] It would exercise this authority through TPT.

When executed as intended, TPT allows HPD to exercise its foreclosure authority strategically and target city funds toward fixing up the most distressed properties. To date, the City has transferred approximately 520 buildings, representing more than 6,000 units, through ten separate "rounds" of TPT.[72]

Under local law, New York City is able to foreclose upon (1) non-cooperative and non-condominium residential properties with a tax lien outstanding for at least one year; and (2) cooperative and condominium properties with outstanding tax liens for at least three years.[73] When selecting properties for TPT, "HPD 'carries out a comprehensive analysis

[65] *Id.*

[66] The housing vacancy rate in New York City was approximately 3.4 percent at the time. *Id.*

[67] *Id.*

[68] Allred, *supra* note 28, at 3.

[69] N.Y.C. Local Law No. 26 (1996).

[70] N.Y.C. Local Law No. 37 (1996); *see also* N.Y.C. INDEP. BUDGET OFF., SAVING HOMES: CITY SPENDING ON HOUSING PRESERVATION GROWS 6 (2003), https://ibo.nyc.ny.us/iboreports/antiabandonment.pdf.

[71] *See* N.Y.C. ADMIN. CODE § 11-401.1; *Third Party Transfer (TPT) In Rem Program*, N.Y.C. DEP'T OF FIN., https://www1.nyc.gov/site/finance/taxes/property-in-rem-forclosure.page (last visited Apr. 21, 2022).

[72] *TPT Hearing*, *supra* note 16, at 8, 31 (statement of Louise Carroll, Comm'r, N.Y.C. Dep't of Hous. Pres. & Dev.).

[73] N.Y.C. ADMIN. CODE §§ 11-401(3), 11-404.

of eligible buildings to determine which ones are [*sic*] exhibit the highest level of physical and financial distress,' focusing on properties that meet the tax lien requirements set forth in local law and that are active in enforcement programs and/or are statutorily distressed."[74]

When the most recent round of TPT began in 2015, a property was considered "statutorily distressed" if it had a lien-to-value ratio equal to or greater than 15 percent and met at least one of the following criteria:

- the property had an average of five or more hazardous (Class B) or immediately hazardous violations per dwelling unit; or
- the property was subject to a lien or liens for $1,000 or more for any expenses incurred by HPD under its Emergency Repair Program ("ERP").[75]

HPD has also contended it is authorized to foreclose on properties regardless of whether they meet the above definition of distress.[76]

As part of the *in rem* foreclosure process, City law requires the Commissioner of the DOF to prepare a list of properties with delinquent taxes, "within a particular borough or section of a tax map," subject to foreclosure as described above, provided that none of the areas specified are "smaller than a [tax] block."[77] "The City interprets this provision to mean [it must foreclose on] all tax delinquent properties in a particular tax class on the same tax block as any other property selected."[78] This means a property need not meet the statutory

74 N.Y.C. COUNCIL, BRIEFING PAPER OF THE OVERSIGHT AND INVESTIGATIONS COMMITTEE AND INFRASTRUCTURE DIVISION 4 (July 22, 2019) (internal quotation marks omitted) [hereinafter TPT REPORT] (citations omitted), https://legistar.council.nyc.gov/View.ashx?M=F&ID=7550500&GUID=4624FD21-225C-41C2-B62D-F2DAC93F7B7D.

75 N.Y.C. ADMIN. CODE § 11-401(4).

76 TPT REPORT, *supra* note 74, at 5.

77 N.Y.C. ADMIN. CODE § 11-405(a). A "tax map" includes "the block map of taxes and assessments to the extent that the territory within the city of New York is or shall be embraced in such map." N.Y.C. ADMIN. CODE § 11-203(a). A "block" is a:

> [P]lot or parcel of land such as is commonly so designated in the city, wholly embraced within the continuous lines of streets, or streets and waterfront taken together where water forms one of the boundaries of a block, and such other parcels of land or land under water as may be indicated by the department of finance upon such tax maps by block numbers as constituting blocks.

N.Y.C. ADMIN. CODE § 11-204(d).

