

NOTE

COMMUNITY OWNERSHIP IN NEW YORK CITY: THE HOUSING DEVELOPMENT FUND CORPORATION

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ABSTRACT

Community ownership refers to tenures and tactics for the shared acquisition, financing, development, rehabilitation, and stewardship of land and housing among residents in a local community. As the COVID-19 pandemic softens multifamily housing markets, tenant activists, policy advocates, and progressive legislators have trumpeted community-owned real estate as a stabilizing force. New York City has long piloted forms of community ownership. An outgrowth of the 1970s fiscal crisis that allowed low-income New Yorkers to found housing cooperatives with their "sweat equity," Housing Development Fund Corporations (HDFCs) presaged the current moment, demonstrating the viability of non-market approaches to housing provision, especially in Black and Latinx neighborhoods withstanding "organized abandonment." Despite their successes, HDFCs face challenges and tradeoffs, both of which offer prescient lessons for emerging forms of community ownership. A thorough examination of HDFCs' triumphs and travails illuminates the potential of community ownership as an alternative to commodified housing and the racial differentiation that underlies it. As exemplified by HDFCs, the promise of community ownership is its ability to contest markets by generating scalable alternatives to profit-oriented institutions that betray a historic and present bent toward antagonizing people of color.

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### INTRODUCTION: “THIS NEIGHBORHOOD IS RICH”

Sunset Park’s renters are fed up. Immigrants making their homes in a working-class Brooklyn neighborhood since the 1970s, they have turned segregation into congregation, nurturing bonds through which they can continue their cultural traditions and fostering spaces so vibrant that residents proclaim, “This neighborhood is rich.”<sup>1</sup> Yet displacement pressures have hampered Sunset Park’s housing stock in recent years. Sunset Park renters increasingly speak of property managers who delay routine building maintenance, prospective landlords who balk at Section 8 Housing Choice

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<sup>1</sup> NEW SCHOOL PARSONS SCHOOL OF DESIGN, THE SUNSET PARK GAZETTE VOL. 2: THE HOUSING ISSUE 6–7 (2018).

Vouchers, heads of households whose rents have tripled over the course of their tenancies, and extended families who crowd together into studio apartments to make ends meet.<sup>2</sup> Their solution? Developing a network of low-income, limited equity housing cooperatives.<sup>3</sup> Joining forces as the United Families of Sunset Park, since 2017, these neighbors have debated, deliberated, assessed and mapped local conditions, and built consensus around a cohousing strategy.<sup>4</sup> Now emboldened by the cruelties of the COVID-19 pandemic, they are ready to implement it.<sup>5</sup> They conceive of housing not as a commodity to be exchanged, but as a resource to be used, “advocating for housing justice through cooperativism.”<sup>6</sup> In rallying behind cooperative housing, the United Families of Sunset Park emblemizes the “new common sense about relations of property and personhood, debt and wealth, reparation and redistribution” that has been forged within the crucible of the pandemic.<sup>7</sup>

As COVID-19 roiled U.S. cities and the real estate market buckled in turn,<sup>8</sup> activists, advocates, and aligned legislators

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<sup>2</sup> See *id.* at 29.

<sup>3</sup> See Ximena Hidalgo Ayala, *United Families of Sunset Park Fight for Decent Housing*, IMPACTO LATINO (May 13, 2021), <https://impactolatino.com/familias-unidas-de-sunset-park-luchan-por-vivienda-digna>.

<sup>4</sup> See GABRIELA RENDÓN ET AL., UNITED FOR HOUSING: RECLAIMING LOCAL COOPERATIVISM IN SUNSET PARK (2020).

<sup>5</sup> Zoom Meeting with Gabriela Rendón, Asst. Prof. Urb. Plan. & Cmty. Dev., Parsons School of Design (Sept. 29, 2021).

<sup>6</sup> RENDÓN, *supra* note 4, at 5.

<sup>7</sup> Ananya Roy, Hannah Appel, & Hilary Malson, *Towards Justice: A Communique from Los Angeles*, 2 RADICAL HOUS. J. 163, 164 (2020).

<sup>8</sup> See ANITA KRAMER ET AL., EMERGING TRENDS IN REAL ESTATE 2021 62 (2021) (“The pandemic and concurrent economic shock destabilized the multifamily sector’s utterly basic measure of worth. Destabilization of millions of households’ capacity to pay rent creates a world of pain for businesses built on predictability models of that single input. Clearly, the nature of demand remains unaltered. In sheer numbers of people, at least three adult generational cohorts, births, and household formation patterns that press against supply of rental communities still apply. Moreover, those fundamentals still suggest a compelling, supportive near-, mid-, and longer-term market hypothesis for more geographically diverse and more attainably priced multifamily development. Still, structural drivers now—for the duration it is impossible to calculate—await a new next chapter. What is disrupted is any semblance of predictability, which materially undercuts the nature of value in the world of multifamily rental community development.”). Kramer and her coauthors point to several developments that alarmed the real

engaged in far-reaching tenant mobilization. Similar to the United Families of Sunset Park, other groups of housing insecure families with children—the Reclaimers, Moms4Housing, and Occupy PHA—devised co-housing strategies to meet their needs.<sup>9</sup> Tenant unions paired mass demonstrations to cancel rent with building-level mutual aid fundraising, rent strikes, and eviction defense blockades.<sup>10</sup> Advocates and policymakers negotiated eviction moratoria and proposed wide-ranging interventions to subsidize the transfer of privately held residential and commercial buildings to tenant associations, nonprofit organizations, and public agencies.<sup>11</sup>

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estate industry and the housing and community development field during the early pandemic, and thus hastened the call for community ownership: (1) out-migrations of higher-income earners from cities, (2) impending eviction spikes among cost-burdened, unemployed, low-income renters absent continuing government interventions, and (3) the unpredictable future of the multifamily residential housing market. *See id.* at 9, 23, 62.

<sup>9</sup> *See* Roy, Appel, & Malson, *supra* note 7, at 166–67; Robin Kaiser-Schatzlein, *How Housing Activists Took on Philadelphia and Won*, NEW REPUBLIC (Mar. 29, 2021), <https://newrepublic.com/article/161730/housing-activists-took-philadelphia-won> (profiling Occupy PHA’s Jennifer Bennetch).

<sup>10</sup> *See generally* Hannah Black, *Tenant Unions for the Future*, DISSENT (Aug. 13, 2020), [https://www.dissentmagazine.org/online\\_articles/tenant-unions-for-the-future](https://www.dissentmagazine.org/online_articles/tenant-unions-for-the-future) (describing tenant organizing during the pandemic, including unions’ use of base building and rent strikes and their broader vision for longstanding change that can foster an eviction-free future even after the COVID-19 eviction moratoria expire).

<sup>11</sup> *See* Rent and Mortgage Cancellation Act of 2021, H.R. 1847, 117th Cong. (2021) (proposing to fully forgive rent and mortgage payments during the pandemic and pair such a measure with an “affordable housing acquisition fund” for the purchase of low-income rental housing); GIANPAOLO BAIOCCHI & H. JACOB CARLSON, *THE CASE FOR A SOCIAL HOUSING REDEVELOPMENT AUTHORITY* (2020), <https://urbandemos.nyu.edu/wp-content/uploads/2020/11/SHDA-whitepaper-Nov2020.pdf> (proposing a new federal agency to acquire, hold, and dispose of distressed properties in a manner prioritizing potential buyers in the “social housing sector”); JAMES A. CROWDER, JR., CHRIS SCHLIDT, & RICK JACOBUS, *OUR HOMES, OUR COMMUNITIES: HOW HOUSING ACQUISITION STRATEGIES CAN CREATE AFFORDABLE HOUSING, STABILIZE NEIGHBORHOODS, AND PREVENT DISPLACEMENT* 5 (2021), [https://www.policylink.org/sites/default/files/pl\\_Our-Homes\\_050321\\_a.pdf](https://www.policylink.org/sites/default/files/pl_Our-Homes_050321_a.pdf) (showcasing “equitable acquisition strategies” that facilitate the purchase of naturally occurring affordable housing by community-based organizations and tenant groups). *See generally* Julie Gilgoff, *Pandemic Related Vacant Property Initiatives*, J. AFFORDABLE HOUS. & CMTY. DEV. L. 212–19 (2021) (synopsizing municipal initiatives to redevelop tax-

The groundswell in the streets and in the halls of power demonstrated the urgency of reimagining housing provision and designing correctives for the private market in land and housing.

The through line that connects activists' co-housing, tenant unions' mutual aid, and policy experts' innovations is community ownership. Community ownership refers to tenures and tactics that enable a local community to share in the acquisition, financing, development, or stewardship of land and housing.<sup>12</sup> While community-owned real estate like limited equity cooperatives, community land trusts (CLTs), and mutual housing associations predate the COVID-19 pandemic,<sup>13</sup> the pandemic underscored the importance

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subsidized, vacant luxury housing and underutilized public land as emergency shelter through long-term agreements with nonprofit homeless services providers).

<sup>12</sup> See Tracy Hadden Loh & Hanna Love, *The Emerging Solidarity Economy: A Primer on Community Ownership of Real Estate*, BROOKINGS INST. (Jul. 19, 2021), <https://www.brookings.edu/essay/the-emerging-solidarity-economy-a-primer-on-community-ownership-of-real-estate>; see also Gabriela Rendón & Miguel Robles-Durán, *Social Property and the Need for a New Urban Practice*, in *THE SOCIAL (RE) PRODUCTION OF ARCHITECTURE: POLITICS, VALUES AND ACTIONS IN CONTEMPORARY PRACTICE* 211–15 (Doina Petrescu & Kim Trogal eds., 2017) (defining “social property” as “experiments in other forms of land tenure beyond private property[,]” particularly “many variations of housing cooperatives, living communes, squatting collectives, common spaces, and public land reserved for its enjoyment and use by all citizens alike.”). Importantly, Rendón et al. seek inspiration for a new social property regime from New York City’s 1970s “community and tenant-led housing programs.” *Id.* at 213–15.

<sup>13</sup> See, e.g., COLIN WARD, *TENANTS TAKE OVER 97 (1974)* (“In New York the City’s own Sweat Equity and Co-op Conversion Programs were preceded by a spontaneous and unorganized ‘people’s movement’ springing up among tenants who found it necessary to form a *de facto* cooperative to run the building and undertake repairs, since their landlords had abandoned the property. [The League of Autonomous Bronx Organizations for Renewal], started in 1966, ‘has moved from tenant organizing to co-op development as the only means for poor people to get decent housing.’”); PETER K. HAWLEY, *HOUSING IN THE PUBLIC DOMAIN: THE ONLY SOLUTION* 82–84 (1978) (providing an early proposal for community ownership in New York City). Per Hawley:

The Metropolitan Council on Housing, in calling for HOUSING IN THE PUBLIC DOMAIN UNDER TENANT CONTROL WITH DIRECT ALLOCATION OF FUNDS, seeks to develop a program and movement to meet the immediate and desperate need for decent housing. This has to be a program unlike those that have been developed before, a program which takes the profit out of housing and thus permits it to be built in vast, affordable quantities.

We do not mean to establish another bureaucracy like the New York City Housing Authority. The Housing Authority does provide relatively low-

of three of its boons. First, community ownership can preserve housing affordability while building assets that serve as households' financial cushions during times of crisis. Second, community ownership can foster local, democratic control over real estate and stave off speculative investment in distressed properties. Third, community ownership can be deployed as a racial equity strategy to reparatively allocate wealth and empower communities of color to co-create trajectories for their neighborhoods, which are typically most threatened by market disruptions.<sup>14</sup> Modes of community ownership rose to prominence during a year of unprecedented housing instability and concomitant agitation.

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rent housing for a fraction of the New Yorkers who desperately need it, and the long waiting lists for public housing apartments are proof of the need. But the long lists are also proof of how desperate people are to get out of privately owned slums. They prefer public housing, even though public housing as we know it has many built-in drawbacks: specifically, the attitude that public housing is provided as charity rather than as a basic human right to shelter.

Nor do we mean to turn housing over to the Housing and Development Administration (HDA), New York City's housing bureaucracy or any such agency. The HDA serves the real estate industry, not the needs of tenants. Its leaders are real estate oriented. HDA's methods of financing the Mitchell-Lama and Municipal Loan Programs are proof of this real estate/banking orientation. The high rents and constant rent increases the HDA approves under these programs show its failure to administer housing at rents tenants can afford.

We mean to establish a Housing Board consisting of tenants, just plain people—no bureaucrats, bankers or real estate people—which would coordinate Tenant Committees . . . The Housing Board and Tenant Committees can learn the technicalities of financing, operations, construction and design and all else needed to build and run housing. They can hire and supervise the services of people who are bookkeepers, bricklayers, electricians, plumbers, architects, and other specialists.

The Housing Board and Tenant Committees need basically to maintain the point of view of the tenant, the people who inhabit the building, those who work for a living and who should be able to come home to relax and refresh themselves instead of coming home to a depressing hassle.

*Id.*

<sup>14</sup> See Sarah Crump & Jenny Schuetz, *What the Great Recession Can Teach Us About the Post-Pandemic Housing Market*, BROOKINGS INST. (Mar. 29, 2021), <https://www.brookings.edu/research/what-the-great-recession-can-teach-us-about-the-post-pandemic-housing-market> (“Both the Great Recession and the COVID-19 pandemic have disproportionately harmed Black and brown communities.”).

New York City has long understood the promise of community ownership. The 1970s, another era of fiscal instability and social unrest, birthed New York's trademark form of community ownership: Housing Development Fund Corporations (HDFCs or low-income cooperatives).<sup>15</sup> The 1970s "stagflation" economy and white and capital flight tore New York City asunder. By 1975, both New York's public services and streetscape had eroded. In low-income communities of color like the South Bronx, the City of New York shuttered facilities and cut utilities to balance its books.<sup>16</sup> Property owners, also feeling the effects of the recession, delayed maintenance, eliminated building necessities like heating and garbage removal, and "abandoned" properties through tax delinquency and arson.<sup>17</sup> As in 2020, tenants and advocates mobilized to meet the moment. The organizations within New York City's burgeoning neighborhood housing movement began to reconceive of state intervention and forge alliances between communities and government that could supplant failing for-profit landlords and ultimately counter housing commodification.<sup>18</sup> Renters, especially Black and

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<sup>15</sup> Under law, New York's low-income housing cooperatives may be called "Housing Development Fund Corporations" or "Housing Development Fund Companies." "Corporation" is the more common title, so I have used it here. There is no legal difference between Housing Development Fund Corporations and Housing Development Fund Companies—the choice between the two terms is superficial. N.Y. PRIV. HOUS. FIN. LAW § 573–2 (McKinney 2022).

<sup>16</sup> See KIM PHILLIPS-FEIN, *FEAR CITY: NEW YORK'S FISCAL CRISIS AND THE RISE OF AUSTERITY POLITICS* 207–08 (2017).

<sup>17</sup> See Michael Diamond, *Rehabilitation of Low-Income Housing Through Cooperative Conversion by Tenants*, 25 AM. U. L. REV. 285, 288–89 (1976) (describing the "deterioration-abandonment process" in low-income housing); Sheldon L. Schreiber, *Abandoned Buildings: Tenant Condominiums and Community Redevelopment*, 2 URB. LAWYER 186, 187 (1970) (listing common precursors to landlord abandonment, such as insufficient building revenues, access to capital, "rising maintenance and rehabilitation costs, high turnover, delayed or forgone payments, increased tenant militancy, and exercise of legitimate legal remedies including rent strikes, theft and vandalism by tenants and addicts, and freeways passing nearby.").

<sup>18</sup> See Laura Wolf-Powers, *New York City's Community-Based Housing Movement: Achievements and Prospects*, in COMMUNITY ACTION AND PLANNING: CONTEXTS, DRIVERS, AND OUTCOMES 217, 217, 224 (Nick Gallent and Daniela Ciaffi eds., 2014); see also Nicholas Dagen Bloom et al., *The Decentralized Network*, in AFFORDABLE HOUSING IN NEW YORK 245–57 (Nicholas Dagen Bloom & Matthew Gordon Lasner eds., 2016) (describing the post-1970s emergence of

Latinx ones, organized to resist the wholesale disinvestment in their neighborhoods by hosting rent strikes, forming tenant unions, and reclaiming properties through “sweat equity” volunteer construction.<sup>19</sup> HDFCs became the official instrument for the latter.

Under various City programs, low-income renters in abandoned properties could come to own their homes by making necessary repairs, paying a nominal fee, and founding an HDFC.<sup>20</sup> The HDFCs were designed with a three-pronged corporate form. First, the cooperative corporation owned the building for the express purpose of providing affordable housing.<sup>21</sup> Second, the residents-turned-shareholders co-owned and co-governed the corporation, developing legally binding income limits and resale restrictions, differentiating HDFCs from market rate cooperatives.<sup>22</sup> Third, the residents entered “proprietary leases” with the corporation for the use and occupancy of their individual units.<sup>23</sup> These features cohered into an organizational form that effectuated permanent affordability, participation, and community stewardship.<sup>24</sup> HDFCs thus became

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“small-scale rehabilitation” by disparate actors such as community development corporations, local agencies, and tenants’ associations).

<sup>19</sup> See, e.g., Jacqueline Leavitt & Susan Saegert, *The Community-Household: Responding to Housing Abandonment in New York City*, 54 J. AM. PLANNING ASS’N. 489, 489 (1988). The authors describe housing abandonment in New York City during the fiscal crisis as follows:

In the last 20 years, low income households and communities in New York have been wrenched by losses of housing, jobs, income, and government support. The period began with high levels of political activism and demands for participation, resource sharing, and self-determination by disenfranchised groups, most of them blacks and Latinos. In 1988, those efforts seem to have ended in failure. Yet this study of tenants in landlord-abandoned buildings indicates that strengths nurtured by the movements of the 1960s led both to tenant initiatives and to government programs that resulted in reclamation of housing by low income people.

*Id.*

<sup>20</sup> Debra Bechtel, *New York City Low-Income Cooperatives: A Guide for Practitioners*, 48 N.Y. REAL PROP. L.J. 17, 18 (2020).

<sup>21</sup> *Id.* at 17.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Duncan Kennedy, *The Limited Equity Coop as a Vehicle for Affordable Housing in a Race and Class Divided Society*, 46 HARV. L.J. 85, 87–99 (2002) (discussing limited equity cooperatives’ utility in increasing the affordable housing supply, encouraging political engagement among stigmatized groups, and



“a vehicle for stability countering the real estate market” that “allowed Black and Brown households to preserve themselves against attempts to displace and gentrify through abandonment.”<sup>25</sup> HDFCs have proven to be a durable, scalable intervention. As of 2020, nearly 33,000 New Yorkers continue to reside in the city’s thousand-plus HDFCs.<sup>26</sup>

The exigencies of the COVID-19 crisis make this an especially auspicious time to revisit HDFCs. Market-oriented systems of housing provision, premised on capital accumulation and circulation, have long antagonized people of color, especially African Americans, by extracting wealth from their deprivation. Conversely, non-market approaches,<sup>27</sup> exemplified by community-owned real estate,

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compelling property owners to act as stewards accountable to their surrounding communities).

<sup>25</sup> Gregory Louis, *Unlocking Progressive Corporate Governance: The Black and Brown HDFC Key*, 10 AM. U. BUS. L. REV. 79, 105–11 (2021).

<sup>26</sup> Bechtel, *supra* note 20, at 17.

<sup>27</sup> I use “non-market” as a shorthand for tenures that prioritize people over profit, even if they are not completely removed from the private market. My conception of non-market encompasses both what Maria Ferreri describes as “non-state, collective (partially) decommodified” housing and what Oksana Mironova describes as “social housing.” Maria Ferreri et al., *Public-Cooperative Policy Mechanism for Housing Commons*, 21 INT’L J. HOUS. POL’Y 1, 2 (2020); Oksana Mironova & Thomas J. Waters, *How Social Is That Housing?*, CMTY. SERV. SOC’Y OF N.Y. (Feb. 18, 2020), <https://www.cssny.org/news/entry/how-social-is-that-housing>. These models have varying degrees of support from the state and varying degrees of engagement with the market. See Adriana Mihaela Soaita, *The Diverse Economies of Housing*, 6 CRITICAL HOUS. ANALYSIS 33, 34–35 (2019) (categorizing housing that is provided by private sector firms driven by profit maximization as “capitalist,” housing that is provided by the nonprofit or public sector as “alternative capitalist,” and housing that is provided by sweat equity and mutual aid groups as “non-capitalist.”). Despite their variety, both housing owned by government and housing owned by neighbors may be considered non-market because the concerns that animate market provision (i.e., profit generation) are decentered in their administration. Cf. TOM ANGOTTI, *NEW YORK FOR SALE: COMMUNITY PLANNING CONFRONTS GLOBAL REAL ESTATE* 20–21 (2011). Angotti’s generous conception of “community land” parallels my defining non-market to include housing that is only partially decommodified. *Id.* Angotti writes:

To gain control over their land, communities do not necessarily need to own the land. Community land may be held in various forms of social ownership or regulated in a way that is consistent with community strategies. More concretely, community land is land taken out of the speculative real estate market and owned by public, nonprofit, or private entities that are responsible for holding the land in public trust, using it for a

pool risk instead of fomenting it through, *inter alia*, recurring speculation and gentrification. By piloting, sustaining, and scaling HDFCs for the past four decades, New York's communities of color have developed a viable, solidaristic alternative to profit-oriented housing provision and its deficiencies. Certain vulnerabilities—operational challenges, legal idiosyncrasies, and tradeoffs—bedevil HDFCs, but an examination of these vulnerabilities offers lessons for emerging forms of community ownership. Such an examination, presented herein, also illumines and reifies the promise of community-owned real estate: its ability to contest markets by generating scalable alternatives to profit-oriented institutions that betray a historic and present bent toward antagonizing people of color.

This Note proceeds in three parts. Part I introduces housing de-commodification as a fulcrum of racial justice and defines community ownership as a longstanding bulwark against recurrent crises. Part II offers a full explication of the HDFC, including its legislative history, legal idiosyncrasies, successes, and challenges, and establishes the HDFC as an exemplar of community ownership. Part III assesses the tradeoffs within HDFCs' organizational form and their implications for pandemic-era community ownership models.

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public purpose, or limiting profits from resale. It may involve a wide variety of forms of ownership: locally based nonprofits, limited-equity cooperatives, and community land trusts; publicly owned community facilities and open spaces; and private homeowners in a local real estate market that is stable and not in flux.

*Id.* As is demonstrated in Part II of this Note, early proponents of low-income housing cooperatives understood them to be on the periphery of market capitalism. See Michael A. Stegman, *Neighborhood Classification and the Role of the Planner in Seriously Distressed Communities*, 45 J. AM. PLANNING ASS'N. 495, 497 (1979) (finding that “the sweat equity demonstration is the epitome of a nonmarket housing intervention.”). HDFCs have been called an “unprecedented brand of quasi-public housing that becomes a kind of quasi-subsidized private housing,” evincing the substantial state role in non-market provision, which I discuss further in Part III. Julia McDonnell Chang, *Tenants Take A New Lease on City Life*, CITY LIMITS, April 1984, at 8. See AMANDA HURON, CARVING OUT THE COMMONS: TENANT ORGANIZING AND HOUSING COOPERATIVES IN WASHINGTON, D.C. 8 (2018) (“The value of the housing is in its daily use, not in its potential market exchange; it has been decommodified. LECs are never fully decommodified—shares are still bought and sold—but the share prices in the D.C. case are so extremely low, compared to market prices, that it is safe to say they are virtually decommodified”). Lastly, Huron's conception of Washington, D.C., limited equity cooperatives parallels my defining HDFCs as non-market housing.

## I. CONCEPTUAL BACKGROUND

### A. “Integration into a Burning House” Won’t Do: Housing Decommodification as Racial Justice

To understand the contemporary turn toward community ownership, one must understand the severe inadequacies of community ownership’s primary, prevailing alternative: housing commodification. Housing is commodified in that it is treated as an alienable consumer good rather than as a common pool resource, an entitlement, or a right.<sup>28</sup> Housing commodification underlies housing insecurity; the brunt of housing insecurity is borne by people of color, especially African Americans.<sup>29</sup>

Indicia of housing insecurity—rent burden, eviction, and shelter stays—demonstrate that the private market does not stably house

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<sup>28</sup> See generally Mary Patillo, *Housing: Commodity Versus Right*, 39 ANNUAL REV. SOCIOLOGY 509, 512–18 (2013) (describing the various ways in which housing functions as a commodity).

