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## New York City's Public Housing Preservation Trust: The Case for Cautious Optimism, Necessity, and Racial Justice

Andrew Darcy

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# NEW YORK CITY’S PUBLIC HOUSING PRESERVATION TRUST: THE CASE FOR CAUTIOUS OPTIMISM, NECESSITY, AND RACIAL JUSTICE

*Andrew Darcy\**

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## INTRODUCTION

The story of the New York City Housing Authority (“NYCHA”) is one of stark contradictions. In one telling, NYCHA is the result of progressive vision and innovation.<sup>1</sup> As the nation’s first public housing authority (“PHA”),<sup>2</sup> it has, for nearly a century, successfully cemented a home and supportive community for millions of working-class and low-income New Yorkers.<sup>3</sup> But, unfortunately, that is not the whole story. There is another one — one which has as main characters neglect, malfeasance, and disarray.<sup>4</sup> For anyone attuned to New-York-related news, there is no longer a shock upon hearing that conditions at some NYCHA developments are downright horrid — or, as a line from a report issued by New York City’s Public Advocate puts it, “entirely unlivable.”<sup>5</sup>

How did things get this way? The answer is complex, subject to debate, and well documented.<sup>6</sup> Suffice to say that it would be folly to argue that NYCHA’s problems can be traced to a single source. The complexity notwithstanding, there is a simple truth (albeit one that might be contrary to the wisdom of the late Notorious B.I.G.): more money, fewer problems.<sup>7</sup>

1. See NICHOLAS DAGEN BLOOM & MATTHEW GORDON LASNER, *Introduction*, in AFFORDABLE HOUSING IN NEW YORK 2–5 (2016).

2. See Peter Marcuse, *Public Housing in New York City: History of Progress*, 50 n.1 (Mar. 1, 1989) (unpublished manuscript) (on file with the author and in NYCHA archives).

3. In 2023 alone, there were 330,118 authorized residents of NYCHA public housing. See N.Y.C. HOUS. AUTH., NYCHA 2023 FACT SHEET 1 (2023), <https://www.nyc.gov/assets/nycha/downloads/pdf/NYCHA-Fact-Sheet-2023.pdf> [<https://perma.cc/79UD-6JFH>] [hereinafter NYCHA FACT SHEET].

4. See *infra* Part I.

5. OFF. OF THE PUB. ADVOC. JUMAANE D. WILLIAMS, HOW THE OTHER HALF LIVES IN PUBLIC HOUSING 4 (Sept. 2022), [https://www.pubadvocate.nyc.gov/static/assets/nycha\\_whitepaper3.pdf](https://www.pubadvocate.nyc.gov/static/assets/nycha_whitepaper3.pdf) [<https://perma.cc/2DVN-CXDL>] [hereinafter PUBLIC ADVOCATE REPORT].

6. See generally Marcuse, *supra* note 2; NICHOLAS DAGEN BLOOM, PUBLIC HOUSING THAT WORKED: NEW YORK IN THE TWENTIETH CENTURY (2008); EDWARD G. GOETZ, NEW DEAL RUINS: RACE, ECONOMIC JUSTICE & PUBLIC HOUSING POLICY (2010).

7. This, of course, is a reference to Notorious B.I.G.’s song, “Mo’ Money, Mo’ Problems.” See NOTORIOUS B.I.G., MO’ MONEY, MO’ PROBLEMS (Bad Boy Records 1997). Biggie, as he was more commonly known, was a Brooklynite but did not grow up in NYCHA housing. See Alaina Demopoulos, *Inside Biggie Smalls’ Childhood Home: How the ‘One*

NYCHA has been struggling with the competing challenges of a portfolio that comprises aging, deteriorating buildings, and decades of disinvestment from the federal government.<sup>8</sup> The sum of this equation is more than \$70 billion. That is, in order for NYCHA to make the repairs it needs to fully sustain its buildings, it needs more than \$70 billion,<sup>9</sup> which is money that it does not have.<sup>10</sup> Without it, the unlivable conditions will not only persist, they will worsen.<sup>11</sup> And, while the threat might not be imminent, it is not beyond the realm of possibility that without an infusion of capital funding, certain NYCHA developments could go the way of Robert Taylor Homes in Chicago and Pruitt-Igoe in St. Louis — turned to rubble.<sup>12</sup>

Make no mistake about it: The fight for NYCHA is about more than repairs and the warranty of habitability.<sup>13</sup> It is also about race and class. Nearly all people who call NYCHA home are people of color, and many of them are low income.<sup>14</sup> That demography is no accident. The combination of 20th century discriminatory housing policies in the private market, white flight from the inner city, and policy choices regarding what type of housing to favor (private, single-family homes) and disfavor, conspired to create a segregated, deteriorating, low-income public housing system.<sup>15</sup> Racial housing covenants, the practice of “steering” people of color away from

*Room Shack’ Turned Into a \$4K Condo*, DAILY BEAST (June 29, 2019), <https://www.thedailybeast.com/inside-biggie-smalls-childhood-home-how-the-one-room-shack-turned-into-a-dollar4k-condo> [https://perma.cc/RD8R-4AQT]. Many of the most influential New York hip-hop artists do, however, hail from NYCHA, and they tend to pay homage to that upbringing in their songs. For example, in Jay-Z’s “Where I’m From,” he provides exciting tales about his days growing up in the Marcy Houses in Brooklyn. JAY-Z, WHERE I’M FROM (Roc-A-Fella Records 1998). Nas, from Queensbridge Houses, has mentioned the development throughout his songs, and has even named songs after his former address: 40-16 Vernon Boulevard. *See* NAS, 40-16 BUILDING (Mass Appeal Records 2021).

8. *See infra* Part I.

9. *See* PETER O’HANLON & STIRLING EDWARD MOORE, N.Y.C. HOUS. AUTH., PHYSICAL NEEDS ASSESSMENT 2023 13 (June 22, 2023), <https://www.nyc.gov/assets/nycha/downloads/pdf/2023-PNA-Report-Physical-Needs-Assessment-NYCHA.pdf> [https://perma.cc/3KC2-4S28] [hereinafter PNA].

10. *See* N.Y.C. HOUS. AUTH., CAPITAL PLAN CALENDAR YEARS 2022–2026 4 (Dec. 30, 2021), <https://www.nyc.gov/assets/nycha/downloads/pdf/capital-plan-2226.pdf> [https://perma.cc/4VQB-HLPR] [hereinafter CAPITAL PLAN].

11. *See id.* at 5 (noting that “capital needs are projected to grow anywhere from \$42.7 billion to \$68.6 billion over the next ten years”).

12. *See* BLOOM & LASNER, *supra* note 1, at 8.

13. New York law implies the warranty of habitability in all leases. *See* N.Y. REAL PROP. LAW § 235-b (2014).

14. N.Y.C. HOUS. AUTH., RESIDENT DATA SUMMARY 2023 2 (Feb. 2023), <https://www.nyc.gov/assets/nycha/downloads/pdf/Resident-Data-Book-Summary-2023.pdf> [https://perma.cc/MT9W-X32X].

15. *See* GOETZ, *supra* note 6, at 7–8; DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 55–57 (1993).

white communities, as well as redlining — a practice by which the mortgage industry refused to lend or insure mortgages in communities of color — made it difficult, if not impossible, for Black families to enjoy the fruits of home ownership in the burgeoning suburbs of mid-20th-century America.<sup>16</sup> Thus, in New York City’s challenging decades that spanned the 1970s through early 1990s, which saw severe fiscal problems and historically high crime rates, there was an exodus from public housing and the city, generally by those who had the means and opportunity.<sup>17</sup>

The conditions in which many NYCHA residents live are not merely temporary, cosmetic inconveniences. Rather, housing conditions are directly related to dignity, health, economic security, and opportunity.<sup>18</sup> It is not, therefore, hyperbole to frame the issue in terms of asking whether a significant percentage of New York’s low-income people of color are entitled to the same basic opportunities as their more affluent neighbors.

16. See RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 23 (2017).

17. See Andrew Scherer, *The Case Against Summary Eviction Proceedings: Process as Racism and Oppression*, 53 SETON HALL L. REV. 1, 13 (2022) (noting that “[i]n the 1970s and early 1980s, New York City was going through a period of disinvestment and economic downturn”); Leah Goodridge & Helen Strom, *Innocent Until Proven Guilty?: Examining the Constitutionality of Public Housing Evictions Based on Criminal Activity*, 8 DUKE F. FOR L. & SOC. CHANGE 1, 8 (2016) (“Nevertheless, certain cities (and public housing developments) were affected by increased crime and drug use in the late 1980’s and early 1990’s, and many residents led the way in calling for policies to increase safety. A 1995 national poll found that 88% of African Americans agreed that individuals convicted of illegal drug sales or possession should be evicted from public housing. In New York City, tenant leaders and activists in the 1980’s demanded that the housing authority (NYCHA) take action to address drugs, crime, and prostitution which affected the City’s 600,000 public housing tenants.”). In between 1950 and 1990, the city saw a population decline of over 500,000, whereas the number of white New Yorkers declined from over seven million to under four million. See *Demographic History of New York City*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Demographic\\_history\\_of\\_New\\_York\\_City](https://en.wikipedia.org/wiki/Demographic_history_of_New_York_City) [<https://perma.cc/FAU5-BFV7>].

18. See, e.g., EDWARD G. GOETZ, *THE ONE-WAY STREET OF INTEGRATION: FAIR HOUSING AND THE PURSUIT OF RACIAL JUSTICE IN AMERICAN CITIES* 46–47 (2018) [hereinafter *THE ONE-WAY STREET OF INTEGRATION*]; Claudia Coulton et al., *Housing Crisis Leaves Lasting Imprint on Children in Cleveland: Study Finds Link Between Poor Housing Conditions and Kindergarten Readiness*, MACARTHUR FOUND. (Aug. 16, 2016), [https://www.macfound.org/media/files/hhm\\_brief\\_-\\_housing\\_crisis\\_children\\_in\\_cleveland.pdf](https://www.macfound.org/media/files/hhm_brief_-_housing_crisis_children_in_cleveland.pdf) [<https://perma.cc/8KH9-8LYU>]; Helen Hughes et al., *Pediatric Asthma Health Disparities: Race, Hardship, Housing, and Asthma in a National Survey*, 17 NAT’L LIBR. MED. 2 (Nov. 19, 2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5337434/> [<https://perma.cc/PYP3-ZJFR>] (noting that asthma “has been linked to poor housing quality”); James Krieger & Donna L. Higgins, *Housing and Health: Time Again for Public Health Action*, 92 AM. J. PUB. HEALTH 758, 758 (2002) (“Housing is an important determinant of health, and substandard housing is a major public health issue.”).

Once framed as such, it becomes clear that NYCHA has not just a moral, but a legal obligation to ensure the answer is yes. Legally, NYCHA must comply with laws, regulations, and rules that govern the landlord-tenant relationship, but it must also do more. Specifically, it is required to take steps to affirmatively further fair housing (“AFFH”).<sup>19</sup> AFFH obligations are found in federal and state law and are designed to ameliorate the vestiges of race-based housing discrimination.<sup>20</sup> They have two aspects, both of which are tied to access to opportunity: (1) providing residents of marginalized communities the chance to move to areas deemed to be of higher opportunity, and (2) bringing opportunity to traditionally underserved communities through investment in resources.<sup>21</sup>

While many discussions regarding AFFH obligations tend to focus on the former, the latter is the only realistic and appropriate option for NYCHA — a unique community within New York City that cannot, and should not, prioritize displacing its residents. Thus, NYCHA’s AFFH obligation is, fundamentally, to preserve its permanently affordable housing and make meaningful efforts to transform its communities to higher-opportunity ones. The focus of this Article is one such action, albeit one that NYCHA may have taken without contemplating its AFFH obligations: the creation of the New York City Public Housing Preservation Trust (the “Trust”).<sup>22</sup>

The Trust is a public benefit corporation, which is an agency or authority established by the government for a specific public purpose.<sup>23</sup> The Trust was created by legislation enacted in June 2022.<sup>24</sup> Its primary purpose is, at first glance, a modest one: to enter into long-term ground leases with NYCHA.<sup>25</sup> The modesty, however, masks a potentially transformative change. Once a NYCHA development is leased to the Trust, it would no longer be *pure* public housing, otherwise known as Section 9.<sup>26</sup> Rather, the property would convert to a form of Section 8 housing, which, for reasons enconced in federal law, will allow NYCHA to obtain substantially

19. See 42 U.S.C. §§ 3608(d), (e)(5); N.Y. PUB. HOUS. LAW § 600 (2021).

20. See *id.* See generally FURTHERING FAIR HOUSING: PROSPECTS FOR RACIAL JUSTICE IN AMERICA’S NEIGHBORHOODS (Justin P. Steil et al. eds., 2021) [hereinafter FURTHERING FAIR HOUSING].

21. See *infra* Part II.

22. See N.Y. PUB. HOUS. LAW §§ 625–649 (2022).

23. See N.Y.C. HOUS. AUTH., A BLUEPRINT FOR CHANGE (Dec. 2020), [https://www.nyc.gov/assets/nycha/downloads/pdf/NYCHA-Blueprint-for-Change\\_NYHC\\_Final.pdf](https://www.nyc.gov/assets/nycha/downloads/pdf/NYCHA-Blueprint-for-Change_NYHC_Final.pdf) [<https://perma.cc/TM5H-ZQYA>] [hereinafter BLUEPRINT].

24. See N.Y. PUB. HOUS. LAW §§ 625–649 (2022).

25. See N.Y. PUB. HOUS. LAW § 626 (2022).

26. Public housing is governed by Section 9 of the National Housing Act of 1937. See 42 U.S.C. §§ 1437–1437z-10.

increased funding for capital projects.<sup>27</sup> As a result, the Trust is a vehicle that could allow NYCHA to end the cycle of disinvestment and disrepair that has continued for decades. It would provide the opportunity for NYCHA's residents to have safe, habitable homes, which would hopefully have a positive spillover effect on all aspects of life activities, from health to happiness.<sup>28</sup>

Alarm bells have gone off about the Trust.<sup>29</sup> The skepticism is appropriate. Any tinkering with public housing — the gold standard when it comes to deeply affordable housing with strong tenant protections — must be scrutinized with a magnifying glass. The skepticism is rightly amplified, given NYCHA's track record of deception and unfulfilled promises.<sup>30</sup>

This Article suggests that the criticisms, while understandable,<sup>31</sup> are not reason to reject the Trust outright. Rather, it argues that the Trust should be viewed with optimism and as a potentially transformative measure to reimagine what small “p” public housing is and can be. It is also a note of caution: the Trust is an opportunity for NYCHA to do it right. If NYCHA swings and misses, the Trust could very well be looked upon as a grave mistake. But there are ways to avoid that judgment, which this Article addresses in the following sections.<sup>32</sup>

Part I provides a brief overview of NYCHA's history, including its innovative origins and strong benefits to tenants. It also details how disinvestment has negatively impacted NYCHA's residents to the point of crisis. Part II explains how issues of racial justice are inherent in any discussion relating to NYCHA. It then addresses the AFFH mandate, with a focus on preservation and place-based strategies. Part III details preservation

27. *See infra* Part III.