78 TPT REPORT, *supra* note 74, at 6 (citing Dec. 3, 2018 Letter from the N.Y.C. Law Dep't at 2, *In Rem Tax Foreclosure Action No. 52*, Index No. 40000/2015 (N.Y. Sup. Ct.) (citing N.Y.C. ADMIN. CODE § 11-405 and stating:

> [T]he law does *not* . . . prevent properties that are not "distressed" from being forced in *in rem* proceedings . . . [U]pon commencement of an *in rem*

definition of "distressed" to be included in a foreclosure action. Instead, "all that is necessary is that the property have a tax lien and be located on the same block as another property designated for foreclosure."[79] Once the list is finalized, the City files *in rem* foreclosure actions in the Supreme Court of each borough, which include all the properties identified by the Commissioner for tax foreclosure in each borough.[80]

The City claims to send tax bills and warning notices to homeowners at risk of foreclosure prior to filing a foreclosure action.[81] Owners of properties subject to foreclosure are afforded the opportunity to pay the full amount of taxes outstanding or enter into an installment payment agreement to have their properties removed from TPT.[82]

Once an *in rem* foreclosure action has been filed, the City is required to mail additional foreclosure notices to all homeowners whose properties have been included in the action, and to publish the notices of foreclosure in newspapers and to post them in courthouses and other conspicuous places in the boroughs in which the properties are located.[83] At this point, an owner can still remove their property from the program by either paying the full amount of taxes outstanding or entering into an installment payment agreement.[84] The terms of such agreements become more onerous as time passes in the TPT process.[85]

A court will ultimately issue a final judgment of foreclosure awarding possession of the properties remaining in the *in rem* action and authorizing DOF to convey the property deeds to a third-party owner.[86] Once a court enters a judgment of foreclosure, a homeowner has four months to redeem their property by paying all outstanding taxes.[87] DOF, in consultation with HPD, also has the discretion to allow

tax foreclosure action, the City is required to include all tax delinquent properties in a particular tax class in the same tax block as any property selected.]).

79 TPT REPORT, *supra* note 74, at 6.

80 N.Y.C. ADMIN. CODE § 11-405(d).

81 *Third Party Transfer (TPT) In Rem Program*, *supra* note 71; *Hearing Before the N.Y.C. Council Comm. on Hous. and Bldgs.*, 2018–21 N.Y.C. Council 26 (Apr. 26, 2018) (statement of Associate Commissioner of HPD).

82 N.Y.C. ADMIN. CODE § 11-405(c); *Third Party Transfer (TPT) In Rem Program*, N.Y.C. DEP'T OF FIN., https://www1.nyc.gov/site/finance/taxes/property-in-rem-forclosure.page (last visited Apr. 21, 2022).

83 N.Y.C. ADMIN. CODE § 11-406.

84 *Id.* §§ 11-407, 11-409.

85 *Third Party Transfer (TPT) In Rem Program*, *supra* note 71.

86 N.Y.C. ADMIN. CODE § 11-412.1(b).

87 *Id.* § 11-412.1(d).

a homeowner to enter into an installment payment agreement at this time if the homeowner has not previously defaulted on a payment agreement for that property.[88]

Before transferring title to foreclosed upon properties to a third party, the DOF notifies the City Council of the proposed transfers.[89] The Council then has forty-five days to review the proposed transfers and either approve or disapprove.[90] If the Council does not act, the transfers are deemed approved.[91] If the Council wishes to disapprove of a particular transfer, it passes a local law to that effect, and the specific property or properties remain with the original owner, and all taxes remain outstanding.[92]

For properties not removed by the Council, the next step is ownership transfer to Neighborhood Restore Housing Development Fund Corporation ("Neighborhood Restore"), "a nonprofit organization that oversees a variety of affordable housing development programs . . . that focus on transitioning properties from financial and physical abandonment to third-party ownership."[93] This transfer extinguishes all outstanding taxes on the property and must occur between four and eight months after a court enters final judgment of foreclosure.[94]

Neighborhood Restore works with developers selected by HPD to stabilize the properties and plan for their rehabilitation.[95] Ultimately, Neighborhood Restore transfers ownership to the selected developer, who is then responsible for rehabilitating the building, if necessary, and managing the property as affordable rental housing.[96]

TPT is an innovative approach to *in rem* foreclosure that has had a tremendously positive effect on the preservation of quality affordable housing while also encouraging property tax compliance.[97] Given the

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[88] N.Y.C. DEP'T OF FIN. RULES § 13-02(b)-(c). This prohibition on owners who have defaulted on prior payment plans does not apply to Housing Development Fund Corporations. *Id.* § 13-02(c).