<sup>29</sup> In the national context, federal housing policies devised in the 1930s and onwards have leveraged markets and other institutional arrangements to antagonize African Americans. These policies were designed with explicit anti-Black intent. See RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* vii (2018); DOUGLAS MASSEY & NANCY DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 2 (1993) (finding that “[n]o group in the history of the United States has ever experienced the sustained high level of residential segregation that has been imposed on blacks in large American cities for the past fifty years. This extreme racial isolation did not just happen; it was manufactured by whites through a series of self-conscious actions and purposeful institutional arrangements that continue today.”). Blacks are thus at the bottom of many housing metrics; those data and that history figure heavily in Part I of this Note. However, Latinx populations also endure the aftereffects of racial discrimination in private housing provision and have co-created new modes of provision to resist them. New York’s Latinx population blossomed after the 1950s and inhabited some of the lowest income neighborhoods, including areas with high rates of landlord abandonment, like the Lower East Side, the South Bronx, and Williamsburg. Both low-income Latinx and Black neighborhoods were HDFC strongholds. In the early 1990s, researchers found that 95% of landlord-abandoned buildings primarily housed African American or “Hispanic” tenants. H. Clark, *Taking Up Space: Redefining Political Legitimacy in New York City*, 26 ENV’T & PLANNING A 937, 944 (1994). In consideration of the foregoing, the theoretical analysis in Part I emphasizes anti-Blackness since anti-Blackness has been central to U.S. housing policy, but the remaining sections of this paper refer to African American and Latinx populations because they are the racial groups that were disproportionately low-income in and resisted the organized abandonment of 1970s New York.

people with low incomes, who tend to be of color, and, critically, may signify that markets are incapable of doing so. Markets underproduce low-cost housing, compelling people with low incomes to rent units beyond their means.<sup>30</sup> As a result, 47.5 percent of U.S. renters, including 54.7 percent of African American renters, occupy units they cannot afford.<sup>31</sup> Rent burden yields eviction. In the United States, there are around 1.9 million eviction filings annually, 35.4 percent of which occur in majority African American neighborhoods.<sup>32</sup> Once they have been evicted from their homes, households often seek emergency shelter, where 47.2 percent of stayers nationally are African Americans.<sup>33</sup> These metrics point to both the ubiquity of housing insecurity and the disproportionate burden that it foists upon Black households.

It is not that Black people are “unsuitable economic subjects,” incapable of participating in markets.<sup>34</sup> Rather, market processes are

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<sup>30</sup> See ANDREW AURAND ET AL., *THE GAP: A SHORTAGE OF AFFORDABLE HOMES* (2021) (analyzing American Community Survey data and finding that there are 10.8 million extremely low-income renters in the U.S. and just 7.4 million homes in the U.S. that are affordable to extremely low-income renters); see also CITIZENS BUDGET COMM’N, *STRATEGIES TO BOOST HOUSING PRODUCTION IN THE NEW YORK CITY METROPOLITAN AREA 19–30* (2020) (finding that New York City underproduces housing because of a shortage of potential development sites, high development costs, and its distortionary property tax system, exacerbating the housing affordability gap); CHRIS WALTERS, *NOT ALL HOUSING UNITS ARE CREATED EQUAL: A REPORT ON THE RELATIONSHIP BETWEEN REZONINGS, AFFORDABLE HOUSING, AND RACIAL EQUITY IN NEW YORK CITY 6* (2021) (calculating that when New York City’s low-income communities of color are rezoned, they are more likely to produce a lower ratio of affordable housing than they were prior to the rezoning, thus suggesting that “upzoning” induces demand and reduces the low-cost housing supply).

<sup>31</sup> See *Renter Cost Burdens by Race and Ethnicity (1B)*, JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV., [https://www.jchs.harvard.edu/ARH\\_2017\\_cost\\_burdens\\_by\\_race](https://www.jchs.harvard.edu/ARH_2017_cost_burdens_by_race) (last visited Mar. 29, 2022).

<sup>32</sup> See Carl Romer, Andre M. Perry, & Kristen Broady, *The Coming Eviction Crisis Will Hit Black Communities the Hardest*, BROOKINGS INST. (Aug. 2, 2021), <https://www.brookings.edu/research/the-coming-eviction-crisis-will-hit-black-communities-the-hardest>.

<sup>33</sup> See MEGHAN HENRY ET AL., *THE 2020 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS: PART 1: POINT-IN-TIME ESTIMATES OF HOMELESSNESS 8* (2021).

<sup>34</sup> Paula Chakravartty & Denise Ferreira, *Accumulation, Dispossession, and Debt: The Racial Logic of Global Capitalism—An Introduction*, 64 AM. Q. 361, 365 (2012). Due to the recurrence of racialized dispossession throughout U.S.

articulated through race.<sup>35</sup> Markets necessitate inequality to generate gain, and racism has historically provided a basis for such

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history, private property ownership, and thus U.S. housing markets, are vectors of racial capitalism. See Jennifer L. Fluri, Abby Hickcox, Shae Frydenlund, & Ridge Zackary, *Assessing Racial Privilege Through Property: Geographies of Racial Capitalism*, GEOFORUM .1–3 (2020). Racial capitalism refers to the inextricable, mutually reinforcing relationship between racism and capitalism. Though racism independently foments disadvantage, racial inequality serves a fundamental role in capitalism's machinations. Markets adapt to and widen racial fault lines; in the context of housing, this means that housing's "availability, affordability, and desirability are intertwined with racialized conceptualizations of space." *Id.*; see also Nawal Arjini, *Keeanga-Yamahatta Taylor Says There is No Housing Crisis: 'It's Just Housing Under Capitalism,'* THE NATION, Sept. 24, 2019 ("Housing more than any area shows the abject failure of capitalism to solve the problems of African Americans.").

<sup>35</sup> See Destin Jenkins & Justin Leroy, *Introduction: The Old History of Capitalism*, in HISTORIES OF RACIAL CAPITALISM 3–4 (Destin Jenkins & Justin Leroy eds., 2021). Among historians and other humanities academics, it is generally undisputed that in the United States, racism and capitalism are chronologically if not conceptually related. Scholars agree that the raw materials, profits, and markets of the Atlantic slave trade powered the Industrial Revolution. See David Eltis & Stanley Engelman, *The Importance of Slavery and the Slave Trade to Industrializing Britain*, 60 J. ECON. HISTORY 123, 123–25 (2000). Scholars further agree that in colonial America, "commodity exchanges . . . [depended] on the invention of race to justify the inheritances of slavery." JENNIFER L. MORGAN, RECKONING WITH SLAVERY: GENDER, KINSHIP AND CAPITALISM IN THE EARLY BLACK ATLANTIC 15 (2021); see also Michael L. Dawson, *Hidden in Plain Sight: A Note on Legitimation Crises and the Racial Order*, 3 CRITICAL HISTORICAL STUDIES 143, 147–48 (2016) (describing the codification of race in colonial America and its enduring links to market mechanisms). However, a lively debate persists on the extent and vigor of this relationship in present-day United States. Are racism and capitalism now merely adjacent and coincident or are they mutually reinforcing and co-constitutive? See JENNIFER L. MORGAN, RECKONING WITH SLAVERY: GENDER, KINSHIP AND CAPITALISM IN THE EARLY BLACK ATLANTIC 17 (2021); THOMAS SUGRUE, THE ORIGINS OF THE URBAN CRISIS 5 (2014). An adjacent and coincident relationship would mean that despite the malign history of the United States, processes of capital accumulation are not inherently racialized. Law reform works to "smooth the roughest edges of capitalism," bending the arc toward market outcomes that are race neutral. Nicholas Lemann, *Is Capitalism Racist?*, NEW YORKER (May 18, 2020), <https://www.newyorker.com/magazine/2020/05/25/is-capitalism-racist>. A mutually reinforcing and co-constitutive relationship would mean that capital accumulation occurs through imbricated processes that are necessarily racialized; market exchange relies on the exploitation of wage labor and the exploitation of wage labor relies on the expropriation of conquered peoples. See Nancy Fraser, *Is Capitalism Necessarily Racist?* POLITICS/LETTERS (May 20, 2019), <http://quarterly.politicsslashletters.org/is-capitalism-necessarily-racist>. Following the lead of scholars like Keeanga-Yamahatta Taylor and Justin Leroy,

inequality.<sup>36</sup> Settler colonialism and chattel slavery evince this relation, as do contemporary developments like white and capital flight and the Great Recession.<sup>37</sup> Neither the enactment of civil rights protections nor public policy's ostensible race neutrality has been able to break the dogged, co-constitutive relationship between race and market capitalism.<sup>38</sup> Due to the prevalence of market-oriented housing provision, this relationship dictates housing outcomes.<sup>39</sup> Housing markets harness and expand racial inequalities in a manner that racially delimits prosperity and penury, impeding Blacks' housing security. Decommodifying housing is thus a racial justice imperative.

When housing provision is market-oriented, owners', governments', and investors' pursuit of large returns manifests itself through cyclical speculation and gentrification, which communities of color, especially Black communities, endure as disinvestment and displacement.<sup>40</sup> When markets are hot, African Americans are

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whose writing is in sync with contemporary social movements, this Note adopts the latter approach, picturing racism and capitalism as contingent systems. If we understand, as Jenkins and Leroy write, that market processes are articulated through race, we can then understand the inevitable failings of market-oriented housing provision. Keeanga-Yamahatta Taylor, *Against Black Homeownership*, BOSTON REV. (Nov. 15, 2019), <https://bostonreview.net/articles/keeanga-yamahatta-taylor-keeanga-excerpt>. Market actors prioritize profit and realize it through "relations of severe inequality among human groups." Jodi Melamed, *Racial Capitalism*, 1 CRITICAL ETHNIC STUDIES 76, 77 (2015). In housing, these relations manifest themselves as the prevalence of substandard housing, housing instability, and housing unaffordability among Black households, which, as I demonstrate in Part I of the Note, often redound to the financial benefit of the owners, investors, and governments.

<sup>36</sup> See Jenkins & Leroy, *supra* note 35, at 3–4.

<sup>37</sup> See *id.*

<sup>38</sup> See A. Mechele Dickerson, *Systemic Racism and Housing*, 70 EMORY L.J. 1535, 1537–38 (2021). Dickerson documents the seemingly irreversible nature of systemic racism in housing. She finds that despite the repeal of public laws that promote systemic racism (e.g., creating racially segregated suburbs) and the adoption of civil rights laws to foment private actors' racism (e.g., blockbusting, racial deed restrictions), "Blacks and Latinos [still] struggle to find affordable housing to buy or to rent" because of discriminatory housing markets. *Id.*

<sup>39</sup> See Taylor, *supra* note 35.

<sup>40</sup> See Matthew Desmond & Nathan Wilmers, *Do the Poor Pay More for Housing? Exploitation, Profit, and Risk in Rental Markets*, 124 AM. J. SOCIOLOGY 1090, 1090–96 (2019). Desmond and Wilmers operationalize "tenant exploitation" as overcharging tenants relative to the market value of their units and conduct an

priced out, contending with high rent burdens; as markets cool, such as during the Great Recession, African Americans are pushed out, experiencing housing insecurity at rates that exceed those of their white peers.<sup>41</sup> Cycles of boom and bust are inherent, structural

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empirical study of the nation's rental markets, determining that such exploitation is most prevalent in low-income neighborhoods, where landlords benefit from low mortgage and property tax burdens, but still command relatively sizable rents. *Id.* Landlords in low-income neighborhoods incorporate a premium into their rents to account for the risks associated with housing that is degraded, overcrowded, experiencing high turnover, and likely to incur arrears. These landlords' losses are infrequent, however, so they realize the premium as higher regular profits. *See* JOHN R. LOGAN & HARVEY L. MOLOTCH, *URBAN FORTUNES: THE POLITICAL ECONOMY OF PLACE 2* (1987) (identifying the contradiction "between residents, who use place to satisfy essential needs of life, and entrepreneurs, who strive for financial return, ordinarily achieved by intensifying the use to which their property is put."); SAMUEL STEIN, *CAPITAL CITY: GENTRIFICATION AND THE REAL ESTATE STATE* 52, 78–79 (2019) (detailing urban planners' obligation to generate the "highest and best use" of local jurisdictions' land by advancing proposals made by real estate developers, their acolytes in local government, and other monied interests); *see generally* RAQUEL ROLNIK, *URBAN WARFARE: HOUSING UNDER THE EMPIRE OF FINANCE* 1–58 (2019) (historicizing the simultaneous development of federally sponsored homeownership and financial instruments aggregating household debts, which catalyzed the risky lending, market volatility, and resulting devastation of the Great Recession); *see, e.g.*, Dan Immergluck & Jonathan Law, *Speculating in Crisis: The Intrametropolitan Geography of Investing in Foreclosed Homes in Atlanta*, 35 *URB. GEOGRAPHY* 1, 3 (2014). After presenting a literature review of previous studies showing investors are "more likely to buy properties in neighborhoods with lower incomes, lower levels of education attainment, and higher proportions of Africans Americans," and higher foreclosure rates, Immergluck and Law presented their findings on post-recession metro Atlanta. *Id.* The authors compiled and analyzed Fulton County tax assessor and property tax digest data, finding that "the density of formerly foreclosed, likely investor-owned properties was generally the highest in neighborhoods on the south and west sides of the city of Atlanta, where poverty and vacancy rates are high. These neighborhoods also tend to be predominantly African American." *Id.* at 6, 20.

<sup>41</sup> Stacey Sutton, *Gentrification and Increasing Significance of Racial Transition in New York City 1970–2010*, 56 *URB. AFFAIRS REV.* 65, 79 (2020) ("While inflated rents are a burden for many residents, the confluence of wage stagnation, the racial wealth gap, and discriminatory housing practices exacerbate the burden of affordability and housing precarity for Black and Latino residents."). Analyzing New York City data from the Longitudinal Tract Data Base and the National Establishment Time Series database, Sutton finds evidence of racialized displacement, that "the pace of gentrification is inversely related to the share of Black and Latino residents." *Id.* at 88. *See also* DEBBIE GRUENSTEIN BOCIAN, WEI LI, & KEITH S. ERNST, *FORECLOSURES BY RACE AND ETHNICITY: THE DEMOGRAPHICS OF A CRISIS* 3 (2010) (finding that 11% of African American homeowners lost their

features of the housing market and are encouraged by market failures whose antecedents are public and private in nature.<sup>42</sup>

The affordable housing crisis is a collective action problem in which rational, private developers will not construct low-cost housing because such construction will not yield “return[s] commensurate with their costs.”<sup>43</sup> The affordable housing crisis is a public choice problem in which self-interested legislators are unlikely to enact housing policies that downwardly redistribute, strain public coffers, and threaten their reelection.<sup>44</sup> When developers do not elect to produce affordable units and public officials shirk their responsibility to do so, the resulting instability may create new venues for capital accumulation and circulation.<sup>45</sup> For example, in neighborhoods destabilized by disinvestment, nearby luxury development can produce spillover effects in which low-cost housing bears a “shadow price” that may be realized through rezoning, new construction, and gentrification.<sup>46</sup> Eviction is another example of

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homes to foreclosure during the 2008 financial crisis and resulting recession, while just 7% of non-Hispanic whites did).

<sup>42</sup> See Calvin P. Bradford & Leonard S. Rubinowitz, *The Urban-Suburban Investment-Disinvestment Process: Consequences for Older Neighborhoods*, 422 ANNALS AM. ACADEMY POL. & SOC. SCIENCE 77, 79 (1975); Neil Smith, *Toward a Theory of Gentrification: A Back to the City Movement by Capital, Not People*, 45 J. AM. PLANNING. ASS'N. 538, 543 (1979). Per Smith, “The physical deterioration and economic deprivation of inner-city neighborhoods is a strictly logical, ‘rational’ outcome of the operation of the land and housing market.” *Id.* He quotes Bradford and Rubinowitz, determining that “neighborhood decline is ‘the result of identifiable private and public investment decisions . . . While there is no Napoleon who sits in a position of control over the fate of a neighborhood, there is enough control by, and integration of, the investment and development actors of the real estate industry that their decisions go beyond a response and actually shape the market.’” *Id.*

<sup>43</sup> Michael Diamond, *Affordable Housing: Of Inefficiency, Market Distortion, and Government Failure*, 53 UNIV. RICHMOND L. REV. 979, 1006–07 (2019).

<sup>44</sup> See *id.* at 1008–09.

<sup>45</sup> Here, capital accumulation and circulation refer to efforts to retain investment and generate wealth through the machinations of urban policy. See Stein, *supra* note 40, at 29–31.

<sup>46</sup> Karl Beitel, *The Affordable Housing Crisis: Its Capitalist Roots and the Socialist Alternative*, 56 SOCIALIST REGISTER 216, 225–26 (2020) (“Rising land prices formed in the luxury sector in turn create ‘spill over’ effects into adjacent lower-cost, lower-income areas. ‘Shadow prices’—the prices of land that would be paid to acquire and redevelop these sites for higher income residents—begin to exceed the residual land prices implied if existing structures were rebuilt at current



private actors' tendency to profit from housing instability. The eviction process often unfolds as an extended period of indebtedness rather than as a singular occurrence.<sup>47</sup> Eviction enables landlords to generate late fees that are over and above their units' market values, gives landlords leverage to remove and replace tenants with higher income earners, and helps landlords avoid costly repairs by preventing tenants from exercising their right to code enforcement.<sup>48</sup>

Consider the history of New Deal exclusion<sup>49</sup> and, a generation later, "predatory inclusion."<sup>50</sup> Both markets' denial of wealth-

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replacement prices. Land prices in urban sub-sectors undergoing vertically intensive redevelopment, and adjacent locations, will thus tend to increase at rates in excess of incomes of existing residents as these sites are redeveloped and sold to higher-income occupants. The effect is to inhibit any possibility of using 'market incentives' to increase the supply of housing affordable to the area's existing working-class, often lower-income tenants.").

<sup>47</sup> See Philip ME Garboden & Eva Rosen, *Serial Filing: How Landlords Use the Threat of Eviction*, 18 CITY & CMTY. 638, 638–57 (2019).

<sup>48</sup> See *id.*

<sup>49</sup> "New Deal exclusion" refers to the systematic denial of New Deal social investments—those that built the U.S. middle class—from African Americans. New Deal exclusion was achieved through three maneuvers: omitting occupations in which Blacks predominated from laws that conferred labor protections, devolving the administration of New Deal programs to racist Southern state and local governments, and writing New Deal laws without anti-discrimination rights of action. See IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA 22–23 (2005); see also ROTHSTEIN, *supra* note 29, at 199–200 (documenting the federal government's promotion of residential segregation through, *inter alia*, the denial of homeownership opportunities, discriminatory underwriting criteria, and the the Fair Housing Act's lack of retroactive remedies). Rothstein notes that:

The Fair Housing Act of 1968 prohibited further discrimination, but it was not primarily discrimination (although this still contributed) that kept African Americans out of most white suburbs after the law was passed. It was primarily unaffordability . . . The advantage that [Federal Housing Administration] and [Veterans Administration] loans gave the white lower-middle class in the 1940s and '50s has become permanent.

*Id.* at 183. But see ERIC SCHICKLER, RACIAL REALIGNMENT: THE TRANSFORMATION OF AMERICAN LIBERALISM: 1932–1965, 132–33 (2016) (detailing African Americans' incorporation into the Democratic Party during the New Deal era). Per Schickler, though New Deal programs accommodated *and* perpetuated racism, "African American leaders and ordinary voters believed that the New Deal, on balance, provided important benefits." *Id.* at 133.

<sup>50</sup> KEEANGA-YAMAHTTA TAYLOR, RACE FOR PROFIT: HOW BANKS AND THE REAL ESTATE INDUSTRY UNDERMINED BLACK HOMEOWNERSHIP 5 (2019)

creating financial products and promotion of wealth-extracting financial products have harmed people of color. The policies that undergirded U.S. suburbanization subsidized and naturalized whites' access to "land, property, and credit" within mainstream markets while relegating African Americans to marginal markets that lacked state correction and subsidization.<sup>51</sup> For instance, during the post-war period, Fannie Mae refused to purchase mortgages for multi-family rental properties, where Blacks were increasingly likely to live, and the Federal Housing Administration deemed lending in minority neighborhoods financially hazardous.<sup>52</sup> Meanwhile, single-family homes in Black neighborhoods were often appraised at lesser value and assessed at higher value.<sup>53</sup> These practices fomented disinvestment, inflated Blacks' housing costs, and entrenched racial differentiation. They constitute the "uneven development of markets," which continues to "[reproduce] conditions of presumed economic self-sufficiency for privileged non-elites, especially whites,

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("Predatory inclusion describes how African American homebuyers were granted access to conventional real estate practices and mortgage financing, but on more expensive and comparatively unequal terms. These terms were justified because of the disproportionate conditions of poverty and dilapidation in a scarred urban geography that had been produced by years of public and private institutional neglect. When redlining ended, these conditions of poverty and distress became excuses for granting entry into the conventional market on different and more expensive terms, in comparison with the terms offered to suburban residents.").

<sup>51</sup> John N. Robinson III, *Surviving Capitalism: Affordability as a Racial "Wage" in Contemporary Housing Markets*, 68 SOC. PROBLEMS 321, 325 (2021). Public policy also relegated Blacks to "direct social programs" whose tethers to the state were apparent and stigmatized. *Id.* at 326. Contrast this with the social investment that facilitated whites' access to markets—such programs were also state-funded, but their use did not connote dependency, impropriety, or other markers of the culture of poverty as Blacks' use of direct social programs did. *See id.* at 325–26; *see also* SUZANNE METTLER, *THE SUBMERGED STATE: HOW INVISIBLE GOVERNMENT POLICIES UNDERMINE AMERICAN DEMOCRACY* 7 (2011) (analyzing the "shrouded form" of federal government aid to the middle class). The "'hidden welfare state' of tax expenditures" obscures the ways in which market outcomes are shaped by government policies, contributing to the "naturalization" that Robinson describes. *Id.* at 13; Robinson, *supra*, at 324.

<sup>52</sup> *See* Robinson, *supra* note 51, at 331; CHLOE N. THURSTON, *AT THE BOUNDARIES OF HOMEOWNERSHIP: CREDIT, DISCRIMINATION, AND THE AMERICAN STATE* 68 (2018); *see also* Dickerson, *supra* note 38, at 1544 (noting that the majority of Black Americans have always been renters).

<sup>53</sup> *See* Robinson, *supra* note 51, at 331.

and real economic incapacitation for communities of color.”<sup>54</sup> It stands to reason that “builders, developers, landlords, mortgage lenders, government agencies, [and] real estate agents” instrumentalized markets to degrade Black Americans such that racial disproportionality and deprivation have become embedded features of real estate markets’ operations despite well-intentioned fair housing reforms.<sup>55</sup>

Conversely, non-market approaches protect against economic dislocations. For example, quantitative studies have documented CLTs’ propensity to stabilize homes and neighborhoods. During the Great Recession, from which Black homeownership rates have yet to recover, mortgaged homes on CLTs were much less likely to experience delinquency and foreclosure.<sup>56</sup> Further, Recession-era data show that neighborhoods with dense concentrations of CLTs benefitted from stable home prices during the crisis and a strong recovery after it.<sup>57</sup> CLT density had a positive relationship with sales prices

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<sup>54</sup> *Id.* at 325.

<sup>55</sup> Smith, *supra* note 42, at 540; see MARY PATTILLO, *BLACK ON THE BLOCK: THE POLITICS OF RACE AND CLASS IN THE CITY* 182 (2007) (“Past racism has so distorted the functioning of institutions and markets—here the housing market—that overt racism is no longer even necessary to ensure inequality, and the discriminatory racial history is no longer visible. The legacy of past racism sustains and reproduces contemporary racial disparities without even having to mention race.”).

<sup>56</sup> See Emily Thaden & Greg Rosenberg, *Outperforming the Market: Delinquency and Foreclosure Rates in Community Land Trusts*, LINCOLN INST. OF LAND POL’Y (Oct. 2010), <https://www.lincolninst.edu/publications/articles/outperforming-market>. While 2008 and 2009 Mortgage Bankers Association surveys reported that 7.01% of households with prime, conventional mortgage loans and 30.56% of households with subprime, conventional mortgage loans were seriously delinquent, the National Community Land Trust Network, now called Grounded Solutions, found that just 1.62% of CLT mortgage loans were seriously delinquent during the same period. See *id.* Further, only 56% of CLT mortgage loans were foreclosed, while 3.31% of prime, conventional mortgage loans and 15.58% of subprime, conventional mortgage loans in the Mortgage Bankers Association study were foreclosed. See *id.*

<sup>57</sup> See Katharine Nelson et al., *The Commodity Effects of Decommodification: Community Land Trusts and Neighborhood Property Values*, 30 HOUS. POLICY DEBATE 823, 824 (2020). The authors examine North and Central Minneapolis, Minnesota, housing data from 2006 to 2017, conducting a differences-in-differences analysis with a hedonic regression model. See *id.* They find that between 2006 and 2010, the clustering of CLTs was associated with higher sales prices in the surrounding areas, such that every additional CLT within 1,000 feet of a home

despite the unprecedented fallout of the housing market.<sup>58</sup> Not only do CLTs shield households during slowdowns, they also buoy households during upturns. In neighborhoods experiencing rates of demographic and socioeconomic change that exceed the citywide median, researchers studying CLTs found both an inverse relationship with gentrification's negative effects and "strong support for the ability of CLTs to help maintain middle-class ratios, education levels, and owner-occupied housing rates."<sup>59</sup> CLTs demonstrate community-owned projects' resistance to housing market fluctuations.