28. Empirical scientific studies have shown the obvious: that there is “strong evidence that households who experience housing difficulties are less satisfied with their lives than those who do not.” Mingzhi Hu et al., *Housing Difficulties, Health Status and Life Satisfaction*, FRONTIERS PSYCH. 1, 1 (2022), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9811203> [<https://perma.cc/YBN8-5NB6>].

29. For example, the group Save Section 9 lobbies exclusively for “federal solutions which aim to rehabilitate and expand the only truly affordable housing stock in America” and rejects any tinkering with public housing — which, as the name of the group suggests, is based in Section 9 of the Housing Act of 1937. *See Section 9 is Public Housing*, SAVE SECTION 9 (Jan. 5, 2024, 10:33 PM), <https://www.savesection9.org> [<https://perma.cc/PZQ6-ULKT>]. As discussed *infra* Part III, there are also serious logistical and financial hurdles that must be overcome to ensure the Trust's success.

30. *See infra* Part I.

31. *See infra* Section III.B.

32. The Author has previously argued that HUD's failure to fully fund Section 9 public housing is itself inconsistent with AFFH obligations. *See* Andrew Darcy, *Feds Can Further 'Fair Housing' Goals by Adequately Funding NYCHA*, CITYLIMITS (Jan. 3, 2023), <https://citylimits.org/2023/01/03/opinion-feds-can-further-fair-housing-goals-by-adequately-funding-nycha> [<https://perma.cc/8LPR-X8HZ>].

and modernization efforts used by NYCHA in the past, as well as their shortcomings. Part IV provides a history of the Trust legislation, as well as an explanation of how a Trust conversion would work in practice. It also highlights the serious concerns that have arisen regarding the Trust. Part V addresses those concerns and suggests that the Trust is a critical component of NYCHA's fair housing obligations. It further explains how NYCHA should fulfill those obligations in practice. This Article concludes by contending that the Trust must succeed if permanently affordable, decent, public housing will exist in New York in the future.

### I. NYCHA'S ROLE IN STABILIZING NEW YORK CITY AND ITS OWN INSTABILITY

New York is currently confronting eviction, homelessness, and affordable-housing crises.<sup>33</sup> These are not, however, uniquely contemporary problems. The Big Apple has been synonymous with housing crisis for over a century.<sup>34</sup> Things came to a head in the early 1930s, when the confluence of (1) a lack of affordable, safe, and decent housing and (2) the economic downturn of the Great Depression resulted in mass housing instability.<sup>35</sup> In 1932 alone, hundreds of thousands of New York City families were served with eviction notices.<sup>36</sup>

Yet, there was a silver lining to this instability: the strengthening of the tenants' rights movement<sup>37</sup> and, in 1934, the government's entry into the housing market via the novel New York City Housing Authority.<sup>38</sup> NYCHA was an experiment of innovative leaders who sought to create government-owned and -operated housing that was deeply affordable, clean, and decent.<sup>39</sup> As one scholar put it, "NYCHA represented, for the first time in the United States, the concept that government had a legitimate role to play

33. See Sarah Garland & Dean Chang, *Adams Plan Would Relax Rules for Developers Amid N.Y.C. Housing Crisis*, N.Y. TIMES (Dec. 8, 2022), <https://www.nytimes.com/2022/12/08/nyregion/eric-adams-nyc-affordable-housing-crisis.html> [<https://perma.cc/VJ66-VHGU>].

34. See BLOOM & LASNER, *supra* note 1, at 3.

35. See Marcuse, *supra* note 2, at 36–37.

36. See *Denies Eviction Report*, N.Y. TIMES (Mar. 29, 1933), <https://timesmachine.nytimes.com/timesmachine/1933/03/29/99217893.html?pageNumber=29> [<https://perma.cc/LCP6-8R6H>] (noting that there were over 3,000 completed evictions in New York in 1932, with over 25,000 eviction warrants issued).

37. See *Reds Battle Police in Rent Strike*, N.Y. TIMES (Jan. 23, 1932), <https://www.nytimes.com/1932/01/23/archives/reds-battle-police-in-rent-strike-riot-500-backed-by-4000-neighbors.html> [<https://perma.cc/NJB5-AG42>].

38. See Marcuse, *supra* note 2, at 37–39.

39. See Marcuse, *supra* note 2, at 37–39. It is important to note that public housing was not, at first, just a housing project; it was also a "giant public works project . . . [that] helped put people back to work during the Great Depression." GOETZ, *supra* note 6, at 6.



in providing directly, and keeping in public ownership, permanent housing of widely acceptable quality for ordinary families who could not afford it in the private market.”<sup>40</sup>

While local officials deserve the credit for NYCHA’s creation, it has never been a purely local endeavor. The federal government has always played some role with NYCHA. While the National Housing Act would not pass until 1937,<sup>41</sup> construction of the first NYCHA developments, the aptly named First Houses, as well as the segregated Williamsburg and Harlem River Houses, were built and financed with assistance from the federal Works Progress Administration and the Public Works Administration.<sup>42</sup> In those early years, rents were affordable because of the federal construction assistance, and tenants’ rent payments covered all operating expenses.<sup>43</sup>

Things have come a long way since then. Today, NYCHA’s public housing has “339,900 authorized residents in 162,143 apartments within 277 housing developments.”<sup>44</sup> NYCHA’s families skew toward being low income, with a significant percentage surviving on fixed income and public benefits.<sup>45</sup> Limited income notwithstanding, NYCHA’s residents can manage to live in an increasingly unaffordable city<sup>46</sup> because of features unique to public housing. Federal law, via the so-called Brooke Amendment

40. Marcuse, *supra* note 2, at 35. While NYCHA was the first local public housing authority, the first completed public housing development was Techwood Homes in Atlanta, Georgia. See GOETZ, *supra* note 6, at 6.

41. See Marcuse, *supra* note 2, at 50 n.1; 42 U.S.C. § 1437.

42. See Marcuse, *supra* note 2, at 60–61, 68; BLOOM & LASNER, *Harlem River Houses in AFFORDABLE HOUSING IN NEW YORK*, *supra* note 1, at 80–82, 91–92; ROTHSTEIN, *supra* note 16, at 23. The Public Works Administration and Works Progress Administration were federal programs created by President Franklin D. Roosevelt and Congress during the Great Depression to help spur economic activity through large-scale public projects that would employ laborers. See LIVING NEW DEAL, *New Deal Programs*, <https://livingnewdeal.org/history-of-the-new-deal/programs> [<https://perma.cc/Y4VH-Q9FQ>].

43. See Marcuse, *supra* note 2, at 60–61, 68; BLOOM, *supra* note 6, at 30–32; ROTHSTEIN, *supra* note 16, at 18. In fact, residents were middle class or members of the working poor, who had to meet strict requirements to gain admission. See BLOOM, *supra* note 6, at 78–80.

44. NYCHA FACT SHEET, *supra* note 3. It should be noted that NYCHA also houses an undetermined — but likely tens of thousands — number of so-called “unauthorized” persons, which are usually family or friends of tenants but whose presence and income have not been reported to NYCHA. See Jake Blumgart, *The Ghost Tenants of New York City*, SLATE (Mar. 3, 2016), <https://slate.com/business/2016/03/new-york-city-public-housing-could-have-more-than-100000-ghost-tenants-living-off-the-books-heres-why.html> [<https://perma.cc/3DU5-5TMG>].

45. See NYCHA FACT SHEET, *supra* note 3.

46. See, e.g., Eliza Shapiro, *Half of N.Y.C. Households Can’t Afford to Live Here, Report Finds*, N.Y. TIMES (Apr. 25, 2023), <https://www.nytimes.com/2023/04/25/nyregion/affordable-housing-nyc.html> [<https://perma.cc/34DB-EXB2>] (noting that “New York City is staring down the worst affordability crisis of the last two decades”).

has, since 1969, set rent in public housing at a percentage of the resident family's income.<sup>47</sup> This has ensured that public housing has remained affordable, even in expensive New York City neighborhoods, like the Upper West Side, and gentrifying ones, like Red Hook.<sup>48</sup>

There are other features that make NYCHA friendly for tenants. For one, tenants are presumptively entitled to lease renewals.<sup>49</sup> Under federal regulations, NYCHA and other PHAs may only terminate a tenancy for “[s]erious or repeated violation of material terms of the lease,” no longer being financially qualified for the apartment, or “other good cause.”<sup>50</sup> If threatened with eviction, tenants have numerous safeguards and protections available to them, which help ensure that evictions are a last resort.<sup>51</sup> Moreover, upon the death or vacatur of a tenant, the lease can be transferred to a so-called “remaining family member” if certain conditions have been

47. See U.S. DEP'T HOUS. & URB. DEV., MAJOR LEGISLATION ON HOUSING AND URBAN DEVELOPMENT ENACTED SINCE 1932 7 (June 2014), [https://www.hud.gov/sites/documents/LEGS\\_CHRON\\_JUNE2014.PDF](https://www.hud.gov/sites/documents/LEGS_CHRON_JUNE2014.PDF) [<https://perma.cc/5ZAU-F3YL>]. The Brooke Amendment initially set residents' share of the rent at 25% of the household income, but it was subsequently increased to 30%. See GOETZ, *supra* note 6, at 34; Courtney Lauren Anderson, *You Cannot Afford to Live Here*, 44 FORDHAM URB. L.J. 247, 252 (2017). The Brooke Amendment was passed because, prior to restructuring the manner in which rents had been set, public housing was becoming unaffordable to its increasingly low-income tenants. See Alana Semuels, *The Power of Public Housing*, ATLANTIC (Sept. 22, 2015), <https://www.theatlantic.com/business/archive/2015/09/public-housing-success/406561/> [<https://perma.cc/6U3E-WUGK>] (“As working-class residents moved out, those left behind were required to pay an increasing share of the rents. In time, some residents were paying more than half of their income for rent to live in public housing . . . [a] highly-publicized rent strike in St. Louis in 1969 drew attention to this and Congress passed the Brooke Amendment, which limited the rents that public-housing authorities could charge to a certain percentage of a residents' income.”).

48. The Upper West Side has had its fair share of public housing, including the Amsterdam, De Hostos Apartments, and Wise Towers. Red Hook is home to eponymous Red Hook East and West. See N.Y.C. HOUS. AUTH., OFFICIAL MAP 2023 (2023), <https://www.nyc.gov/assets/nycha/downloads/pdf/nychamap.pdf> [<https://perma.cc/FPV3-5P8W>].

49. See Lease Requirements, 24 C.F.R. § 966.4(a)(2)(i) (2023).

50. *Id.* § 966.4(l)(2)(i). Many states have enacted or are attempting to enact some form of a good-cause eviction provision in the private market to help stabilize renters. See, e.g., N.J. STAT. ANN. § 2A:18-61.1 (West 2022); *c.f.* Luis Ferré-Sadurní, *N.Y. Democrats, at Odds Over Tenant Protections, Fail to Reach Housing Deal*, N.Y. TIMES (June 8, 2023), <https://www.nytimes.com/2023/06/08/nyregion/housing-good-cause-eviction.html> [<https://perma.cc/EDV8-TW5Y>].

51. See, e.g., *Escalera v. N.Y.C. Hous. Auth.*, 924 F. Supp. 1323, 1328–29 (S.D.N.Y. 1996); LEGAL SERVS. OF N.Y.C., *Settlement in Fields v. Russ Speeds Up NYCHA Rent Adjustments*, <https://www.legalservicesnyc.org/storage/PDFs/fields%20v.%20russ%20settlement%20explainer%201.pdf> [<https://perma.cc/FA4S-EFHQ>]; Megan Stuart, *Housing is Harm Reduction: The Case for the Creation of Harm Reduction Based Termination of Tenancy Procedures for the New York City Housing Authority*, 13 CUNY L. REV. 73, 85 (2009).

met.<sup>52</sup> The combination of these aspects helps ensure that NYCHA families can treat their apartments as home for generations.

But NYCHA is in trouble, and that trouble began decades ago. While public housing in New York started on strong footing, it quickly took a step back as the federal government imposed strict cost-containment requirements on construction that resulted in developments being built in a manner that was inferior to the initial developments.<sup>53</sup> As one scholar has noted, “[t]he shortcuts taken during construction and design to minimize upfront costs had the ultimate effect of contributing to higher operating costs down the road.”<sup>54</sup> Given the increasing operating costs, as early as 1968, government officials were sounding the alarm that NYCHA’s financial model was an unsustainable one.<sup>55</sup> Because adequate planning and resources were lacking from an early point in NYCHA’s history, the unsustainability was an inevitable outcome.

Given the restrictions on the amounts that residents are obligated to pay and the high operating costs, for decades, NYCHA has depended upon subsidies from the federal government. Specifically, NYCHA has relied on two Department of Housing and Urban Development (“HUD”) funds: the Public Housing Operating Fund and Capital Fund.<sup>56</sup> This dependency, while essential, has also proven to be a vulnerability.

In the 1970s, President Nixon effectively ended the expansion of the public-housing program, slashing its budget in favor of the private-market-reliant Section 8 program.<sup>57</sup> Unlike government-run and -operated public housing — which is authorized and governed by Section 9 of the National Housing Act<sup>58</sup> — the Section 8 Housing Choice Voucher program operates under the assumption that low-income renters will be able to find housing in

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52. See *Ortiz v. Rhea*, 8 N.Y.S.3d 188, 189 (App. Div. 2015); N.Y.C. HOUS. AUTH., MANAGEMENT MANUAL 148–73 (2022) (on file with author).