[89] TPT REPORT, *supra* note 74, at 7.

[90] *Id.* at 7–8.

[91] N.Y.C. ADMIN. CODE § 11-412.2.

[92] *Id.*

[93] *What is Neighborhood Restore?*, NEIGHBORHOOD RESTORE HOUS. DEV. FUND CORP., http://www.neighborhoodrestore.org/ (last visited Apr. 21, 2022).

[94] N.Y.C. ADMIN. CODE §§ 11-401(4), 11-412.1(c).

[95] *Affordable Housing Development and Rehabilitation*, NEIGHBORHOOD RESTORE HOUS. DEV. FUND CORP., http://www.neighborhoodrestore.org/work/#affordable (last visited Apr. 21, 2022).

[96] TPT REPORT, *supra* note 74, at 8.

[97] *See TPT Hearing*, *supra* note 16, at 31, 34 (statement of Louise Carroll, Comm'r, N.Y.C. Dep't of Hous. Pres. & Dev.).

dire consequences to homeowners of being completely divested of their property, however, a critical look at the program's real-world impact is necessary.

III. TPT ROUND X: THE IMPACT OF TPT IN MODERN-DAY NEW YORK

In 2015, the City selected 420 properties for Round X of TPT.[98] Three years later, in the fall of 2018, the City transferred sixty-five of those properties to Neighborhood Restore.[99] Of the 420 properties included in the round, most responded to notice and were removed, resulting in the collection of approximately $40 million of outstanding arrears.[100]

Despite the built-in procedural backstops—clear notice provisions, payment agreements, the redemption period, and City Council review—the round drew extensive criticism.[101] Several of the 420 properties initially targeted in Round X, like the Saunders' home,[102] were not in the kind of severe physical or financial distress alleged to be the concern of the program as originally conceived.[103] Many homeowners complained of a lack of notice or opportunity to address the arrears that formed the basis for the transfer of their property.[104] Furthermore, some elected officials raised concerns about the potential disparate impact the program seemed to have on communities of color, divesting homeowners in black and brown neighborhoods of their equity while leaving predominantly white neighborhoods largely untouched.[105]

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[98] TPT REPORT, *supra* note 74, at 9.

[99] *Id.*

[100] *TPT Hearing*, *supra* note 16, at 34.

[101] *See* Joe Mauceri, *New Yorkers in Debt Losing Their Homes As Part of Program Designed to Preserve Quality Affordable Housing*, PIX11 (Dec. 12, 2018, 6:00 PM), https://pix11.com/2018/12/11/new-yorkers-in-debt-losing-their-homes-as-part-of-program-designed-to-preserve-quality-affordable-housing/; *City Council Housing Chair Expresses Concern over Mayor's Plan to Expand Seizure of Private Residential Properties*, N.Y.C. COUNCIL (Jan. 10, 2019), https://council.nyc.gov/robert-cornegy/2019/01/10/housing-chair-concerned-by-expansion-of-property-seizures/.

[102] After pressure from the Chair of the Council's Committee on Housing & Buildings, the City ultimately coordinated with Neighborhood Restore to have the deed to the Saunders home transferred back to the family. Kathleen Culliton, *City Returns Home It Snatched from Crown Heights Senior*, PATCH.COM (Jan. 11, 2019, 6:01 PM), https://patch.com/new-york/prospectheights/city-returns-home-it-snatches-crown-heights-senior.

[103] TPT REPORT, *supra* note 74, at 3.

[104] *Id.* at 9.

[105] *See, e.g.*, *TPT Hearing*, *supra* note 16, at 11 (statement of Council Member Ritchie Torres).

Many of the properties selected for inclusion in Round X appeared to be in fine physical and financial condition,[106] much like the Saunders' home. Half of the properties selected for Round X fell below the 15 percent lien-to-value ratio required by the statutory definition of distress.[107] In fact, the average lien-to-value ratio of those properties was only 3 percent, well below the 15 percent statutory threshold for distress.[108] The total market value of these properties was $152 million, while the total outstanding arrears were just $4.5 million.[109] One hundred and fifty-five of the properties did not have the requisite number of housing code violations required by local law.[110] In the end, four of the properties transferred had lien-to-value ratios below fifteen percent and, therefore, were not statutorily distressed.[111]

When a property like the Saunders' home is taken through TPT, as with some tax foreclosure schemes generally, the property owners face losing the equity they have accumulated over many decades without receiving any compensation.[112] Apart from the constitutional takings concern this raises,[113] it has the effect of depriving a family of a significant intergenerational asset. For many Americans, especially homeowners of color, the equity they have accumulated in their homes is the primary source of wealth.[114] Thus, any municipal program that might divest them of this asset must be appropriately tailored to avoid such a harsh result.

