

**FROM SLUM CLEARANCE TO ECONOMIC
DEVELOPMENT: A RETROSPECTIVE OF
REDEVELOPMENT POLICIES IN NEW YORK
STATE**

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INTRODUCTION

New York has always been an innovator in the field of urban redevelopment, continually experimenting with new programs aimed at ridding our cities of blighted areas and creating better living, working, and recreational areas. But as Charles Abrams, the renowned New York City housing and urban affairs scholar, cautioned, “[e]ach innovation creates its own precedent, forging another outward link to its further extension.”¹ Although less well known than urban theorists and planners such as Lewis Mumford, Jane Jacobs, and Robert Moses, Abrams was instrumental in shaping slum clearance, public housing, and redevelopment policies in New York and across the country, and his ideas continue to resonate in contemporary discussions about economic and community development. A housing reformer and civil rights lawyer, Abrams was motivated by his belief that poverty and discrimination were “intolerable in a society based on the premise of equality.”² He coined the phrase “socialism for the rich and private enterprise for the poor,”³ and as his biographer, A. Scott Henderson, explained: “[h]e championed various policies because he assumed a democratic society was obliged to provide its citizens with equal rights and certain social provisions, such as affordable housing and municipal services.”⁴

But as Abrams saw housing policies evolve over time, he came to see an ideological shift from a “general welfare state” to a “business welfare state,”⁵ and he began to oppose government programs that offered skewed subsidies and guarantees to private interests, rather than direct benefits to the public. Although he understood that general economic stimulation had broad public benefits, he believed that the blurred distinction between the public and private aspects of economic development programs would eventually produce inequitable results.⁶ He also feared

¹ Charles Abrams, *The Subsidy and Housing*, 22 J. OF LAND & PUB. UTIL. ECON. 131, 131 (1946).

² A. SCOTT HENDERSON, *HOUSING AND THE DEMOCRATIC IDEAL: THE LIFE AND THOUGHT OF CHARLES ABRAMS* 22 (2000).

³ See *id.* at 208; Phillip F. Horning, Book Review, 23 OKLA. L. REV. 347 (1970) (reviewing WILLIAM O. DOUGLAS, *POINTS OF REBELLION*) (noting that Justice Douglas favorably quotes this phrase in his work).

⁴ HENDERSON, *supra* note 2, at 3; see also Murray Illson, *Charles Abrams, Worldwide Housing Expert, Dies*, N.Y. TIMES, Feb. 23, 1970, at 26 (documenting Abrams’ wide-ranging accomplishments).

⁵ HENDERSON, *supra* note 2, at 3.

⁶ *Id.* at 112–13.

special interest politics and the growing influence of lobbies, which he thought “were attempting to ‘harness government and its power plant to their own interests’”⁷ Prior to his death in 1970, he criticized the “perversion of social reforms” that came with the increasing prevalence of private enterprise in redevelopment programs. As he saw it, “[i]n the long run . . . the profit motive somehow operates as the undesignated but effective legislator while the public obligation is pushed under the rug.”⁸

The goal of this article is to describe the evolution of those policies in New York State, within their historical context and in light of Abrams’ ideas about business welfare economics and social justice. The article will concentrate primarily on statutes and jurisprudence, and at times it will also explore the people and the motivations that shaped the law, as well as the projects that resulted from various programs. This article is not intended to be exhaustive, however, and many redevelopment programs and laws will not be covered.⁹ Federal urban renewal laws, in particular, will not be discussed in detail.¹⁰ Nor is this article intended to be a perfectly neutral timeline. Almost all of New York’s early redevelopment laws were described as experiments when they were enacted, and this article argues that more attention should be paid to the actual results and shortcomings of those laws.

The first section of this article will discuss New York’s earliest approach to eliminating the slums. These restrictive building regulations, which sought to reform tenement house construction, were early expressions of a broadening police power, and they lay the basis for the more intrusive urban legislation that would come. Next, the article will discuss the state’s limited dividend housing statute, which offered tax exemptions in exchange for regulated rentals. The third section focuses on the creation and

⁷ *Id.* at 114 (noting that Abrams’ concerns prefigured political science theories relating to regulatory capture and special interest politics).

⁸ *Id.* at 201.

⁹ Many subjects of state policy have been omitted, such as tax increment financing, business improvement districts, and the Eminent Domain Procedure Law. See N.Y. EM. DOM. PRO. §§ 101–709 (McKinney 2002); N.Y. GEN. MUN. LAW §§ 970-a–970-r, 980-a–980-q (McKinney 2002).