53. See GOETZ, *supra* note 6, at 32.

54. GOETZ, *supra* note 6, at 33.

55. See BLOOM, *supra* note 6, at 214.

56. See Ed Gramlich, *Public Housing*, in NATIONAL LOW INCOME HOUSING COALITION ADVOCATES’ GUIDE 4-33 (2022), [https://www.nlihc.org/sites/default/files/2022-03/2022AG\\_4-08\\_Public-Housing.pdf](https://www.nlihc.org/sites/default/files/2022-03/2022AG_4-08_Public-Housing.pdf) [<https://perma.cc/CK2R-84BY>] (“Public housing Operating and Capital Fund subsidies provided by Congress and administered by HUD’s Office of Public and Indian Housing (PIH) contribute the balance of what PHAs receive to operate and maintain their public housing units.”); CAPITAL PLAN, *supra* note 10, at 26 (noting over 50% of NYCHA’s capital funding comes from federal sources).

57. See Gramlich, *supra* note 56, at 4-33 (“President Nixon declared a moratorium on public housing in 1974, shifting the nation’s housing assistance mechanism to the then-new Section 8 programs (both new construction and certificate programs) intended to engage the private sector.”); see also GOETZ, *supra* note 6, at 49.

58. See 42 U.S.C. §§ 1437–1437z-10.

the private market.<sup>59</sup> If and when they find an apartment (and that is assuming they can overcome source-of-income discrimination, as well as find a unit that meets all the requirements of the Section 8 program<sup>60</sup>), HUD subsidizes the monthly rent, usually through a local housing authority, and tenants pay only 30% of their income.<sup>61</sup> While there are some similarities between the two programs, the Section 8 program creates a categorically different role for the federal government — that of a distant subsidy provider, as opposed to a direct housing provider.

Thus, there was a “steady disinvestment, both literal and political, from the commitment to provide safe, decent, and affordable housing through public ownership.”<sup>62</sup> During that era, many families that could leave public housing did. As Richard Rothstein noted, “[t]he loss of middle-class tenants also removed a constituency that had possessed the political strength to insist on adequate funds for their projects’ upkeep and amenities. As a result, the condition and then the reputation of public housing collapsed.”<sup>63</sup> The 1980s saw increased public-housing disinvestment at the same time that many urban communities in which they were located began to experience a rise in crime and over-policing during the so-called “war on drugs.”<sup>64</sup> This further accelerated the exodus from public housing of those who had the means to do so.<sup>65</sup> But it was in the early 2000s that things took a dramatic turn for the

59. See U.S. DEP’T HOUS. & URB. DEV., HOUSING CHOICE VOUCHERS FACT SHEET (Jan. 11, 2024), [https://www.hud.gov/topics/housing\\_choice\\_voucher\\_program\\_section\\_8](https://www.hud.gov/topics/housing_choice_voucher_program_section_8) [<https://perma.cc/7JC4-YH7M>] [hereinafter SECTION 8 FACT SHEET] (“The housing choice voucher program is the federal government’s major program for assisting very low-income families, the elderly, and the disabled to afford decent, safe, and sanitary housing in the private market. Since housing assistance is provided on behalf of the family or individual, participants are able to find their own housing, including single-family homes, townhouses and apartments.”).

60. See, e.g., UNLOCK NYC, SERIAL DISCRIMINATORS LIST: WHO IS LOCKING NEW YORKERS WITH HOUSING VOUCHERS OUT OF THE RENTAL MARKET? (Oct. 2023), <https://cdn.glitch.global/b185c63a-8d27-412b-b4cb-047ca0c8de79/SerialDiscrimination-Report-2023-Digital.pdf?v=1697488588488> [<https://perma.cc/484M-8893>].

61. See SECTION 8 FACT SHEET, *supra* note 59.

62. GOETZ, *supra* note 6, at 7.

63. ROTHSTEIN, *supra* note 16, at 37.

64. See Goodridge & Strom, *supra* note 17, at 11, 13.

65. See GOETZ, *supra* note 6, at 49; see also Fran Quigley, *Public Housing Works. We Need More of It.*, JACOBIN (Feb. 23, 2023), <https://jacobin.com/2023/02/public-housing-new-york-affordable-rent-real-estate> [<https://perma.cc/9MDA-94LJ>] (“[I]n the early 1980s . . . President Ronald Reagan and a compliant Congress slashed funding for affordable housing by nearly 80 percent. The nation’s housing system has yet to recover: the United States devoted 1.4 percent of our Gross Domestic Product to federal interventions in affordable housing during the 1970s, but today our commitment has shrunk to only 0.25 percent.”); AMEE CHEW, CTR. FOR POPULAR DEMOCRACY, SOCIAL HOUSING FOR ALL: A VISION FOR THRIVING COMMUNITIES, RENTER POWER, AND RACIAL JUSTICE 17 (Mar. 2022), [https://www.populardemocracy.org/sites/default/files/Social%20Housing%20for%20All%20-%20English%20-%20FINAL%203-21-2022\\_0.pdf](https://www.populardemocracy.org/sites/default/files/Social%20Housing%20for%20All%20-%20English%20-%20FINAL%203-21-2022_0.pdf) [<https://perma.cc/3V2G-AKPV>]

worse. During the presidency of George W. Bush, the cuts to public housing were so severe that they threatened NYCHA's solvency.<sup>66</sup> This underfunding created a snowball effect: it limited what repairs and maintenance could be done, which in turn created more need for capital improvements.<sup>67</sup>

With aging buildings and insufficient funding,<sup>68</sup> stories of the horrors of living in NYCHA became increasingly prevalent, with some scholars rightfully identifying the situation as a "public health crisis."<sup>69</sup> The New York City Comptroller released a report in 2014,<sup>70</sup> which noted:

- In 2002, 60% of public housing apartments had at least one deficiency. By 2011, 79% of public housing apartments had at least one deficiency.
- In 2002, water leaks were observed in approximately one-fifth of NYCHA apartments. By 2011 that percentage was nearly one-third.
- The number of units with broken or missing windows increased 945% from 2005 to 2011.
- From 2005 to 2011, rodent observations increased 12 percentage points, with over 36% of NYCHA apartments experiencing this condition in 2011.

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[hereinafter SOCIAL HOUSING FOR ALL] (noting that the "'War on Drugs' during the 1980s and beyond has influenced public housing policy, expanding mechanisms to scapegoat and criminalize residents of color").

66. See BLOOM, *supra* note 6, at 251.

67. See N.Y. UNIV. FURMAN CTR., NYCHA'S ROAD AHEAD: CAPITAL AND OPERATING BUDGET NEEDS, SHORTFALLS, AND PLANS 3 (Aug. 2019), [https://furmancenter.org/files/NYCHAs\\_Road\\_Ahead\\_Final.pdf](https://furmancenter.org/files/NYCHAs_Road_Ahead_Final.pdf) [<https://perma.cc/88CF-EAPD>] ("NYCHA's deferred maintenance and capital investments are due in large part to inadequate funding. Federal capital funding has fallen both nominally and in inflation adjusted terms, resulting in a constantly widening deficit over time that is exacerbated by continually growing costs. The federal retreat in the face of deteriorating conditions has been well documented for years."); BOS. CONSULTING GRP., RESHAPING NYCHA SUPPORT FUNCTIONS (Aug. 2012), <https://www.nyc.gov/assets/nycha/downloads/pdf/BCG-report-NYCHA-Key-Findings-and-Recommendations-8-15-12vFinal.pdf> [<https://perma.cc/7QHGSYWZ>] ("NYCHA faces a vicious cycle in which underfunded capital improvements drive higher unmet demands, cause increasing structural deficits and maintenance/repair needs.").

68. See CAPITAL PLAN, *supra* note 10, at 4–5.

69. Justin R. La Mort, *Public Housing and Public Health: The Separate and Unequal Protection of Private and Public Housing Tenants' Health in New York City*, 27 J. AFFORDABLE HOUS. & COMM. DEV. L. 385, 391 (2018).

70. OFF. OF THE N.Y.C. COMPTROLLER, HOW NEW YORK LIVES: AN ANALYSIS OF THE CITY'S HOUSING MAINTENANCE CONDITIONS (Sept. 2014), [https://comptroller.nyc.gov/wp-content/uploads/documents/How\\_New\\_York\\_Lives.pdf](https://comptroller.nyc.gov/wp-content/uploads/documents/How_New_York_Lives.pdf) [<https://perma.cc/C85M-LPJG>].

- From 2008 to 2011, heating equipment breakdowns increased by 72.8% and units with broken plaster and peeling paint increased by 111%.<sup>71</sup>

Mold was uniquely problematic given its prevalence and negative health effects.<sup>72</sup> In 2013, residents of NYCHA who have asthma commenced a lawsuit on the theory that NYCHA’s failure to promptly and effectively remediate mold was a violation of the Americans with Disabilities Act.<sup>73</sup> NYCHA promptly settled the case,<sup>74</sup> but almost immediately began defaulting on its obligations.<sup>75</sup> In 2017, NYCHA did an assessment of its buildings and the estimated amount needed to stabilize the portfolio through renovations and repairs.<sup>76</sup> This audit, known as a physical needs assessment (PNA), determined that NYCHA would need “\$45.2 billion . . . over 20 years.”<sup>77</sup>

Just one year later, in 2018, the situation hit what will hopefully be its nadir. It was then that the United States Attorney’s Office for the Southern District of New York sued NYCHA.<sup>78</sup> The Complaint alleged that NYCHA had failed to maintain its buildings in a safe and sanitary manner, in violation of various federal laws.<sup>79</sup> But it was not just conditions that prompted the suit. Rather, prosecutors alleged that NYCHA had engaged in a massive

71. *Id.* at 1.

72. *See id.* at 10.

73. *See* Complaint, Baez et al. v. N.Y.C. Hous. Auth., 533 F. Supp. 3d 135 (S.D.N.Y. 2021) (No. 13-CV-8916), ECF No. 1.

74. *See* Stipulation and Order of Settlement, Baez et al. v. N.Y.C. Hous. Auth. (S.D.N.Y. 2021) (No. 13-CV-8916), ECF No. 11.

75. *See* Memorandum and Order at 3, Baez et al. v. N.Y.C. Hous. Auth., No. 13-CV-8916 (S.D.N.Y. 2023), ECF No. 88 (“NYCHA has been out of compliance with the Consent Decree from the day it was entered by this Court.”). To be fair, NYCHA has been employing numerous efforts to improve mold conditions and has attacked the problem in a variety of different ways. *See* Air Quality in NYCHA Apartments: Hearing Before the N.Y.C. Council Comm. on Public Housing 2–4 (Feb. 28, 2023) (testimony from Brad Greenburg, Chief Compliance Officer, New York City Housing Authority), <https://www.nyc.gov/assets/nycha/downloads/pdf/2023-air-quality-testimony-FINAL.pdf> [<https://perma.cc/42ND-8P7N>].

76. *See* STV AECOM PNA, PHYSICAL NEEDS ASSESSMENT 2017 5 (Mar. 25, 2018), <https://www.nyc.gov/assets/nycha/downloads/pdf/PNA%202017.pdf> [<https://perma.cc/7Y6U-PPSV>].

77. *Id.* Demonstrating how the lack of comprehensive repairs accelerates decline, in 2023, that number ballooned to over \$78 billion. PNA, *supra* note 9 (“The total projected cost of all needs – remediate and replacement – over the next twenty (20) years is \$78.34 billion (2023 Dollars). The bulk of this need is due greatly to the aging NYCHA portfolio, where the average age of a NYCHA building is roughly 60 years and 70% of the portfolio was built prior to 1970.”).

78. *See* Complaint, United States v. N.Y.C. Hous. Auth., 347 F. Supp. 3d 182 (S.D.N.Y. 2018) (No. 18-CV-5213), ECF No. 11.

79. *See id.*

cover-up. Specifically, they claimed that NYCHA had made false statements regarding the state of its buildings, including the presence of lead-based paint — a serious health hazard for children.<sup>80</sup> They further alleged that NYCHA had engaged in false and deceptive practices to prevent HUD from uncovering the degree of disrepair during its regular inspections.<sup>81</sup> Among the relief requested in the Complaint was the appointment of a monitor pursuant to Section 6(j)(3) of the U.S. Housing Act of 1937.<sup>82</sup>

The parties settled the case, but the settlement agreement was rejected by Judge William Pauley III,<sup>83</sup> who reasoned that it lacked sufficient clarity and enforceability.<sup>84</sup> The case was then voluntarily dismissed by the federal prosecutors. Following the dismissal, the parties, along with HUD and New York City, entered into an extrajudicial agreement that resulted in the appointment of a monitor.<sup>85</sup> This so-called “HUD Agreement” is now the document that provides the framework for NYCHA’s transition out of the depths of disarray. Among many other provisions, it requires that NYCHA and the appointed monitor create detailed “Action Plans” to implement the mandates in the following “pillar” areas: (1) lead-based paint; (2) mold and leaks; (3) elevators; (4) pests and waste; (5) heat and hot water; and (6) inspections.<sup>86</sup>

Yet, as Judge Pauley noted in his rejection of the proposed settlement, it is doubtful that any “solution will offer an immediate panacea, in large part due to NYCHA’s crippling \$31.8 billion capital deficit.”<sup>87</sup> The comment was prescient. Despite progress, the issues plaguing the NYCHA have continued. In 2022, the New York City Public Advocate released a report after an investigation, which noted six recurring problems, which had some overlap with the HUD Agreement pillars: “(1) the widespread and recurring mold problems, (2) rodent and insect infestations, (3) elevator service interruptions, (4) broken fire exit doors, (5) security concerns, and (6) consistent lack of hot water and no heat due to the mishandling of boiler

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80. *See id.* at ¶¶ 3–4, 8.

81. *See id.* at ¶¶ 8–10.

82. *See* 42 U.S.C. § 1437d(j)(3). The federal government has used “monitors” in several different spheres in which it is attempting to encourage or force systemic change — at times with various degrees of success. *See, e.g.*, Consent Judgment, *Nunez v. City of New York et al.*, No. 11-CV-5845-LTS-RWL (S.D.N.Y. Oct. 17, 2023), ECF 209-1.

83. *See* *United States v. N.Y.C. Hous. Auth.*, 347 F. Supp. 3d 182, 188 (S.D.N.Y. 2018).

84. *See id.* at \*199–205.

85. *See* N.Y.C. HOUS. AUTH., U.S. DEPT. OF HOUS. AND URB. DEV., & CITY OF N.Y., NYCHA MONITORING AGREEMENT (Jan. 31, 2019), <https://www.nyc.gov/assets/nycha/downloads/pdf/nycha-monitoring-agreement.pdf> [<https://perma.cc/7XPE-TDFL>] [hereinafter HUD Agreement].