Non-market approaches are so protective because they pool and mitigate risk instead of fomenting it as market-oriented approaches do. In the CLT context, pre-purchase review of financial terms and post-purchase contractual rights to intervene protect homeowners from suboptimal outcomes.<sup>60</sup> In limited equity cooperatives, like HDFCs, the cooperative corporation holds the deed to the property and the shareholders, acting through the cooperative corporation, take out one, shared "blanket mortgage" with the

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was associated with a 3–5% higher sales price. *See id.* Analyzing their post-2010 data, they found that the introduction of CLT properties was associated with a 10.9% increase in sales prices. *See id.*

<sup>58</sup> *See id.*

<sup>59</sup> Myungshik Choi, Shannon Van Zandt, & David Matarrita-Cascante, *Can Community Land Trusts Slow Gentrification?* 40 J. URBAN AFFAIRS 394, 402–07 (2018). The Choi et al. study was twofold. First, Choi deployed a binomial logistic regression, which assessed the relationship between gentrification and a collection of neighborhood indicators, finding that "presence of CLTs decreased the odds of gentrification by 70%." *Id.* Second, with paired t-tests, Choi found statistically significant differences in racial composition, affordability, and income levels in neighborhoods with and without a CLT. Neighborhoods without CLTs were whiter, less affordable, and higher income. *See id.*

<sup>60</sup> *See* John Emmeus Davis, *Common Ground: Community-Owned Land as a Platform for Equitable and Sustainable Development*, 51 U.S.F. L. REV. 1, 15 (2017). CLT ground leases typically specify that homeowners cannot mortgage or refinance their homes without the CLT's permission. *See id.* at 35. The lease terms may forbid the homeowner from taking out a mortgage that increases their debt by an excessive amount or otherwise "threaten[s]" the interests of the CLT or the homeowner. GROUNDED SOLUTIONS NETWORK, COMMUNITY LAND TRUST TECHNICAL MANUAL ch. 11-A, at 14 (2011). Ground leases can also require mortgages to send notices of default to CLTs and grant CLTs the right to cure the default during homeowners' contractually designated cure period. Ground leases also provide a purchase option through which the CLT may regain homes transferred to lenders via deeds in lieu of foreclosure. *See id.* at 189.

property as collateral.<sup>61</sup> This coordination improves cooperatives' ability to secure financing, particularly in the redlined, low-income neighborhoods where HDFCs were initially established.<sup>62</sup> Revolving loan funds, pools of "patient capital" that are sustained through the repayment of individual loans, and community financing, in which small-dollar, "non-accredited" equity investors join forces as real estate investment cooperatives, can also contribute to the capital stack for community-owned projects.<sup>63</sup> Despite their different legal configurations, non-market approaches operationalize solidarity as a matter of course.

On the eve of his death, Dr. Martin Luther King, Jr., remarked that he feared the civil rights movement was integrating Blacks into a burning house, securing juridical rights to malfunctioning institutions that had been, and were likely to continue to be, sites of Black deprivation.<sup>64</sup> The housing market is one such "burning" institution. Market-oriented systems of housing provision have long antagonized people of color, especially African Americans, by extracting

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<sup>61</sup> BARRY MALLIN, LIMITED EQUITY COOPERATIVES: A LEGAL HANDBOOK 6 (1990); see also Robert M. Nelson, *Examining Cooperative Conversion: An Analysis of Recent New York Legislation*, 11 *FORDHAM URB. L.J.* 1089, 1094–95 (1983).

<sup>62</sup> See Nelson, *supra* note 61, at 1094–95.

<sup>63</sup> NICHOLAS SHATAN & OLIVIA R. WILLIAMS, A GUIDE TO TRANSFORMATIVE LAND STRATEGIES: LESSONS FROM THE FIELD 28–40 (2020). Affordable housing developments generally braid market-oriented government subsidies (e.g., tax credits and tax-exempt bonds from state housing finance agencies) and conventional sources (e.g., mortgages from private lenders). See *id.* at 31. Community ownership's proponents have devised financing mechanisms like revolving loans funds that serve as flexible, long-term funding streams and real estate investment cooperatives that allow local residents to democratically manage shared resources and acquire properties together. *Id.* at 32, 37. These are "patient" tools in that they need not produce the quick returns that are the fulcrum of conventional financing; their investors are "non-accredited" in that they are merely neighbors and strangers, not the high-dollar investors regulated by the U.S. Securities and Exchange Commission. See BRETT THEDOS & LEIHA EDMONDS, NEW MODELS FOR COMMUNITY SHAREHOLDING 1–13 (2020) for a helpful primer on community financing.

<sup>64</sup> Stephen Kendrick & Paul Kendrick, *Opinion: King Was Unpopular and Demoralized Before He Died. He Pressed on Anyway*, *WASH. POST.* (Apr. 3, 2018), [https://www.washingtonpost.com/opinions/king-was-unpopular-and-demoralized-before-he-died-he-pressed-on-anyway/2018/04/03/06f9f1d0-345b-11e8-8bdd-cdb33a5eef83\\_story.html](https://www.washingtonpost.com/opinions/king-was-unpopular-and-demoralized-before-he-died-he-pressed-on-anyway/2018/04/03/06f9f1d0-345b-11e8-8bdd-cdb33a5eef83_story.html).

wealth from their exploitation.<sup>65</sup> Racial inequality is not merely an aftereffect of private actors' liaising in markets, but rather a constitutive component of markets, one that follows from market participants' compulsion toward wealth maximization.<sup>66</sup> Instead of pursuing "economic inclusion"—expanding access to noxious systems—housing policy should foster generative systems that are premised on solidarity and agency within economic relations. Such systems would better serve all people, irrespective of their race. Community ownership, particularly community-owned residential real estate, can be a generative system.

#### B. *Community-Owned Real Estate as a Bulwark Against Recurrent Crises*

Community ownership refers to tenures and tactics for the shared acquisition, financing, development, rehabilitation, and stewardship of land and housing among residents in a local community.<sup>67</sup> Its proponents operate from an understanding that

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<sup>65</sup> See Taylor, *supra* note 35. Taylor finds that:

The assumption that a mere reversal of exclusion to inclusion would upend decades of institutional discrimination underestimated the investments in the economy organized around race and property. The concept of race and especially racial inferiority helped to establish the 'economic floor' in the housing market. One's proximity to African Americans individually, as well as to their communities, helped to determine the value of one's property. This revealed another reality. Markets, as in the means by which the exchange of commodities is facilitated, do not exist in vacuums, nor do abstract notions of 'supply and demand' dictate their function. Markets are conceived and constituted by desire, imagination, and social aspirations, among other malleable factors. This does not mean that markets are not real, but that they are not shaped by need alone. They are shaped by political, social, economic, and in the case of housing, racial concerns. And in the United States, these market conditions were shaped and stoked by economic actors that stood to gain by curtailing access to one portion of the market while then flooding another with credit, capital, and indiscriminate access to distressed and substandard homes.

*Id.*

<sup>66</sup> See *id.*; see also Prentiss A. Dantzer, *The Urban Process Under Racial Capitalism: Race, Anti-Blackness, and Capital Accumulation*, 2 J. RACE, ETHNICITY, & THE CITY 113, 114 (2021) (critiquing the writing of David Harvey and observing that "By negating the role of race in the urban process, racial inequalities are treated as an effect of uneven development . . . rather than central components.").

<sup>67</sup> See generally Loh & Love, *supra* note 12.

redistributing property redistributes power.<sup>68</sup> If market-based approaches ingrain “concentrated, ‘winner-takes-all’ ownership,” then non-market approaches, like those that undergird community ownership, ingrain “democratic forms of economic life.”<sup>69</sup> Community ownership does not seek to ingratiate communities of color within risk-laden capitalist markets, a longstanding, if unarticulated, goal of the housing and community development field.<sup>70</sup> Rather, community ownership is geared toward building new “modes of social and economic ordering”<sup>71</sup> that prioritize the social utility of land and

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<sup>68</sup> See Davis, *supra* note 60, at 3.

<sup>69</sup> Bronwen Morgan & Declan Kuch, *Radical Transactionalism: Legal Consciousness, Diverse Economies, and the Solidarity Economy*, 42 J.L. & SOC’Y 556, 565 (2015). “Economic democracy” refers to “social control over the allocation of economic resources.” R. Henry Weaver, *Is Consumer Activism Economic Democracy?*, 22 U. PA. J.L. SOC. CHANGE 241, 247 (2019). This Note foregrounds diverse economies—the notion that there are ongoing, interstitial experiments that work to meet human needs where market capitalism does not. Economic democracy and the solidarity economy are concepts related to the diverse economies framework that point to the necessity of new, humane systems of economic and social relations.

<sup>70</sup> See Penn Loh & Boone Shear, *Solidarity Economy and Community Development: Emerging Cases in Three Massachusetts Cities*, 46 CMTY. DEV. 244, 247 (2015). Per Loh and Shear,

Community development aspirations for impoverished ‘inner’ cities are often expressed in grandiose terms such as ‘eradication of poverty’ and ‘neighborhood revitalization,’ and embodied in Federal initiatives such as Empowerment Zones and Enterprise Communities of the 1990s and today’s Promise Neighborhoods and Zones. Yet these interventions remain solidly in the grips of the idea that we simply need to figure out how to make the capitalist market work for the benefit of communities.

*Id.*; see also Renee A. Berger & Gabriel Kasper, *An Overview of the Literature on Community Development Corporations*, 4 NONPROFIT MGMT. & LEADERSHIP 241, 241 (1993) (noting that “[Community development corporations], in their quiet way, have become a major component of corrective capitalism; in this free-enterprise nation they are finding ways to open doors to classes and individuals otherwise excluded from the American dream”); Loh & Love, *supra* note 12. Despite the general, anti-capitalist consensus within the solidarity economy movement, whose actors aspire to build a new economic system in which people and planet, not profit, comes first, Loh and Love argue that modes of community ownership should strive to “co-exist in harmony with markets.” *Id.*

<sup>71</sup> Simon Deakin et al., *Legal Institutionalism: Capitalism and the Constitutive Role of Law*, 45 J. COMPAR. ECON. 188, 189 (2017).

housing, or use value, over their price on the private market, or exchange value, and thus promote housing security.<sup>72</sup>

“Community” is a slippery term in local government law.<sup>73</sup> It may refer to people who reside within a certain legal jurisdiction, and are thus entitled to participate in the jurisdiction’s “process of government.”<sup>74</sup> It may also refer to people who belong to a shared racial, ethnic, or cultural lineage.<sup>75</sup> Here, in the context of community ownership, “community” is geographically defined, referring to neighborhood residents who are connected to the local nonprofit organizations and tenant associations that sponsor “decentralized” real estate development.<sup>76</sup> The community may be residents in a multi-family property undergoing a cooperative conversion or the

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<sup>72</sup> See Tom Angotti, *Struggles for Land and the Promise of the Community Land Trust*, 3 SCIENZE DEL TERRITORIO 378, 379 (2015). Angotti reasons that:

By essentially taking housing out of the private land market and increasing community control, [community land trusts] can help shelter communities from the global casino appropriately known as the FIRE sector (Finance, Insurance and Real Estate). Public housing (state subsidized and managed housing) also removes housing from the private marketplace, although control is not vested in community-based organizations. Many other state-subsidized housing programs, including rent regulations, vouchers and mortgage subsidies, shape or restrict the market. If we look at these methods together, they add up to an approach that values land more for its social utility (use value) as opposed to its price on the market (exchange value). When land is used for housing under these regulated regimes, housing is treated more as a basic human right instead of a commodity to be exchanged on the marketplace.

*Id.*; see also Lorenzo Vidal, *Cooperative Islands in Capitalist Waters: Limited-Equity Housing Cooperatives, Urban Renewal, and Gentrification*, 43 INT’L J. URB. & REGIONAL RSCH. 157, 159 (2019) (noting that “[i]n the specific case of housing,” use value and exchange value “are reflected in the commodity’s quality as ‘home’ versus its value as real estate.”).

<sup>73</sup> See, e.g., Richard T. Ford, *Law’s Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843, 851–907 (1999) (defining “political community” and contrasting it with “culturally defined jurisdictional subdivisions”).

<sup>74</sup> *Id.*

<sup>75</sup> See *id.*

<sup>76</sup> Nicholas Dagen Bloom et al., *The Decentralized Network*, in AFFORDABLE HOUSING IN NEW YORK 245–57 (Nicholas Dagen Bloom & Matthew Gordon Lasner eds., 2016) (describing the post-1970s emergence of “small-scale rehabilitation” by disparate actors such as community development corporations, local agencies, and tenants’ associations).



homeowners, concerned citizens, and public officials who sit on a CLT's board.

There is also an undercurrent of solidarity within the “community” component of community ownership—neighbors who jointly hold and use land and housing often cohere around a shared commitment to going further by going together. United Families of Sunset Park, the immigrant households resisting displacement in present-day Brooklyn, emphasize working together to “build [their] own homes” and stewarding properties for future generations.<sup>77</sup> Early HDFC shareholders, Harlemites resisting “organized abandonment”<sup>78</sup> by rehabilitating their buildings during New York’s fiscal crisis, emphasized collaborating to achieve dignified living conditions despite landlords’ and local agencies’ negligence.<sup>79</sup> This emphasis on solidarity means that common interest communities such as condominiums and homeowners’ associations are not necessarily forms of community ownership. Community ownership is defined by more than just common property or tenancies in common—instead, it is both place-based and purpose-driven.<sup>80</sup>

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<sup>77</sup> NEW SCHOOL PARSONS SCHOOL OF DESIGN, *supra* note 1, at 31–32.

<sup>78</sup> Ruth Wilson Gilmore popularized the term “organized abandonment,” a descriptor of forgotten places that have been simultaneously abandoned by capital and state. *See, e.g.,* DEMOCRACY NOW!, *The Case for Prison Abolition: Ruth Wilson Gilmore on COVID-19, Racial Capitalism & Decarceration*, [https://www.democracynow.org/2020/5/5/ruth\\_wilson\\_gilmore\\_abolition\\_coronavirus](https://www.democracynow.org/2020/5/5/ruth_wilson_gilmore_abolition_coronavirus) (last visited Nov. 4, 2021). Gilmore’s conception of organized abandonment builds on the writing of David Harvey. Ruth Wilson Gilmore, *Forgotten Places and the Seeds of Grassroots Planning*, in *ENGAGING CONTRADICTIONS: THEORY, POLITICS, AND METHODS OF ACTIVIST SCHOLARSHIP* 31 (Charles R. Hale, ed. 2008) (citing Harvey’s *Limits of Capital*).

<sup>79</sup> *See* Brian D. Goldstein, *The Urban Homestead in the Age of Fiscal Crisis*, in *THE ROOTS OF URBAN RENAISSANCE: GENTRIFICATION AND THE STRUGGLE OVER HARLEM 153–56* (2017) (describing The Renigades, a 1970s Latinx, Harlem-based “street gang,” that worked to redevelop their neighborhood’s crumbling housing stock through “self-help”).

<sup>80</sup> Modes of community ownership operationalize solidarity in their organizational structures; common interest communities need not do so. *See, e.g.,* Michael H. Schill, Ioan Voicu & Jonathan Miller, *The Condominium Versus Cooperative Puzzle: An Empirical Analysis of Housing in New York City*, 36 J. L. STUD. 275, 280–83 (2007) (contrasting cooperatives in which residents share a single blanket mortgage and own shares in a single corporation with condominiums in which residents own separate units and acquire them via separate mortgages).

Community ownership invokes the “spatial imaginary” that turns segregation into congregation.<sup>81</sup>

In New York City, community ownership’s primary implements are limited equity cooperatives—the subject of this Note—CLTs, and mutual housing associations.<sup>82</sup> Limited equity cooperatives like HDFCs enable residents to purchase shares in and collectively manage a cooperative corporation that owns their housing. CLTs employ a dual ownership structure such that a locally controlled nonprofit owns the land, residents own the improvements, and the two parties enter into long-term ground leases governing use and occupancy.<sup>83</sup> Mutual housing associations’ organizational form melds components of CLTs and limited equity cooperatives. Like a land trust, mutual housing relies on a “hub-and-spoke model” in which a central nonprofit owns the land and numerous residents enter into ground leases to access the buildings.<sup>84</sup> Like cooperatives, mutual housing entails participatory tenant management and regulatory agreements with affordability restrictions.<sup>85</sup> Mutual housing diverges from land trusts and cooperatives in its reliance on a membership structure in which residents do not hold fee title to their homes.<sup>86</sup>

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<sup>81</sup> George Lipsitz, *The Racialization of Space and the Spatialization of Race: Theorizing the Hidden Architecture of Landscape*, 26 LANDSCAPE J. 10, 11 (2007).

<sup>82</sup> See Rendón & Robles-Durán, *supra* note 12, at 217.

<sup>83</sup> See Stephen R. Miller, *Community Land Trusts: Why Now Is the Time to Integrate This Housing Activists’ Tool into Local Government Affordable Housing Policies*, 23 J. AFFORDABLE HOUS. & CMTY. DEV. L. 349, 355–56 (2015) (describing community land trusts’ dual ownership and leased land structure).

<sup>84</sup> Jean C. Berman, *Volunteering for Affordable Housing in New York City*, 1 J. AFFORDABLE HOUS. & CMTY DEV. L. 18, 20–21 (1991) (mentioning mutual housing association’s use of ground leasing).

<sup>85</sup> See, e.g., THE LOWER EAST SIDE PEOPLE’S MUTUAL HOUSING ASSOCIATION 1–3 (2021), <http://www.lespmha.org/wp-content/uploads/2021/08/LESPMHA-Who-We-Are-Sept05.pdf> (describing the mutual housing association’s 99-year regulatory agreement with the City of New York and residents’ participation in the mutual housing association’s leadership structure).

<sup>86</sup> Mutual housing residents are not owners, so while they benefit from price controls and housing security, they may not buy or sell their units and they cannot develop equity. See, e.g., *Mut. Hous. Tompkins Cnty. v. Hawes*, 780 N.Y.S.2d 276, 279 (2004) (outlining the structure of an Ithaca, NY mutual housing association). Low-income cooperatives’ resident-shareholders do not own their buildings or their units. Instead, they own shares in a cooperative corporation that holds fee

Limited equity cooperatives, CLTs, and mutual housing associations are “hardy, yet rare perennials;” they have long existed on the periphery of the private real estate market, though none of them is completely removed from it.<sup>87</sup> Community-owned real estate is thus emblematic of the notion of diverse economies—by piloting, sustaining, and connecting non-market institutions, communities have offered a viable, solidaristic alternative to profit-oriented exchange. “Diverse economies” seeks to describe the oft-overlooked, multifarious nature of economic life.<sup>88</sup> If the U.S. economy is a diverse one, with experimental, interstitial interventions constantly blossoming to bridge the gap between market and state provision and human need, then “diverse legal entity structures” exist too, institutionalizing alternative interventions at the periphery of market capitalism.<sup>89</sup> Community-owned real estate demonstrates that, despite the prevalence of market provision, it is eminently possible to build and sustain non-market alternatives.

Modes of community ownership achieve scale through “economic integration,” fostering linkages through networks of support and exchange that sustain individual initiatives.<sup>90</sup> For instance, as discussed further in Part II of this Note, a “values chain” of mission-oriented investors makes New York’s thousand-plus HDFCs

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title to the building, with their share allocation corresponding to their unit size. *See, e.g.,* *Wali v. City of New York*, 22 Misc. 3d 478, 480–84, (N.Y. Sup. Ct. 2008). The court describes the 2170 Atlantic Avenue HDFC as holding record title to its building. *See id.* at 479. After a 2003 judgment of foreclosure, the City of New York conveyed fee title of the building to a third-party manager; the third party was “seized of an estate in fee simple absolute.” *Id.* at 481. CLT residents have a fee interest in their properties and the improvements, while CLTs have a fee interest in land, owning the underlying parcels. GROUNDED SOLUTIONS NETWORK, *supra* note 60, at ch. 22, at 1–3.

<sup>87</sup> Kennedy, *supra* note 24, at 85.

<sup>88</sup> Morgan & Kuch, *supra* note 69, at 566–73; *see also* Adam Bledsoe, Tyler McCreary & Willie Wright, *Theorizing Diverse Economies in the Context of Racial Capitalism*, GEOFORUM, 2019, at 1 (defining “diverse economies” as existing “economic formations that do not adhere to capitalist modes of production,” ongoing new arrangements that demonstrate that capitalism is but one aspect of current economic relations).

<sup>89</sup> Morgan & Kuch, *supra* note 69, at 576.

<sup>90</sup> Ethan Miller, *Solidarity Economy: Key Concepts and Issues*, in SOLIDARITY ECONOMY I: PAPERS AND REPORTS FROM THE 2009 U.S. FORUM ON THE SOLIDARITY ECONOMY 35 (Emily Kawano, Thomas Neal Masterson, Jonathan Teller-Elsberg eds., 2009).

possible.<sup>91</sup> These investors contribute to the financing to acquire and rehabilitate multifamily buildings during the cooperative conversion, despite lenders' typical unfamiliarity with and reluctance toward unconventional tenures.<sup>92</sup> Bulk purchasing arrangements among coteries of HDFCs are another example of the networks of support among aligned actors that allow HDFCs to achieve scale. HDFCs in Manhattan, Brooklyn, and the Bronx join forces to purchase fuel, insurance, and bookkeeping services at favorable rates, collaborating to procure property management essentials they may not be able to afford on their own.<sup>93</sup> If the values chains that sustain community-owned projects were reproduced en masse, they could foster new systems that supplant commodified housing's recurrent boom and bust with long-term, stable tenancies.<sup>94</sup>

Community ownership can be considered a racial justice tool because traditional modes of ownership have done a disservice to people of color. Racial domination was not an aberrational occurrence in the development of U.S. property law—it was a fundament, a condition precedent for the exchange of land and people that predominated transacting in the early United States.<sup>95</sup> Property interests were “racially contingent,” relying on iterative forms of conquest to define, legitimize, and sustain them.<sup>96</sup> Private ownership as practiced in the United States has produced a variegated landscape in

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

<sup>92</sup> See GERALD L. RIOUX & CHRISTINE L. RIOUX, LIMITED EQUITY HOUSING COOPERATIVES: A FINANCING OPPORTUNITY FOR CALIFORNIA LENDERS 3–4 (1994).

<sup>93</sup> See, e.g., *UHAB Membership for HDFCs*, URBAN HOMESTEADING ASSISTANCE BOARD, <https://www.uhab.org/get-involved/member> (last visited Jan. 28, 2022).

<sup>94</sup> Contra James DeFilippis et al., *On the Transformative Potential of Community Land Trusts in the United States*, 51 *ANTIPODE* 795, 803–07 (2019). While I follow the lead of Renee Hatcher, *infra* note 250, at 37–38, in envisioning the scaling of the solidarity economy as the likely result of the building out and stringing together of networks of community-owned projects, bureaucratization and a loss of political fervor is also a potential result of such activity.

<sup>95</sup> See K-Sue Park, *Race and Property Law*, in *THE OXFORD HANDBOOK OF RACE AND LAW IN THE UNITED STATES* 1 (Devon Carbado, Khiara Bridges, Emily Houh eds., 2021) (recounting the “mutually formative relationship between race and property” and its manifestations through dispossession, degradation, and limiting the efforts of people of color to occupy and acquire property).

<sup>96</sup> *Id.* at 3.

which value continues to be derived from racial domination.<sup>97</sup> For Black Americans in particular, the “predominance of exclusionary features of private ownership has been experienced as oppression rather than autonomy.”<sup>98</sup> The law underpins racialization, and racialization underpins markets.

Often, when communities of color endure dispossession and displacement, they “push beyond a diagnosis of oppressive dynamics and create place-specific alternatives to the expressions of capitalism they encounter,” manifesting diverse economies.<sup>99</sup> HDFCs are one such alternative. During the organized abandonment of New York City’s 1970s fiscal crisis, Black and Latinx New Yorkers developed HDFCs as an alternative to market-oriented housing, which, in that distinct geopolitical moment, landlords “milked” for resources and local agencies condemned without expeditious plans for their restoration and productive use.<sup>100</sup> Community ownership is an opportunity to undo legacies of exclusion by creating new systems with solidarity and agency at the fore. A capacious

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<sup>97</sup> See *id.* at 13–15.

<sup>98</sup> Margalynne Armstrong, *African Americans and Property Ownership: Creating Our Own Meanings, Redefining Our Relationships*, 1 AFR.-AM. L. & POL’Y REP. 79, 85–86 (1994).

<sup>99</sup> Bledsoe, McCreary & Wright, *supra* note 88, at 8.