¹⁰ For articles documenting the history and politics behind federal urban renewal policy, see, among others, Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL’Y REV. 1 (2003) and Amy Lavine, *Urban Renewal and the Story of Berman v. Parker*, 42 URB. LAW. 423 (2010).

early years of New York's public housing program,¹¹ and the landmark case that upheld the use of eminent domain for public housing, *New York City Housing Authority v. Muller*.¹² The Housing Article of the 1938 New York Constitution is discussed in the next section. *Murray v. La Guardia*, which upheld the use of eminent domain for private redevelopment several years later, is discussed in the fifth section, along with the legislation and development project that were involved in the case.¹³ The proliferation of urban redevelopment laws and the expansion of their private goals is the focus of the sixth section, and the following section discusses the New York State Urban Development Agency. The article concludes by suggesting the need for legislative attention and reforms.

I. RESTRICTIVE BUILDING REGULATIONS

A. Tenement Regulations

New York was among the first states to enact comprehensive building regulations, beginning with nineteenth century tenement laws.¹⁴ "Old law" tenements—those constructed prior to 1901—were notorious for their squalid conditions and were often cramped, dark, and unventilated—the result of "so many mercenary landlords who only contrive in what manner they can stow the greatest number of human beings in the smallest space."¹⁵ The problem was particularly acute in New York City,

¹¹ A complete discussion of public housing policy and its implications on urban redevelopment is beyond the scope of this article. For an excellent resource about New York's public housing system, see NICHOLAS DAGAN BLOOM, *PUBLIC HOUSING THAT WORKED: NEW YORK IN THE TWENTIETH CENTURY* (2008).

¹² 1 N.E.2d 153, 156 (N.Y. 1936).

¹³ 52 N.E.2d 884 (N.Y. 1943).

¹⁴ See Frank S. Alexander, *The Housing of America's Families: Control, Exclusion, and Privilege*, 54 EMORY L.J. 1231, 1250–56 (2005) (discussing early building codes). While the New York Tenement House Act of 1867 is generally credited as one of the first modern building regulations in the country, nuisance buildings were not ignored by governmental authorities prior to this time. See 10 N.Y. STATE CONSTITUTIONAL CONVENTION COMM., PROBLEMS RELATING TO TAXATION AND FINANCE 408–09 (1938) [hereinafter POLETTI REPORT ON TAXATION AND FINANCE] (describing rules enacted by the Dutch West India Company in the seventeenth century, including a law permitting "the condemnation of 'improper and disorderly' houses and fences"); see also RICHARD PLUNZ, *A HISTORY OF HOUSING IN NEW YORK CITY: DWELLING TYPE AND SOCIAL CHANGE IN THE AMERICAN METROPOLIS 2* (1990).

¹⁵ Brief for Charles Abrams as Amicus Curiae Supporting Petitioner-Respondent, at 7–8, *N.Y.C. Hous. Auth. v. Muller*, 1 N.E.2d 153 (N.Y. 1936)

where millions of people lived in these conditions.¹⁶ The tenements were not only injurious to their inhabitants; poor construction and lack of sanitary facilities also exacerbated the spread of fires and epidemics.¹⁷ Popular support for housing reform grew toward the end of the nineteenth century, especially after Jacob Riis' infamous exposé, *How the Other Half Lives*, was published in 1890.¹⁸ Numerous governmental reports also called attention to the social and economic "menaces" of the slums.¹⁹

Although enacted with commendable intentions, the early tenement laws did little to improve housing conditions, and housing that was constructed following their enactment would easily be considered uninhabitable today. The major provisions of New York's 1867 Tenement House Act merely required that each building have a fire escape (although not necessarily one providing egress to each apartment), a window in each room (but not necessarily a window opening to the exterior), and a privy or outhouse for every twenty residents.²⁰ Amendments passed in 1879 went somewhat further and required each room to have a window opening to the exterior or to an airshaft.²¹ Despite these laws, poor housing conditions persisted. As the historian

[hereinafter ABRAMS AMICUS BRIEF] (quoting Geret Forbes, New York City Inspector of Health).