86. *Id.* at ¶¶ 33–43, Exs. A–B.

87. *United States v. N.Y.C. Hous. Auth.*, 347 F. Supp. 3d 182, 216 (S.D.N.Y. 2018).

outages during the winter months.”<sup>88</sup> That same year, a New York City Housing Court judge said that if NYCHA was a small, private landlord, its owner would be in jail for failing to provide a building in Queens heat and hot water for months.<sup>89</sup> In short, earnest efforts to do better in the wake of the HUD Agreement notwithstanding, NYCHA is still struggling and its residents are continuing to suffer the consequences.

## II. THE IMPLICATIONS FOR RACIAL JUSTICE AND FAIR HOUSING OBLIGATIONS

### A. Race and Public Housing

Implicated in anything affecting NYCHA’s residents is the issue of racial justice. NYCHA’s residents are predominantly people of color.<sup>90</sup> This is not mere happenstance; it is the result of forces that have been at play for decades. As one commentator notes:

Systemic racism — from the legacy of red-lining practices to restrictive zoning — has precluded non-white individuals from owning homes or building wealth at the same rates as their white counterparts. This leaves them overly-represented in government assistance programs, including public housing. Therefore, any issues that arise in public housing (unsafe living conditions, misuse of government funds, etc.) are issues of racial justice and disproportionately affect families of color.<sup>91</sup>

NYCHA was once home to many more white families, although NYCHA initially segregated developments by race.<sup>92</sup> Yet, in the post-Depression era, many working-class white residents of public housing — and many white residents of New York City in general — were able to take advantage of

88. PUBLIC ADVOCATE REPORT, *supra* note 5, at 9.

89. *See* PUBLIC ADVOCATE REPORT, *supra* note 5, at 7.

90. *See* PUBLIC ADVOCATE REPORT, *supra* note 5, at 7. NYCHA’s residents are overwhelmingly Black and Latinx New Yorkers. According to NYCHA’s statistics, 43% of NYCHA’s residents identify as Black and 45% identify as Hispanic. White residents make up only 4% of the total. N.Y.C. HOUS. AUTH., RESIDENT DATA BOOK 2023 2 (2023), <https://www.nyc.gov/assets/nycha/downloads/pdf/Resident-Data-Book-Summary-2023.pdf> [<https://perma.cc/7GHF-446U>]. Over one-third survive on a form of fixed income, and nearly 13% are on public assistance. *Id.*

91. Julia Selby, *Home Is Where the Harm Is: Corruption, Fraud, and Abuse in NYC’s Public Housing*, CORNELL POL’Y REV. 5 (footnote omitted), <https://www.cornellpolicyreview.com/home-is-where-the-harm-is-corruption-fraud-and-abuse-in-nycs-public-housing/?pdf=6399> [<https://perma.cc/PX8K-TLNW>]; *see also* Traolach O’Sullivan, *The Need for Racial Justice in National Housing Policy*, COLUM. POL. REV. (Jan. 27, 2023), <http://www.cpreview.org/blog/2023/1/the-need-for-racial-justice-in-national-housing-policy> [<https://perma.cc/V6YX-X77N>] (noting that “[r]acial segregation and concentrated poverty in public housing did not happen by accident [but rather] through redlining, urban renewal, restrictive covenants, disinvestment, and white flight”).

92. *See* BLOOM, *supra* note 6, at 170.



homeownership programs made available by the Federal Housing Administration and the Home Owners' Loan Corporation.<sup>93</sup> Those opportunities were not available to Black Americans.<sup>94</sup> Moreover, through practices such as redlining and other forms of discrimination in the real estate market, Black Americans were largely shut out of the post-war boom years for buying homes and creating intergenerational wealth, whereas white Americans were not.<sup>95</sup> Thus, in those critical years of suburban sprawl, public housing increasingly became housing exclusively for racial minorities, many of whom had unjustly been shut out of the private real-estate market.<sup>96</sup>

The emptying of certain neighborhoods in New York City accelerated in the 1970s, as the City teetered on the edge of bankruptcy, imposed austerity measures, and simultaneously dealt with a general increase in crime.<sup>97</sup> During that era, families of all races who had the means left public housing for other opportunities.<sup>98</sup>

It was not just the racial composition of NYCHA that changed, but the socioeconomic composition as well. While some scholars posit that NYCHA has a much more diverse socioeconomic composition than other PHAs,<sup>99</sup> the fact remains that beginning in the 1960s, NYCHA became home to an increasing number of families that required support from government assistance, the majority of whom have been Black and Latinx.<sup>100</sup>

Once NYCHA was segregated racially and socioeconomically, the conditions were set to allow for a rapid deterioration of the physical conditions of the properties, as well as for the potential for neighborhood decline. As Douglas Massey and Nancy Denton argued in their groundbreaking book, *American Apartheid*:

[P]ublic housing projects in most large cities had become [B]lack reservations, highly segregated from the rest of society and characterized by extreme isolation. The replacement of low-density slums with high-density towers of poor families also reduced . . . class diversity . . . and brought about a geographic concentration of poverty that was previously unimaginable . . . . The degree of racial segregation in public housing is

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93. See GOETZ, *supra* note 6, at 7.

94. See GOETZ, *supra* note 6, at 7.

95. See generally ROTHSTEIN, *supra* note 16.

96. See GOETZ, *supra* note 6, at 7.

97. For a discussion of the financial despair New York City endured during the 1970s, see KIM PHILLIPS-FEIN, *FEAR CITY: NEW YORK'S FISCAL CRISIS AND THE RISE OF AUSTERITY* (2017).

98. See *id.*

99. See BLOOM, *supra* note 6, at 245.

100. See BLOOM, *supra* note 6, at 210–11.

directly and unambiguously linked to the differential growth of [B]lack and white urban populations in the postwar era[.]<sup>101</sup>

As Massey and Denton argue, racial and socioeconomic hyper-segregation is correlated with higher incidences of neighborhood ills, such as crime and physical deterioration.<sup>102</sup>

Once that history is acknowledged, it becomes glaringly obvious that the physical condition of NYCHA's properties is a civil rights issue. The condition of public housing cannot be untangled from decades of housing discrimination. As one scholar put it,

Given the clear and consistent overrepresentation of [B]lacks in the public housing of America's largest cities, any action, positive or negative, directed at public housing will have a disparate impact on African Americans. Had Congress, or HUD, or any presidential administrations from 1970 through 2010 attempted to systematically improve public housing, the beneficiaries would have disproportionately been African American.<sup>103</sup>

The converse is also true. In the words of Human Rights Watch,

The vast majority of NYCHA residents are Black or Latinx, many of whom entered public housing following a history of displacement. The disinvestment in public housing, and failure to create adequate alternatives, threatens a crucial source of stability for these households, deepening the structural discrimination they already experience and exacerbating existing disparities.<sup>104</sup>

This state of affairs screams out for a powerful remedy — and quickly.

## **B. Place-Based Strategies to Affirmatively Furthering Fair Housing**

What is the practical import of raising the intersection of racial justice and poor housing conditions, other than to lament the shameful history? Among other things, it is to make the point that accepting the status quo is not a viable option, either morally or legally. Morally, it is unacceptable to allow residents of one of the wealthiest cities in the world to live in conditions that are unsafe and unsanitary. Legally, PHAs like NYCHA have an obligation to do more than merely not discriminate.<sup>105</sup> They also must take affirmative

101. MASSEY & DENTON, *supra* note 15, at 57.

102. See MASSEY & DENTON, *supra* note 15, at 132, 139–40.

103. GOETZ, *supra* note 6, at 114.

104. Jackson Gandour, “*The Tenant Never Wins*” *Private Takeover of Public Housing Puts Rights at Risk in New York City*, HUM. RTS. WATCH (Jan. 27, 2022), <https://www.hrw.org/report/2022/01/27/tenant-never-wins/private-takeover-public-housing-puts-rights-risk-new-york-city> [<https://perma.cc/6MJR-VCFX>].

105. For a discussion on the AFFH and its history, see generally FURTHERING FAIR HOUSING, *supra* note 20. While the federal AFFH mandate is applicable to HUD and other

steps to further the goals of fair housing; in the parlance of the housing and community development world, they must take steps to AFFH.

In recent years, there have been volumes written on AFFH issues,<sup>106</sup> and this Article does not purport to do justice to all aspects of the topic. But a brief overview is appropriate. AFFH obligations originate in the Fair Housing Act,<sup>107</sup> although the wording of the statute is less than inspiring. It requires the Secretary of HUD to “administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies” of the FHA.<sup>108</sup> AFFH obligations are, at their core, about improving housing opportunities for historically marginalized communities.<sup>109</sup> While HUD has, under different presidential administrations, taken varying stances about how to fulfill its obligations,<sup>110</sup> the federal judiciary has consistently held that the provision is a meaningful one.<sup>111</sup>

For decades, the courts have concluded that AFFH obligations require HUD not only to take affirmative steps to further fair housing goals, such as removing vestiges of segregation, but also to require states and localities that benefit from federal funds to do the same.<sup>112</sup> Specifically, HUD must “use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases.”<sup>113</sup> As of this writing, HUD has issued a proposed AFFH rule that will require its state and local partners, like NYCHA, to affirmatively further fair housing by “taking meaningful actions . . . that overcome patterns of segregation, eliminate

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Executive-branch agencies, 42 U.S.C. § 3608(d), (e)(5), one way in which HUD fulfills its duty is by requiring its state and local partners to engage in the same behavior. *See generally* Affirmatively Furthering Fair Housing, 88 Fed. Reg. 8516 (proposed Feb. 9, 2023) (to be codified at 24 C.F.R. pts. 5, 91, 92, 93, 570, 574, 576, 903, 983) [hereinafter Proposed AFFH Rule].

106. *See, e.g.*, FURTHERING FAIR HOUSING, *supra* note 20.

107. *See* FURTHERING FAIR HOUSING, *supra* note 20. New York has imposed unique AFFH obligations upon certain municipalities and agencies within the state. *See* Andrew Darcy, *Using State Law to Enforce Affirmatively Further Fair Housing Obligations: No Longer Fitting a Square Peg in a Round Hole*, 29 CARDOZO J. EQUAL RTS. & SOC. JUST. 593, 594–96 (2023).

108. 42 U.S.C. § 3608(e)(5).

109. *See* Howard Husock, *Affirmatively Furthering Fair Housing: Are There Reasons for Skepticism?*, in FURTHERING FAIR HOUSING, *supra* note 20, at 127.

110. *See* FURTHERING FAIR HOUSING, *supra* note 20, at 3333.

111. *See* Florence Wagman Roisman, *Affirmatively Furthering Fair Housing in Regional Housing Markets: The Baltimore Public Housing Desegregation Litigation*, 42 WAKE FOREST L. REV. 333, 364–69 (2007).

112. NAACP v. Sec’y of Hous. & Urb. Dev., 817 F.2d 149, 155 (1st Cir. 1987).

113. *Id.* at 155.

inequities in housing and related community assets, and foster inclusive communities.”<sup>114</sup>

The definition leads to yet another question, which is, what counts as “meaningful actions”? That becomes a more fraught question and a potentially divisive one. There is a tension in the fair-housing community between those who maintain that fair housing is primarily about unlocking the doors for people of color to move to areas with enhanced resources usually associated with life opportunity (e.g., schools, nutrition, healthcare) and those who suggest opportunity can be brought to the marginalized communities through community development.<sup>115</sup> The proposed AFFH Rule recognizes the two sides of the coin because “meaningful action” includes consideration of both mobility and place-based strategies.<sup>116</sup>

As HUD noted in the Notice of Proposed Rulemaking:

This proposed rule also recognizes that there is a need to take a balanced approach when devising ways to overcome fair housing issues . . . [and] [a]ffirmatively furthering fair housing can involve both bringing investments to improve the housing, infrastructure, and community assets in underserved communities as well as enabling families to seek greater opportunity by moving to areas of the community that already enjoy better community infrastructure and community assets.<sup>117</sup>

As the Proposed Rule notes, a “balanced approach” is necessary under an AFFH framework because “[w]here a community has been starved of investment, some may want to leave for other communities, while others will want to bring those resources to bear to improve the circumstances of where they live.”<sup>118</sup> The import of this discussion is that NYCHA can and must fulfill its AFFH obligations by preserving and modernizing its housing developments and taking other steps to assist its communities set the groundwork to increase opportunities for its residents.

114. Proposed AFFH Rule, *supra* note 105, at 8557. Similarly, under state law, NYCHA has unique AFFH obligations. New York’s AFFH law requires NYCHA to, among other things, “reduce disparities in access to opportunity” and “eliminate disproportionate housing needs.” N.Y. PUB. HOUS. LAW § 600 (McKinney 2021).

115. See Proposed AFFH Rule, *supra* note 105, at 8557; see also Edward G. Goetz, *The Fair Housing Challenge to Community Development*, in FURTHERING FAIR HOUSING, *supra* note 20, at 121–22, 146 (noting the critique that exclusively focusing on integration in effect puts white communities on a pedestal and thus reinforces racial hierarchies and stereotypes that give rise to animus).

116. See Proposed AFFH Rule, *supra* note 105, at 8568 (“Strategies and meaningful actions may include . . . place-based strategies and meaningful actions that are a part of a balanced approach, including preservation of existing HUD-assisted and other affordable housing.”).

117. See Proposed AFFH Rule, *supra* note 105, at 8527.

118. Proposed AFFH Rule, *supra* note 105, at 8532.

The alternative is relocation. To be sure, there is tremendous value in providing opportunities for residents of under-resourced neighborhoods to voluntarily move into well-resourced ones. There are also direct and indirect benefits to living in diverse, integrated communities.<sup>119</sup> But there are both philosophical and practical problems with large-scale efforts to dismantle public housing and requiring residents to relocate.