<sup>100</sup> A common precursor to low-income cooperative conversions, “milking” refers to landlords’ practice of undermaintaining buildings on the brink of condemnation or tax foreclosure in order to maximize gains before their buildings lose all market value. According to Duncan Kennedy, “the milking landlord treats his property as a wasting rather than a renewable asset.” Duncan Kennedy, *The Effect of the Warranty of Habitability on Low Income Housing: “Milking” and Class Violence*, 15 FLA. ST. U. L. REV. 485, 489 (1987). Milking is particularly disconcerting because low-income tenants remain in the building, facing degrading housing quality, which violates their leases and threatens their health. See Ronda Kaysen, *As Rents Rise in the Bronx, Old-Timers Feel the Pressure*, N.Y. TIMES (July 7, 2017), <https://www.nytimes.com/2017/07/07/realestate/as-rents-rise-in-the-bronx-old-timers-feel-the-pressure.html>. Kaysen provides a contemporary example of milking. Kaysen describes a landlord who agreed to sell his building to his residents so that they could cooperatively own the building after state officials began investigating him for sidestepping rent stabilization laws. See *id.* As the rent stabilization investigation made the landlord’s continued profitable ownership of the building less likely, he installed a rooftop billboard and stopped completing routine maintenance. Now, “some apartments have pipes and windows that leak, broken floorboards and missing bathroom tiles, crumbling paint and plaster, kitchens with no cabinets and faulty electrical wiring.” *Id.*

understanding of ownership—ownership as a set of relations that favors “use value over exchange value” and “sociality over selfishness”—can honor the history of Black organizing for collective land access and scale proven strategies for countering inequitable market forces.<sup>101</sup>

## II. UNDERSTANDING HDFCS

### A. *Legislative History and Early Implementation*

Since access to housing depends upon access to capital, and housing outcomes are occluded by an ongoing, bitter history of racial stratification, communities of color have had to resist both exclusion from mainstream markets and inclusion within subaltern, exploitative ones. Their resistance has often taken the form of institution building, devising new tenures that can confer collective security.<sup>102</sup> In New York City, Black and Latinx renters in Harlem, the Lower East Side, and the South Bronx founded HDFCs to weather the simultaneous public and private disinvestment of the 1970s.<sup>103</sup> Two legislative enactments powered HDFCs: Article XI of the New York Private Housing Finance Law (Article XI) and Local Law 45 of 1976.

Introduced in February 1966 as HDFCs’ authorizing legislation, Article XI was explicitly designed to remedy the deficiencies in market-oriented housing provision. The drafters reasoned from an understanding that the “ordinary operations of private enterprise cannot provide an adequate supply of safe and sanitary dwelling accommodations at rentals [*sic*] which families and persons of low income can afford.”<sup>104</sup> Thus Article XI provided technical assistance, pre-development grants, and favorable tax treatment to would-be “non-profit sponsors” of low-income housing: settlement houses,

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<sup>101</sup> Lipsitz, *supra* note 81, at 10, 14.

<sup>102</sup> See Krystle Okafor, *Towards the Black Commons: Meeting the Moment with Community Land Trusts*, in RACIAL JUSTICE IN HOUSING FINANCE: A SERIES ON NEW DIRECTIONS 83 (Megan Haberle & Sophia House, eds. 2021) (celebrating noteworthy Black experiments in community ownership such as Fannie Lou Hamer’s Freedom Farm Coop and the New Communities, Inc., community land trust).

<sup>103</sup> See Goldstein, *supra* note 79, at 178.

<sup>104</sup> Assemb. Bill No. 5306, 1966 S. § 571 (N.Y. 1966).

labor organizations, and the like.<sup>105</sup> Assemblymember Charles Stockmeister, a cosponsor of the bill, hoped that Article XI would “change the nature of sponsorship of low income housing in this state from builders and others with pecuniary interest to eleemosynary institutions.”<sup>106</sup> In questioning and developing alternatives to market-oriented housing provision, New York state legislators foreshadowed contemporary campaigns for community ownership.

While Article XI’s legislative record does not explicitly mention race, it does note that Governor Nelson Rockefeller solicited input on the bill from churches in Harlem, a predominantly Black neighborhood that was one of New York’s hardest hit by landlord abandonment.<sup>107</sup> Harlem was also home to New York’s first sweat equity projects, in which neighbors, responding to the “East Harlem riots in 1967,” beautified their block, installed shared infrastructure, and began purchasing their buildings.<sup>108</sup> The congregations of the East Harlem Protestant Parish, Ebenezer Wesleyan Methodist Church, Chambers Methodist Baptist Church, and Metropolitan Community Methodist Church made entreaties related to stewardship and participation, sharing plans to reduce poverty’s indignities through the collective control of local resources. Metropolitan Community Methodist Church, for instance, billed their neighborhood as

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<sup>105</sup> N.Y. EXEC. DEP’T, DIV. OF HOUS. & CMTY. RENEWAL, COMMENTS ON ASSEMB. B. NO. 5306 (June 1, 1966); *see also* Memorandum from Charles F. Stockmeister, Assemb. Intro. No. 5306, Senate Print No. 5646 (on file with author), which mentions that “the bill creates two different types of non-profit corporations: a type of membership corporation which will provide rental housing and a type of business corporation which will provide cooperative housing,” ownership structures that echo contemporary notions of community ownership. *Id.*

<sup>106</sup> Memorandum from Charles F. Stockmeister, Assemb. Intro. No. 5306, Senate Print No. 5646 (on file with author). During the era of Article XI’s drafting, “eleemosynary” referred to institutions that were charitable, nonprofit, or otherwise “engaged unselfishly in helping others.” *Kaufman v. American Youth Hostels, Inc.*, 6 A.D.2d 223, 226 (N.Y. App. Div. 1958).

<sup>107</sup> In 1984, more than two-thirds of the buildings the City owned due to tax foreclosure were located in Harlem. *See Leavitt & Saegert, supra* note 19, at 489; Letter from C. Richard Cox, Associate Minister, Metro. Cmty. Methodist Church, to Nelson A. Rockefeller, Governor of N.Y. (May 5, 1966) (on file with author).

<sup>108</sup> Rita Reif, *Self-Help Housing: Within Limits, It Works*, N.Y. TIMES (July 11, 1976), <https://www.nytimes.com/1976/07/11/archives/selfhelp-housing-within-limits-it-works-self-help-housing-within.html>.

the “area where both the need and the promise are the greatest.”<sup>109</sup> They then argued that their forays into housing provision would “change the community into one which is closely knit, where neighbor cares for neighbor; where there is a mutual relationship between the individual and the community.”<sup>110</sup> With the congregations’ support, Governor Rockefeller executed Article XI in June 1966.

In the midst of the fiscal crisis, the New York City Council developed a local complement to Article XI that would facilitate the conversion of distressed multifamily rental housing into low-income cooperatives: Local Law 45 of 1976.<sup>111</sup> Local Law 45 shortened the grace period before which the City would seize tax delinquent properties, flooding the City’s rolls with abandoned buildings.<sup>112</sup> Due to Local Law 45’s fast track, in the 1980s, the City of New York came to own about 50 percent of the Lower East Side’s residential real estate<sup>113</sup> and 60 percent of Harlem’s.<sup>114</sup> The City disposed of this real estate via an alphabet soup of programs within HPD, several of which transferred title to renters and community groups, furthering Black and Latinx communities’ ongoing reclamation efforts.<sup>115</sup> In the legislative hearing that preceded Local Law 45’s passage, Charles Laven, president of the Urban Homesteading Assistance Board (UHAB), reasoned that the law was an “opportunity for local community organizations or organized groups of tenants to take control and manage” properties as an “exciting

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<sup>109</sup> Letter from C. Richard Cox, *supra* note 107.

<sup>110</sup> *Id.*

<sup>111</sup> Previously N.Y. Admin. Code Tit. D, § D17-4.0. Now at N.Y. Admin. Code § 11-404(a); *see also* Sonmax, Inc. v. New York 43 N.Y.2d 253 (1977) (finding Local Law 45 is constitutional, rebuffing landlord plaintiff’s challenge).

<sup>112</sup> *See* N.Y.C Council, Local Law Int. No. 956 (Apr. 27, 1976) § D17.40 (on file with author) (showing changes to the City’s administrative code that shortened the foreclosure by action in rem process from three years to one, attaching a lien to properties with one year’s unpaid taxes). Wolf-Powers, *supra* note 18, at 22–22 (mentioning the glut of City-owned properties that followed the passage of Local Law 45).

<sup>113</sup> *See* BENJAMIN HOLTZMAN, THE LONG CRISIS: NEW YORK CITY AND THE PATH TO NEOLIBERALISM 48 (2021).

<sup>114</sup> *See* Leavitt & Saegert, *supra* note 19, at 490.

<sup>115</sup> *See id.* (describing HPD’s Tenant Interim Lease, Community Management, and Private Ownership and Management Programs); *see also infra* note 153 for further information on HPD’s alternative management programs.



alternative” for an era in which “private ownership of multiple dwellings for investment purposes is no longer feasible.”<sup>116</sup> Local Law 45 was not conceived as a de commodification and racial justice device, but its potential as such was readily identified by tenants and advocates who harnessed it to create sweat equity housing.<sup>117</sup> Early shareholders’ work was so potent that the “real estate industry had expressed fears that the low-income co-op movement might result eventually in expropriation of landlord property.”<sup>118</sup>

Article XI and Local Law 45 accelerated the pace of tenants’ sweat equity redevelopment.<sup>119</sup> The tenants were “ex-offenders,” “welfare mothers,” and organizers within the city’s emergent network of people of color-led community groups.<sup>120</sup> Formerly incarcerated young men took up homesteading to learn trades that would enable them to end their crimes of necessity.<sup>121</sup> One, reflecting on a sweat equity project he completed, remarked that “It’s a dream

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<sup>116</sup> *Public Hearing on Local Law Int. No. 956 Before the N.Y.C. Executive Chamber* (Oct. 6, 1976) (statement by Charles Laven, Urb. Homesteading Assistance Bd.) (on file with author).

<sup>117</sup> See Steven Katz & Margit Mayer, *Gimme Shelter: Self-Help Housing Struggles Within and Against the State in New York City and West Berlin*, 9 INT’L J. URBAN & REG’L RSCH. 15, 20 (1985) (showing that “While the New York neighbourhood movement broadened out to include local groups which had a different constituency and orientation, and while several technical assistance organizations servicing local groups played an increasingly important role in setting the agenda for the movement, the impetus of the movement continued to come from local neighbourhood groups organizing poor black and Puerto Rican tenants during the 1970s.”).

<sup>118</sup> Ronald Lawson, *Owners of Last Resort: The Track Record of New York City’s Early Low-Income Housing Cooperatives Created between 1967 and 1975*, 30 J. RADICAL POL. ECON. 60, 72 (1998).

<sup>119</sup> Sweat equity revitalization preceded the passage of Local Law 45. See RACHEL BRATT, COMMUNITY-BASED HOUSING: POTENTIAL FOR A NEW STRATEGY, 16 (1985). Bratt documented low-income cooperative conversion prior to the passage of Local Law 45. New York tenants initiated 37 low-income cooperative conversions, comprising 2,100 units, by 1973. See *id.* Bratt also showed that low-income tenants were the drivers of New York’s low-income cooperative housing movement, writing that “While some of New York’s programs are now administered through the city, much of the impetus for their creation came from tenant and neighborhood organization.” *Id.* at 15.

<sup>120</sup> Lawson, *supra* note 118, at 67.

<sup>121</sup> See Irving Spiegel, *Gang Shows Off Housing Project: ‘Sweat Equity’ Is Employed in Tenement Renovation*, N.Y. TIMES, May 11, 1975, at 56.

come true, and it means people in the ghetto can control their own lives, build for the future.”<sup>122</sup> Low-income women of color parlayed their skills as heads of households—fostering bonds, stretching dollars—into leadership positions in tenant associations through which they would manage cooperative conversions.<sup>123</sup> Coterie of neighbors and strangers formed organizations like Adopt-a-Building on the Lower East Side and People’s Development Corporation in the Bronx to expand the reach of their rehabilitation and cooperative conversion work.<sup>124</sup> Devising and running low-income cooperatives was not a straightforward matter: “Tenants and the leaders who struggled for years to create stable, secure homes did surmount overwhelming obstacles to achieve their goals, including lack of resources, long-term poor living conditions, the problems of keeping people together in the buildings, and racism encountered in meetings with City officials.”<sup>125</sup> But youth, mothers, and community groups persevered, taking action that ultimately ignited a movement to reimagine housing tenure.<sup>126</sup>

Consider the Renigades, a 1970s–1980s Harlem “Youth Gang for the People.”<sup>127</sup> Before the Renigades were “for the people,”

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<sup>122</sup> *Id.*

<sup>123</sup> See Leavitt & Saegert, *supra* note 19, at 492 (finding that the “activities of women in co-ops linked domestic life and cooperative organization”).

<sup>124</sup> See David F. White, *Toil on Labor Day Gives Block Extra Lift: East Siders Remove Trash and Renovate Tenements*, N.Y. TIMES, Sep. 7, 1976, at 35 (documenting an Adopt-a-Building sweat equity project that was “being refurbished by prospective residents under the supervision of skilled foremen with city and Federal money”); Charles Lockwood, *South Bronx Group Renovates Building with “Sweat Equity,”* CHRISTIAN SCI. MONITOR, Mar. 23, 1979, at 15 (describing People’s Development Corporation cooperative conversions).

<sup>125</sup> Clark, *supra* note 29, at 942.

<sup>126</sup> See Bratt, *supra* note 119, at 16. It is important to note that sweat equity housing conversions were an endogenous movement led by low-income people of color. Quoting Robert Kolodny, Bratt notes that low-income cooperative conversion programs “emerged ‘primarily in response to the demands of tenants who had sustained their buildings for a period themselves but who needed the financing to upgrade the buildings and the leverage to gain permanent control of them at nominal cost.’” *Id.*

<sup>127</sup> URB. HOMESTEADING ASSISTANCE BD., SECOND ANNUAL PROGRESS REPORT AND PROPOSAL FOR FUNDING FOR U-HAB, THE URBAN HOMESTEADING ASSISTANCE BOARD 21 (1976); David Rubel, *N.Y. Gang Goes Straight—Into Housing*, WASH. POST., Oct. 29, 1983, at E20; George James, *Sweat Equity is Not Sweat to These Willing, Able Hands*, N.Y. DAILY NEWS, Mar. 26, 1979, at 150.

committing themselves to neighborhood improvement projects, they were “just another young gang terrorizing the community, collecting protection money from merchants,” and engaging in the local drug trade.<sup>128</sup> The Renigades changed course around 1970, when their membership collaborated to rebuild their headquarters at 251 East 119th Street.<sup>129</sup> From then on, the “gang members worked as carpenters, masons, plumbers, electricians, or bricklayers,” remodeling Harlem’s abandoned real estate and establishing cooperative housing.<sup>130</sup> They focused on Harlem’s easternmost blocks, targeting properties between 125th Street, 116th Street, the East River, and Third Avenue, where Latinx and Black households predominated.<sup>131</sup> The Renigades championed community control and collective action, pursuing housing redevelopment as means to throw off the yoke of the public and private sectors. They wrote:

What do you do when your landlord, who has the legal responsibility for maintaining and managing your apartment, has abandoned your building and cannot be located to make repairs? . . . What do you do when the City, which has the moral responsibility to assist tenants when landlords walkout, claims it cannot help? . . . You can own your own home, and finally be rid of the rats, the landlords, the leaks, and the City. You can rebuild your block, your homes, and your lives.<sup>132</sup>

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<sup>128</sup> *Id.*; U.S. OFF. OF CONSUMER AFF., PEOPLE POWER: WHAT COMMUNITIES ARE DOING TO COUNTER INFLATION 114–15 (1980) (“One worker recalls, ‘I was heavy into the drug thing and heard about the work from one of my brothers. So I figured, why not give it a try. No pay, but at least I would be doing something besides drugs. But now I got a skill. I know how to do a job.’”).

<sup>129</sup> See Rubel, *supra* note 127.

<sup>130</sup> U.S. OFF. OF CONSUMER AFF., *supra* note 128, at 114–15 (“When the renovation of the East 119th Street building was completed in 1975, the Renegades [sic] turned it over to the cooperative housing corporation they had organized. The co-op included several gang members, their families and other neighborhood residents in need of decent housing who now jointly own and operate the building. The average \$140 monthly payment would have been twice as steep if the building had been renovated in a conventional manner. (Although not available in time to assist the Renegades, co-ops may now qualify for technical and financial assistance from the newly created National Consumer Cooperative Bank.)”).

<sup>131</sup> See ALAN SCOTT GREGERMAN, THE LIMITS OF SELF-HELP, THE LIMITS OF HELP: AN ASSESSMENT OF THE EFFECTIVENESS OF ALTERNATIVE COMMUNITY-BASED APPROACHES TO ECONOMIC DEVELOPMENT 241–42, 246 (1982).

<sup>132</sup> Goldstein, *supra* note 79, at 154–58.

Armed with this credo, the Renigades formally incorporated as the Renigades Housing Movement in 1974, solidifying their transition from a gang into a “housing and community advocacy organization.”<sup>133</sup>

According to the Taskforce on City-Owned Property, a leadership table composed primarily of City staff and representatives from nonprofit advocacy organizations, the groundswell of volunteer construction and cooperative conversions was tantamount to the creation of a new mode of economic ordering, one premised on community ownership. In a 1978 report, the Taskforce declared that “There is no choice but to build a new sector for low-income residential management and ownership . . . One that is based on various forms of nonprofit and cooperative ownership, and has locally and democratically controlled planning, management, and development as its cornerstone.”<sup>134</sup> The report acknowledged the housing market’s failures and sought solutions beyond its confines.<sup>135</sup> Echoing the diverse economies framework, the Taskforce on City-Owned Property conceived of their work not merely as ameliorative charity, filling gaps left by the private sector, but as a new system with the might to replace and outdo the private sectors’ inadequate provision of housing.

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<sup>133</sup> GREGERMAN, *supra* note 131, at 247.

<sup>134</sup> Benjamin Holtzman, *The Decentralized Network*, in AFFORDABLE HOUSING IN NEW YORK 260 (Nicholas Dagen Bloom & Matthew Gordon Lasner eds., 2016). *Contra*. NICOLE MARWELL, BARGAINING FOR BROOKLYN: COMMUNITY ORGANIZATIONS IN THE ENTREPRENEURIAL CITY 44–45 (2007) (describing 1960s New York’s “impending fiscal crisis” and documenting how “By the end of the 1960s, several small groups of community activists . . . were beginning to develop new strategies to recover the disappear[ing] use value of their neighborhood’s housing.”). The period in which Laven wrote also sparked the creation of community development corporations which, as indicated in Berger & Kasper, *supra* note 70, are often capitalistic in orientation.

<sup>135</sup> See Holtzman, *supra* note 134; see also NEIL F. CARLSON, UHAB COMES OF AGE: THIRTY YEARS OF SELF-HELP HOUSING IN NEW YORK CITY 6 (2014). Carlson writes:

The Task Force’s report, which was written by UHAB founder Chuck Laven, was a laundry list of progressive recommendations: simplify loan procedures, create more mechanisms for nonprofit management, expand the Housing Litigation Bureau, offer tenants of in rem buildings the opportunity to manage the property, expand rehab programs—and sell more in rem buildings to tenant cooperatives.

*Id.*

It may be argued that low-income cooperatives did not presage community ownership, but rather the rise of public-private partnerships like business improvement districts and friends of the park groups that supplanted the government with “self help” during an era that exposed the inefficiencies of New York’s post-war social democracy.<sup>136</sup> It may also be argued that HDFCs’ forebearers, particularly those within state government, did not envision community control of land and housing, but rather a not-for-profit affordable housing industry much like the one that exists today.<sup>137</sup> However, the solidarity articulated by the impacted populations who built HDFCs brick by brick and the visionary advocates who advised and supported them suggests something more.<sup>138</sup> Their statements point to a commitment to community ownership. Their actions culminated in a robust, cooperatively owned housing stock that, forty years later, continues to anchor many low-income New Yorkers in place.

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<sup>136</sup> Holtzman, *supra* note 113, at 3–4 (arguing that the post-1970s imposition of market logic in New York City did not result merely from top-down policy reforms, but also from residents’ bottom-up, self-organization into groups like low- and middle-income housing cooperatives, business improvement districts, and park conservancies).

<sup>137</sup> See, e.g., CMTY. SERV. SOC’Y OF N.Y., HOUSING AND URBAN DEVELOPMENT LEGISLATION IN NEW YORK STATE vii (1966). Writing at the time of Article XI’s passage, the Community Service Society of New York characterized Article XI as an intervention that will improve the nonprofit sector’s ability to generate “middle-income housing.” *Id.* They wrote that:

The most important bill that became law this year is one creating a Housing Development Fund, which will provide advances and expert services to help non-profit groups develop moderate-rent housing. By providing ‘seed’ money for initial costs, the fund will enable non-profit groups without capital to draw up initial plans on the basis of which they can apply for federal or state loans. When the loan is received, the seed money will be paid back to the fund.

*Id.*

<sup>138</sup> See, e.g., Lockwood *supra* note 124. Lockwood notes People’s Development Corporation’s was a “band of young Hispanic and black men and women, plus a few socially concerned whites from outside the neighborhood,” a descriptor that may typify urban homesteaders’ demographics generally. *Id.*

## B. Mechanics

### 1. Authorizing Legislation

HDFCs are corporations organized pursuant to section 573 of Article XI.<sup>139</sup> Though most HDFCs are formed as business corporations, not nonprofit corporations, each must include a charitable purpose in their certificate of incorporation indicating that they are “organized exclusively to develop a housing project for persons of low income.”<sup>140</sup> HDFCs must also adhere to an inurement prohibition. Their certificates of incorporation are required to stipulate that “all income and earnings of the corporation shall be used exclusively for corporate purposes, and that no part of the net income or net earnings of the corporation shall inure to the benefit or profit of any private individual, firm, corporation or association.”<sup>141</sup> In exchange for the charitable character of their work, HDFCs are entitled to a collection of benefits, most importantly reduced real property taxes.<sup>142</sup>

Since the 1970s, reportedly at the behest of the New York City Law Department,<sup>143</sup> New York City legislators and residents have relied on Article XI to found and capitalize over 1,000 low-income,

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<sup>139</sup> See N.Y. PRIV. HOUS. FIN. LAW § 572-9.

<sup>140</sup> N.Y. PRIV. HOUS. FIN. LAW § 573-3(a); Bechtel, *supra* note 20, at 19 (indicating that most HDFCs are incorporated as business organizations).

<sup>141</sup> N.Y. PRIV. HOUS. FIN. LAW § 573-3(b).

<sup>142</sup> See N.Y. PRIV. HOUS. FIN. LAW § 576 (requiring that HDFCs enter regulatory agreements with their supervising agency as a condition of state advance receipt); N.Y. PRIV. HOUS. FIN. LAW § 576-c (requiring HDFCs to enter regulatory agreements when they receive municipal loans). N.Y. PRIV. HOUS. FIN. LAW § 577 (entitling HDFCs to property tax exemptions).

<sup>143</sup> See Wolf-Powers, *supra* note 18, at 221. Wolf-Powers notes that urban homesteading—tenants’ takeover and cooperative conversion of abandoned housing—preceded any formal legislative authorization, but after the unprecedented erosion of New York’s housing stock in the mid-1970s,

The city’s legal department agreed to use an obscure provision in state housing law, the Housing Development Fund Corporation (HDFC), as a vehicle for turning over abandoned and distressed homes (buildings that the city had seized for non-payment of taxes) to community groups for the purpose of establishing tenant owned cooperatives. While activists were constantly frustrated by the difficulty of obtaining city grants and loans for the renovation of buildings, the HDFC provided a crucial legal mechanism.

*Id.*

limited equity housing cooperatives.<sup>144</sup> In a marked contrast to commodified housing, HDFCs keep shareholders' housing costs stable when markets heat up and help shareholders resist default as markets cool.<sup>145</sup> By distributing their "bundle of rights" among shareholders, the cooperative corporation, and government agencies, and adhering to income limits and resale restrictions, HDFCs curb individual appropriation.<sup>146</sup> New York City's low-income cooperative housing stock may thus be considered a commons.<sup>147</sup>

## 2. Formation and Financing

Sweat equity redevelopment, also known as urban homesteading, emerged in the 1960s as a process for rehabilitating distressed, tax foreclosed properties through volunteer construction and converting them into cooperative apartments.<sup>148</sup> Transitioning properties to tenant ownership and management, sweat equity redevelopment was seen as one of few viable strategies for reinvigorating

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<sup>144</sup> See Bechtel, *supra* note 20, at 17.

<sup>145</sup> See Susan Saegert & Lymari Benítez, *Limited Equity Housing Cooperatives: Defining a Niche in the Low-Income Housing Market*, 19 J. PLANNING LITERATURE 427, 428 (2005) (indicating that "[limited equity cooperatives] offer stable housing costs in hot real estate markets and resistance to default in down markets while requiring similar or lower subsidies than other comparable rental housing.").

<sup>146</sup> Vidal, *supra* note 72, at 160.

<sup>147</sup> See *id.* Vidal defines a commons as "a collective and non-commodified social relation established between a natural or human-made resource, in this case the housing stock, and a community of reference" and indicates that commoning implies community control, "that the community can 'decide for themselves the norms, values and measures of things' without owners who can exercise their overriding income rights." Vidal's definition of commons encompasses the participation and community stewardship that are the hallmarks of New York's low-income housing cooperatives. Even though HDFCs are only partially decommodified—not fully removed from the private market—and they do not exhibit the open access that often typifies a commons, they may still be considered a commons. See also Sheila Foster & Christian Iaione, *The City as a Commons*, 34 YALE L. & POL'Y REV. 281, 292–93 (2016) (defining the commons as both "limited access" resources like housing cooperatives and "open access" resources like Hardin's ruinous pasture); Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1244 (1968) (noting that unregulated, open resources invite overuse and free rider problems). Converting a resource to a commons is not an unqualified benefit. The difficulties that inhere in housing commons are detailed in Parts II and III of this Note.