As outlined in Part II, HDFCs were a unique solution to a problem that grew out of the City's early use of *in rem* foreclosure.[115] Their creation had the dual benefit of removing *in rem* properties from the City's ledger while also creating long-term affordable housing for low-income New Yorkers. Because the current New York City tax lien sale

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106 *See* TPT REPORT, *supra* note 74, at 9.

107 *Id.*

108 *Id.*

109 *Id.* at 10.

110 *Id.* at 9.

111 *Id.*

112 *See* Enright, *supra* note 2, at 669.

113 *See In Rem* Tax Foreclosure Action No. 53 Borough of Brooklyn, No. 8700/15, slip op. at 8–12 (N.Y. Sup. Ct. Mar. 28, 2019).

114 *See* Jing Fu, *Homeownership is Key to Household Wealth*, NAT'L ASS'N OF HOME BUILDERS (Mar. 22, 2018), https://eyeonhousing.org/2018/03/homeownership-is-key-to-household-wealth/?_ga=2.170470632.910417077.1605473507-179102064.1605473507.

115 Michelle Higgins, *Bargains With a 'But,'* N.Y. TIMES (June 27, 2014), https://www.nytimes.com/2014/06/29/realestate/affordable-new-york-apartments-with-a-catch.html.

process specifically exempts HDFCs,[116] the City's only option for "HDFCs with outstanding arrears is to put the buildings through the TPT process."[117] In Round X, 118 of the properties selected for foreclosure, and "27 of the 65 properties that were foreclosed upon" were HDFCs.[118] The practical implication of an HDFC transfer through TPT is that the building converts from a cooperative to a rental building. This means the shareholders in such properties, many of whom spent years rehabilitating and maintaining them when the City no longer wanted to, stand to lose ownership of their units as a result of TPT.

While most of the HDFCs selected for Round X were statutorily distressed, it is unclear if the City pursued enough other measures to ensure tax compliance, thus avoiding the need to foreclose upon these buildings.[119] The City's handling of HDFC rehabilitation is of particular note because HPD "anticipate[s] Round 11 of TPT will include even more HDFC coops."[120]

Another concern that came out of Round X was the concentration of selected properties in certain neighborhoods,[121] which gave the impression that the City had targeted homeowners of color.[122] While the City vehemently denied such targeted enforcement, City data showed that TPT overwhelmingly targeted properties in just eleven neighborhoods, including thirty-two properties in the Saunders' neighborhood of Crown Heights[123]—a vibrant, majority Black neighborhood in central Brooklyn. The City targeted no properties from the borough of Staten Island,[124] where white people represent 76.3 percent of the population.[125]

While there is no clear evidence to suggest the City was targeting homeowners of color, it is worth noting the disparate impact *in rem* foreclosures typically has on homeowners of color. Studies have shown

116 N.Y.C. ADMIN. CODE §§ 11-319(b)(10), 11-401.1(a).

117 TPT REPORT, *supra* note 74, at 12.

118 *Id.*

119 *Id.* at 13.

120 *Id.*

121 *Id.* at 13–14.

122 *See, e.g.*, Brief for NAACP Legal Defense and Educational Fund, Inc. as Amicus Curiae Supporting Appellants at 6, Dorce v. City of New York, No. 20-1809 (2d Cir. Sept. 3, 2020).

123 TPT REPORT, *supra* note 74, at 14.

124 *Id.* at 13.

125 *QuickFacts: Richmond County (Staten Island Borough), New York*, U.S. CENSUS BUREAU (last visited Apr. 21, 2022), https://www.census.gov/quickfacts/richmondcountystatenislandboroughnewyork.

that "property tax foreclosures are highly concentrated among low-income communities with large African American and Latino populations."[126] In fact, evidence suggests municipalities tend to over-assess the taxable value of property owned by people of color.[127] More can and must be done to ensure municipalities are not unintentionally contributing to the displacement of people of color through the administration of their tax assessment and enforcement policies.