¹⁶ The problem was of such proportions that in 1925, more than 70,000 old law tenements, or about two thirds of the city's apartment buildings, were still in use. Mildred Adams, *War is Declared Against New York's Slums*, N.Y. TIMES, Oct. 24, 1926, at XX3 (citing a 1925 Tenement House Commission report). In 1938, an estimated 64,000 old law tenements were left. 6 N.Y. STATE CONSTITUTIONAL CONVENTION COMM., PROBLEMS RELATING TO BILL OF RIGHTS AND GENERAL WELFARE 636 (1938) [hereinafter POLETTI REPORT ON THE BILL OF RIGHTS].

¹⁷ See POLETTI REPORT ON THE BILL OF RIGHTS, *supra* note 16, at 637–38 (citing reports by the New York City Housing Authority and the Committee of Housing and Regional Planning); see generally PLUNZ, *supra* note 14, at 2 (discussing hygienic concerns in the tenements).

¹⁸ JACOB A. RIIS, *HOW THE OTHER HALF LIVES: STUDIES AMONG THE TENEMENTS OF NEW YORK* (1890). A sequel to this landmark publication was printed in 1902. JACOB A. RIIS, *THE BATTLE WITH THE SLUM* (1902). Both volumes have been acknowledged as pivotal in the field of progressive housing reform. See *Jacob A. Riis, Reformer, Dead*, N.Y. TIMES, May 27, 1914, at 11; see also Lavine, *supra* note 10 (discussing the growth of the progressive housing movement generally, with particular emphasis on Washington, D.C.).

¹⁹ See ABRAMS AMICUS BRIEF, *supra* note 15, at 8–11, 14–16, 50–51, 69 (outlining various housing reports).

²⁰ 1867 N.Y. Laws 2265–69. The law also contained provisions regarding cellar residences, garbage collection, and chimneys, and it required the reporting of contagious diseases. *Id.* at 2269–73.

²¹ 1879 N.Y. Laws 554–55.

Kenneth Jackson explained, inflated land prices and concentrated poverty in areas located close to employment sustained demand for even “[t]he infamous ‘dumbbell’ tenement in New York, which occupied 90 percent of its plot, which crowded twenty-four families (not including boarders) into its meager rooms, and which offered residents only the vista of a narrow airshaft”²²

In 1901 significant changes were made to the tenement laws in response to increasingly poor housing conditions and growing support for reforms. Lawrence Veiller played an important role in obtaining support for the progressive housing movement; he helped organize the Tenement House Committee of the New York Charity Organization in 1898 and eventually succeeded in having the state create a Tenement Housing Commission in 1900. The Commission’s report, which covered housing conditions in New York City and other areas in the state, was the basis for the 1901 Tenement House Act.²³ Although this legislation far surpassed earlier versions,²⁴ it still fell well behind modern standards.

Among its particulars, the 1901 Tenement House Act established stricter requirements for fire escapes and fire prevention, including provisions applicable to existing buildings, and it imposed height, lot coverage, and rear yard requirements on new tenements.²⁵ Each room in new tenements, except bathrooms, had to have a window opening directly onto the street or onto a courtyard—not an airshaft—and all new apartments had to be supplied with running water.²⁶ New tenements also had to include at least one bathroom for every three rooms, and the owners of existing tenements were required to replace outhouses and school sinks with at least one sewer-connected bathroom for every two families.²⁷ Significantly, the 1901 law imposed permit requirements for new construction and

²² KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 116 (1987).

²³ See *THE TENEMENT HOUSE PROBLEM, INCLUDING THE REPORT OF THE NEW YORK STATE TENEMENT HOUSE COMMISSION OF 1900* (Robert W. DeForest & Lawrence Veiller eds., 1903). For biographical information about Lawrence Veiller and a discussion of his influence on the growing reform movement, see Lower East Side Tenement Museum, *Birth of a Housing Act*, http://209.160.6.175/features_dolkart2.html (last visited Jan. 17, 2011).

²⁴ See John G. Hill, *Fifty Years of Social Action on the Housing Front*, 22 *SOC. SERV. REV.* 160, 165 (1948).

²⁵ 1901 N.Y. Laws 891.

²⁶ *Id.* at 905, 910.