Historical examples of so-called “moving to opportunity” programs for public-housing residents have had questionable outcomes.<sup>120</sup> One of the largest such programs implemented by HUD, known as HOPE VI, has been decried by some housing advocates as “false hope.”<sup>121</sup> Studies have shown that many residents displaced from public housing — voluntarily or otherwise — move to other high-poverty, segregated neighborhoods.<sup>122</sup> They also suggest that families displaced from public housing “do not seem to benefit with better employment or increased economic security,”<sup>123</sup> and question whether mobility programs result in improved physical or mental health.<sup>124</sup> While there are undoubtedly many complex factors that will impact the results of a mobility program, some of the neutral or negative outcomes might be traced to post-relocation racial discrimination in, for example, the job market.<sup>125</sup> Additionally, mobility programs can uproot families from tightknit communities in which they have strong support networks and settled routines, leaving them untethered from familiarities and customs that had provided support previously, which can lead to feelings of insecurity.<sup>126</sup>

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119. See, e.g., William T. Riley, *Integrated Neighborhoods are Good for Your Health*, NAT'L INST. OF HEALTH (June 2, 2017), <https://obssr.od.nih.gov/news-and-events/news/director-voice/integrated-neighborhoods-are-good-your-health> [<https://perma.cc/C663-6V7F>] (“There are many benefits from living in more diverse and integrated neighborhoods, and a recently published study funded by the National Heart, Lung, and Blood Institute (NHLBI) provides additional evidence that moving to more integrated neighborhoods has health benefits.”).

120. Some mobility programs have developed through litigation, such as in the outcome of public-desegregation cases; others arose out of regulatory projects. See GOETZ, *supra* note 6, at 60–68.

121. NAT'L HOUS. L. PROJECT ET AL., FALSE HOPE: A CRITICAL ASSESSMENT OF THE HOPE VI ii (June 2002), <https://www.nhlp.org/files/FalseHOPE.pdf> [<https://perma.cc/4UTY-VYTR>] (“[Public Housing Redevelopment Program] HOPE VI plays upon the public housing program’s unfairly negative reputation and an exaggerated sense of crisis about the state of public housing in general to justify a drastic model of large-scale family displacement and housing redevelopment that increasingly appears to do more harm than good.”).

122. GOETZ, *supra* note 6, at 175.

123. GOETZ, *supra* note 6, at 146.

124. GOETZ, *supra* note 6, at 147.

125. See GOETZ, *supra* note 6, at 146.

126. See GOETZ, *supra* note 6, at 146–47, 176.

Practical outcomes aside, the philosophical problem with public-housing relocation efforts is that it reinforces the idea that government should abdicate any responsibility to provide its citizens with safe, decent housing and that the private market is the solution to housing woes. Those efforts also presume that residents of public housing do not want to remain in their communities, thereby reinforcing the narrative that public-housing communities have nothing positive to offer. Those premises are false.

Instead of throwing in the towel, the fair-housing challenge for NYCHA is how to drastically improve its residents' quality of life and ensure they have equal access to the opportunities available to their neighbors, regardless of race, wealth, or neighborhood. There is a need to reject the binary choice of the status quo or relocation. While capital improvements and modernization efforts will not be a panacea, they are essential first steps to ensuring that a re-envisioned NYCHA can survive and thrive. To make that happen, creative thinking is required. And NYCHA does not want for creative efforts.

### III. NYCHA'S PRESERVATION EFFORTS

NYCHA has responded to the federal government's disinterest and disinvestment in a variety of ways and has been engaging in efforts to preserve and modernize its developments. Some are required by the HUD Agreement,<sup>127</sup> and others are voluntary. The most prominent in the latter category is the Rental Assistance Demonstration (RAD) program.

RAD is a program authorized by federal legislation passed in 2011, which allows public housing agencies to convert public-housing units to one of two forms of rental assistance authorized under Section 8 of the United States Housing Act of 1937.<sup>128</sup> Section 8, a form of federal housing subsidy introduced in 1974,<sup>129</sup> is a deep subsidy<sup>130</sup> but differs from public housing

127. See HUD Agreement, *supra* note 85, at 7–16.

128. See Consolidated and Further Continuing Appropriations Act of 2012, Pub. L. No. 112-55, 125 Stat. 552. As explained by HUD, “RAD provides conversion authority only; no funding is provided. Projects approved for RAD conversion shift from one form of subsidy to another. Specifically, a project funded under the public housing program converts to assistance under a long-term, renewable, project-based Section 8 housing assistance payments (HAP) contract. A PHA has the option of converting to either [project-based voucher] assistance or project-based rental assistance (PBRA).” DEP’T HOUS. & URB. DEV., RENTAL ASSISTANCE DEMONSTRATION 5 (Feb. 2022) [https://www.hud.gov/sites/dfiles/Housing/documents/RAD\\_PBV\\_QUICK\\_REFERENCE\\_GUIDE\\_2022.pdf](https://www.hud.gov/sites/dfiles/Housing/documents/RAD_PBV_QUICK_REFERENCE_GUIDE_2022.pdf) [<https://perma.cc/6RF9-HWMA>].

129. See *Section 8 Program Background Information*, DEP’T HOUS. & URB. DEV., [https://www.hud.gov/program\\_offices/housing/mfh/rfp/s8bkinfo](https://www.hud.gov/program_offices/housing/mfh/rfp/s8bkinfo) [<https://perma.cc/HX9B-KZQF>] (last visited Feb. 8, 2024).

130. A “deep subsidy” is contrasted with a “shallow subsidy” in two key ways: (1) the duration of the subsidy (i.e., permanent versus temporary) and (2) whether the subsidy is tied

in material ways. Most saliently, it subsidizes rents in private rental units, not government-owned and operated ones.<sup>131</sup>

NYCHA has named its RAD program Permanent Affordability Commitment Together (PACT).<sup>132</sup> For all of its nuance, PACT/RAD is about one thing: increasing the amount of funding available to allow renovations to be made at a development.<sup>133</sup> As public housing fell out of favor with government officials, its funding decreased; as Section 8's popularity increased, so did its funding.<sup>134</sup> Because of the different funding mechanisms, once a NYCHA property converts to a Section 8 building through a PACT/RAD conversion, the amount of federal subsidy per unit increases.<sup>135</sup>

In summary, PACT/RAD operates as follows: NYCHA identifies a development for a proposed conversion and then selects private-sector development partners, with whom it enters into a 99-year lease for the management of the property.<sup>136</sup> Although day-to-day operations become the responsibility of the private developer, NYCHA maintains ownership of the land and buildings, while also administering the Section 8 subsidy that becomes attached to each unit.<sup>137</sup> With Section 8 funding secured via long-term contracts with NYCHA (and backed by HUD), the developers are able to borrow against it and obtain up-front funding needed for major capital renovations.<sup>138</sup> Increased funding is not the only benefit of a PACT/RAD conversions; the developers are also not subject to strict and arcane

to a renter's income such that rent remains affordable notwithstanding fluctuations in income. See GOETZ, *supra* note 6, at 4.

131. See *Section 8 Program Background Information*, *supra* note 129.

132. *Permanent Affordability Commitment Together (PACT)*, N.Y.C. HOUS. AUTH. <https://www.nyc.gov/site/nycha/about/pact.page> [<https://perma.cc/6489-AFE2>] (last visited Feb. 8, 2024).

133. *Id.*; see also WILL FISCHER ET AL., CTR. ON BUDGET & POL'Y PRIORITIES, AN AGENDA FOR THE FUTURE OF PUBLIC HOUSING 2-3 (2021), <https://www.cbpp.org/research/housing/an-agenda-for-the-future-of-public-housing> [<https://perma.cc/R2CV-4TPP>].

134. See FISCHER ET AL., *supra* note 133; Gandour, *supra* note 104 (“While both Section 8 and Section 9 are subject to annual congressional appropriations, Congress has, especially since 2000, chosen to increase appropriations to subsidize private housing under Section 8 while at the same time reducing public housing funding under Section 9. Switching to Section 8 also allows PHAs to better access private financing, as well as other public subsidies which are typically reserved for the private sector.”).

135. *Stabilizing the Foundation: Transforming NYCHA to Address Its Capital Needs*, CITIZEN'S BUDGET COMMISSION (July 3, 2018), <https://cbcny.org/research/stabilizing-foundation> [<https://perma.cc/75YB-GF6D>] [hereinafter *Stabilizing the Foundation*].

136. N.Y. HOUS. DEV. CORP., TERM SHEET PACT PRESERVATION PROJECT 1 (2021), [https://www.nychdc.com/sites/default/files/2021-07/HDC%20NYCHA%20Preservation%20Term%20Sheet.FINAL\\_.pdf](https://www.nychdc.com/sites/default/files/2021-07/HDC%20NYCHA%20Preservation%20Term%20Sheet.FINAL_.pdf) [<https://perma.cc/N3W4-UETM>].

137. See *id.*

138. See *id.* at 3.

procurement rules that limit NYCHA's ability to efficiently do renovations.<sup>139</sup>

NYCHA is currently capped under federal regulations to converting 62,000 units using PACT/RAD, and it is approaching its cap.<sup>140</sup> Through 2022, "36,103 apartments, across 137 NYCHA developments, have been renovated, are under construction, or are in the community planning and design process" under PACT/RAD.<sup>141</sup> At first, at least some residents appeared to have been pleased with the renovations that took place after a conversion. For example, one resident of the Baychester Houses in the Bronx noted that "what was happening at Baychester was 'a miracle and a blessing.'"<sup>142</sup> A *New York Times* article noted the following regarding Baychester:

Today the campus looks spotless, with refurbished playgrounds, fresh plantings and a new basketball court. The buildings have been reclad with a waterproof material and faux-wood paneling. The renovation is not Architecture with a capital A. But it is dignified and better than some market rate housing. Glassed-in entrances have replaced the old carceral doorways. There are new lobbies, new light fixtures in the hallways, new recycling rooms and compactors in the basements. Apartments have been outfitted with new bathroom fixtures, windows and kitchen appliances.<sup>143</sup>

The improved conditions may have also improved tenant morale and investment in the community. For example, more tenants were going to tenant meetings and investing in the property's upkeep.<sup>144</sup> NYCHA has also

139. *Stabilizing the Foundation*, *supra* note 135 (noting that "NYCHA's federally funded procurements are governed by restrictive regulations that increase the time and cost of capital work and discourage many qualified firms from bidding on NYCHA projects").

140. CITIZENS BUDGET COMMISSION, TESTIMONY ON THE IMPACT OF RAD/PACT PROGRAM: SUBMITTED TO THE CITY COUNCIL COMMITTEE ON PUBLIC HOUSING (May 3, 2022) (testimony from Sean Campion, Senior Research Associate, Citizens Budget Commission), [https://cbcny.org/sites/default/files/media/files/CBCTESTIMONY\\_RAD-PACT\\_05032022\\_0.pdf](https://cbcny.org/sites/default/files/media/files/CBCTESTIMONY_RAD-PACT_05032022_0.pdf) [<https://perma.cc/HW66-4G75>] [hereinafter TESTIMONY ON THE IMPACT OF RAD/PACT PROGRAM].

141. *Mayor Adams, HUD, NYCHA Announce Pact Program on Track to Improve Living Conditions for 76,000 NYCHA Residents, Deliver \$7.2 Billion in Building Upgrades*, OFF. WEBSITE OF THE CITY OF N.Y., (Jan. 5, 2023), <https://www.nyc.gov/office-of-the-mayor/news/007-23/mayor-adams-hud-nycha-pact-program-track-improve-living-conditions-76-000> [<https://perma.cc/ESS9-XZMM>].

142. Michael Kimmelman, *A Rebirth in the Bronx: Is This How to Save Public Housing?*, N.Y. TIMES (Aug. 5, 2021), <https://www.nytimes.com/2021/08/05/arts/design/bronx-public-housing.html> [<https://perma.cc/UX4N-QQQL>].

143. *Id.*

144. *Id.* ("Tenants used to throw garbage anywhere during NYCHA times, said Gross [a NYCHA resident]. NYCHA didn't care, so residents didn't care . . . . People [now] feel safe, and my tenant meetings have started getting busier, Gross said. Nobody used to show up under NYCHA, but now they're engaged." (internal quotation marks omitted)).



made efforts to involve tenants in choosing the developers who will manage the development.<sup>145</sup>

PACT/RAD, however, has engendered significant controversy. In 2022, the Human Rights Watch issued a scathing report, which concluded “that PACT conversions result in the loss of key protections for residents.”<sup>146</sup> Among the report’s findings were:

- “PACT properties are largely exempt from the obligations of [the HUD Agreement];”<sup>147</sup>
- Some converted developments “saw substantial increases in evictions after conversion;”<sup>148</sup>
- Residents were still complaining of inadequate heat;<sup>149</sup>
- Repairs being made cheaply;<sup>150</sup> and
- Residents noted that they “lost their social service providers or that such providers were either nonexistent or had little presence at their development.”<sup>151</sup>

There are other macro concerns with the RAD program in general, including the risk that Congress may fail to provide adequate funding for converted properties, the absence of meaningful oversight by HUD, and the weakening of rights and protections otherwise available for public-housing residents.<sup>152</sup> Moreover, even if PACT/RAD was considered a universal success, it is limited to 62,000 units, which leaves over 110,000 units unaccounted for.<sup>153</sup>

145. Recently, residents of the Chelsea-Elliott and Fulton Houses decided, along with NYCHA and their PACT/RAD partners, to take the dramatic step of having their developments demolished and rebuilt. *See* Mihir Zaveri, *To Improve Public Housing, New York City Moves to Tear It Down*, N.Y. TIMES (June 20, 2023), <https://www.nytimes.com/2023/06/20/nyregion/public-housing-demolish.html> [<https://perma.cc/2S6Z-UZNL>].

146. HUM. RTS. WATCH, *supra* note 104, at Overview.

147. HUM. RTS. WATCH, *supra* note 104.

148. HUM. RTS. WATCH, *supra* note 104.

149. HUM. RTS. WATCH, *supra* note 104.

150. HUM. RTS. WATCH, *supra* note 104.

151. HUM. RTS. WATCH, *supra* note 104. In addition, residents of PACT developments are precluded from being transferred to NYCHA-managed properties, even if they had previously been approved. This, advocates have said, is arbitrary and a violation of the residents’ rights. *See* Greg Smith, *NYCHA Promised a Pain-Wracked Man He Could Move. Then a Private Management Company Took Over His Building*, CITY (Dec. 20, 2022), <https://www.thecity.nyc/2022/12/20/23519006/nycha-pain-move-rad-private-management-building> [<https://perma.cc/WG6K-NM2W>] (noting that “[w]ith the RAD conversion, Liboy’s transfer derailed”).

152. *See* NAT’L HOUS. L. PROJECT, HUD HOUSING PROGRAMS: TENANTS’ RIGHTS, § 12.2.4.1 (5th ed. 2019) (Rental Assistance Demonstration Program Overview).