While HPD claimed to have provided more generous notice and redemption arrangements than required by law in Round X, homeowners of properties included in Round X argued the City provided them with little notice and insufficient opportunities to redeem their properties.[128] According to the City, "[e]ach building with outstanding property taxes and water and sewer charges [in Round X was] proactively contacted by the city, a minimum of 70 times since the beginning of the rounds in 2015, including notices, letters, bills, robocalls and direct . . . outreach."[129] Specifically, the City stated that "[i]n addition to the standard property tax and water or sewer bills, each owner received multiple letters that indicated that their property was subject to transfer through TPT" and "HPD also made robocalls in English and Spanish and offered property owner clinics to provide further information and assistance."[130]

Some homeowners involved in Round X alleged they did not receive notice that their properties were slated for foreclosure.[131] In one lawsuit, a homeowner claimed that she was unaware the City foreclosed on her building until she received a copy of a flyer posted at the property stating the City transferred it to Neighborhood Restore.[132]

As outlined above, homeowners have up to four months after foreclosure to redeem their property by paying all outstanding arrears[133] or by entering into an installment payment agreement with the City to do so.[134] Some of the homeowners whose properties were

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126 JOHN RAO, NAT'L CONSUMER L. CTR., THE OTHER FORECLOSURE CRISIS: PROPERTY TAX LIEN SALES 5 (2012).

127 *See generally* Carlos Avenancio-Leon & Troup Howard, *The Assessment Gap: Racial Inequalities in Property Taxation* 22 (Dec. 2021), https://ssrn.com/abstract=3465010.

128 *See, e.g.*, *In Rem* Tax Foreclosure Action No. 53 Borough of Brooklyn, No. 8700/15, slip op. at 8–12 (N.Y. Sup. Ct. Mar. 28, 2019).

129 *Hearing Before the N.Y.C. Council Comm. on Hous. and Bldgs.*, *supra* note 81.

130 *Id.*

131 *See In Rem Tax Foreclosure Action No. 53 Borough of Brooklyn*, slip op. at 1.

132 *Id.* at 14.

133 N.Y.C. ADMIN. CODE § 11-412.1(d).

134 19 RCNY § 13-02(b), (c).

included in Round X, however, claimed that the City inhibited their efforts to redeem their properties.[135] For example, one homeowner was unable to pay her taxes because the City had improperly recorded the owner of the property, despite the homeowner's repeated attempts to resolve the issue.[136] Other homeowners claimed the City disregarded their payment agreements and foreclosed upon their properties anyway.[137] In some cases, the City accepted payments from the owners of properties already foreclosed upon. The City even admitted to accepting approximately $72,000 in payments from an HDFC post-foreclosure, $21,000 of which they accepted after shareholders could no longer legally redeem the property.[138]

Ultimately, the experiences of Round X demonstrate that, despite good intentions, the use of *in rem* foreclosure can have grave consequences. Even in a comprehensive *in rem* foreclosure program like TPT with clear notice provisions, installment payment options, a four-month redemption period, and review by the City Council, property owners can become collateral damage.

IV. WHAT WORKS AND WHAT DOESN'T

There is much to be learned from New York City's experience with the TPT program. Given the City's long history with *in rem* foreclosure and affordable housing, the City does some things well, but other areas have room for improvement.

First, HPD offers many resources aimed at assisting property owners to ensure that their buildings are kept in good repair and that they can stay current on their property taxes.[139] The Landlord Ambassadors program offers "technical assistance and emergency loans to small building owners."[140] The Homeowners HelpDesk assists with foreclosure prevention, guidance on scam avoidance, and advice on home repair, among other programs.[141] And through the HomeFix

[135] *See, e.g.*, In Rem *Tax Foreclosure Action No. 53 Borough of Brooklyn*, slip op. at 12 ("[T]his is not a case where a landlord has made no effort to maintain the property. Rather, the shareholders and board [of the property] are desperately seeking to maintain and rehabilitate the . . . property and to pay all outstanding sums due, obviating the need for any transfer under [TPT].").

[136] *Id.* at 13–14.

[137] *Id.* at 3–4.

[138] *Id.* at 23.

[139] *TPT Hearing*, *supra* note 16, at 36.