²⁷ *Id.* at 910, 912.

alterations, and included some enforcement provisions.²⁸ Although some alterations to existing buildings were required to be made within one year, most landlords did not comply voluntarily.²⁹ Moreover, the Tenement House Department, created to enforce the law, was insufficiently funded,³⁰ and many of the law's most important provisions were merely prospective; they "did not so much alleviate conditions . . . as insure that the worst abuses would not be reproduced"³¹

Additional and more restrictive building regulations were established under New York City's 1916 zoning code—the first comprehensive zoning scheme in the country³²—as well as the 1929 Multiple Dwelling Law (MDL),³³ which superseded the 1901 Tenement House Act. The MDL included stricter building requirements and, for the first time, required all apartments in new tenements to have their own bathrooms.³⁴ The legislation was viewed as weak and inadequate by then-Governor Franklin D. Roosevelt.³⁵ Nevertheless, he acknowledged that the MDL's shortcomings were "not a valid reason for disapproving the bill if it gives other needed relief; and I am convinced that it does."³⁶

B. Judicial Approval of Restrictive Regulations

These restrictive building regulations were early assertions of the police power and were susceptible to judicial challenges. The courts, however, acknowledged the slum problem and rejected various causes of action intended to undermine the tenement laws. In one of the earliest such cases, the New York Court of Appeals in 1895 upheld regulations requiring tenement owners to furnish water in "sufficient quantity" on each floor of occupied

²⁸ *Id.* at 915–17.

²⁹ See Lower East Side Tenement Museum, http://www.tenement.org/encyclopedia/housing_tenements.htm (last visited Jan. 17, 2011).

³⁰ HENDERSON, *supra* note 2, at 48.

³¹ JACKSON, *supra* note 22, at 131.

³² GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE 8-5 (Stuart Meck ed., 2002).

³³ 1929 N.Y. Laws 1663.

³⁴ *Id.* at 1697.

³⁵ Memorandum from Governor Franklin D. Roosevelt to the New York State Legislature Approving A New Multiple Dwellings Law (Apr. 18, 1929), in 1 PUBLIC PAPERS OF FRANKLIN D. ROOSEVELT 309 (1938) [references to this collection are hereinafter PUB. PAPERS OF FRANKLIN D. ROOSEVELT].

³⁶ *Id.*

tenements.³⁷ The court found the requirements to be reasonable exercises of the police power, both for fire protection and sanitation purposes, and rejected attacks based on the cost of compliance and lack of any pre-enforcement hearing provision.³⁸ The 1901 Tenement House Act faced a similar challenge when a building owner refused to comply with an order to replace her building's school sink³⁹ with one bathroom for every two families. Taking notice of a variety of studies and reports finding school sinks to be public health nuisances, the Court of Appeals explained that their abolition "was an absolute necessity in the due protection of the public health in the city of New York."⁴⁰ In addition to affirming the law on police power grounds, the court also held that it was not a taking of property requiring compensation.⁴¹

Shortly after its enactment, the MDL was challenged on the ground that it violated the Home Rule provision of the State Constitution, which generally prohibits the legislature from interfering with local governments' "property, affairs [and] government."⁴² The Court of Appeals rejected the challenge by a vote of 5-2, holding that the slum problem was a matter of state concern and an appropriate topic of legislation.⁴³ As Judge Cardozo explained in his concurring opinion, the law was primarily intended "to eradicate the slum. It seeks to bring about conditions whereby healthy children shall be born, and healthy men and women reared, in the dwellings of the great metropolis. To have such men and women is not a city concern merely. It is the concern of the whole State."⁴⁴ In 1937, the Court of Appeals

³⁷ *Health Dep't of N.Y. v. Rector*, 39 N.E. 833, 834-35 (N.Y. 1895).

³⁸ *Id.* at 838-39.

³⁹ School sinks were a sort of outhouse connected to the sewer. For additional explanation, see TYLER ANBINDER, *FIVE POINTS: THE 19TH-CENTURY NEW YORK CITY NEIGHBORHOOD THAT INVENTED TAP DANCE, STOLE ELECTIONS, AND BECAME THE WORLD'S MOST NOTORIOUS SLUM* 85-86 (2001).

⁴⁰ *Tenement House Dep't of N.Y. v. Moesch*, 72 N.E. 231, 233 (N.Y. 1904).

⁴¹ *Id.* at 232-34.

⁴² N.Y. CONST. art. IX, § 2(b)(2). For general information on home rule powers, see 25 N.Y. JUR. 2D *Counties, Towns and Municipal Corporations* § 86 (2001).

⁴³ *Adler v. Deegan*, 167 N.E. 705, 708-09 (N.Y. 1929).