<sup>148</sup> See Reif, *supra* note 108; Stegman, *supra* note 27, at 495–98.

neighborhoods where the “private market [had] ceased to function;” it was the “epitome of a nonmarket housing intervention.”<sup>149</sup> In sweat equity projects, tenants’ volunteer labor constituted an in kind down payment, securing them a deed to their buildings from the City.<sup>150</sup> Tenants would draw from municipal loan programs and, on occasion, federal demonstration funds, to finance reconstruction projects.<sup>151</sup> They would also benefit from a ten-year tax abatement.<sup>152</sup> About a decade after the first sweat equity project took place, HPD began to support HDFC formation through “alternative management programs” that offered training and financial assistance to tenants and nonprofits who sponsored cooperative conversions.<sup>153</sup>

While sweat equity is no longer practiced, Article XI’s tax exemptions are still in place, and the remaining alternative management programs continue to provide an avenue to cooperative conversion for buildings that enter foreclosure and for buildings whose landlords, defeated by the complexities of low-income property

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<sup>149</sup> *Id.*

<sup>150</sup> See Robert Kolodny, *The Emergence of Self-Help in the USA as a Housing Strategy for the Urban Poor*, 5 HABITAT INT’L 213, 213–15 (1980).

<sup>151</sup> See *id.* at 217; see Nancy A. Brownstein, *The Warranty of Habitability As Applied to New York City In Rem Housing: A Premature Promise*, 50 BROOK. L. REV. 1103, 1110 (1984) (“The tenants provide the necessary labor for management, maintenance, and repair, and the city provides a substantial monetary commitment for long term rehabilitation and short term repair.”); see also Bernard Cohen, *Rehabilitating Sweat Equity—Part I*, CITY LIMITS, February 1980, at 17. Cohen itemizes the rehabilitation costs for an HDFC cooperative conversion, profiling a seven-unit building that was completed in 1979. See *id.* The conversion entailed \$119,000 for materials, \$22,098 for soft costs (e.g., services from architects, lawyers, and accountants), and a \$14,109 contingency allowance, which necessitated a \$155,207 mortgage. See *id.* The average sweat equity rehabilitation cost \$22,000 per unit. See *id.*; see also Michael A. Stegman, *An Exercise in Sweat Equity or Futility: 991–993 Columbus Avenue*, in HOUSING FINANCE AND PUBLIC POLICY: CASES AND SUPPLEMENTARY READINGS 88–98 (1986) (describing the financing for a model 1979–1980 sweat equity deal).

<sup>152</sup> See URB. HOMESTEADING ASSISTANCE BD., *supra* note 127, at 1.

<sup>153</sup> Kolodny, *supra* note 150, at 218; see also Frank P. Braconi, *In Re In Rem: Innovation and Expediency in New York’s Housing Policy*, in HOUSING AND COMMUNITY DEVELOPMENT IN NEW YORK CITY: FACING THE FUTURE 103–09 (Michael H. Schill ed., 1999) (providing an overview of HPD’s alternative management programs that transferred foreclosed properties to tenant, nonprofit, and private ownership).



management, opt to sell to their tenants.<sup>154</sup> UHAB—which has served as a base builder and technical assistance provider for low-income renters in New York City since the 1970s—typically catalyzes cooperative conversions.<sup>155</sup> UHAB initiates the transaction by utilizing City, state, and philanthropic funds to acquire the property from the selling landlord on the tenant association’s behalf, becoming the building’s interim owner.<sup>156</sup> A lender, often HPD or the Community Preservation Corporation, which was founded to combat the redlining of blighted neighborhoods during the 1970s fiscal crisis, then makes below-market rate construction or permanent loans to UHAB to underwrite the property’s acquisition and rehabilitation.<sup>157</sup> After the tenants have undergone training and incorporated a cooperative corporation, UHAB conveys the property to them, transferring the permanent loan, which the tenants-turned-shareholders pay down with assistance from credit unions or

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<sup>154</sup> See 28 R.C.N.Y. § 21-22 (“HPD is responsible for managing, rehabilitating, and disposing of buildings owned by the City. HPD’s goals include improving living conditions for Tenants in City-owned buildings and returning the City’s housing stock to private tax-paying ownership, while maintaining it as affordable housing.”); *Division of Alternative Management (DAMP)*, N.Y.C. DEP’T. OF FIN., <https://www1.nyc.gov/site/finance/benefits/benefits-division-of-alternative-management-damp.page> (last visited Jan. 28, 2022); see also, e.g., Affordable Neighborhood Cooperative Program, N.Y.C. DEP’T. OF HOUS. PRESERVATION & DEV., <https://www1.nyc.gov/site/hpd/services-and-information/affordable-neighborhood-cooperative-program-ancp.page> (last visited Jan. 28, 2022). The Affordable Neighborhood Cooperatives Program converts tax foreclosed, “in rem” properties to HDFCs. *Id.*

<sup>155</sup> See, e.g., AMY STARECHESKI, OURS TO LOSE: WHEN SQUATTERS BECAME HOMEOWNERS IN NEW YORK CITY 125–28 (2016) (describing the process used to convert Lower East Side squats to low-income housing cooperatives during the Bloomberg administration).

<sup>156</sup> See *id.*

<sup>157</sup> See Kathryn Wilde, *Partnerships for Housing*, 36 PROCEEDINGS OF THE ACAD. OF POL. SCI. 111, 114–15 (1986) (describing the Community Preservation Corporation’s willingness to invest in risky, distressed properties despite their “low rent rolls, low valuations, inexperienced ownership[,]” and poor physical condition); see also MARK WILLIS & SEAN CAPPERIS, MORTGAGE FINANCING FOR SMALL MULTIFAMILY RENTAL PROPERTIES: WHAT IS THE PROBLEM? 1 (2016) Willis et al. note that the “Community Preservation Corporation (CPC) have traditionally been niche players that specialize in lending in underserved neighborhoods to owners of affordable rental stock using lines of credit from financial institutions and working with state and local government programs to enhance the ability of these owners to access capital.” *Id.*

revolving loan funds like UHAB's HomeOwnership Lending, which was established with foundations' program-related investments.<sup>158</sup>

Mission-oriented capital and hired help have replaced sweat equity redevelopment. Whereas neighbors would once share in the voluntary labor required for moderate and even substantial rehabilitation, they now contract out needed repairs, drawing from a network of community development lenders who are willing to take on the rigamarole of cooperative conversions. Despite their reconfigured processes, HDFCs are no less solidaristic: "Development lending is a nonmarket (i.e. social) activity."<sup>159</sup> Newly formed HDFCs are the result of small, idiosyncratic deals with high transaction costs and narrow margins that generally elude mainstream lenders due to their limited profitability.<sup>160</sup>

### 3. Regulatory Arrangements

After their cooperative conversion, HDFCs are bound by Article XI, and, should they elect to enter one, an HPD regulatory agreement.<sup>161</sup> To preserve HDFCs as housing for people with low incomes, Article XI's income limit requires HPD to cap "carrying

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<sup>158</sup> The foregoing analysis describes the socially responsible lenders from which HDFCs source their capital costs. After the conversion, HDFCs must source their operating costs, monies required to run HDFCs as multifamily rental housing. HDFCs often rely on subsidies to secure their rent rolls, the monthly "carrying costs" that shareholders set and charge themselves to pay down their blanket mortgages and develop reserve funds. Both U.S. Department of Housing and Urban Development Section 8 Housing Choice Vouchers and local tax credits for owners who house older adults are common HDFC operating subsidies. See Starecheski, *supra* note 155, at 127.

<sup>159</sup> Christie I. Baxter, *Canals Where Rivers Used to Flow: The Role of Mediating Structures and Partnerships in Community Lending*, 10 ECON. DEV. Q. 44, 45 (1996).

<sup>160</sup> See *id.*

<sup>161</sup> See *infra* note 176. The New York Attorney General's Office has certain regulatory authority over HDFCs. The office is empowered to issue rules pertaining to real estate securities, and may thus oversee the cooperative conversion process, approving the formation of new cooperatives and the offering plans cooperatives use to recruit shareholders. N.Y. GEN. BUS. LAW § 352-eeee. Moreover, pursuant to N.Y. PRIV. HOUS. FIN. LAW § 573-5, some HDFCs have included income limits and resale restrictions in their certificates of incorporation at HPD's behest, so the certificates of incorporation may be considered part and parcel to HDFCs' regulatory arrangements as well. See Bechtel, *supra* note 20, at 19–21.

charges,” or rents, setting them at a rate just high enough to pay down the blanket mortgage, and requires HDFCs to house shareholders whose incomes are no more than six times the carrying charges.<sup>162</sup> Though Article XI’s income limit is less developed than the income guidelines required by other affordable housing programs,<sup>163</sup> compliant HDFCs receive a partial property tax exemption, which HPD extends for term-limited periods.<sup>164</sup> The partial property tax exemption is widely acknowledged as the lifeblood of HDFCs—without it, HDFCs’ boards would be required to set carrying charges at amounts that low-income earners could not afford.<sup>165</sup>

HPD regulatory agreements are form documents that stipulate affordability, good governance, and operational controls that are

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<sup>162</sup> N.Y. PRIV. HOUS. FIN. LAW § 576-1a (“Maximum rentals shall be fixed by the commissioner or the supervising agency, as the case may be, based upon the final gross project cost, at an amount sufficient to pay the necessary costs of the project.”); N.Y. PRIV. HOUS. FIN. LAW § 576-1b (“Dwellings in any such project shall be available for persons or families whose probable aggregate annual income does not exceed six times the rental (including the value or cost to them of heat, light, water and cooking fuel) of the dwellings to be furnished such persons or families, except that in the case of persons or families with three or more dependents, such ratio shall not exceed seven to one.”).

<sup>163</sup> See Tom Robbins, *NYC’s Homesteading Programs: A Land Rush to Nowhere?*, CITY LIMITS, April 1984, at 19 (“Other government programs . . . have specific income guidelines, while the six- or seven-times rent and maintenance leaves much more leeway. Working backwards, this means homesteaders whose final costs are high can have correspondingly high incomes.”).

<sup>164</sup> See N.Y. PRIV. HOUS. FIN. LAW § 577-1a. Article XI specifies that local tax exemptions for HDFCs may be no longer than 40 years in length. See *id.* The New York City Board of Estimate enacted the current alternative management program partial property tax exemption in a March 30, 1989, resolution; it is 40 years long, expiring in 2029. See Brief for Respondents part 3 at 11–13, 78 South 1st Street HDFC v. Crotty, 75 N.Y.2d 982 (1990) (No. 99) (excerpting the Board of Estimate resolution). Per the New York State Constitution, tax exemptions may be no longer than 60 years. N.Y. CONST. art. XVIII, § 2.

<sup>165</sup> See Virginia K. Smith, *Why 2017 Could Be Make-or-Break for New York’s Affordable HDFC Co-ops*, BRICK UNDERGROUND, (Jan. 12, 2017), <https://www.brickunderground.com/buy/2017-regulatory-agreement-dispute-HDFCs> (“Currently, HDFCs receive reduced tax rates via the DAMP tax cap in order to keep maintenance costs manageable for shareholders, so having this tax benefit revoked if a building doesn’t sign on could spell spiraling costs for both boards and shareholders alike—not exactly a boon to affordability.”).

coterminous with HPD's thirty-year loans.<sup>166</sup> The agreements "set forth the terms under which [HDFCs] shall be preserved and used as affordable housing providing cooperative homeownership opportunities for low-income households."<sup>167</sup> At present, HDFCs enter regulatory agreements with HPD whenever they access HPD financing, which typically occurs during the cooperative conversion and subsequent transactions in which HDFCs require financing to address their backlog of capital needs.<sup>168</sup> HPD's most recent form regulatory agreement features several provisions that safeguard HDFCs' long-term affordability. First, it supplants Article XI's terms with stricter income limits and resale restrictions than those in the law, limiting unit sales to households with earnings and assets that do not exceed a certain percentage of the metropolitan area's median for each.<sup>169</sup> Second, it mandates third-party monitoring to oversee HDFCs' compliance with income limits, conduct elections,

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<sup>166</sup> See, e.g., MANHATTAN CMTY. BD, HPD-HDFC REGULATORY AGREEMENT DRAFT 10, <https://www1.nyc.gov/html/mancb10/downloads/pdf/HPD-HDFC-Regulatory-Agreement-Draft.pdf> (last visited Feb. 11, 2022).

<sup>167</sup> *Id.* at 1.

<sup>168</sup> See, e.g., *Affordable Neighborhood Cooperative Program Term Sheet*, N.Y.C. DEP'T OF HOUS. PRES. & DEV., <https://www1.nyc.gov/assets/hpd/downloads/pdfs/services/ancp-term-sheet.pdf> (last visited Feb. 11, 2022) (describing loans for Article XI cooperatives engaged in substantial and moderate rehabilitation during cooperative conversions).

<sup>169</sup> See Bechtel, *supra* note 20, at 19 (noting that HPD regulatory agreements feature asset and income limits that are "non-existent" in Article 11). For instance, the regulatory agreement for the Affordable Neighborhood Cooperative Program, the successor program to the Tenant Interim Lease program that catalyzed many early HDFCs, stipulates that HDFC units "must be sold to households whose incomes do not exceed 120%" of New York City's area median income, which was \$128,880 for a household of three in 2021. See *Affordable Neighborhood Cooperative Program Term Sheet*, *supra* note 168; *Area Median Income*, N.Y.C. DEP'T OF HOUS. PRES. & DEV., <https://www1.nyc.gov/site/hpd/services-and-information/area-median-income.page> (last visited Feb. 11, 2022). Article XI only requires that shareholders' incomes do not exceed six times their carrying charges. See N.Y. PRIV. HOUS. FIN. LAW § 576-1b. By contrast, HPD's form regulatory agreement contemplates more stringent asset limits and income limits. See N.Y.C. DEP'T OF HOUS. PRES. AND DEV., HDFC Cooperative Regulatory Agreement Draft (Preservation Finance) 2-5 (2021) (on file with author) (defining "income limit," "asset limit," and "ineligible household"). This form served as the basis for a regulatory agreement that was used for an HDFC deal that I assisted with while interning at UHAB, which suggests that its terms are binding on this HDFC and others.

and review and approve blanket mortgages before HDFCs enter them.<sup>170</sup> Third, it mandates professional property management to collect rent and maintain HDFCs' books and records.<sup>171</sup> Fourth, it requires regular carrying cost increases and contributions to both operating and replacement reserves such that HDFCs are equipped to address issues like late rent payments or basic systems repairs.<sup>172</sup> HPD reports that of New York's 1,048 HDFCs, only 207 have active regulatory agreements.<sup>173</sup> Though regulatory agreements constrain shareholders' decision making in certain respects, undermining the community control that inspired the neighborhood housing movement, the agreements are suitable complements for Article XI.

Notably, HDFCs' regulatory agreements exhibit substantial variation due to HPD's contract-based approach to HDFCs' regulation. Instead of promulgating a coherent set of rules that "provide transparency as to the legal basis for their requirements, or the procedural basis for their decisions," HPD "has treated each building as a unique project, and it has freely made modifications to its various program documents on a building-by-building basis."<sup>174</sup> The regulatory agreements have evolved over the course of low-income cooperatives' forty-year history, with HPD revising their terms based on mayoral administrations' prerogatives, the contours of the City's various alternative management programs, and tenants' perceived leverage *ex ante*.<sup>175</sup> Many older HDFCs were never bound

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<sup>170</sup> See N.Y.C. DEP'T OF HOUS. PRES. AND DEV., *supra* note 169, at 6.

<sup>171</sup> See *id.* at 23–24.

<sup>172</sup> See *id.* at 17, 27–29.

<sup>173</sup> See MANHATTAN CMTY. BD., PRESERVING AFFORDABLE HOMEOWNERSHIP: HDFC COOPS AND OUR COMMUNITY 3, <http://www.nyc.gov/html/mancb3/downloads/calendar/2016/HDFC%20for%20CB10%20presentation.pdf> (last visited Feb. 12, 2022).

<sup>174</sup> LAWRENCE H. MCGAUGHEY, LEGAL ISSUES REGARDING HPD'S PROPOSED REGULATORY SCHEME FOR HDFCS, 3, 7, (City Bar Center for Continuing Legal Education, New York City Bar) (Westlaw 2018).

<sup>175</sup> See Bechtel, *supra* note 20, at 20 ("HPD, the Board of Estimate, and the City Council revamped the [Tenant Interim Lease alternative management] program periodically over the years, which means that establishing what period or era a building belongs to will indicate what restrictions apply and in what array of legal documents."). HDFCs formed in the late 1970s and early 1980s often did not have regulatory agreements. HPD and the tenant associations that formed HDFCs during an era of urban decay and population loss did not anticipate the need to mandate affordability of tenement apartments—their low cost was an inevitability.

by regulatory agreements or entered regulatory agreements that have long since expired.<sup>176</sup> Such HDFCs need only comply with Article XI to retain their tax exemption, even though Article XI does not impose the stricter terms found in regulatory agreements that promote the longevity of HDFCs as an enduring source of permanently affordable housing. HDFCs' patchy, paltry regulatory arrangements enable individual appropriation through market rate and cash-preferred sales. Such sales allow the low-income households of color who founded HDFCs to develop equity, but they hinder HDFCs' functioning as a commons.<sup>177</sup>

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Early HDFCs even contemplated recruiting middle income shareholders to subsidize buildings' rental income during the depths of the fiscal crisis. *See* Cohen, *supra* note 151, at 17. Further, HPD provided minimal support to the initial HDFCs, so it would have been untoward for them to bind shareholders with an onerous set of proscriptions. During cooperative conversions in the 1980s, tenants, lacking pre-development funds from the City, would "scavenge for materials" and rehabilitate properties on a shoestring budget. Cohen, *supra* note 151, at 18; *see also* URB. HOMESTEADING ASSISTANCE BD., *supra* note 127, at 2 ("Key to the Homesteading/Sweat Equity concept is that it has not required a single cent of public subsidy. All money borrowed by the Homesteaders is being returned to the City at a slightly greater interest than the City's own borrowing rate. Even the tax abatements represent no loss, since abandoned buildings pay no taxes to begin with."). HDFCs formed in the mid-1980s as the city's economy began to revive, especially those in gentrifying neighborhoods, entered security agreements requiring them to share profits with the city. *See* Bechtel, *supra* note 20, at 20. HDFCs formed in the mid-2000s onward face the strictest terms, which are designed to preserve HDFCs as a long-term source of affordable housing. *See id.*

<sup>176</sup> *See* Bechtel, *supra* note 20, at 20 (describing HDFCs formed between 1980 and 1987, which were regulated with a 10-year deed restriction instead of the 40-year regulatory agreement that attaches to HPD's current loan programs).

<sup>177</sup> *See generally* SHEILA FOSTER, LAW AND THE URBAN COMMONS (2019). Foster observes that unlike Ostrom's unregulated, natural resources commons, the "urban commons" is governed via an admixture of "informal social norms and user-imposed sanctions as well as formal agreements, legislation, or policies." *Id.* at 3. HDFCs' ownership structures—inculcated in their certificates of incorporation, bylaws, and proprietary leases—are not sufficient bulwarks to sustain them for the long-term as a partially decommodified alternative in New York's tight housing market, where low-rent units are in high demand but low supply, and HDFCs' low-income shareholders are eager to generate wealth. It is possible that HDFCs would thus benefit from formal HPD oversight via the implementation of well-crafted regulatory agreements, which can empower shareholders to "work cooperatively with government agencies and public officials to design, enforce and monitor the rules needed to manage shared resources." *Id.* at 3.

#### 4. Ownership Structure

Title to an HDFC's building vests in its cooperative corporation.<sup>178</sup> Three key documents determine the "relationship between the shareholder/lessees of a cooperative corporation and the corporation": the certificate of incorporation, the bylaws, and the proprietary lease.<sup>179</sup> The certificate of incorporation births the cooperative corporation and institutes the inurement prohibition.<sup>180</sup> The bylaws establish the procedures for HDFCs' governance such as voting, calling and facilitating meetings, conducting board business, and managing finances.<sup>181</sup> The proprietary lease covers shareholders' use and occupancy of their units.<sup>182</sup> The certificate of incorporation, bylaws, and proprietary lease are often intertwined, such that in a cooperative, "neither the corporate nor the leasehold attributes of the relationship can be viewed in isolation from one another."<sup>183</sup> The documents must be read as one, along with any appurtenant regulatory agreements.<sup>184</sup> Together, they establish HDFCs' ownership structure, defining shareholders' interests, rights, duties, and liabilities.<sup>185</sup>

HDFCs' ownership structure ingrains permanent affordability, participation, and community stewardship.<sup>186</sup> For permanent affordability, HDFCs rely on "flip taxes" to retain equity from each unit

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<sup>178</sup> See *supra* note 86 and accompanying text.

<sup>179</sup> *Fe Bland v. Two Trees Management Co.*, 66 N.Y.2d 556, 563 (1985).

<sup>180</sup> See, e.g., *Housing Development Fund Corporation Boilerplate Certificate of Incorporation*, N.Y. HOMES & CMTY. RENEWAL, [https://hcr.ny.gov/system/files/documents/2020/12/hdfc-cert-of-incorporation-template\\_december2020.doc](https://hcr.ny.gov/system/files/documents/2020/12/hdfc-cert-of-incorporation-template_december2020.doc) (last visited Feb. 10, 2022).

<sup>181</sup> See, e.g., *Sample Bylaws*, URB. HOMESTEADING ASSISTANCE BD., <https://www.uhab.org/resource/sample-by-laws> (last visited Feb. 10, 2022).

<sup>182</sup> See, e.g., *Sample Proprietary Lease*, URB. HOMESTEADING ASSISTANCE BD., <https://www.uhab.org/resource/sample-proprietary-lease> (last visited Feb. 10, 2022).

<sup>183</sup> *Fe Bland v. Two Trees Management Co.*, 66 N.Y.2d at 563.

<sup>184</sup> See *id.*

<sup>185</sup> See Edward P. Scott, *The Cooperative Apartment in Government-Assisted Low-Middle Income Housing*, 111 U. PA. L. REV. 638, 640 (1963).

<sup>186</sup> See Kennedy, *supra* note 24, at 87.

sale;<sup>187</sup> income limits and resale restrictions in their deeds and organizational documents; a regulatory agreement and HPD oversight to enforce the restrictions; and the various Article XI tax exemptions.<sup>188</sup> For participation, they rely on both bylaws<sup>189</sup> that empower residents to conduct business together in meetings, board elections, and special committees, and on routine shareholder voting,<sup>190</sup> which charts a democratic course for HDFCs' operations. For community stewardship, HDFC shareholders rely on centralized boards to harness the "stability offered by community control"<sup>191</sup> and execute proprietary leases with ninety-nine-year terms that encourage residents to stay in place and develop an enduring stake in their neighborhoods.<sup>192</sup> With these legal levers, HDFC shareholders have held the line against redlining, austerity, and neglect and ultimately demonstrated that community ownership is feasible and sustainable at scale. HDFCs' architects—their early shareholders and

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<sup>187</sup> See, e.g., *Murzinski v. 566-568 W. 159th Street Hous. Dev. Fund Corp.*, 2008 N.Y. Misc. LEXIS 8612 1, at \*4 (Sup. Ct., Jan. 29, 2008) (describing a flip tax imposed between 1984 and 1992, in which the cooperative corporation would retain at least 50% of selling tenants' unit sales price "as a reserve for capital and operating expenses"). Subsidy retention via flip taxes enables HDFCs to employ public dollars in a manner that cyclically underwrites the city's cooperative housing stock.

<sup>188</sup> See, e.g., *Arthur v. 1809-15 7th Ave. Hous. Dev. Fund Corp.*, 2021 N.Y. Misc. LEXIS 1723 1, at \*7 (Sup. Ct., Apr. 9, 2021) (examining an HPD regulatory agreement encumbering the HDFC for a 30-year "resale period" in which HPD approval is required before the building can be sold or mortgaged).

<sup>189</sup> See, e.g., *Green v. Cristancho*, 2018 N.Y. Misc. LEXIS 3422 1, at \*1–9 (Sup. Ct., Aug. 2, 2018) (analyzing a notice of special meeting and good standing for board election matter and foregrounding bylaws as an HDFC's procedural rules of the road).

<sup>190</sup> See, e.g., *In re Thakur v. 210 Forsyth St. Hous. Dev. Fund Corp.*, 844 N.Y.S.2d 686, 687, 689 (2007) (reestablishing "one member—one vote" at an HDFC organized under the Not-for-Profit Corporations Law such that each of the four resident "families have equal voice in the operation of the building in which they reside.").