[140] *Id.*

[141] *Id.*

program, HPD provides low-cost loans to struggling homeowners.[142] Second, the City has observed many recommended best practices for its *in rem* foreclosure program,[143] like offering HDFCs retroactive property tax abatements and implementing installment payment agreements for municipal arrears.[144] Third, the City does allow the residents of certain properties subject to TPT to petition to become HDFCs, which offers the kind of homeownership opportunities that might otherwise be threatened by the program's conversion of HDFCs into rental units. Finally, New York City has made a strong commitment to the creation of permanently affordable housing in the past few years. Through changes in City policy and recent changes to rent stabilization laws on the state level, the City now requires longer affordability terms in affordable housing development deals.[145]

Typically, City-funded affordable housing is subject to regulatory agreements that mandate rents in particular units remain affordable to low-income people for a certain period of years. At the end of that term, however, developers can choose to opt out of the affordability arrangement and transition the units to market rate rents.[146] Now, the City faces an "expiring use crisis" as the units created during the Koch Administration of the 1980s reach the end of their affordability terms and private developers opt to make them market rate apartments.[147] Fortunately, data suggests nonprofit community developers are significantly more likely than private developers to renew their

[142] *Id.*

[143] *See* RAO, *supra* note 126, at 5–7.

[144] HDFC REPORT, *supra* note 41, at 5.

[145] *See* STEPHANIE SOSA-KALTER, ASS'N FOR NEIGHBORHOOD HOUSING AND DEVELOPMENT, MAXIMIZING THE PUBLIC VALUE OF NEW YORK CITY-FINANCED AFFORDABLE HOUSING 21 (2019), https://anhd.org/report/maximizing-public-value-new-york-city-financed-affordable-housing.

[146] Until recently, the standard affordability term required for City-funded development was thirty years. *Id.* Typically, developers sought Low-Income Housing Tax Credits (LIHTC) and Private Activity Bonds (PAB) to fund these projects. *Id.* at 10. The LIHTC is issued to state governments by the federal government and awarded to private developers through a competitive process. *What Is the Low-Income Housing Tax Credit and How Does It Work?*, TAX POL'Y CTR., https://www.taxpolicycenter.org/briefing-book/what-low-income-housing-tax-credit-and-how-does-it-work (last visited Apr. 21, 2022). Developers then sell the credits to private investors to obtain funding. Once the development is complete, the investors can then claim the tax credit. *Id.* PABs are tax-exempt bonds issued by or on behalf of state or local governments to raise money to fund certain projects like affordable housing developments. *Private Activity Bond (PAB)*, INVESTOPEDIA, https://www.investopedia.com/terms/p/privateactivitybond.asp (last visited Mar. 10, 2022).

[147] SOSA-KALTER, *supra* note 145, at 10.

affordability terms,[148] and the City's trend toward prioritizing deals with such community-based developers means the problem of expiring use can be largely avoided in the future.

Even still, much of the City's TPT program needs improvement. First, there are shortcomings in the City's ability to provide effective notice to homeowners. The fact that most properties exited TPT suggests notice was effective for most of the affected property owners. But the problems highlighted with several properties indicate the City's notice provisions are far from perfect.

Second, the complex bureaucratic matrix of the program wherein multiple different agencies administer municipal charges could result in a property being subject to foreclosure. Coupled with City staff who are entirely unaware of the program's existence, this means property owners are at risk of being unable to redeem their property before it is foreclosed on. This problem is exacerbated by what appeared to be a selective application of the City's discretion to allow redemption of certain properties toward the end of Round X.

Finally, while the City largely transferred the properties ultimately foreclosed on to nonprofit community developers, the fact remains that in many cases, homeowner equity was traded for affordable rental units. Moreover, some properties were actually transferred to private developers, meaning the City stands to lose affordable housing due to limited affordability terms like those associated with LIHTC-financed development.

V. WHAT CAN BE DONE

First, the City should restrict the foreclosure of properties through TPT to those that meet the statutory definition of distress. The City argues that it has the discretion to transfer property with any amount of outstanding arrears, and that where a property is located on the same tax block as a distressed property, it must be included in TPT.[149] The City Council should re-introduce and pass Int. 1594 of 2019, a bill introduced by a Brooklyn councilman, which would remove the requirement that selected parcels not be smaller than tax blocks.[150] Where other properties may have property tax delinquency, the City should channel its resources to outreach instead of foreclosure.

Second, the City should increase the resources available to property owners before moving to foreclose. The City expends

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[148] *Id.*

[149] *See supra* text accompanying note 78.