153. TESTIMONY ON THE IMPACT OF RAD/PACT PROGRAM, *supra* note 140.

Separate and apart from PACT/RAD, NYCHA is also executing plans for systemic changes that are required by the HUD Agreement. One major strategy is the so-called Comprehensive Modernization program, or “Comp Mod.”<sup>154</sup> Under the HUD Agreement, New York City agreed to provide NYCHA with \$2.2 billion for capital expenditures.<sup>155</sup> Included within that amount is funding for targeted projects (e.g., replacement of elevators), but there is also funding allocated for two “comprehensive project scopes.”<sup>156</sup> Those will take place at Saint Nicholas Houses in Harlem and Todt Hill Houses in Staten Island.<sup>157</sup> Comp Mod is an effective program that will not involve regulatory changes or challenges but, given its funding limitations, is necessarily limited in its scope. Barring an influx of local or federal funding, it is unlikely to be scaled.

The HUD Agreement also requires NYCHA to be more strategic and efficient. It requires NYCHA and the appointed monitor to create “Action Plans” to address its key “pillars,” which include lead-based paint, heat and hot water, elevators, mold and leaks, pests, and waste management.<sup>158</sup> The Action Plans set forth strategies to address inefficiencies in the process for addressing repairs, as well as ways to ensure that NYCHA meets the metrics set forth in the HUD Agreement. Unfortunately, however, these efforts will be unable to create the sea-change that NYCHA needs. As the Monitor noted in a report regarding NYCHA’s performance with heat-related metrics,

NYCHA has not focused sufficient attention and resources on properly maintaining and replacing its ailing heat distribution systems . . . . While it should be acknowledged that replacing heating pipes in development walls is very expensive, time consuming, and highly disruptive to residents who

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154. N.Y.C. HOUS. AUTH., COMPREHENSIVE MODERNIZATION WHITE PAPER (Jan. 2022), [https://www.nyc.gov/assets/nycha/downloads/pdf/NYCHA\\_Comp\\_Mod\\_Consultation\\_White\\_Paper.pdf](https://www.nyc.gov/assets/nycha/downloads/pdf/NYCHA_Comp_Mod_Consultation_White_Paper.pdf) [<https://perma.cc/WK6S-6L3A>].

155. N.Y.C. HOUS. AUTH., CITY CAPITAL ACTION PLAN (May 8, 2021) [https://www.nyc.gov/assets/nycha/downloads/pdf/comp-mod/NYCHA\\_City\\_Capital\\_Action\\_Plan.pdf](https://www.nyc.gov/assets/nycha/downloads/pdf/comp-mod/NYCHA_City_Capital_Action_Plan.pdf) [<https://perma.cc/M3Z4-H2WA>].

156. *Id.* at 5.

157. *Id.* at 10. “The scope of a comprehensive modernization project should at a minimum typically include abatement of hazardous materials (lead, mold, and asbestos) where applicable, accessibility and security enhancements, envelope work to decrease air and moisture infiltration, upgrades to heating, hot water, ventilation and cooling systems, new kitchens and bathrooms, upgrades to electrical systems, replacement of piping in chase walls and plumbing systems, elevator replacements, improvement of waste management systems, new fire suppression systems and renovations to apartment interiors and common spaces. Where funding is available, projects could also include additional enhancements to apartment interiors and common areas, building exteriors and grounds, and decarbonization, energy and water efficiency investments.” COMPREHENSIVE MODERNIZATION WHITE PAPER, *supra* note 154.

158. See HUD Agreement, *supra* note 85, at 7–8, Exs. A–B; CITY CAPITAL ACTION PLAN, *supra* note 155, at 3–4.

would likely have to be relocated from their apartments for the months needed to complete the work — NYCHA has reached a point when it can no longer avoid facing the fact that some of these systems must be immediately replaced in its buildings.<sup>159</sup>

These aspects of the HUD Agreement<sup>160</sup> are well intentioned and have the goal of improving conditions for residents by making NYCHA more efficient and accountable. They are, however, in some senses, unfunded mandates that will only scratch the surface. The question thus remains, what is NYCHA to do?

#### IV. TRUST THE TRUST?

##### A. Logistics and Legislative History

In 2020, in the wake of the HUD Agreement and perhaps the realization that something more is needed to right the ship, NYCHA and supportive state legislators introduced a new idea: the New York City Public Housing Preservation Trust.<sup>161</sup> The Trust, it was suggested, would be a public-benefit

159. BART M. SCHWARTZ, THIRTEENTH MONITOR REPORT 17 (Mar. 8, 2023), <https://www.nyc.gov/assets/nycha/downloads/pdf/NYCHA-Monitor-Thirteenth-Quarterly-Report-3.8.23.pdf> [<https://perma.cc/S87K-X445>].

160. NYCHA has also introduced something called the Neighborhood Model, which has as its goal to decentralize decision making by creating multiple “neighborhoods” with greater autonomy and flexibility. See *NYCHA’s Neighborhood Model Restructures Operations to Improve Service Delivery*, NYCHANOW (Mar. 2021), <https://nychanow.nyc/nychas-neighborhood-model-restructures-operations-to-improve-service-delivery/> [<https://perma.cc/W7ZR-858H>]; see also N.Y.C. HOUS. AUTH., NYCHA TRANSFORMATION: PHASE I IMPLEMENTATION PLAN 23 (Feb. 2022), <https://www.nyc.gov/assets/nycha/downloads/pdf/NYCHA-Transformation-Implementation-Plan-Phase-I-Final.pdf> [<https://perma.cc/2JWY-Q997>] (“The developments will become largely independent entities, each operating with their own budget and staff. The Property Manager and his or her staff become the node for all resident interaction — any on-site issue, even those that require a third-party vendor or centralized service, will run through the management office. No official activity will occur on-site without knowledge and approval from the Property Manager.”).

161. N.Y. Assemb. 2019-A11149, 2020 Sess. (N.Y. 2020), <https://www.nysenate.gov/legislation/bills/2019/A11149> <https://www.nysenate.gov/legislation/bills/2019/A11149> [<https://perma.cc/HS3P-MFEU>].

corporation<sup>162</sup> that would enter into a long-term ground lease<sup>163</sup> with NYCHA. The Trust would then contract management of the property back to NYCHA.<sup>164</sup> The end goal of the transfer is similar to that under the PACT/RAD program: to transition the form of federal subsidy for the properties from Section 9 public housing to a form of Section 8.<sup>165</sup>

Yet, PHAs cannot freely remove Section 9 public housing units from the market. In order to proceed with the conversion, NYCHA would have to take advantage of a process called Section 18 disposition.<sup>166</sup> Section 18 of the Housing Act of 1937<sup>167</sup> allows public housing authorities to “demolish or dispose” of public housing units when certain conditions are met. The common theme of the Section 18 process is that the disposition must be in the best interest of the tenants.<sup>168</sup> There are a variety of “justifications” for Section 18 disposition that NYCHA could use.<sup>169</sup> NYCHA has stated that it believes many of its units meet the “obsolescence” category, which requires a showing that the cost of repair at a development is not economical.<sup>170</sup>

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162. Public benefit corporations or “public authorities,” as they are sometimes known in New York are “are corporate instruments of the State created by the Legislature to further public interests.” *What is a Public Authority?*, OFF. OF THE N.Y. STATE COMPTROLLER, <https://www.osc.state.ny.us/public-authorities/what-public-authority> [<https://perma.cc/9XRG-EUZK>]. Public authorities have the ability to issue bonds and take on more debt than states and municipalities, while also avoiding certain restrictions that would otherwise be imposed without complying with certain restrictions imposed upon states and municipalities. See Shariful Khan, *The Failed Promise of The Public Benefit Corporation: A Case Study of The Metropolitan Transportation Authority*, 15 ALBANY GOV. L. REV. 127, 128–29 (2022).

163. A “ground lease” is “[a] long-term . . . lease of land only . . . and any improvements built by the lessee usu[ally] revert to the lessor.” BLACK’S LAW DICTIONARY (11th ed. 2019).

164. See *Public Housing Preservation Trust*, N.Y.C. HOUS. AUTH., <https://www.nyc.gov/site/nycha/about/public-housing-preservation-trust.page> [<https://perma.cc/3VD8-5EBL>] (last visited Feb. 8, 2024).

165. See *id.*

166. ALEC GOODWIN, NEW YORK CITY INDEPENDENT BUDGET OFFICE, MONEY FOR NYCHA? EXAMINING THE PUBLIC HOUSING PRESERVATION TRUST & OTHER STRATEGIES *in* NYCHA’S BLUEPRINT FOR CHANGE 5 (Feb. 2023), <https://www.ibo.nyc.ny.us/iboreports/money-for-nycha-examining-the-public-housing-preservation-trust-and-other-strategies-in-nychas-blueprint-for-change-february-2023.pdf> [<https://perma.cc/WT4T-QWJQ>] [hereinafter IBO REPORT].

167. 42 U.S.C. § 1437p.

168. *Id.* § 1437p(a).

169. See generally BLUEPRINT, *supra* note 23; see also U.S. Dep’t of Hous. & Urb. Dev., Office of Pub. & Indian Hous., Notice PIH 2018-04 (HA), at 9 (Mar. 22, 2018, rev. July 3, 2018), <https://www.hud.gov/sites/dfiles/PIH/documents/pih2018-04.pdf> [<https://perma.cc/A3LH-LQAR>].

170. *Id.* at 6.

After the “disposition” — which is also called “repositioning” in that there is no physical demolition or disposition of the units<sup>171</sup> — NYCHA or the Trust can apply for a form of Section 8 assistance called Tenant Protection Vouchers (TPVs).<sup>172</sup> TPVs generally take two forms: (1) relocation TPVs, which allow for families to relocate temporarily, until the PHA replaces the initial public-housing unit with another one, and (2) replacement TPVs, which provide tenants with permanent assistance when the PHA is not replacing their public-housing unit.<sup>173</sup>

Through TPVs, NYCHA could obtain around an additional \$650 per unit per month relative to Section 9 funding.<sup>174</sup> Given how HUD calculates the Section 9 subsidy to NYCHA, the subsidized portion of the rent for each apartment would become nearly double under the Trust.<sup>175</sup> The Trust will be able to leverage the HUD-guaranteed income streams and finance renovations and capital improvements by issuing municipal bonds.<sup>176</sup> In theory, by converting to the Trust, developments will promptly have a significant source of funding to improve conditions.

171. U.S. DEP’T HOUS. & URB. DEV., OFF. OF PUB. & INDIAN HOUS., SECTION 18 DEMOLITION AND DISPOSITION 2, <https://www.hud.gov/sites/dfiles/PIH/documents/Section%2018%20Overview%20.pdf> [<https://perma.cc/U5JT-67JK>].

172. See U.S. Dep’t of Hous. & Urb. Dev., *supra* note 169. TPVs are “provided to protect HUD-assisted families from hardship as the result of a variety of actions” that PHAs take which could impact the residents. *Tenant Protection Vouchers*, U.S. DEP’T OF HOUS. & URB. DEV., [https://www.hud.gov/program\\_offices/public\\_indian\\_housing/programs/hcv/tenant\\_protection\\_vouchers](https://www.hud.gov/program_offices/public_indian_housing/programs/hcv/tenant_protection_vouchers) [<https://perma.cc/F5QV-NXE6>].

173. U.S. DEP’T OF HOUS. & URB. DEV., OFF. OF PUB. & INDIAN HOUS., TENANT PROTECTION VOUCHERS (TPVs) FOR PUBLIC HOUSING ACTIONS (Feb. 2020), [https://www.hud.gov/sites/dfiles/PIH/documents/\\_TPV\\_Repositioning\\_Guidance\\_Feb%202020.pdf](https://www.hud.gov/sites/dfiles/PIH/documents/_TPV_Repositioning_Guidance_Feb%202020.pdf). [<https://perma.cc/456A-LDDX>]; Ed Gramlich, *Tenant Protection Vouchers*, in NATIONAL LOW INCOME HOUSING COALITION ADVOCATES’ GUIDE 4-13 (2022), [https://nlihc.org/sites/default/files/2022-03/2022AG\\_4-03\\_Tenant-Protection-Vouchers.pdf](https://nlihc.org/sites/default/files/2022-03/2022AG_4-03_Tenant-Protection-Vouchers.pdf) [<https://perma.cc/G8B5-KGKF>] (“An EV will pay the difference between a tenant’s required contribution toward rent and the new market-based rent charged by an owner after the housing conversion action, even if that new rent is greater than a PHA’s basic voucher payment standard. A PHA’s regular voucher payment standard is between 90% and 110% of the Fair Market Rent (FMR). EV rents must still meet the regular voucher program’s ‘rent reasonableness’ requirement; rents must be reasonable in comparison to rents charged for comparable housing in the private, unassisted market (and ought to be compared with any unassisted units in the property undergoing a conversion action). EV payment standards must be adjusted in response to future rent increases.”).

174. BLUEPRINT, *supra* note 23, at 7.

175. BLUEPRINT, *supra* note 23, at 7.

176. N.Y.C. HOUS. AUTH., NYC PUBLIC HOUSING PRESERVATION TRUST 4, 6, <https://www.nyc.gov/assets/nycha/downloads/pdf/Public-Housing-Preservation-Trust-Booklet-Final-Digital.pdf> [<https://perma.cc/D749-MXRP>] (last visited Mar. 4, 2024).

Trust legislation was first introduced in 2020.<sup>177</sup> Given the concerns about RAD, there was significant pushback from the public and legislators.<sup>178</sup> It did not make it to the Governor's desk after sponsoring members of the legislation withdrew support.<sup>179</sup> In 2022, the legislation was reintroduced with significant amendments.<sup>180</sup> The coalition of support broadened after one such amendment: the introduction of a voting requirement.<sup>181</sup>

As amended, the bill specified that before NYCHA can transfer a property to the Trust, a development's residents must vote and approve it pursuant to a set of rules that NYCHA would make available to the public for notice and comment.<sup>182</sup> The key portion of the voting requirement is clear:

NYCHA shall not transfer, convey, assign, mortgage, or pledge to the trust, or permit or suffer any transfer, conveyance, assignment, mortgage, or pledge to the trust any interest in such housing facility, or any part thereof, prior to the posting of the final requirements for the voting process, prior to the completed vote at such housing facility approving such option, and prior to the satisfaction of applicable federal law and regulations.<sup>183</sup>

In addition to the new voting requirement, legislators also included in the bill adjustments to succession rights. Specifically, the legislation provided a temporary period prior to a conversion to the Trust during which occupants of NYCHA apartments could take over the apartment lease even though they were not on the official household composition, as required by NYCHA's rules.<sup>184</sup>

177. N.Y. Assemb. 2019-A11149 (Nov. 13, 2020), <https://www.nysenate.gov/legislation/bills/2019/A11149> [<https://perma.cc/ZF6A-ZY5E>].