<sup>191</sup> *Levandusky v. One Fifth Ave. Apartment Corp.*, 75 N.Y.2d 530, 533, 536 (1990) (describing New York City cooperatives as "a quasi-government—'a little democratic sub society of necessity'" where lessees forgo certain rights within owners' usual bundle in exchange for the economic and social benefits of cooperative living).

<sup>192</sup> See Mallin, *supra* note 61, at 29–30.



champions within the neighborhood housing movement—developed them for this express purpose.

### C. HDFCs' Successes

HDFCs' successes are threefold. First, these low-income housing cooperatives advanced racial justice. They improved Black and Latinx households' living conditions, disrupting patterns of deferred maintenance that eroded units' habitability and threatened to permanently remove affordable units from the city's housing stock. HDFCs addressed residents' immediate habitability concerns through sweat equity rehabilitation.<sup>193</sup> HDFCs also instituted a fix for future habitability issues—their board structure and shareholder voting ensured that instead of seeking to improve housing quality by appealing to private landlords' better nature or by waging rent strikes and "repair and deduct" campaigns, residents could simply determine for themselves when repairs would be made.<sup>194</sup> An early 1990s study of New York's low-income housing cooperatives found that cooperative shareholders rated their housing quality and safety higher than peers who lived in formerly abandoned, privately managed buildings.<sup>195</sup> These data indicate that sweat equity participants were able to provide dignified homes for themselves and their neighbors during an era when structural constraints made such housing a rarity for people of color in areas of concentrated poverty. In managing HDFCs themselves, disenfranchised populations—young men involved in the criminal legal system, single mothers who relied on cash assistance—moved from margin to center, took control of their environments, and became agents of change. The people of color who founded HDFCs thus experienced their cooperatives as ennobling institutions, remedies for the urban decay that occurred in the wake of organized abandonment.

Second, HDFCs piloted community ownership, gradually uncovering critical preconditions for achieving community ownership

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<sup>193</sup> See Lawson, *supra* note 118, at 70.

<sup>194</sup> Diamond, *supra* note 17, at 289–95 (describing sweat equity renovation as an alternative to forming tenant unions, hosting rent strikes, and bringing suit under housing codes—tenants' other options for seeking redress and upgrading and preserving low-cost housing). See also Lawson, *supra* note 118, at 65.

<sup>195</sup> See Saegert & Benítez *supra* note 145, at 430 (citing a 1998 survey comparing residents in City-, nonprofit-, and privately-managed buildings that were formerly surrendered to the City as in rem housing).

at scale. Long-lasting HDFCs benefit from the institutional design elements that ingrain permanent affordability, participation, and community stewardship, as well as from several external factors. A well-organized tenant base, typically one that engaged in activism against a departing, malfeasant landlord, is best positioned to join forces in navigating the legal complications and dilatory bureaucratic processes that cooperative conversions entail.<sup>196</sup> Technical assistance on cooperative governance and property management lays the groundwork for high functioning boards, ensuring that they are prepared to play their roles and that their shareholders can hold them accountable if they do not.<sup>197</sup> A constellation of deep subsidies—including capital subsidies to facilitate acquisition and rehabilitation and operating subsidies to safeguard rent rolls—are a necessity for closing the gap between low-income households' finances and expensive metropolitan areas' costs of living.<sup>198</sup> Regulatory oversight to compel boards to enforce income limits and resale restrictions protects the cooperative housing stock from “going private” via attrition.<sup>199</sup> HDFCs demonstrate that tenant mobilization, technical assistance, deep subsidies, and regulatory oversight promote the longevity of community-owned projects. This then suggests that HDFCs' local and state authorizations and related programmatic efforts are not mere anachronisms. They point to a wholesale framework for community ownership in diverse contexts.

Third, HDFCs successfully contested markets, which, as explained in Part I, have a historic and present bent toward antagonizing people of color. The “dead-end real estate market” of 1970s New York stranded Black and Latinx New Yorkers in crumbling, unsafe

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<sup>196</sup> Diamond, *supra* note 17, at 298 (explaining that “In some instances, tenants may have already found the more traditional remedies [for pursuing repairs] lacking. In a long struggle over conditions, such a group may become highly organized and unified, and the experience they have gained in past attempts can prove tremendously valuable.”).

<sup>197</sup> See Lawson, *supra* note 118, at 78 (observing that low-income housing cooperatives that were founded before 1976 and still operational in the early 1990s typically benefited from management training).

<sup>198</sup> See Sally L. Stevens, *Low Income Co-Ops: A Solution to Abandonment*, 17 N.Y.L.F. 148, 156 (1971) (stating that “essential to any low-income cooperative program would be the provision of some government subsidy”).

<sup>199</sup> Andy Reicher, *The Case for New Regs for the City's Affordable Co-ops*, CITY LIMITS (Mar. 21, 2017), <https://citylimits.org/2017/03/21/cityviews-the-case-for-new-regs-for-the-citys-affordable-co-ops>.

buildings, surrendering them to dilapidation because their buildings' upkeep was no longer a profitable possibility.<sup>200</sup> The white and capital flight that precipitated the bottoming out of New York's real estate market is but one expression of a broader pattern of New Deal exclusion, predatory inclusion, and, more generally, markets' racial differentiation.<sup>201</sup> To contest the impediments they faced, New Yorkers produced and sustained HDFCs, a partially decommodified housing tenure in which shared ownership was earned through volunteer construction.<sup>202</sup> In the late 1990s, an HDFC shareholder observed that HDFCs "are intended to be the permanent homes for the self-supporting working poor and low- to moderate-income families . . . They are not intended to be investment property or for market speculation."<sup>203</sup> HDFCs were thus developed as permanently affordable, democratically controlled housing in opposition to organized abandonment. HDFCs lend credibility to the notion of diverse economies—they suggest that new, non-market legal entity structures might have the wherewithal to supplant market mechanisms and the racial differentiation that pervades them. In dreaming up and building out a network of HDFCs, low-income communities of color demonstrated alternative economic relations to confer their collective survival.

Commentators have questioned whether the typical boons of permanent affordable housing are among HDFCs' primary

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<sup>200</sup> Oscar Perry Abello, *Help Is on the Way for Low-Income Co-op Buildings in NYC*, NEXT CITY (Mar. 1, 2017), <https://nextcity.org/urbanist-news/preserving-nyc-affordable-housing-habitat-cdfi-loan>.

<sup>201</sup> See *supra* notes 49 and 50 and accompanying text.

<sup>202</sup> See Desiree Fields, *Contesting the Financialization of Urban Space: Community Organizations and the Struggle to Preserve Affordable Rental Housing in New York City*, 37 J. URBAN AFFAIRS 144, 144 (2014). Fields provides a useful, working definition of contestation as resistance to neoliberal urbanism. She writes:

In large part, the contemporary infrastructure of urban community organizations is rooted in the social movements of the 1960s and the urban struggles of the 1970s, when cities faced a crisis of disinvestment and capital flight. Today urban struggles revolve more around claiming and preserving space for low-income residents in a context where urban land and housing are central nodes in global capital flows.

*Id.*

<sup>203</sup> *Rules on Occupancy in a Co-op*, N.Y. TIMES (Jul. 26, 1998), <https://www.nytimes.com/1998/07/26/realestate/rules-on-occupancy-in-a-co-op.html>.

successes.<sup>204</sup> When government stabilizes a family's housing costs through a local rent control ordinance or a fixed-rate, amortized, federally insured mortgage, there is an expectation that the family will have the wherewithal to invest in children's education, start a small business, or age in place.<sup>205</sup> When the subsidy promotes homeownership, government's expectations are heightened—households with such subsidies should be empowered to build intergenerational wealth.<sup>206</sup> Data suggest that many HDFC shareholders have achieved the economic security and wealth creation that state actors have in mind.<sup>207</sup> However, other shareholders reside in buildings that have returned to the dilapidation and tax arrears that necessitated tenant takeover in the first instance.<sup>208</sup> Still other HDFC

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<sup>204</sup> See Caleb Melby, *New York's Real Estate Tax Breaks Are Now a Rich-Kid Loophole*, BLOOMBERG BUSINESSWEEK (Oct. 8, 2021), <https://www.bloomberg.com/graphics/2021-nyc-taxes-hdfc-coops> (lambasting HDFCs' as a tax giveaway for "rich kids" due to the yet-to-be-quantified attrition of units from the program via market rate sales).

<sup>205</sup> See generally Jenny Schuetz, *Nine Rules for Better Housing Policy*, BROOKINGS INST. (May 2, 2018), <https://www.brookings.edu/blog/the-avenue/2018/05/02/nine-rules-for-better-housing-policy> (noting that policymakers view wealth-building as a central housing policy goal).

<sup>206</sup> See *id.*

<sup>207</sup> Recent data indicate that about 90% of HDFC units are owned by their original purchaser and about 84% of HDFC units that have been sold were purchased for \$500,000 or less. See Andrew Reicher, *CityViews: The Case for New Regs for the City's Affordable Co-ops*, CITY LIMITS (Mar. 21, 2017), <https://citylimits.org/2017/03/21/cityviews-the-case-for-new-regs-for-the-citys-affordable-co-ops>; GEOFFREY PROPHETER, MEMORANDUM: COST ESTIMATES FOR ALTERNATIVE TAX EXEMPTIONS FOR SOME HDFC COOPS 1 (2015). If the majority of HDFCs are owned by original shareholders, who were decidedly low-income at the time of the program's founding, it stands to reason that HDFC shareholders have created wealth by coming to own their own apartments, even if their unit value is capped by resale restrictions.

<sup>208</sup> See Will Swarts, *Lost Wealth: Low-Income New York City Homeowners are Losing*, AL JAZEERA (May 29, 2019), <https://www.aljazeera.com/features/2019/5/29/lost-wealth-low-income-new-york-city-homeowners-are-losing> ("Though they may be valuable real estate, not all of New York City's HDFC co-ops are well-managed. And as was the case in the 1970s and 80s, some have amassed hundreds of thousands of dollars in unpaid bills"); Michael Gartland, *Shareholders in Harlem Co-op Could Lose Homes Over Debt They Say They Don't Owe*, N.Y. DAILY NEWS (Oct. 7, 2019), <http://www.nydailynews.com/new-york/ny-hdfc-harlem-foreclosure-hpd-maverick-20191007-6avyjc7b5rdpnosno-kuhua42mq-story.html> (showing "decrepit" conditions in a Harlem HDFC).

shareholders are higher-income newcomers to their neighborhoods, a far cry from the low-income people of color who founded HDFCs during the geopolitical moment at which New York City reached its nadir.<sup>209</sup> These are legitimate concerns, which, as detailed below, often follow from HDFCs' legal idiosyncrasies.

#### D. HDFCs' Legal Idiosyncrasies

An interlocking set of organizational documents gives life to HDFCs' ownership structure—the certificates of incorporation, by-laws, and proprietary leases prescribing HDFCs' management and operations as housing for low-income New Yorkers. Article XI and varied HPD regulatory agreements enact the regulatory arrangements for New York's HDFCs, further circumscribing their management and operations. HDFCs are unique in that their ownership structure centers tenant management, a form of non-expert, interested leadership that is uncommon in corporate governance.<sup>210</sup> HDFCs' building-by-building regulatory arrangements also make them unique, given the uniformity and hierarchy that typically colors regulation.<sup>211</sup> HDFCs are regulated pursuant to loan terms, and each HDFC's financing is “packaged differently,” meaning each HDFC must comply with a different set of negotiated rules ranging from lax to strict in their conception.<sup>212</sup> These distinguishing aspects

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<sup>209</sup> See Melby, *supra* note 204.

<sup>210</sup> Corporate boards typically favor directors who are disinterested, independent firm outsiders. See Donald C. Clarke, *Three Concepts of the Independent Director*, 32 DEL. J. CORP. L. 73, 73–82 (2007) (describing outsiders' monitoring, consultative, and regulatory role on boards). In contrast, HDFC board members, residents of the building that is the corporation's sole asset, are inherently interested in the board's business.

<sup>211</sup> See Elizabeth Elia, *Perpetual Affordability Covenants: Can These Land Use Tools Solve the Affordable Housing Crisis?*, 124 PENN ST. L. REV. 57, 83–87 (2019). In her critique, Elia contrasts the uniform regulatory framework and due process protections of zoning enabling acts with affordability covenants, like HDFC regulatory agreements, which “arise under contract, by mutual consent of the contracting parties.” *Id.* She writes, “When a municipality uses private, negotiated agreements, such as covenants, to allocate public resources or to issue conditional zoning or permitting approvals, it can be difficult to ascertain whether the municipality is exercising its contracting power or its police power.” *Id.* at 86.

<sup>212</sup> Cohen, *supra* note 151, at 16; see, e.g., the contrasting regulatory arrangements of the 3681 Broadway HDFC and the 501 West 143rd HDFC, two HDFCs discussed in Part II of the Note. Both HDFCs entered regulatory agreements with HPD requiring a 60-40 profit split when units are sold, with HPD retaining 40%

of HDFCs, referred to herein as legal idiosyncrasies, are implicated in the challenges HDFCs have faced in recent years. While HDFCs are idiosyncratic in the law, it is likely that newly devised, community-owned projects will also center self-governance and rely on government financing. HDFCs' idiosyncrasies and their related complications are thus instructive in the COVID-19 era as new forms of community ownership emerge.

### 1. Regulatory and Contract Law

Under Article XI, HPD is designated as HDFCs' "supervising agency."<sup>213</sup> Administrative agencies like HPD typically employ

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of the proceeds. *See* Security Agreement between 3681 Broadway Hous. Dev. Fund Corp. and the N.Y.C. Dep't of Hous. Pres. and Dev. § 6 (Dec. 14, 1993), <https://a836-acris.nyc.gov/DS/DocumentSearch/BBL> (on file with author) [hereinafter 3681 Broadway Security Agreement]; 60/40 Security Agreement between 501 West 143 Street Hous. Dev. Fund Corp. and the Dep't of Hous. Pres. and Dev. § 6 (June 26, 1990), <https://a836-acris.nyc.gov/DS/DocumentSearch/BBL> (on file with author). However, 501 West 143rd is subject to stricter income limits due to the funding stream that capitalized its cooperative conversion. At its founding in 1990, the 501 West 143 HDFC was financed with federal Rental Rehabilitation Program funds pursuant to Section 17 of the U.S. Housing Act of 1937. *See* Agreement between 501 West 143 Street Hous. Dev. Fund Corp. and the Dep't of Hous. Pres. and Dev. 1–2 (June 26, 1990), <https://a836-acris.nyc.gov/DS/DocumentSearch/BBL> (on file with author). That funding required the recording of a Section 17 Agreement with affordability covenants stipulating that upon completion of the rehabilitation, 70% of the HDFC's residents would "be lower income families or persons as defined in 24 CFR 813.102," applying the area median income-based income limits of the federal Section 8 Housing Choice Voucher program. *Id.* This language also appears in the 501 West 143rd Street HDFC's deed. *See* Deed between 501 West 143 Street Hous. Dev. Fund Corp. and N.Y.C. 3 (June 26, 1990), <https://a836-acris.nyc.gov/DS/DocumentSearch/BBL> (on file with author). The 3681 Broadway HDFC did not make use of Rental Rehabilitation Program or any other program requiring recorded affordability covenants, so its income limits are defined only by Article XI, which sets eligible incomes at six times the carrying charges, a rather lax standard. *See* 3681 Broadway Security Agreement, *supra*; N.Y. PRIV. HOUS. FIN. LAW § 576-1b.

<sup>213</sup> N.Y. PRIV. HOUS. FIN. LAW § 572-14; see also N.Y.C. Charter 1802(6)(d), which empowers HPD to "represent the city in carrying out the provisions of the private housing finance law" and "exercise the powers, rights and duties vested" in supervising agencies. *Cf.* N.Y. GEN. BUS. LAW § 352-eeee. Pursuant to its authority under the Martin Act, the Attorney General of the State of New York regulates the sale of real estate securities, including interests in cooperative housing. *See id.* The Attorney General's Office manages the incorporation of HDFCs and the sale of HDFC shares, but their oversight over HDFCs' operations is limited. *See id.*

unilateral rulemaking processes to oversee the industry and refine the body of regulations in their charge. These processes often include notice and comment, in which regulated entities may review and provide feedback on a draft rule, and adjudication, in which the agency reshapes its body of regulations by ruling on a single entity's case.<sup>214</sup> While notice and comment enables regulated entities to lobby, and adjudication enables regulated entities to present arguments, neither process intends to engender parity between the regulator and the regulatee. Traditional rulemaking processes are centered on hierarchy and standardization. This, in turn, promotes consistency, transparency, and accountability.<sup>215</sup>

In its regulation of HDFCs, HPD has forgone traditional rulemaking for a contract-based regime. The agency has never published regulations for the low-income housing cooperatives under its care.<sup>216</sup> Instead of promulgating a single set of regulations to which all HDFCs must adhere, HPD, at its discretion, has entered into site-specific regulatory agreements with individual HDFCs, exchanging below-market-rate loans for restrictions that maintain HDFCs' affordability.<sup>217</sup> To be sure, a contractarian approach is not novel in affordable housing and community development law.<sup>218</sup> However, HDFCs are distinguished by both their lack of a code of regulations and the degree of variation within their regulatory arrangements.<sup>219</sup>

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<sup>214</sup> See Michael P. Vandenbergh, *The Private Life of Public Law*, 105 COLUM. L. REV. 2029, 2032 (2005) (characterizing traditional rulemaking as either adjudicatory or notice and comment).

<sup>215</sup> See DANIEL P. SELMI, LAND USE REGULATION BY CONTRACT, LOYOLA-LA LEGAL STUDIES PAPER No. 2009-5, 22, 26 (2009).

<sup>216</sup> See Bechtel, *supra* note 20, at 20 (noting that "HPD has not promulgated regulations to implement Article II of the PHFL").

<sup>217</sup> See *id.*

<sup>218</sup> See Elia, *supra* note 211, at 60–61 (noting the ubiquity of affordability covenants).

<sup>219</sup> See Bechtel, *supra* note 20, at 20 ("HPD has not promulgated regulations to implement Article 11 of the PHFL. Instead, HPD has relied 'almost exclusively on project-specific documents rather than general regulations . . . One effect of two and a half decades of regulation by contract, involving hundreds of individual buildings, has thus been a lack of clarity surrounding the legal requirements applicable to HDFC cooperatives.'").

Since the mid-1980s, HPD has opted in certain instances to require shareholders incorporating HDFCs to record regulatory agreements against their buildings.<sup>220</sup> The stringency of the agreements depended upon the City's policy priorities and the City's perception of market conditions and tenants' leverage. HPD debuted its regulatory agreements with HDFCs in revitalizing neighborhoods like Clinton and Chelsea as the fiscal crisis waned.<sup>221</sup> These HDFCs agreed to revenue sharing flip taxes that enabled the City to retain a percentage of the HDFCs' unit sales proceeds, capturing value from burgeoning neighborhood change.<sup>222</sup> HDFCs founded after 2003 agreed to stricter agreements that mandate income limits and resale restrictions, reserve contributions, and external monitoring and management.<sup>223</sup> After regulatory agreements are recorded, HDFC boards are expected to implement them—selecting income eligible shareholders, selling shares for affordable prices, and sharing sale proceeds with HPD—with few City audits.<sup>224</sup> Once the initial agreements expire, HDFCs are bound by regulations only if they agree to them as a condition for new financing.<sup>225</sup> HPD's regulation by

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<sup>220</sup> See Bechtel, *supra* note 21, at 20–21 (describing the various form regulatory and security agreements HDFCs have executed over the years).

<sup>221</sup> See Holtzman, *supra* note 113, at 48–52 (describing the Mayor Ed Koch administration's swift disposition of distressed multifamily buildings and their prioritization of recouping profits where possible); see also Michael A. Stegman, *The Special Problem of In Rem Housing*, in HOUSING FINANCE AND PUBLIC POLICY: CASES AND SUPPLEMENTARY READINGS 107–08 (1986) (describing the development of the 60-40 Security Agreement in the mid-1980s and the debate over homesteaders in reviving areas deriving a windfall from the City's low cost building sales).

<sup>222</sup> See Stegman, *supra* note 221, at 107–08.

<sup>223</sup> See Bechtel, *supra* note 20, at 21.

<sup>224</sup> See, e.g., *Kuhn v. Brown*, 2014 N.Y. Misc. LEXIS 1631, at \*2 (Sup. Ct. Apr. 4, 2014) (interpreting an HDFC security agreement with minimal supervision, finding that “HDFC agreed to pay City 40 percent of its profits from the sale of any shares in the building, and City agreed to audit HDFC no more than once every two years, waivable under certain circumstances”).

<sup>225</sup> Most HDFCs are incorporated under the New York Business Corporations Law; as such, any major decision, like the adoption of a new regulatory agreement, must be approved via a majority board or membership vote, depending on the particulars of the HDFC's bylaws and certificate of incorporation. See N.Y. BUS. CORP. § 614-b. Further, when HPD tried to develop a routine regulatory scheme for the HDFCs in 2016, they did so by proffering a deeper tax exemption in exchange for stricter regulations. Highlighting HDFCs' decision making autonomy



contract approach replaces typical rulemaking's hierarchy and standardization with parity, variability, and vested rights.<sup>226</sup>

The use of regulation by contract is apparent in HDFCs' case law. The courts characterize HDFCs' regulatory arrangements as negotiations and interpret diametric regulatory agreements for HDFCs founded mere years and blocks apart. In *White v. New York City Department of Housing Preservation & Development*, the court indicated that the HDFC in question, the 50 West 112th Street HDFC, which took title to its building in 1996, exchanged income and resale caps "in return" for their Article XI property tax exemption.<sup>227</sup> In *Kuhn v. Brown*, the court notes that the 501 West 143rd Street HDFC, which took title to its building in 1990, traded less frequent audits for a 60-40 split of sales profits.<sup>228</sup> These HDFCs' regulatory arrangements are quite different. The 143rd Street HDFC must comply with an agreement stipulating that the City has a security interest in its building and is entitled to 40 percent of its shareholders' sale proceeds.<sup>229</sup> The 112th Street HDFC does not have a regulatory agreement with HPD—public records suggest the shareholders never entered one—allowing its board to pursue "lucrative sales" in derogation of HDFCs' legislative purpose with "no

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during the 2016 negotiations, HPD stated that "HPD will ask the Council to give Coop HDFCs at least a year, after enactment [of the deeper tax exemption], before HDFCs will be asked to make a decision to sign the agreement." MANHATTAN CMTY. BD., *supra* note 173, at 10.

<sup>226</sup> See Selmi, *supra* note 215, at 2–7 (indicating that as a public function, regulatory law generally advances democratic norms, but regulation by contract melds public and private law, incorporating private law's non-hierarchical relationships and bargaining into the regulatory process).

<sup>227</sup> See *White v. N.Y.C. Dep't of Hous. Pres. & Dev.*, 2018 N.Y. Misc. LEXIS 4393, at \*2 (Sup. Ct. Oct. 2, 2018).

<sup>228</sup> See *Kuhn*, 2014 N.Y. Misc. LEXIS 1631 at \*1–2. The court states:

[Plaintiff] alleges that on or about June 26, 1990, City sold the building located at 501 West 143rd Street in Manhattan to third-party defendant 501 West 143 Street Housing Development Fund Corporation (HDFC) for \$9,500. The parties thereupon entered into a security agreement whereby HDFC agreed to pay City 40 percent of its profits from the sale of any shares in the building, and City agreed to audit HDFC no more than once every two years, waivable under certain circumstances.

*Id.*

<sup>229</sup> See *id.* at \*3.

practical oversight.”<sup>230</sup> Since the 112th Street HDFC does not have a regulatory agreement, they need only comply with Article XI to maintain the partial property tax exemption that keeps their units affordable. However, the regulatory arrangement that Article XI instills on its own is meager, merely requiring the HDFC to adhere to an antiquated income limit when recruiting new shareholders.<sup>231</sup> While the 143rd Street HDFC has a regulatory arrangement that encourages subsidy retention through public oversight, the 112th Street HDFC does not, enabling its shareholders to sell their units for whatever the market will bear, “[reaping] a huge windfall at the City’s expense.”<sup>232</sup>

Regulation by contract has deep implications for HDFCs’ long-term viability. Regulations can give force to the permanent affordability, participation, and community stewardship that are low-income cooperatives’ hallmark. The income limits and resale restrictions within HDFCs’ regulatory agreements enforce the charitable purpose and inurement prohibition in Article XI, which distinguish HDFCs from market rate cooperatives.<sup>233</sup> HDFC bylaw terms specifying how shareholders will collaborate in the work of managing the HDFC may also be bolstered in regulatory agreements, particularly those that require third-party monitoring. Further, regulatory agreements can require reserve contributions and external management to promote fiscal solvency, guarding against the mismanagement that beleaguers a subset of HDFCs. HPD’s recent regulatory agreements, which bind just one-fifth of New York’s HDFCs, require each of these policies for safeguarding HDFCs for the long-term—income limits and resale restrictions, reserve contributions, and external monitoring and management.<sup>234</sup> Yet the regulation by contract approach makes it seemingly impossible for HPD to unilaterally mandate the policies within their latest

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<sup>230</sup> *White*, 2018 N.Y. Misc. LEXIS 4393 at \*13. Public records suggest that the HDFC did not record a regulatory or security agreement after taking title to the property. See AUTOMATED CITY REGISTER INFORMATION SYSTEM, <https://a836-acris.nyc.gov/DS/DocumentSearch/BBL> (last visited Nov. 21, 2021).