[150] N.Y.C. Int. No. 1594 (Jan. 9, 2019).

tremendous staff time and money to coordinate the TPT program, including resources it brings to bear in the ultimate rehabilitation process. The City should leverage more of this funding for improvements and property tax assistance on the front end, instead of penalizing property owners by moving to foreclose and transfer these properties to developers. Where property records suggest a particular delinquent property owner may be vulnerable (e.g., elderly, disabled, etc.), the City should enlist the help of social service agencies to conduct outreach and connect property owners with resources that can help them address financial matters to avoid foreclosure.[151]

Where foreclosure is absolutely necessary, the City should prioritize the transfer of properties to land banks, which in conjunction with community land trusts (CLTs), and mutual housing associations (MHAs), can ensure permanent affordability, ownership opportunities, and community control that private developers cannot. These strategies have demonstrated promise in other localities[152] and, when used in conjunction, offer a better way for New York City to prevent displacement resulting from the many ongoing crises facing its housing market.

First, New York City should establish a land bank.[153] A land bank is a nonprofit corporation created by local law that aggregates vacant, abandoned, and tax delinquent parcels of land for future sale and development.[154] Generally, land banks are granted special power and legal authority, which allow municipalities the flexibility to return such problem properties to productive use.[155] These powers include the ability to obtain property at low or no cost through foreclosure; to hold land tax-free; to extinguish back taxes and other arrears; to lease properties for temporary uses; and to negotiate sales based on

151 RAO, *supra* note 126, at 6.

152 *See* Dan Wu & Sheila R. Foster, *From Smart Cities to Co-Cities: Emerging Legal and Policy Responses to Urban Vacancy*, 47 FORDHAM URB. L.J. 909, 921–22 (2020); Alese Bagdol, Note, *Property Taxes and Community Land Trusts: A Middle Ground*, 91 TEX. L. REV. 939, 942 (2013); Diana A. Silva, Note, *Land Banking as a Tool for the Economic Redevelopment of Older Industrial Cities*, 3 DREXEL L. REV. 607, 620–21 (2011).

153 A bill to establish a New York City land bank was previously introduced in the New York City Council with the express goal of "acquiring, warehousing and transferring real property to develop, rehabilitate and preserve affordable housing." *See* N.Y.C. Int. No. 118 (Jan. 31, 2018).

154 *See Land Banks*, NAT'L COMMUNITY STABILIZATION TR., http://www.stabilizationtrust.org/get-involved/land-banks (last visited Apr. 21, 2022); *Land Bank FAQ's*, CTR. FOR CMTY. PROGRESS, https://communityprogress.org/resources/land-banks/lb-faq/ (last visited Apr. 21, 2022).

155 *Land Bank FAQ's*, CTR. FOR CMTY. PROGRESS, https://communityprogress.org/resources/land-banks/lb-faq/ (last visited Apr. 21, 2022).

outcomes deemed to be in the public interest, such as the creation of affordable housing.[156]

Land banking folds nicely into the mechanisms already created by TPT to foreclose on tax delinquent properties and clear title. Instead of transferring title to private developers in exchange for affordable housing set asides, the City could transfer title to a land bank.[157] A New York City land bank could be seeded with the 1,459 vacant, unutilized properties the City already owns.[158] A 2016 report by the New York City Comptroller estimated these properties alone could support the creation of 53,116 units of permanently affordable housing.[159] As distressed properties are identified by HPD for inclusion in TPT, they could be funneled to a City land bank instead of being transferred to third parties to develop housing with affordability guaranteed for only a period of years. To better effectuate permanent affordability, a New York City land bank should be used in conjunction with the growing network of community land trusts cropping up in the City.[160]

Like land banks, CLTs are nonprofit organizations geared toward marshaling land for community uses, such as creating and preserving affordable housing.[161] CLTs differ from land banks in two important ways. First, CLTs maintain permanent ownership of land, while land banks transfer vacant and undeveloped properties to third parties.[162] Instead of selling properties, CLTs enter long-term leases with the individuals or entities who purchase the building or home atop that land.[163] In return, the CLT regulates the extent of the profit a building owner is allowed to make from selling the building.[164] This regulation effectively allows the community to set the price of the building,

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156 *Id.*

157 OFF. OF THE N.Y.C. COMPTROLLER, BUILDING AN AFFORDABLE FUTURE: THE PROMISE OF A NEW YORK CITY LAND BANK 12 (2016), https://comptroller.nyc.gov/wp-content/uploads/documents/The_Case_for_A_New_York_City_Land_Bank.pdf.