178. See, e.g., *The New York City Housing Authority's (NYCHA's) Blueprint for Change Proposal to Help Streamline Operations and Address Its Capital Needs*, Paula Z. Segal, Senior Staff Attorney, Take Root Justice, Testimony to the N.Y. State Assemb. on A11149, 2020 Sess. (N.Y. 2020), <https://takerootjustice.org/wp-content/uploads/2022/01/2020.12.8-TakeRoot-Testimony-on-Blueprint-Bill-at-Assembly.pdf> [<https://perma.cc/76HY-AE2T>].

179. See *We Won! Hours after Our Protest Against the NYCHA Blueprint, the Blueprint Sponsors Withdrew the Bills from Consideration This Legislative Session*, FIGHT FOR NYCHA (June 3, 2021), <https://fightfornycha.org/2021/06/03/we-won/> [<https://perma.cc/T433-W7E2>].

180. S.B. 9409-A, 2022 Sess. (N.Y. 2022), <https://legislation.nysenate.gov/pdf/bills/2021/S9409A> [<https://perma.cc/CAS3-83UB>].

181. N.Y. PUB. HOUS. LAW § 630(2) (2022).

182. *Id.* In adopting this provision, NYCHA was following a model used in London in the 1980s, when residents of public councils were able to vote on the future of their housing. See CITIZENS HOUSING PLANNING COUNCIL, PUBLIC HOUSING REVOLUTION: LESSONS FROM LONDON (Oct. 2019), [https://chpcny.org/wp-content/uploads/2019/10/Public-Housing-Revolution-Report\\_CHPC.pdf](https://chpcny.org/wp-content/uploads/2019/10/Public-Housing-Revolution-Report_CHPC.pdf) [<https://perma.cc/YA2H-935Q>].

183. N.Y. PUB. HOUS. LAW § 630(2) (2022).

184. See *id.* § 631(7). Cf. MANAGEMENT MANUAL, *supra* note 52, at Chapter I, Section XII.

With these key amendments, the legislation garnered the support of legal services organizations, such as The Legal Aid Society,<sup>185</sup> and progressive legislators, such as state Senator Julia Salazar who sponsored the bill.<sup>186</sup> Notably, the legislation also had a safeguard built into it: it capped the number of units that can transfer to the Trust to 25,000.<sup>187</sup> The bill was passed by both houses of the legislature and signed by Governor Kathy Hochul on June 16, 2022.<sup>188</sup> The enactment of the legislation triggered NYCHA's timeline to draft voting rules for public comment, which were published on October 14, 2022.<sup>189</sup>

### B. The Trust Challenges

The Trust's passage, even with the revised legislation, has not been met with unanimous fanfare or approval.<sup>190</sup> Groups have mobilized around rejecting it.<sup>191</sup> The concerns raised are valid and worth consideration.

First, people do not trust the Trust. For years, NYCHA has made promises and pronouncements about strategic change, often with catchy titles.<sup>192</sup> But things have remained the same,<sup>193</sup> and these experiences leave the Trust vulnerable to accusations that it is more of the same.

Second, there is justifiable concern that any tampering with rights under Section 9 is inherently problematic.<sup>194</sup> Section 9 is the gold standard in terms of tenant protections and being deeply affordable. Those rights are firmly

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185. See *LAS: Albany Must Create a NYC Public Housing Preservation Trust*, LEGAL AID SOC'Y (May 11, 2022), <https://legalaidnyc.org/news/las-albany-must-create-a-nyc-public-housing-preservation-trust/> [<https://perma.cc/A3US-K7NG>].

186. S.B. 9409-A (N.Y. 2022), <https://legislation.nysenate.gov/pdf/bills/2021/S9409A> [<https://perma.cc/D68R-Q6FG>].

187. N.Y. PUB. HOUS. LAW § 630(1) (2022).

188. N.Y. Assemb. 7805-D, Gen. Assembly., 2021-2022 Reg. Sess. (N.Y. 2022)

189. *Comment on the Public Housing Preservation Trust Draft Voting Procedures*, NYCHA J. (Oct. 14, 2022), <https://nychajournal.nyc/comment-on-the-public-housing-preservation-trust-draft-voting-procedures> [<https://perma.cc/6MFT-VSHJ>].

190. N.Y.C. HOUS. AUTH., WRITTEN COMMENTS SUBMITTED IN RESPONSE TO THE PUBLIC HOUSING PRESERVATION TRUST DRAFT VOTING PROCEDURES (2022), <https://www.nyc.gov/assets/nycha/downloads/pdf/written-public-comments-public-housing-preservation-trust-draft-voting-procedures.pdf> [<https://perma.cc/K8JQ-VM75>] [hereinafter TRUST COMMENTS].

191. See *Save Section 9*, *supra* note 29.

192. There have been programs such as NextGen and The Plan to Preserve Public Housing. See CITY OF N.Y. MAYOR BILL DE BLASIO & N.Y.C. HOUS. AUTH., NEXTGENERATION NYCHA (May 2015), <https://www.nyc.gov/assets/nycha/downloads/pdf/nextgen-nycha-web.pdf> [<https://perma.cc/T9Y7-CBU8>]; *NYCHA Outlines the "Plan to Preserve Public Housing"*, NYCHA J. (May 2006), <https://www.nyc.gov/assets/nycha/downloads/pdf/j06maye.pdf> [<https://perma.cc/Q37D-R3CF>].

193. See *supra* Section I.A.

194. TRUST COMMENTS, *supra* note 190, at 5, 6–7, 9–11.

entrenched in federal law, which leaves them strongly positioned against threats of being weakened.<sup>195</sup> Once a development converts to the Trust, the Section 9 rights and protections will no longer be mandated under federal law.<sup>196</sup>

Third, there is concern about the financial details of the conversion. The simplicity with which NYCHA describes the increased funding minimizes the fact that the Trust will issue a substantial amount of debt through municipal bonds to finance the renovations.<sup>197</sup> While generally considered a safe investment, municipal debt does not carry the same stability and guarantee of federal debt.<sup>198</sup> Debt inherently involves risk and thus leaves the Trust vulnerable to questions regarding what could occur if there was a default. In recent years, several municipalities and Puerto Rico have teetered on the edge of, if not ventured into, insolvency.<sup>199</sup> Scholarship around the topic demonstrates just how risky it is for public agencies to be overloaded with private debt.<sup>200</sup>

195. See 42 U.S.C. § 1437a (2022) (setting rent restrictions in public housing); 24 C.F.R. § 964.11 (2000) (establishing public housing tenants' right to organize). NYCHA also has a strong resident leadership council, the City-Wide Public Resident Council, which is designed to help advocate for resident concerns. See CITY-WIDE PUB. HOUS. RESIDENT COUNCIL, BYLAWS FOR THE JURISDICTIONAL WIDE RESIDENT COUNCIL FOR THE PUBLIC HOUSING RESIDENTS OF THE NEW YORK CITY HOUSING AUTHORITY (2022), <https://www.nyc.gov/assets/nycha/downloads/pdf/CCOPY-Bylaws-V10.pdf> [<https://perma.cc/ZP9K-J9DD>].

196. See *supra* notes 176–84 and accompanying text.

197. N.Y. PUB. HOUS. LAW § 637 (2022); NYC PUBLIC HOUSING PRESERVATION TRUST, *supra* note 176, at 6.

198. See *Municipal Bonds and Defaults*, BONDVIEW, [https://www.bondview.com/articles/municipal\\_bonds\\_and\\_defaults](https://www.bondview.com/articles/municipal_bonds_and_defaults) [<https://perma.cc/9F2E-YZUK>] (last visited Feb. 8, 2024) (“Any security issued directly by the federal government, such as Treasury securities and savings bonds, are considered free from risks of default, even though they are unrated . . . . Though municipal bonds are considered safe, as in any other any investment, they have some risks.”).

199. Among the list are Detroit, Puerto Rico, and Stockton California. See Dominic Rushe, *Detroit Becomes Largest US City to File for Bankruptcy in “Historic ‘Low Point,’”* GUARDIAN (July 18, 2013), <https://www.theguardian.com/world/2013/jul/18/detroit-formally-files-bankruptcy> [<https://perma.cc/33AE-CL9H>]; Jim Christie, *How Stockton Went Broke: A 15-Year Spending Binge*, REUTERS (July 3, 2012), <https://www.reuters.com/article/us-stockton-bankruptcy-cause/how-stockton-went-broke-a-15-year-spending-binge-idUSBRE8621DL20120703> [<https://perma.cc/VA9K-KMPW>]; Maria Chutchian, *Puerto Rico Exits Bankruptcy, but Work Remains*, REUTERS (Mar. 15, 2022), <https://www.reuters.com/legal/transactional/puerto-rico-exits-bankruptcy-work-remains-2022-03-15/> [<https://perma.cc/HSW5-8LUN>].

200. See generally Destin Jenkins, *THE BONDS OF INEQUALITY: DEBT AND THE MAKING OF THE AMERICAN CITY* (2021). Notably, municipalities also endured risk based on the fact that the municipal bond market had been rigged by big banks for years. See Jonathan Stempel, *UBS, Others Reach \$100 million Muni Bond Rigging Settlements*, REUTERS (Feb. 24, 2016), <https://www.reuters.com/article/banks-bidrigging-settlements/ubs-others-reach-100-million-muni-bond-rigging-settlements-idUSL2N1630UK> [<https://perma.cc/VK3L-MK8F>].



The question becomes: what will occur if the Trust defaults? Could the lenders take the buildings and privatize them for profit? While the answer to that question is definitively no,<sup>201</sup> it still leaves unanswered what exactly would occur if the Trust became insolvent and defaulted on its debt service payments.

Fourth, there is a technical concern that there might be inadequate TPVs to fund the 25,000 units approved by the Trust legislation, much less the 110,000 units that currently lack a funding plan.<sup>202</sup> There is not, as of this writing, sufficient congressional appropriations to fully fund 25,000 TPVs.<sup>203</sup> Given that, the elephant-in-the-room question is whether the Trust can realistically be a plan to benefit the majority of NYCHA's residents, or whether it will be a program like Comp Mod: effective, but not scalable.<sup>204</sup>

Those concerns notwithstanding, NYCHA is moving full speed ahead with its plans for the Trust, having formed a Board of Directors and hired staff.<sup>205</sup> As this Article was being written, NYCHA held its first vote at the Nostrand Houses in Brooklyn.<sup>206</sup> More than 50% of the development's heads of household, and more than 800 residents in total, voted; of those, 464 voted for the Trust.<sup>207</sup> Given that the majority of voting residents selected the Trust, Nostrand Houses will be the first development to undergo a conversion.<sup>208</sup>

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201. State law prohibits this. "Notwithstanding any default on any obligation referred to in subdivision thirteen of this section, and any remedies exercised as a result of such default, provisions relating to the restricted use of the housing facilities for the provision and operation of housing for low-income families and current residents shall at all times continue to be in effect in perpetuity, and the housing facilities shall remain subject to the provisions of subdivision four of section six hundred thirty of this article and section six hundred thirty-one of this article. The trust shall not pledge the fee ownership of the housing facilities as part of a financing arrangement." N.Y. PUB. HOUS. LAW § 637(14) (2022).

202. New York City's Independent Budget Office noted that "a recent increase in funding for the tenant protection voucher program passed as part of the federal Omnibus bill in late December is an encouraging sign." IBO REPORT, *supra* note 166, at 6.

203. IBO REPORT, *supra* note 166, at 8.

204. See *supra* notes 166–68 and accompanying text.

205. See *Our Team*, N.Y.C. PUB. HOUS. PRES. TR., <https://www.preservationtrust.org/our-team> [<https://perma.cc/EL9U-U7TX>]; see also *Our Board*, N.Y.C. PUB. HOUS. PRES. TR., <https://www.preservationtrust.org/board> [<https://perma.cc/KS9Z-QFF>].

206. *Voting at Nostrand*, N.Y.C. HOUS. AUTH., <https://www.nyc.gov/site/nycha/residents/voting-nostrand.page> [<https://perma.cc/GBF3-4DEP>] (last visited Feb. 8, 2024).

207. *Id.*

208. See *NYCHA Residents in Brooklyn Vote to Enter Public Housing Preservation Trust*, ABC 7 NY (Dec. 15, 2023), <https://abc7ny.com/nycha-nostrand-houses-public-housing-preservation-trust-brooklyn/14188854/> [<https://perma.cc/WF7S-ABV5>].

## V. THE CASE FOR NECESSITY AND RACIAL JUSTICE

While there are undoubtedly legitimate concerns about the Trust, none of them outweigh the reasons to cautiously support it. This Part attempts to explain why the Trust is a vital tool that must succeed, and why it aligns with public or social housing and civil rights goals. Moreover, this Part explains why the Trust is an opportunity for NYCHA to be a model for the rest of the country and to prove wrong the concept that public housing must be associated with negativity. To do so, this Part proceeds with five points and related suggestions.

### A. The Trust is a Form of Permanently Affordable Public or Social Housing Even If It Is Not Pure Section 9 Housing

Some have argued that the Trust has no meaningful difference from PACT/RAD and that it involves privatization.<sup>209</sup> This concern deserves to be heard and responded to with care. Indeed, concerns about the role that private, for-profit developers play in the world of affordable housing can justifiably be viewed with skepticism.<sup>210</sup>

The Trust, however, is a public-benefit corporation, and likely was structured that way to eliminate the concerns that arise when private developers become enmeshed with public housing.<sup>211</sup> As a public-benefit corporation, the Trust is definitively not private in that it is a publicly managed and governed entity.<sup>212</sup> The Trust is thus similar in nature to the Metropolitan Transit Authority, the agency that manages public transit in

209. See, e.g., Marquis Jenkins et al., *Opinion: NYCHA's 'Public Housing Preservation Trust' Is A Farce of Resident Engagement*, CITY LIMITS (June 22, 2022), <https://citylimits.org/2022/06/22/opinion-nychas-public-housing-preservation-trust-is-a-farce-of-resident-engagement/> [https://perma.cc/2FUU-JWTZ] (noting that “[e]lected officials in favor of the Trust across each level of government have positioned the future of public housing at the crossroads between either embracing privatization through the Trust (or for some communities RAD/PACT), or maintaining an ever worsening status quo of substandard living conditions”).