<sup>231</sup> See Robbins, *supra* note 163; N.Y. PRIV. HOUS. FIN. LAW §§ 576-1a, 576-1b.

<sup>232</sup> Holtzman, *supra* note 113, at 50.

<sup>233</sup> See *supra* notes 140 and 141.

<sup>234</sup> See MANHATTAN CMTY. BD., *supra* note 173, at 12, 14.

regulatory agreements. Because of their parity with HDFC shareholders, HPD has faced difficulty in issuing correctives that would adapt HDFCs to changing economic conditions, streamline and optimize the varying use restrictions that govern the city's one thousand HDFCs, or institute stricter terms than the City could leverage when Local Law 45 impelled the swift disposition of the City's ballooning residential portfolio.<sup>235</sup>

While agencies engaged in traditional rulemaking have the capacity to revise their regulatory arrangements with proposed rules or even informal guidance like handbooks and memoranda, a revision to HDFCs' regulatory agreements necessarily entails renegotiation. Unilateral action to revise HDFCs' regulatory agreements would abrogate shareholders' vested rights as contracting parties, causing public uproar, or even a regulatory takings challenge.<sup>236</sup> If HPD is to revise HDFCs' regulatory arrangements to safeguard HDFCs for the long term, the agency must strike a bargain with shareholders in exchange for ongoing subsidies, achieving a mutually beneficial result.

## 2. Corporate Law

HDFCs subvert corporate law norms. Corporations, manned by disinterested, expert board members and passive investor shareholders, are typically oriented toward the singular purpose of profit generation.<sup>237</sup> HDFCs, however, were founded during a moment when socio-political forces made landlordism for profit impossible.<sup>238</sup> HDFCs therefore do not seek to capitalize on the machinations of the market, but rather, to withstand them. Since an HDFC's board members reside in the building that is the corporation's sole holding,

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<sup>235</sup> See Abigail Savitch-Lew, Annalisa Ramnarain, & Christian Vasquez, *City Pushes to Regulate Low-Income Coops Amid Some Shareholders' Opposition*, CITY LIMITS (Feb. 24, 2017), <https://citylimits.org/2017/02/24/city-pushes-to-regulate-low-income-coops-amid-some-shareholders-opposition>.

<sup>236</sup> See Nestor M. Davidson, *Relational Contracts in the Privatization of Social Welfare: The Case of Housing*, 24 YALE L. & POL'Y REV. 263, 291–92 (2006) (citing *Cienega Gardens v. U.S.*, 331 F.3d 1319, 1337 (Fed. Cir. 2003) and noting that the retroactive revision of a contractual right to prepay for loans in affordable housing transactions violates the Fifth Amendment Due Process Clause).

<sup>237</sup> See Louis, *supra* note 25, at 82 (noting the assumption in corporate law that corporations exist to generate wealth).

<sup>238</sup> See Schreiber, *supra* note 17, at 187–88.

they are inherently interested and unpassive, having an enduring stake in the corporation's operations.<sup>239</sup> The corporation—purchased with neighbors' sweat equity, encumbered by a blanket mortgage that neighbors take out and pay down together, and managed through neighbors' collective effort—is not merely a “nexus of contracts,” but something more meaningful, a structure that seeks stability through solidarity.<sup>240</sup>

HDFCs' distinct corporate form, with its non-market orientation, engaged shareholders, and interested, non-expert directors, is vulnerable to mismanagement. Without board members' usual subject matter and technical expertise, HDFC boards often struggle with fundamental corporate governance and property management functions.<sup>241</sup> Further complicating matters are the inherent tensions of HDFCs “as both home for and business operated by its low-income shareholder-residents.”<sup>242</sup> Board members often struggle to both balance their books and to compromise with shareholders whose low wages cannot bear additional rent increases even when those rent increases are needed to make building repairs and pay municipal fees.<sup>243</sup> Moreover, the usual corporate bulwarks for

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<sup>239</sup> See Louis, *supra* note 25, at 113 (contrasting HDFC shareholders with typical corporate shareholders, reasoning that HDFC shareholders “have a stronger interest in controlling internal corporate affairs than their investment counterparts: the interest in preserving their homes”).

<sup>240</sup> *Id.* at 98. The nexus of contracts theory favors the “contractarian atomization of the corporation,” while HDFCs and other entities managed via progressive corporate governance adopt a relational, solidaristic understanding of the firm.

<sup>241</sup> See Naomi Cohen, *When Boards Go Awry, Anything Goes in Affordable Co-Ops*, COLUM. DAILY SPECTATOR (Nov. 21, 2013), <https://naomicohen.xyz/2013/11/28/when-boards-go-awry-anything-goes-in-affordable-co-ops>.

<sup>242</sup> Jennie O'Flanagan, *Who Should Fix the Sink?: Addressing Maintenance and Repairs in Limited Equity Cooperatives*, in *THE PUBLIC NATURE OF PRIVATE PROPERTY* 153, 155 (Robin Paul Malloy & Michael Diamond, eds. 2011).

<sup>243</sup> See Lawson, *supra* note 118, at 82. Lawson notes that

Because of the financial squeeze felt by most co-op residents, they frequently lacked the collective will to raise carrying charges as needed—and in a co-op this was their decision. It was not surprising, then, once they were established and had responsibility for setting their own charges, that many of the co-ops ignored the analyses of their finances and . . . allowed rent levels to lag . . . Lagging rents occurred in spite of mounting problems with tax and debt service payments.

*Id.*; see also Braconi, *supra* note 153, at 105 (noting the “chronic unwillingness of tenant-comprised co-op boards to implement sufficient rent increases”).

promoting careful diligence and preventing self-dealing, such as committees for addressing key issues and auditing the corporation's finances, are not built into low-income housing cooperatives' ownership structure.<sup>244</sup> Checks from "sophisticated" directors or officers with expertise in corporate governance or property management are also typically unavailable in HDFCs.<sup>245</sup> HDFCs' self-governance instills participation and community stewardship, but it simultaneously provides few fail-safes for unprepared or unscrupulous actors. The complexities of self-governance can result in fiscal distress. The City estimates that one-third of New York City's HDFCs are at risk of foreclosure due to unpaid property tax and water and sewer charges.<sup>246</sup>

HDFCs' ownership structure is distinct from that utilized in other community-owned real estate models. Contrast HDFCs with CLTs. Resident-shareholders comprise HDFC boards—there are neither external, nor expert voices to contribute to the corporate governance or property management of HDFC buildings. Tenant training and public oversight could bolster HDFC boards, instilling the knowhow and accountability favored under corporate law, yet HPD's oversight is variable and tenant associations report that HPD's trainings are faulty.<sup>247</sup> Conversely, CLT boards feature equal

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<sup>244</sup> See *Sample Bylaws*, *supra* note 181 (note that UHAB's model HDFC bylaws do not designate a committee structure as corporate bylaws typically do).

<sup>245</sup> Cohen, *supra* note 241.

<sup>246</sup> See Christian Zhang, *Locals Weigh Future of Low-Income Homeowner Program*, COLUM. DAILY SPECTATOR, (Jan. 4, 2015), <https://www.columbiaspectator.com/news/2013/11/21/locals-weigh-future-low-income-homeowner-program> (noting that 300 HDFCs are experiencing financial distress); MANHATTAN CMTY. BD., *supra* note 173, at 4 (noting that there are around 1,000 HDFCs in New York City).

<sup>247</sup> A recent New York City Public Advocate's Office report indicates that during the cooperative conversion process, "HPD's training to tenant associations is not adequately preparing tenants for the reality of what it takes to own and run a building." OFF. OF THE N.Y.C. PUB. ADVOC. LETICIA JAMES, POLICY BRIEF: PRESERVING QUALITY AFFORDABLE HOUSING BY ADEQUATELY FUNDING AND ADMINISTERING THE HPD TENANT INTERIM LEASE (TIL) PROGRAM 4–5 (2017). Similarly, HPD's oversight during the cooperative conversion process exhibits "significant corruption vulnerabilities," which have enabled tenant association leaders to misallocate and mismanage building funds. *Id.* After the cooperative conversion, HDFCs may avail themselves to free trainings, though they are not mandatory unless the HDFC has entered into a recent regulatory agreement with HPD. HPD's oversight of HDFCs post-conversion varies widely; only HDFCs

representation from people who live or work on CLTs' land, residents from CLTs' surrounding communities, and local officials.<sup>248</sup> CLTs also employ in-house administrators to handle property management tasks like "monitoring compliance with occupancy and use restrictions, monitoring the condition of homes, maintaining communications with homeowners, working with residents who are having trouble meeting their financial obligations, and overseeing transfers of ownership."<sup>249</sup> Board members need not attend to these tasks. CLTs' tripartite boards balance self-governance with intel from external, expert directors and officers. This helps limit conflicts of interest, prevent agency problems, and increase capacity without losing sight of participation and community stewardship, fundamentals of community ownership. HDFCs do not suggest that corporate law and community-owned projects are incompatible, though, community ownership should entail creatively reimagining organizational forms and governance structures.<sup>250</sup> HDFCs also do not suggest that self-governance is inherently flawed. Rather, HDFCs indicate that self-governance can be an institutional design challenge—the exercise of shared power may result in certain vulnerabilities.<sup>251</sup>

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with recent regulatory agreements are required to have sustained engagement with the agency. *See* N.Y.C. DEP'T OF HOUS. PRES. AND DEV., *supra* note 169, at 26–27. Less than one-third of New York's HDFCs have an active regulatory agreement. *See* MANHATTAN CMTY. BD., *supra* note 173, at 4.

<sup>248</sup> *See* Grounded Solutions, *supra* note 60, at 59.

<sup>249</sup> *Id.* at 207.

<sup>250</sup> *See* Renee Hatcher, *Solidarity Economy Lawyering*, 28 TENN. J. RACE, GENDER, & SOC. JUST. 23, 30–32 (2019); *see supra* notes 89–90 and accompanying text; *see* David Bollier, *Reinventing Law for the Commons*, in *LAW AND POLICY FOR A NEW ECONOMY* 137, 160 (Melissa K. Scanlan ed., 2017) (“[T]here is a great deal of experimentation going on with new organizational forms, because old structures, whether for-profit or nonprofit, do not adequately recognize and support the types of commoning that people are doing or aspire to do.”).

<sup>251</sup> As the CLT comparison indicates, HDFCs are distinguished by how they operationalize self-governance. Unlike CLTs, whose boards blend self-governance with expert, external voices, and do not take on an administrative role, HDFCs rely solely on non-expert, internal voices and do take on an administrative role. This constitutes a legal idiosyncrasy. One might draw a comparison between HDFCs and closely held corporations, which also tend to center non-expert, internal voices, and nonprofit corporations, which share HDFCs' inurement prohibition. However, HDFCs are distinguished from both. Literature suggests that closely held corporations and nonprofit corporations make use of traditional corporate governance by recruiting expert, external directors more often than HDFCs

The potential perils of self-governance are apparent in *Lama v. 3681 Broadway HDFC*, a shareholder derivative suit.<sup>252</sup> Alleging breach of fiduciary duty, the 3681 Broadway shareholders sued their board, and the City of New York as its codefendant, over a bevy of management issues including, *inter alia*, a “failure to pay real estate taxes,” a lack of transparent record keeping, and the “election of unqualified directors . . . .”<sup>253</sup> The shareholders homed in on the board president, who simultaneously acted as the HDFC’s managing agent, responsible for rent collection.<sup>254</sup> They alleged that the board president “arbitrarily enforced collection against certain tenants and tenant-shareholders.”<sup>255</sup> For her part, the board president submitted pleadings showing that when she assumed her role, she inherited an undercapitalized corporation with pre-existing tax arrears, just \$2,500 in its accounts, and around \$36,000 locked in a certificate of deposit, a financial product that prohibits withdrawals for a designated time period.<sup>256</sup>

Traditional corporations have safeguards in place to prevent the impasse that 3681 Broadway faced. Generally, corporate boards

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do. See David A. Rubenstein & Adam S. Weinstock, *Best Practices for Corporate Governance in Closely Held Businesses*, STOUT (Mar. 1, 2014), <https://www.stout.com/en/insights/article/best-practices-corporate-governance-closely-held-businesses> (describing the implementation of good governance procedures in closely held settings); CHANTAL RASSART & HUGH MILLER, *THE EFFECTIVE NOT-FOR-PROFIT BOARD: A VALUE-DRIVING FORCE 18–20* (2013) (“Recruiting and retaining qualified independent directors is challenging for any organization, particularly for NPOs where directors normally serve as volunteers. Nevertheless, NPOs need balanced, diversified and fully committed boards.”). Certain high functioning HDFCs have made use of board best practices, like committees to act as check on board members, but these HDFCs appear to be the exception, not the rule. See Leavitt & Saegert, *supra* note 19, at 493 (“A dense, supportive social network was encouraged by the co-op’s formal and informal activities. For example, in one building led by a four-woman board, a housing committee checks problems in apartments and recommends action to the board. A finance committee talks with tenants whose rent is in arrears and consults with the board on what actions to take.”). Thus, HDFCs may be considered idiosyncratic due to their divergence from corporate governance best practices.

<sup>252</sup> See *Lama v. 3681 Broadway HDFC*, 2019 N.Y. Misc. LEXIS 1907, at \*2 (Sup. Ct. Apr. 11, 2019).

<sup>253</sup> *Id.* at \*2.

<sup>254</sup> See *id.* at \*5.

<sup>255</sup> *Id.* at \*5 (citation omitted).

<sup>256</sup> See *id.* at \*8–9.

recruit independent, experienced directors and allocate responsibilities in a manner that retains the distance and diligence required for shrewd monitoring.<sup>257</sup> 3681 Broadway floundered under the leadership of a joint board president and managing agent charged with both collecting rents and self-monitoring her effectiveness in doing so. As a resident of the HDFC, the board president was conflicted even further—she had the unenviable task of collecting rent from and initiating nonpayment proceedings against her neighbors. The HDFC would benefit from directors who could provide external oversight and make judicious, yet painful decisions. In addition, the HDFC would benefit from proven directors who can offer the expertise that is typical among corporate board members. Expert directors would likely have prevented the confounding balance between liquidity and savings within 3681 Broadway's books. A traditional corporate form features formal accountability systems like an audit committee of independent directors responsible for "reviewing the corporations' processes for compiling financial data [and] their internal controls."<sup>258</sup> Without an audit committee, the 3681 Broadway board president was left to draft and issue her own reports, acting as a check on herself. 3681 Broadway's struggles were not merely breaches of fiduciary duties that might befall any corporation with underperforming board members. The HDFC encountered distinct struggles that followed from HDFCs' solidaristic corporate form, which, in its adoption of self-governance, inadvertently winnows out structures for good governance. *Lama* suggests that, like regulation by contract, HDFCs' corporate form can undermine their operational success.

### E. HDFCs' Challenges

#### 1. Market Rate Sales, Cash-Preferred Sales, and Subletting

Despite its legal designation as the supervising agency for low-income housing cooperatives, HPD only regulates HDFCs pursuant to the terms of alternative management programs and their attendant financial packages.<sup>259</sup> Though the New York Supreme Court has

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<sup>257</sup> See Clarke, *supra* note 210, at 80–83.

<sup>258</sup> Lynne L. Dallas, *The Multiple Roles of Corporate Boards of Directors*, 40 SAN DIEGO L. REV. 781, 789 (2003).

<sup>259</sup> See Bechtel, *supra* note 20, at 20.



ruled that “HPD may very well have the authority to promulgate emergency rules, to fix imminent safety conditions, and provide due process protection to HDFC’s [*sic*] tenants,” the agency’s oversight has been limited.<sup>260</sup> HDFCs’ underregulation and the variety and parity inherent in regulation by contract have facilitated mission drift through market rate sales and cash-preferred sales in certain HDFCs.

In hot markets, some HDFCs have recruited income poor, asset rich shareholders to purchase units in an effort to remunerate themselves and raise funds for building maintenance and debt service, a lawful yet unsavory interpretation of Article XI.<sup>261</sup> Instead of housing home health aides and food service workers, some HDFCs have pursued “creative class” young professionals who qualify as low-income, but have sufficient family wealth to make an all-cash apartment purchase.<sup>262</sup> Other HDFCs have illegally sold apartments for what the market can bear.<sup>263</sup> Not all HDFCs have been gentrified. Recent data indicates that about 90 percent of HDFC units are owned by their original purchaser, and about 84 percent of HDFC units that have been sold were purchased for \$500,000 or less.<sup>264</sup> However, in certain neighborhoods, a vehicle for community stewardship and collective resistance among marginalized populations has now inadvertently and perturbingly become a vehicle for the early career development of scions of well-to-do families.<sup>265</sup>

Further, HDFCs’ low-income earners are burdened by regulatory agreements’ flip taxes, the shared equity formula that allocates unit sale revenue among the HDFC, the seller, and, in certain

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<sup>260</sup> *White v. N.Y.C. Dep’t of Hous. Pres. & Dev.*, 2018 N.Y. Misc. LEXIS 4393, at \*14–15 (Sup. Ct. Oct. 2, 2018).

<sup>261</sup> *See Melby, supra* note 204.

<sup>262</sup> *Id.*

<sup>263</sup> *See id.*

<sup>264</sup> *See Andrew Reicher, CityViews: The Case for New Regs for the City’s Affordable Co-ops*, CITY LIMITS (Mar. 21, 2017), <https://citylimits.org/2017/03/21/cityviews-the-case-for-new-regs-for-the-citys-affordable-co-ops> (providing original purchasers figure); GEOFFREY PROPHETER, MEMORANDUM: COST ESTIMATES FOR ALTERNATIVE TAX EXEMPTIONS FOR SOME HDFC COOPS 1 (2015) (providing affordable sales price figure).

<sup>265</sup> *See Melby, supra* note 204.

instances, HPD.<sup>266</sup> Since the original HDFC purchasers are aging, in need of money for retirement and healthcare, bound by flip taxes, and based in reviving neighborhoods, some resort to subletting.<sup>267</sup> Subletting for profit undermines HDFCs' legal and taxpayer-subsidized purpose as low-income cooperatives.

The ills of market rate sales, cash-preferred sales, and subletting follow from HPD's lax regulatory approach.<sup>268</sup> HPD is hands-off in its oversight, only regulating HDFCs in agreements with variable terms that are executed when the HDFCs first take title to or refinance their buildings. Many HDFCs have expired or expiring use restrictions—the terms barring subletting or requiring HDFCs to recoup modest profits from unit sales are time-limited. An HDFC founded in the 1980s that entered into a typical ten-to-thirty-year regulatory arrangement with HPD now has the authority to pursue an exorbitant profit.<sup>269</sup> If HDFCs were regulated in a more traditional manner, HPD could have introduced rules for all of New York's HDFCs that fully implement Article XI by promulgating asset limits and curb subletting and market-rate sales by requiring external monitoring.

In the mid-1980s, HPD first introduced agreements with 60-40 flip taxes, like that at issue in *Kuhn v. Brown*, for select HDFCs in hot markets, employing contract-based regulations to underwrite

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<sup>266</sup> See Bechtel, *supra* note 20, at 20–21 (detailing variations in HDFC flip fees since the 1980s).

<sup>267</sup> See Savitch-Lew et al., *supra* note 235. For a discussion of shareholders' personal financial constraints, see Starecheski, *supra* note 155, at 150–51.

<sup>268</sup> See Starecheski, *supra* note 155, at 184 (quoting an HDFC shareholder who suggests that HPD's lax oversight of HDFCs encourages illegal subletting). Starecheski writes:

And while the requirements for how to run their co-ops may have been strict, enforcement has generally been loose. As Jessica Hall explained, “No one [at the monitoring agency] wants to do extra work. If you keep your shit together and you don't have internal problems, no one is going to come around with a magnifying glass.” In other low-income limited-equity co-ops in gentrifying neighborhoods, residents have sublet or sold their apartments for high prices far in excess of those permitted by the regulatory agreements governing their buildings.

*Id.*

<sup>269</sup> See Bechtel, *supra* note 20, at 19 (noting time horizon for resale restrictions).

and share in the gains of neighborhood revival.<sup>270</sup> HPD could have responded to the nascent gentrification of neighborhoods like Clinton and Chelsea via traditional rulemaking, adopting a perpetual affordability policy for all of New York’s HDFCs. For instance, HPD could have issued a rule mandating thirty-year affordability covenants with an extension at the City’s option.<sup>271</sup> A regulatory arrangement of this nature, promulgated for all HDFCs via administrative rulemaking, would have prevented the expiring use restrictions and unit loss that HDFCs exhibit today. Irrespective of whether one aspires to neighborhood revival, as the administration of Mayor Ed Koch did, or to affordable housing preservation, as the community ownership field does, regulation by contract appears to be a suboptimal strategy. It hinders policymaking. HPD has negotiated with shareholders one by one, crafting individualized, variable regulatory arrangements that are difficult to reform in one fell swoop. These regulatory arrangements have also proven insufficient for retaining HDFCs as a source of permanently affordable housing. Because HPD employs regulation by contract, achieving a systemwide fix to address market rate sales, cash-preferred sales, and subletting will require bargaining and finding common ground with HDFC shareholders, a thorny endeavor.

## 2. Mismanagement and Fiscal Distress

Like all corporate boards, HDFC directors are required to head organizational affairs—conduct financial audits, author management reports, and host regular meetings and elections.<sup>272</sup> Since cooperative corporations own tenant-run buildings, their directors must also engage in property management: collecting rent, paying taxes and utility bills, and contracting with “supers” and

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<sup>270</sup> See Stegman, *supra* note 221, at 107–08.

<sup>271</sup> See, e.g., Elia, *supra* note 211, at 62 (“Boston currently requires perpetual affordability covenants for all privately-owned, publicly-funded affordable housing projects.”); CITY OF BOSTON, MAYOR’S OFF. OF HOUS. POLICIES, LONG-TERM AFFORDABILITY POLICY, <https://drive.google.com/file/d/13IRb-WKVL00y9VsVmTZ3rD4uUvZOIregv/view> (last visited Oct. 19, 2022) (“The affordability and income restriction for rental or cooperative housing development projects shall have an affordability term ‘In Perpetuity.’”).

<sup>272</sup> See *How Does a Cooperative Operate?*, URB. HOMESTEADING ASSISTANCE BD., <https://www.uhab.org/resource/operation-of-the-cooperative> (last visited Mar. 20, 2022) (listing the responsibilities of HDFC boards).

custodians.<sup>273</sup> Unfortunately, HDFC shareholders report that their directors too often exhibit a lack of competence or diligence.<sup>274</sup> Abrogating their bylaws, HDFC boards forgo basic governance and property management tasks.<sup>275</sup> Their inadequate record keeping makes it difficult for cooperatives to secure financing and for HPD to pursue early intervention, should they elect to, with HDFCs that are at risk of tax foreclosure.<sup>276</sup> Without regular meetings and elections, shareholders are unable to stay abreast of their buildings' operations or exact accountability by voting out inattentive or ineffective directors.

HDFCs' solidaristic corporate form, through which nonexpert, interested directors manage a building where they and their neighbors reside, is partially at fault here. Cooperatives commendably cede control to low-income tenants, empowering them and furthering participation and community stewardship, but without sufficient training and support, HDFC shareholders may lack the know-how to operate a multifamily building. HDFCs' self-governance also enables directors to accommodate cash-strapped shareholders in a manner that undermines HDFCs' long-term solvency. Boards may opt to forgo rent increases, keeping shareholders' monthly costs low despite inflation, or to grant rent holidays, delaying rent collection and covering the balance by deferring reserve contributions and municipal bill payments. These practices are well-intentioned, but they hinder HDFCs' ability to make repairs and keep up their buildings' basic systems. Mismanagement can beget fiscal distress.

Regulation by contract further complicates HDFCs' management woes. Since HPD underregulates its low-income housing cooperatives with time-limited, variable regulatory agreements, it has not compelled most of the city's HDFCs to submit to routine City monitoring. By the City's own admission, "there are currently no comprehensive City-wide services to assist property owners with

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<sup>273</sup> See *id.*

<sup>274</sup> See Cohen, *supra* note 241 (describing HDFC boards' poorly handled or wholly foregone recordkeeping and elections); Nikita Stewart, *Under City Program, Renters-Turned-Homeowners Could Become Renters Again*, N.Y. TIMES (Jul. 29, 2018), <https://www.nytimes.com/2018/07/29/nyregion/co-op-low-income-nyc-rent.html> (indicating HDFC boards need "oversight and guidance").

<sup>275</sup> See Cohen, *supra* note 241.