⁴⁴ *Id.* at 711 (Cardozo, J., concurring). Ernst N. Adler owned an apartment building located on East 93rd Street in Manhattan. See *Test Case Assails New Dwelling Law*, N.Y. TIMES, June 14, 1929, at 46. Because of the home rule issue, the case "brought about the unusual situation of [the city's corporation counsel] appearing in support of a suit against a city official, [the] Tenement House Commissioner . . ." *Id.*; see also *New Dwelling Law Held Constitutional by*

reaffirmed the holdings in these cases when it again upheld the MDL against a takings challenge.⁴⁵ In a unanimous opinion, the court explained that the costs of compliance could not be viewed as unreasonable in light of the deplorable housing conditions the law was intended to eliminate.⁴⁶

II. LIMITED DIVIDEND HOUSING

A. *The Inadequacy of Restrictive Regulations*

Building and sanitation laws greatly improved housing conditions for many people, but despite their proliferation and wide acceptance by the public and the courts, they did not suffice to eliminate the slums.⁴⁷ To begin with, many of the early laws required only minimal improvements, as described above,⁴⁸ and enforcement resources were often limited.⁴⁹ More important, however, was the growing realization that the slum problem could not be solved by requiring higher building standards unless some mechanism was also created to ensure the production of an adequate stock of low income housing. As Charles Abrams explained: “Drastic use of the police power without simultaneous provision of new units would leave [slum dwellers] completely homeless, since private enterprise will not provide them without profit.”⁵⁰ Governor Al Smith echoed this sentiment in his 1926

Court of Appeals, N.Y. TIMES, Aug. 9, 1929, at 1 (discussing reaction to the ruling).

⁴⁵ *Adamec v. Post*, 7 N.E.2d 120, 124 (N.Y. 1937); see also *Law on Tenements Upheld by Court*, N.Y. TIMES, Mar. 10, 1937, at 5.

⁴⁶ *Adamec*, 7 N.E.2d at 124.

⁴⁷ See, e.g., Franklin D. Roosevelt, Governor of N.Y., Address on Better Housing Conditions (Feb. 28, 1930), in 1 PUB. PAPERS OF FRANKLIN D. ROOSEVELT, *supra* note 35, at 312.

⁴⁸ See *supra* Part I.A.; see also ABRAMS AMICUS BRIEF, *supra* note 15, at 19.

⁴⁹ See Memorandum from Governor Franklin D. Roosevelt to the New York State Legislature Vetoing a Bill Permitting Multiple Occupancy in Tenement Houses (Apr. 4, 1932) 1 PUB. PAPERS OF FRANKLIN D. ROOSEVELT, *supra* note 35, at 313–14 (vetoing a bill that would have relaxed occupancy restrictions and stating: “The bill is being urged on the plea that the present law is not being enforced. I do not believe that that argument is a sound one.”).

⁵⁰ ABRAMS AMICUS BRIEF, *supra* note 15, at 13; see also 4 N. Y. STATE CONSTITUTIONAL CONVENTION COMM., STATE AND LOCAL GOVERNMENT IN NEW YORK 250 (1938) [hereinafter POLETTI REPORT ON STATE AND LOCAL GOVERNMENT] (“It had been discovered that a more fundamental problem, perhaps, than the existence of unfit dwellings is the inability of the poor to pay for better ones The need, it appeared, was for more houses, for better houses, and, above all, for cheaper houses.”).

Message to the Legislature, explaining that until that point, “[t]he building of homes has been looked upon as an enterprise . . . in which the element of speculative profit has been operative. So long as this point of view is maintained it has been proven impossible to construct the homes we need or to rebuild the tenement areas”⁵¹

Housing reform was a priority for Governor Smith, who had grown up in New York City’s slum-ridden Lower East Side.⁵² He appointed a Housing Commission in 1923 to study the problem, and the commission’s work formed the basis of the 1926 State Housing Law.⁵³ Passage of the legislation was no small feat; government involvement in housing was still a fairly novel concept in the 1920s⁵⁴ and one prone to being labeled as “socialistic.”⁵⁵ Even Lawrence Veiller, who had spearheaded the campaign for restrictive legislation in 1901, was opposed to government intervention in the housing market.⁵⁶ As a result of these concerns, the State Housing Law was conservative in its approach and kept “to the American tradition” of providing only limited, indirect subsidies.⁵⁷

⁵¹ Alfred E. Smith, Governor of N.Y., Annual Message to the Legislature (Jan. 6, 1926), in 1 PUBLIC PAPERS OF ALFRED E. SMITH 53 (1929) [references to this collection are hereinafter PUB. PAPERS OF ALFRED E. SMITH].