210. See SOCIAL HOUSING FOR ALL, *supra* note 65, at 2 (“Policymakers must wake up to the fact that the for-profit, private sector is incapable of creating deeply affordable housing at scale. We cannot continue to rely on for-profit development to solve problems that it is in fact driving. Without decisive intervention, the devastating harms of corporate profiteering in our housing market will only increase.”). In other settings private owners have taken steps to exit deeply affordable housing programs after a short period of time. See NAT’L HOUS. L. PROJECT, BRIEF HISTORY OF HUD-SUBSIDIZED MORTGAGE PRESERVATION ISSUES, <https://www.nhlp.org/wp-content/uploads/Brief-History-of-HUD-Subs-Mortgage-Pres-Issues-for-CW.pdf> [https://perma.cc/6QQM-USSU] (“This combination of time-limited use restrictions and profit-motivated ownership, when combined with any changing housing market conditions that create more profitable uses, threatens the continued use of this housing for low-income families.”).

211. N.Y. PUB. HOUS. LAW § 626 (2022). See generally Gandour, *supra* note 104.

212. See *supra* note 211 and accompanying text.

New York City — an entity that is rarely, if ever, associated with being private.<sup>213</sup> The fact that the Trust is governed by a statute, which provides transparency regarding its powers, limitations, and obligations, reinforces its public nature.<sup>214</sup> Indeed, it is far from an opaque project governed by the whims of real estate moguls motivated by profit. Additionally, the governing statute is clear that NYCHA’s residents, while no longer protected by Section 9, will still have all of their public-housing rights and benefits fully enforced after the conversion occurs.<sup>215</sup> These protections are not only legislatively mandated but will also be built into the governing documents between NYCHA and the Trust, as well as the Trust and its residents.<sup>216</sup> This private ordering of affairs is extra assurance that residents will be protected from any attempt to weaken their rights.

And, thus, while the Trust is not Section 9 public housing, it is a close analogue and would meet the definition of lower-case “p” public housing, or social housing:

[H]ousing that is permanently affordable, protected from the private market, and under democratic community control. It can be owned by public entities or non-profits. It may be occupied by renters as well as homeowners who have formed cooperatives or who live on community land trusts. Social housing includes public housing for the lowest-income and most marginalized residents, as well as affordable options for low- and moderate-income households.”<sup>217</sup>

In short, calls for NYCHA to remain funded under Section 9, while understandable, elevate form over substance. The Trust is a truly public option to preserve and modernize deeply affordable housing in New York City.

### **B. The Risk of Default is Low; The Legislature Can Do More to Protect Residents Anyway**

Concerns surrounding the Trust defaulting on its debt are valid. There are, however, numerous strong protections in place to protect residents. The Trust legislation is clear that under no circumstances can NYCHA’s properties be sold or taken over by lenders.<sup>218</sup> While lenders could, in theory, obtain a leasehold interest in a development, which would provide

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213. See *State Public Authorities Dashboard*, OFF. OF THE N.Y. STATE COMPTROLLER, <https://www.osc.state.ny.us/reports/state-public-authorities-dashboard> [<https://perma.cc/E269-FHBE>] (last visited Feb. 8, 2024).

214. NY PUB. HOUS. LAW §§ 625–29 (2022).

215. *Id.* § 631.

216. *Id.* § 631(2).

217. SOCIAL HOUSING FOR ALL, *supra* note 65, at 9.

218. See N.Y. Pub. Hous. Law § 637(14) (2022).

them with managerial responsibilities,<sup>219</sup> residents' rights will remain protected by lease and statute.<sup>220</sup> As a result, there is reason to believe that lenders would restructure the Trust's debts before taking over property-management responsibilities for an unprofitable venture.<sup>221</sup>

Critically, the Trust legislation allows the city and the state to provide financial assistance to the Trust in the event of default, but it does not provide a guarantee.<sup>222</sup> That should change. There should be an obligation for city and state governments to step in to protect residents in the event of a Trust default. While the protections described above are appropriate, insolvency and other related legal proceedings could severely compromise the experiment.<sup>223</sup> Residents should not have to live in fear of what might occur to their homes based on unexpected financial shocks or arcane legal proceedings.

### C. The Trust Has an Element of Democracy; It Should be Strengthened

NYCHA's residents are in the driver's seat. For a development to undergo a conversion to the Trust, the residents of that development must vote and approve it.<sup>224</sup> Without enough support from the community, the conversion will not occur.

Critics have rightly noted that in order for a vote to count, only 20% of a development is required to cast a vote.<sup>225</sup> That number was not pulled out of thin air or designed to limit participation; rather, it reflects voting rates among NYCHA residents for issues like resident-leadership elections.<sup>226</sup> The key to getting the majority of a development to participate is for NYCHA to create and effectively administer a robust pre-vote outreach program. NYCHA should learn from its successful outreach at Nostrand

219. See IBO REPORT, *supra* note 166, at 10.

220. See N.Y. Pub. Hous. Law § 637(14) (2022).

221. See IBO REPORT, *supra* note 166, at 10–11.

222. See N.Y. Pub. Hous. Law § 637(13) (2022).

223. See *supra* notes 211–16 and accompanying text.

224. N.Y. Pub. Hous. Law § 630(1) (2022).

225. NYCHA increased the threshold from 10% to 20% in response to criticisms to the draft voting rules. See David Brand, *Under New Election Rules, 20% of Households Could Determine Fate of NYCHA Developments*, CITY LIMITS (Dec. 12, 2022), <https://citylimits.org/2022/12/12/under-new-election-rules-20-of-residents-could-determine-fate-of-nycha-developments/> [<https://perma.cc/7RBM-KDFW>].

226. N.Y.C. HOUS. AUTH., PUBLIC HOUSING PRESERVATION TRUST DRAFT VOTING PROCEDURES: PUBLIC COMMENTS & RESPONSES 5–6, <https://www.nyc.gov/assets/nycha/downloads/pdf/trust-voting-procedures-comments-and-responses.pdf> [<https://perma.cc/ZT7H-73FA>].

Houses<sup>227</sup> and continue to improve its efforts to incentivize as many residents as possible to let their voices be heard.

Moreover, the ability to participate in the future of a development is a key principle that needs to be espoused in everything the Trust does in the future. NYCHA has made appropriate first steps, as the Trust legislation builds in resident-participation requirements,<sup>228</sup> and the Trust has two NYCHA residents on its nine-member Board of Directors.<sup>229</sup> But robust resident participation should not end there. The vote cannot be a one-time opportunity for residents to meaningfully engage with NYCHA leadership over the future of their homes.<sup>230</sup>

NYCHA must also create a reversion option if Section 9 funding matches or surpasses the TPV funding in the future. Public housing is inherently more secure than any other form of affordable housing, and the convoluted processes surrounding the Trust are only required because public housing funding has been gutted. If there is, by some chance, a public housing renaissance, no members of the NYCHA community should miss it.

#### **D. The Trust Is the Best Option Available, and the Situation Is Dire**

There is no time to wait. While the ideal would be for the federal government to fully fund Section 9 (as the Author has argued elsewhere it should<sup>231</sup>) that is unlikely to happen.

A comment on the proposed voting rules framed the issue well. This comment criticized NYHCA's decision to use the phrase "status quo" as an option on the proposed voting ballots. Specifically, the comment noted, correctly, that there was no explanation of how "NYCHA intends to fund comprehensive repairs under the 'status quo' voting option . . . [T]he draft rules need to direct NYCHA to create, and present to the tenants, a repair funding plan under the 'status quo' option specific to each development."<sup>232</sup>

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227. See *supra* notes 222–24 and accompanying text.

228. N.Y. PUB. HOUS. LAW § 631(5) (2022).

229. See *Our Board*, N.Y.C. PUB. HOUS. PRES. TR., *supra* note 205.

230. NYCHA must also create a reversion option if Section 9 funding matches or surpasses the TPV funding in the future. Public housing is inherently more secure than any other form of affordable housing, and the convoluted processes surrounding the Trust are only required because public housing funding has been gutted. If there is, by some chance, a public housing renaissance, no members of the NYCHA community should miss it.

231. See Darcy, *supra* note 32.

232. LEGAL SERVS. NYC, COMMENT ON THE PUBLIC HOUSING PRESERVATION TRUST DRAFT VOTING PROCEDURES (2022), reprinted in TRUST COMMENTS, *supra* note 190, at 37, 44–45, <https://www.nyc.gov/assets/nycha/downloads/pdf/written-public-comments-public-housing-preservation-trust-draft-voting-procedures.pdf> [<https://perma.cc/P3UW-CRQK>] (in New York City Housing Authority, Written Comments Submitted in Response to the Public Housing Preservation Trust Draft Voting Procedures).

This comment, while smart, suggests a currently unrealistic option: based on large-scale need, insufficient funding, and deficits, NYCHA cannot propose a comprehensive modernization and repair plan for each development.<sup>233</sup> And if history is any guide, none is coming.<sup>234</sup>

Given this reality, NYCHA cannot simply sit back and keep using Band-Aids to solve the hemorrhaging. The conditions at NYCHA's developments are impacting people's lives today. The situation must be treated as the emergency that it is.<sup>235</sup> The status quo simply is not a viable option, and the Trust is the best current alternative.

### **E. AFFH Obligations Require NYCHA to Undertake Comprehensive Modernization Efforts**

Finally, as addressed in Part I, the conditions across NYCHA's portfolio present civil rights issues. The conditions cannot be divorced from the history of public housing — a history that has been infused with racial discrimination.<sup>236</sup> NYCHA, as a unique community within New York City, should not satisfy its AFFH goals through attempts to deconstruct public housing and displace its residents into the private market. A displacement model would be ineffective and inappropriate, given the size, culture, and strong-rooted community that NYCHA developments foster.<sup>237</sup> Rather, its focus must be on place-based efforts to bring opportunities to the community.

233. *See supra* Part I.

234. *See supra* Section I.B. To be clear, this is not a suggestion that there literally is not enough money to support NYCHA; there is no doubt that public housing could be fully funded if there was sufficient political will. *See, e.g.*, Jenkins et al., *supra* note 209 (“True resident leaders, public housing tenants, and organizers, however, see a third way forward: fully funding public housing with public funds. While elected officials have preferred to pass the buck on government funding for NYCHA from city, to state, to federal budgets, in truth, each level has been culpable in the decades-long disinvestment of public housing communities. Just this year alone, public budgets allocated billions of dollars in federal spending for military intervention abroad, the state subsidy of a billionaire's football stadium in Buffalo, and even over a billion dollars in city funding for the PACT conversions of public housing to private management companies rather than for public housing itself.”).

235. NYCHA is not hiding the dire straits. For example, its Chief Compliance Officer framed the issue in his testimony to the New York City Council, “[l]et me emphasize this point: we have a short window to address NYCHA's plumbing and its physical infrastructure before the systems fail.” *See* Testimony from Brad Greenburg, *supra* note 75, at 4. While his comment was focused on plumbing issues specifically, the urgency carries over to many other conditions.

236. *See supra* Section I.B.

237. The Author has personally observed the informal strength of NYCHA communities through his work. It also manifests itself in more formal ways, such as formal resident-engagement initiatives. *See Resident Engagement Department*, N.Y.C. HOUS. AUTH., <https://www.nyc.gov/site/nycha/residents/getting-involved-as-a-resident.page> [<https://perma.cc/F4YL-JD3K>] (last visited Feb. 8, 2024).

Preservation of public housing serves AFFH obligations because well-maintained, deeply affordable housing improves residents' economic security, health, education, and employment opportunities.<sup>238</sup> It also reduces interaction with the criminal justice system.<sup>239</sup> But remediating serious conditions is just scratching the surface. Life opportunities will not magically arise because residents now have heat in the winter. Rather, NYCHA must also focus on other aspects of opportunity infrastructure.

What should NYCHA do with the funding received from the Trust? The goal must be to create “public housing with excellent property management, good schools nearby, high quality public services, engaged and informed public-sector supervision of housing authorities, and private-sector investments providing jobs and retail opportunities for residents.”<sup>240</sup> These are the initiatives — along with parks, safe streets, and gathering areas — that will boost opportunity.

Some of these goals may be beyond NYCHA's sole control. But neither government leaders nor concerned members of society generally can allow a failure of imagination or courage to conclude that they are unachievable. Thus, for example, NYCHA can use the Trust to:

- invest in community centers to foster educational and recreational programs;
- create a NYCHA shuttle to assist residents of developments that live in transportation deserts get to work and school;
- build and beautify green spaces and outdoor gathering areas;
- use design methods and community involvement to prevent crime in a sustainable and community driven manner;
- bolster its family engagement services, to help those residents with mental health or other life challenges;
- employ Trust residents both to help upkeep the properties and develop a sense of pride and ownership in the community; and
- invite appropriate retail opportunities on Trust properties.

These steps, alongside strong partnerships with the city and state, could very well provide the groundwork necessary to build safe, thriving communities.

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238. THE ONE-WAY STREET OF INTEGRATION, *supra* note 18, at 46–47.

239. THE ONE-WAY STREET OF INTEGRATION, *supra* note 18, at 46–47.

240. GOETZ *supra* note 6, at 185; *see also* Husock, *supra* note 109, at 140 (noting that one approach to AFFH goals is “to take steps to provide the high-quality public goods associated with ‘better’ neighborhoods: good schools, safe streets, clean parks and playgrounds, reliable public transit”).

### CONCLUSION

The Trust is a creative and necessary method for NYCHA to preserve and modernize its housing stock while satisfying its AFFH obligations. It is a worthwhile experiment, and one that is sorely needed. Given that it is an experiment, it is also an opportunity to completely reimagine what public housing is and looks like. While popular media tends to focus on the negative, NYCHA developments are proud communities that are a core part of the fabric of New York. It is time that the government and NYCHA's neighbors provide the necessary support to allow NYCHA's communities to thrive.

For those who think that is an unrealistic and idealistic goal, bear in mind that "[t]here is very little inherent in the public housing model that precludes these outcomes; it is how our public and private institutions respond to public housing that has produced the negative outcomes we have seen in American public housing."<sup>241</sup> The challenge, instead, is one of will and one of resources.

The eyes of the country are on NYCHA, for it is not alone in struggling to manage its public housing. Leaders at all levels of government, tenant advocates, and resident leaders should work together to ensure the Trust experiment is not only a success for New York but for public housing residents across the country.

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241. GOETZ, *supra* note 6, at 185.