<sup>276</sup> See *id.*

early diagnosis and management of issues that may lead to crisis.”<sup>277</sup> Self-governance with limited external oversight and programmatic support means that HDFCs on the brink of plunging into the red often do so.<sup>278</sup>

When an HDFC has a municipal tax lien that has been due or unpaid for at least three years, it enters foreclosure via the Third Party Transfer Program.<sup>279</sup> In the program, HPD deeds the property to a developer who rehabilitates it and manages it as a rent stabilized apartment building.<sup>280</sup> With their abiding management difficulties and resulting fiscal distress, and with HPD’s lack of oversight, 111 HDFCs were included in HPD’s 2015 round of tax-foreclosed properties.<sup>281</sup> Since Third Party Transfer vests title in developers, it has the effect of undoing the housing and neighborhood reclamation that HDFCs once promoted, expropriating properties that frequently constitute low-income Black and Latinx households’ only source of wealth.<sup>282</sup> Securing HDFCs as an enduring stock of affordable

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<sup>277</sup> N.Y.C. DEP’T OF HOUS. PRES. & DEV., THIRD PARTY TRANSFER PROGRAM WORKING GROUP FINAL REPORT 3 (2021), <https://www1.nyc.gov/assets/hpd/downloads/pdfs/services/tpt-working-group-final-report.pdf>.

<sup>278</sup> See, e.g., *In re* Tax Foreclosure Action No. 53 Borough of Brooklyn, 2019 N.Y. Misc. LEXIS 1321 (Sup. Ct. Mar. 28, 2019).

<sup>279</sup> See N.Y.C., N.Y. ADMINISTRATIVE CODE § 11-404-b; *In re* Tax Foreclosure Action No. 53 Borough of Brooklyn, 2019 N.Y. Misc. LEXIS 1321, at \*6–7. (explaining the Third Party Transfer Program and finding the City’s seizure of HDFCs from their shareholders in this instance to be a “grave injustice”). The Court writes:

According to the City, the purpose of the Third Party Transfer Program is to encourage prompt payment of tax arrears, and, if the arrears are not paid, to transfer distressed residential buildings, which have unpaid tax arrears, quickly to new owners, who have the expertise to address problems and to complete prompt rehabilitation of the properties. Under the Third Party Transfer Program, the City initiates in rem foreclosure actions against tax delinquent buildings in poor condition and obtains foreclosure judgments. After review by the City Council, HPD then oversees the conveyance of the properties to responsible new owners found to be qualified to rehabilitate and manage the properties.

*Id.*

<sup>280</sup> See *Third Party Transfer (In Rem) Program*, N.Y.C. DEP’T OF FIN., <https://www1.nyc.gov/site/finance/taxes/property-in-rem-foreclosure.page> (last visited Mar. 20, 2022).

<sup>281</sup> See Stewart, *supra* note 274.

<sup>282</sup> See *id.*; see also Brief of NAACP Legal Defense and Educational Fund, Inc. as Amicus Curiae in Support of Plaintiffs-Appellants at 3–4, *Dorce v. City of*

housing necessitates regulatory arrangements that provide training and oversight without undermining the autonomy required for participation and community stewardship.

### III. ANALYSIS

#### *A. HDFCs' Tradeoffs and Lessons for Emerging Forms of Community-Owned Real Estate*

At the onset of the COVID-19 pandemic, as major cities became viral hotspots and their rental housing markets softened, the gravity of household rent debt and its racial disproportionality renewed activists', advocates', and aligned legislators' interest in community-owned real estate. They realized that landlords "may not be able to weather extended periods of reduced rental income" and that by removing housing from the speculative market, the "direct acquisition of lower rent buildings by community-based organizations or groups of tenants can provide immediate protection to vulnerable tenants and preserve [cities'] income diversity."<sup>283</sup> New York's low-income housing cooperatives may be considered a standard bearer for such approaches. HDFCs predate the contemporary understanding of community ownership, but they are squarely within its tradition.

Though HDFCs are a longstanding institution that has withstood both the organized abandonment of the 1970s and the speculation and secondary displacement that hamper low-income communities of color today, they are not without their foibles. Within HDFCs' legal form lies tradeoffs and tensions—the opportunity

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New York, 2 F. 4th 82 (2d Cir. 2020) (No. 20-1809) ("In the most recent rounds of foreclosures under the TPT Program, the City seized and transferred several homes in predominantly Black and Latinx neighborhoods without providing the owners adequate notice or an opportunity to redeem their properties from the Program. . . . The TPT Program exacerbates the racial wealth gap and homeownership disparities. Homeownership, and the accompanying equity and stability, has long been a key component of wealth acquisition and economic growth for most American families. But federal, state, and local governmental laws, regulations, and policies have played a significant role in the creation and perpetuation of racial gaps in homeownership in New York City and throughout the country. The TPT Program is leading to the loss of homeownership in Black and Latinx communities and expropriating years of work and thousands—even millions—of dollars in home equity from them.").

<sup>283</sup> Crowder et al., *supra* note 11, at 5, 9.

costs associated with prioritizing permanent affordability, participation, and community stewardship. These tradeoffs, detailed below, can inform the creation of new tenures and tactics that effectuate community ownership.

### 1. Permanent Affordability vs. Wealth Creation

In hot markets like New York City's—where housing demand exceeds supply, housing cost growth outpaces wage growth, and housing policy fuels the “growth machine”—subsidizing affordable units is the sine qua non of inclusive urbanism.<sup>284</sup> Preventing gentrification-caused displacement necessitates public investment to preserve existing low-cost units and sponsor new ones, anchoring communities in place. HDFCs fund housing opportunities through subsidy retention.<sup>285</sup> After a one-time investment in a unit, resale restrictions capping the appreciation a shareholder may accrue at sale and, in some instances, returning a percentage of the sales proceeds to the City, ensure the subsidized unit is affordable for the long term.

An alternate approach to investing in affordable housing is subsidy forgiveness, one-time assistance for affordable housing preservation or development that need not be repaid.<sup>286</sup> When affordable housing is financed via subsidy forgiveness, as in homebuyer grants and forgivable loans, the affordability period is term-limited, not perpetual.<sup>287</sup> A homeowner who benefited from public support in purchasing their home may sell it to realize a windfall. The seller benefits from the market rate sale, experiencing it as a wealth creation event, and the unit, once affordable, returns to the market unsubsidized, no longer contributing to efforts to curb the affordability crisis. In subsidy forgiveness programs, the money follows the household; in subsidy retention programs like HDFCs, the money stays with the unit. There is an inherent tension between individual

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<sup>284</sup> See Logan & Molotch, *supra* note 40, at 50–51 (defining the “growth machine” as the process through which cross-sector leaders wield public and private systems to extract wealth from cities).

<sup>285</sup> See RICK JACOBUS & JEFFREY LUBELL, PRESERVATION OF AFFORDABLE HOMEOWNERSHIP: A CONTINUUM OF STRATEGIES 17 (2007) (describing subsidy retention programs).

<sup>286</sup> See *id.* at 8.

<sup>287</sup> See *id.* at 9.

appropriation that generates household wealth through subsidy forgiveness and commoning that promotes permanent affordability through subsidy retention.

HDFCs enabled residents of Black and Latinx neighborhoods enduring redlining, disinvestment, and public neglect to resist and rebuild. Such communities have historically been denied asset building opportunities and accordingly lag behind their peers in the assets that allow one to manage “economic shocks” and foster inter-generational economic mobility for one’s children.<sup>288</sup> Housing policies that serve people of color without materially closing the racial wealth gap are inherently inadequate. Transferring wealth to communities of color, especially Black ones, through homeownership programs that employ subsidy forgiveness is a reparative intervention. In adopting the opposite tack, forgoing subsidy forgiveness for subsidy retention, HDFCs fostered durable affordability, but left their shareholders without the nest egg that substantial home equity provides. Community ownership conjures “cooperative islands in capitalist waters.”<sup>289</sup> Despite the stability conferred by community ownership, households who own shares in community-owned real estate still require, and, due to ongoing racial stratification and antagonism in the United States, deserve, equity-bearing assets. Is it possible for community-owned real estate to redress the “land dispossession and wealth extraction that Black people [have] suffered” if “by definition it explicitly rejects the commodification of land for wealth attainment?”<sup>290</sup>

Actors developing new forms of community-owned real estate must strike a suitable balance between subsidy retention programs’ permanent affordability and subsidy forgiveness programs’ wealth creation. It is true that community-owned real estate is inspired by a relational understanding of land that prioritizes its use value over

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<sup>288</sup> In 2017, Black households had a median owned wealth of just \$1,700, while Latinx households had a median owned wealth of just \$2,000. Black and Latinx asset poverty may be attributed to “public policies and practices throughout our history [that] have worked to benefit White families at the expense of communities of color.” DEDRICK ASANTE-MUHAMMAD ET AL., *THE ROAD TO ZERO WEALTH: HOW THE RACIAL WEALTH DIVIDE IS HOLLOWING OUT AMERICA’S MIDDLE CLASS* 6–16 (2017).

<sup>289</sup> See generally Vidal, *supra* note 72.

<sup>290</sup> Norrinda Hayat, *A Critique of the Black Commons as Reparations*, 45 NYU REV. L. & SOC. CHANGE 370, 401–02 (2022).



its exchange value. It is also true that HDFC shareholders realize value from their units over the course of their lease term via reduced monthly costs, so a windfall is less justifiable. Nonetheless, HDFCs' flip taxes, limiting the returns shareholders see at sale, bear some responsibility for the market rate sales and resulting attrition that mar the program. If shareholders could retain more than just their original cash equity plus interest, then they may be less likely to pursue sales and subleases that abnegate HDFCs' express purpose.<sup>291</sup>

Contemporary models of community-owned real estate should iterate, pursuing new legal maneuvers that simultaneously provide a permanent affordable housing stock and redistribute resources to households in need of asset building. Well-designed regulatory controls have the potential to align these competing concerns. New community-owned projects can make use of a modified flip tax that does not seek to recoup funds for municipal agencies as HDFCs' 60-40 agreements do. New projects can also reexamine the inurement prohibition that bars shareholders' receipt of earnings. For instance, new projects can be designed to maintain income limits and resale restrictions and forgo inurement proscriptions, such that their shareholders could receive year-end distributions from leased retail, roof, or parking spaces. This would enable shareholders to build wealth from their neighborhoods' improving conditions, while also sustaining their neighborhoods' affordable housing stock for future generations.

## 2. Participation vs. Expertise

Community-owned real estate provides opportunities for local democratic control of land and housing. HDFCs emphasize self-governance in a manner that has empowered marginalized populations to determine the trajectories of their neighborhoods and the allocation of the resources at their disposal. HDFCs' participatory governance structure stands in a marked contrast to the top-down urban renewal, slum clearance, and public authority-driven development that impeded the sovereignty of New York's low-income

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<sup>291</sup> See Mallin, *supra* note 61, at 24 (itemizing the components of HDFCs' flip taxes).

communities of color during the era that preceded HDFCs' birth.<sup>292</sup> When residents are at the helm, overseeing their homes without the financial calculus that colors landlords' decision making, residents may employ their discretion in determining the best approaches to tenant selection, preventative property maintenance, and rent increases, while governing their homes in a manner that prioritizes their use value over their exchange value. Prioritizing buildings' use value should yield dignified living environments tailored to residents' needs.

During HDFCs' early years, self-governance was associated with higher rates of resident satisfaction and improved housing quality.<sup>293</sup> As the program has matured, it has become clear that self-governance may entail sacrificing the property management expertise that is required for a well-run building. Further, HDFCs' management by an inherently interested, unpassive board of resident-shareholders makes them vulnerable to organizational conflict and mismanagement.

External support via professional property managers and public or nonprofit monitoring may thus be required to maintain the viability of community-owned projects. Free of the conflicts of interest that burden shareholders and board members who reside in the building that they must govern, property managers can make tough choices to raise rents or judiciously draw down buildings' reserves. Monitors can ensure that projects' bylaws are heeded such that meetings, elections, and reporting occur in accordance with agreed upon timeframes and standards. External support can supplement projects' participatory structure with board governance and property management expertise. Management and monitoring interventions do, however, entail a loss of community control and its benefits.

Newly formed community-owned projects will be required to strike a workable balance between participation and expertise. HPD mandates both external management and monitoring in its most

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<sup>292</sup> See, e.g., ROBERT CARO, *THE POWER BROKER: ROBERT CARO AND THE FALL OF NEW YORK* 852–84, 893 (1974) (detailing the City's 1960 demolition of a lower income neighborhood with a "very good, solid housing stock" and subsequent construction of the Cross-Bronx Expressway, despite community opposition).

<sup>293</sup> See Saegert & Benítez, *supra* note 145, at 429–30.

recent HDFC regulatory agreements.<sup>294</sup> HDFCs' current regulatory arrangements have tilted the scales in favor of professional expertise, but there are alternatives. Community-owned real estate can favor participation by centering tenant organizing and technical assistance, especially during the predevelopment period, and by convening diverse boards that incorporate external, expert perspectives. Well-designed training modules that prepare tenants to facilitate meetings and elections and develop accounting systems for their buildings can promote sound operations. Actions that cultivate a sense of self-efficacy during the cooperative conversion, like collaboratively negotiating with the seller, can foster trust among tenants and prepare them for shared leadership. Institutional designs that braid perspectives from residents, community members, and public officials, as CLT boards do, can retain self-governance while instilling safeguards for good governance. The high rate of fiscal distress among HDFCs is a sobering reminder of the potential faults of self-governance. Through training, organizing, and well-crafted organizational structures, shrewd management of the urban commons becomes possible.<sup>295</sup>

### 3. Community Stewardship vs. State Involvement

Fostering housing affordability for people with low incomes in one of the nation's tightest markets necessitates capital and operating subsidies. HDFCs make use of both.<sup>296</sup> Local, state, and federal funding each contribute to HDFCs' capital stack.<sup>297</sup> Even when real

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<sup>294</sup> See *Affordable Neighborhood Cooperative Program Term Sheet*, *supra* note 168 ("Third Party Property Management and a Third Party Co-op Monitor required for the term of the regulatory period"); Aaron J. Yowell et al., *New York City Department of Housing Preservation and Development Issues New Article XI Real Property Tax Exemption Term Sheet*, NIXON PEABODY (Apr. 12, 2021), <https://www.nixonpeabody.com/en/ideas/articles/2021/04/12/hpds-new-article-xi-term-sheet>.

<sup>295</sup> See Sheila Foster, *Collective Action and the Urban Commons*, 87 NOTRE DAME L. REV. 57, 62 (2011). Foster theorizes an urban commons modeled on Ostrom's natural resource commons, in which users successfully manage common pool resources like community gardens and land trusts. She finds that "rivalrous and degraded common urban resources are being collectively restored and managed by groups of users in the absence of government coercion and (often) oversight." *Id.*

<sup>296</sup> See *supra* notes 155–158 and accompanying text.

<sup>297</sup> See *id.*

estate is community owned, the state remains implicated in its long-term viability.

As a practical matter, HDFCs' reliance on the state limits their shareholders' autonomy. The dictates in HPD regulatory agreements may hinder or even prohibit shareholders from making their own choices regarding critical matters like the tradeoff between affordability and wealth building. For instance, in recent years, regulatory agreements have forbidden shareholders from selling commercial spaces within their buildings, though doing so could generate much-needed funds for maintenance and tax bills without threatening HDFCs' charitable purpose or the affordability of their residential spaces.<sup>298</sup> HDFCs are premised on community stewardship, in which residents with long-term leases rooting them in place constitute boards that exert democratic control over their buildings and collaborate to look after the resources at their disposal. Regulatory agreements that predetermine major policies may make shareholder voting a perfunctory matter. Government involvement can circumscribe shareholders' intendance of the properties they own together.

HDFCs' reliance on the state also means that they are entangled with public institutions that, in certain respects, employ market-oriented frameworks, the harms of which are detailed in earlier sections of this Note. Racial differentiation is an endemic feature of commodified housing. With the rise of public-private partnerships and intercity competition, government-assisted housing has comparable vulnerabilities. Potential economic growth motivated HPD's development of 60-40 flip taxes during the Koch administration.<sup>299</sup> That economic growth, now realized, threatens low-income New Yorkers of color with gentrification and displacement today. Cautionary tales abound—consider local governments' instrumentalization of public housing in the 1990s with the federal HOPE VI program. Under HOPE VI, local housing authorities pursued public housing demolition and redevelopment in a manner that cleared land for more profitable uses, remade neighborhoods for socially favored groups, attracted investment, and subordinated the U.S. Department of Housing and Urban Development's "public mission to market

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<sup>298</sup> See N.Y.C. DEP'T OF HOUS. PRES. AND DEV., *supra* note 169, at 25.

<sup>299</sup> See *supra* note 221 and accompanying text.

values of cost-minimization and efficiency.”<sup>300</sup> Though greener pastures may be possible, government-assisted housing can exhibit the compulsion toward wealth maximization and related deleterious effects that have long hampered U.S. housing policy.<sup>301</sup>

It behooves actors developing new forms of community ownership in the wake of the COVID-19 pandemic to explore financing mechanisms and affordability controls that look beyond the state. Greater reliance on community financing and even land donation can obviate the constraints HDFCs have faced as a result of their reliance on public monies.<sup>302</sup> It is unlikely that community financing and donations can fully replace the deep subsidies required in

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<sup>300</sup> Danielle Pelfrey Duryea, *Gendering the Gentrification of Public Housing: HOPE VI's Disparate Impact on Lowest-Income African American Women*, 13 GEO. J. POVERTY L. & POL'Y 567, 568–71 (2006) (characterizing HOPE VI as the “public housing aspect of urban gentrification”).

<sup>301</sup> For a discussion of the “greener pastures,” see NICHOLAS DAGEN BLOOM, PUBLIC HOUSING THAT WORKED: NEW YORK IN THE TWENTIETH CENTURY 1–10 (2008) (lionizing the New York City Housing Authority, its “good management practices,” and its enduring role in New York City despite the rise of HOPE VI and the privatization of public housing).

<sup>302</sup> See Oscar Perry Abello, *With Donations as Small as \$10, Land Trust Makes \$9.4M Affordable Housing Buy in S.F.*, NEXT CITY (Feb. 1, 2022), <https://nextcity.org/urbanist-news/with-donations-as-small-as-20-land-trust-makes-9m-affordable-housing-buy>. CLTs have been able to acquire multifamily residential buildings without government involvement by relying on a combination of crowdfunding and debt from socially responsible lenders like credit unions and community development intermediaries. See, e.g., SOLIDARITY HOUSING, <https://www.solidarityhousing.com/> (last visited Mar. 20, 2022). Developed in 2021 by Canadian activists Carla Bergman, Nick Montgomery, and Jamie Leigh Gonzales, Solidarity Housing proposes to partner with single-family homeowners in transitioning ownership of their residential properties to CLTs. See SOLIDARITY HOUSING, *Who We Are*, <https://www.solidarityhousing.com/who-we-are> (last visited Apr. 5, 2022); SOLIDARITY HOUSING, *The Model*, <https://www.solidarityhousing.com/the-model> (last visited Apr. 5, 2022). After the donation, the seller receives a portion of the new residents’ monthly carrying costs and has the option of remaining in the building as a resident. See *id.* Solidarity Housing’s nascent model employs donated land, so their residents can sidestep both acquisition costs and state control. See generally Shatan & Williams, *supra* note 63, at 42 (“Even as interest in alternative financing strategies emerges, it’s important to recognize that ‘free’ money [grants and donations that do not have to be paid back, especially without significant red tape or strings attached] is the most impactful in making a project affordable. Indeed, the more ‘free money’ an organization has access to, the more it can ‘buy down’ the affordability of a project, make it more accessible to lower-income residents, and provide services those residents need.”).

expensive markets, but additional leverage may limit the extent to which shareholders in community-owned projects must compromise with and capitulate to government priorities. However, if community-owned real estate is not reliant on public monies and their regulations, shareholders should be sure to independently craft the income, asset, and resale restrictions that will ensure projects' permanent affordability and to empower their boards to enforce the restrictions.

Lastly, the HDFC case indicates that the parameters of community ownership need examining. The pandemic and its related market disruptions have ignited interest in transferring distressed multifamily properties to tenants, nonprofits, and local agencies in the hopes that they will serve as community stewards for land and housing. However, these are not equivalent entities. Government agencies are inherently motivated by concerns that are broader than the hyperlocal focus of a property's shareholders and can exhibit a politics that is anathema to the solidarity that motivates community ownership. Whether the deed is held by government, tenants, or a nonprofit will greatly shape the success of the shared use and governance to which community ownership aspires.

#### CONCLUSION

The promise of community ownership, as exemplified by HDFCs, is its ability to contest markets by generating scalable alternatives to profit-oriented institutions that betray a historic and present bent toward antagonizing people of color. The vagaries of the housing market redound to the detriment of people of color, especially African Americans. To resist market mechanisms, people of color have developed new modes of social and economic ordering, like HDFCs, that put solidarity and agency at the fore. HDFCs feature legal idiosyncrasies like regulation by contract, in which their supervising agency binds shareholders in agreements instead of engaging in rulemaking, and solidaristic self-governance, in which interested, nonexpert, unpassive board members manage HDFCs. Operational issues like inadequate management and fiscal distress bedevil certain HDFCs, and these issues tend to follow from HDFCs' distinct legal structure. Nonetheless, HDFCs' challenges and related tradeoffs offer important lessons for COVID-19-era community-owned projects. Balancing permanent affordability and

wealth creation, participation and expertise, and community stewardship and state involvement is difficult, yet achievable.

Low-income housing cooperatives are more relevant now than ever. New York City is in the midst of an unprecedented affordable housing crisis. On average, a two-bedroom, New York apartment rents for \$2,340, a price that is out of reach for many.<sup>303</sup> Nearly half of New York City residents are rent burdened, devoting more than 30 percent of their monthly earnings to housing and utilities.<sup>304</sup> Extremely low-income renters are hardest hit by the city's tight market: 49 percent of such renters devote most of their income to housing and utilities, leaving them vulnerable to overcrowding, eviction, shelter stays, and with the work stoppages of the COVID-19 pandemic, insurmountable debt loads.<sup>305</sup> As in the 1970s, these renters tend to be Black and Latinx.<sup>306</sup>

What is more, New York City's policies and practices, market-oriented in their approach, often exacerbate the affordable housing crisis.<sup>307</sup> New York is no longer the "fear city," of planned shrinkage and arson.<sup>308</sup> Instead, its fortunes reversed, it is the "luxury city" where land use and development are fine-tuned to promote "highest and best uses" that can generate an urban environment suitable for the talent and industry for whom New York competes with its peer

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<sup>303</sup> See U.S. DEP'T OF HOUS. & URBAN DEV., *FY 2022 New York, NY HUD Metro FMR Area FMRs for All Bedroom Sizes, FY 2022 Fair Market Rent Documentation System*, HUD USER, [https://www.huduser.gov/portal/datasets/fmr/fmrs/FY2022\\_code/select\\_Geography.odn](https://www.huduser.gov/portal/datasets/fmr/fmrs/FY2022_code/select_Geography.odn) (last visited Mar. 20, 2022) (to access the cited figure, select "New York, NY HUD Metro FMR Area" from dropdown menu at bottom of page).

<sup>304</sup> See Tanay Warkerkar, *Nearly Half of NYC Households are Rent Burdened*, CURBED N.Y. (Oct. 12, 2018), <https://ny.curbed.com/2018/10/12/17965416/nyc-rent-burden-households-affordable-housing>.

<sup>305</sup> See *id.*; Stefanos Chen, *Low-Income Renters Who Fell Behind Face Staggering Debts*, N.Y. TIMES (May 26, 2021), <https://www.nytimes.com/2021/05/26/realestate/new-york-rent-eviction.html>.

<sup>306</sup> Black and Latinx New Yorkers are more likely to be low-income than their white peers. The Robin Hood Foundation reports "In every year from 2016 to 2019, Black and Latino New Yorkers were twice as likely to live in poverty as white New Yorkers." ABRAHAM ARRIAGA ET AL., *STATE OF POVERTY AND ADVANTAGE IN NEW YORK CITY: VOLUME 3*, at 5 (2021).

<sup>307</sup> See, e.g., Walters, *supra* note 30.

<sup>308</sup> Phillips-Fein, *supra* note 16, at 40, 205–07.

cities.<sup>309</sup> Low-income communities of color, once bedraggled by decay and neglect, are now grasping for the right to remain.

An about-face is required to disrupt the profit maximization, speculation, and gentrification that are antecedents for New York's affordable housing crisis and its racially disproportionate burdens. Deep investments in community ownership, including reforming and expanding the city's portfolio of HDFCs, have the potential to disrupt the crisis.

A reciprocal exchange between HDFCs as an early form of community-owned real estate and emerging, pandemic-era models of community-owned real estate would be an incredibly instructive starting point. Just as HDFCs offer lessons for new modes of community ownership, innovations from neighborhood real estate investment trusts and joint community-conservation land trusts can reinvigorate and inform New York's plans to safeguard HDFCs. Such an exchange would reject the politics of market-oriented provision that allowed for landlord abandonment and now abides exclusionary displacement. It would also honor the bold aspirations of HDFCs' founders.

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<sup>309</sup> Stein, *supra* note 40, at 52–54, 78–88; JULIAN BRASH, BLOOMBERG'S NEW YORK: CLASS AND GOVERNANCE IN THE LUXURY CITY 3–21 (2011).