158 *Id.* at 5.

159 *Id.*

160 *Id.* at 13; *see* Abigail Savitch-Lew, *The N.Y.C. Community Land Trust Movement Wants to Go Big*, CITYLIMITS (Jan. 8, 2018), https://citylimits.org/2018/01/08/the-nyc-community-land-trust-movement-wants-to-go-big/.

161 *See* LINDA E. FISHER & JUDITH FOX, THE FORECLOSURE ECHO 181 (2019) (briefly explaining the CLT model and its benefits in creating affordable property ownership opportunities).

162 OFF. OF THE N.Y.C. COMPTROLLER, *supra* note 157, at 13.

163 *See* FISHER & FOX, *supra* note 161, at 181; *Frequently Asked Questions*, N.Y.C. CMTY. LAND INITIATIVE, https://nyccli.org/resources/clts-and-mhas-frequently-asked-questions/ (last visited Apr. 21, 2022).

164 FISHER & FOX, *supra* note 161, at 181–82.

insulating the sale from market inflation and ensuring it remains affordable for future owners.[165]

Second, CLTs do not have the broad range of powers typically conferred on land banks, but rely on purchase and donation to acquire land.[166] In the context of TPT, the City could donate the land on which TPT buildings sit to CLTs. The CLT, in turn, could then manage the disposition of the buildings to ensure they are maintained as affordable housing in perpetuity. This effort could be further augmented by creating partnerships with mutual housing authorities.

Like CLTs, MHAs are democratically-governed, nonprofit organizations.[167] MHAs, however, are focused on the ownership and management of housing affordable to low- and very low-income households.[168] MHAs employ a number of strategies to keep housing costs low, including: sharing resources across multiple buildings, subsidizing operating costs by renting commercial space, and purchasing supplies and services in bulk.[169] Also, like CLTs, MHAs restrict the profit individuals make from sales.[170] These characteristics mean the structure of MHAs dovetails nicely with the structure of CLTs. In fact, MHAs and CLTs could be set up to have interlocking boards, meaning they can coordinate their efforts to ensure permanent affordability.[171]

To better serve the dual goals of property tax compliance and affordable housing preservation without exacerbating displacement and gentrification, New York City must rethink its approach to tax foreclosures, especially the TPT program. First, the City can and should adopt Intro. 1594 to prevent buildings with small amounts of municipal arrears from being swept into the TPT program just because they are on the same tax block as a truly distressed property. Second, the City should marshal the resources of its many social service agencies to better protect vulnerable property owners from falling behind on property taxes. And finally, the City should establish a land bank, which in conjunction with CLTs and MHAs, provides a readymade solution for ensuring the kind of community-centered ownership and development

[165] Chelsea King, Comment, *Merging Inclusionary Zoning and Community Land Trust to Increase Affordable Housing in Baltimore Without Displacing Neighborhoods*, 49 U. BALT. L.F. 43, 59–60 (2018).

[166] OFF. OF THE N.Y.C. COMPTROLLER, *supra* note 157, at 13.

[167] N.Y.C. CMTY. LAND INITIATIVE, *supra* note 163.

[168] *Id.*

[169] *Id.*

[170] *Id.*

[171] *Id.*

necessary to create permanently affordable housing and homeownership opportunities for the increasing number of New Yorkers struggling to afford a home.

VI. CONCLUSION

The importance of property tax revenues to municipal budgets means tax foreclosures are here to stay. But the affordable housing crisis facing cities like New York, especially in the wake of the cataclysmic economic threat posed by the global coronavirus pandemic, requires thoughtful, proactive solutions that do not just kick the can down the road by offering sweetheart deals to private developers. To be sure, TPT was an innovative approach to addressing the widespread abandonment and neglect plaguing New York City for the decades preceding its creation. But changing circumstances, and an enhanced understanding of other mechanisms for land and housing development, make clear that TPT needs changing. In particular, the creation of a land bank and the transfer of properties to CLTs and MHAs for the preservation and management of truly permanent affordable housing would go a long way to addressing the current shortcomings of the program. These changes would make TPT a model that other municipalities can adopt as they seek to address their own budget shortfalls and dwindling stocks of affordable housing.