⁵² See Aaron Rabinowitz, Member of the State Hous. Bd. of New York, Address at the Housing Conference in Boston, MA (Apr. 29, 1931), available at THE HERBERT H. LEHMAN COLLECTIONS, <http://www.columbia.edu/cu/lweb/indiv/rbml/units/lehman/index.html> [hereinafter LEHMAN ARCHIVES] (stating: “[Governor Smith] was determined that a practicable method be devised to eliminate the thousands of old buildings.”); see also ROBERT CARO, THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK 113–19 (1975); LOUIS H. PINK, THE NEW DAY IN HOUSING 102–04 (1928).

⁵³ Rabinowitz, *supra* note 52.

⁵⁴ The State Housing Law was preceded by a 1922 post-war tax exemption for all new housing. 1922 N.Y. LAWS 655. The measure, however, did not result in much affordable housing construction. One report went so far as to say that “it was almost useless.” POLETTI REPORT ON TAXATION AND FINANCE, *supra* note 14, at 411. In addition to the unaffordable character of housing produced under the post-war tax exemption, many of the projects were located in suburban areas. PINK, *supra* note 52, at 127. Thus, the tax exemption was doubly overbroad, subsidizing housing that neither alleviated affordable housing shortages nor removed insanitary slum areas.

⁵⁵ See, e.g., Memorandum from Governor Alfred E. Smith to the New York State Legislature Approving the New York State Housing Law (May 10, 1926) [hereinafter HOUSING APPROVAL MEMO], in 1 PUB. PAPERS OF ALFRED E. SMITH, *supra* note 51, at 427–28; see also PINK, *supra* note 52, at 127; POLETTI REPORT ON THE BILL OF RIGHTS, *supra* note 16, at 642.

⁵⁶ See HENDERSON, *supra* note 2, at 49–50 (discussing Veiller’s opposition to public housing).

⁵⁷ Adams, *supra* note 16, at XX3. Another early foray into housing subsidies,

B. The 1926 State Housing Law

The 1926 State Housing Law authorized the creation of limited dividend housing corporations, building on the work of progressive housing developers such as the Improved Dwelling Association and the Tenement Housing Building Company, which had already begun constructing inexpensive but sanitary and affordable housing in the late nineteenth century. The benevolent ideologies espoused by these companies had led them to voluntarily limit their profits, but the State Housing Law recognized that less altruistic private developers would need financial incentives to build projects that would otherwise be unprofitable.⁵⁸ Accordingly, the law granted a tax exemption to defray costs in exchange for imposing rental caps and limits on profits.⁵⁹ In some cases, the law also authorized the use of eminent domain.⁶⁰

Importantly, the 1926 law also created a State Housing Board that was given broad power and control over limited dividend housing companies: projects could only be undertaken if the board had found that housing problems in the locality were caused by conditions impeding the ordinary operation of private enterprise; projects could not be approved unless the board determined that they would be financially feasible under the law's rent limits;

it should be noted, was the Walker-Heckscher Plan of 1927, which proposed to obtain slum land for clearance and redevelopment through excess condemnations incident to street widening projects. POLETTI REPORT ON TAXATION AND FINANCE, *supra* note 14, at 412. However, the pilot project proposed by the plan's sponsors proved to be cost-prohibitive, with New York City Mayor Jimmy Walker "denouncing those property owners who held out for 'as much as the traffic could bear' as 'exorbitant' in their demands." *First Model Homes to Rise on East Side*, N.Y. TIMES, Apr. 3, 1929, at 26; see PINK, *supra* note 52, at 115-21.

⁵⁸ See 1926 N.Y. Laws 1507; HOUSING APPROVAL MEMO, *supra* note 55; POLETTI REPORT ON TAXATION AND FINANCE, *supra* note 14, at 410-12.

⁵⁹ 1926 N.Y. Laws 1507-1509 (rental caps), 1513-1516 (limited dividends), 1518 (tax exemption). The statute set rent limits at \$12.50 per room in Manhattan, \$11 per room in Brooklyn and the Bronx, and \$9-10 per room elsewhere in the State. These rates, however, were not affordable to those in the lowest income brackets, and they could not compete with tenements renting for half the price. See POLETTI REPORT ON STATE AND LOCAL GOVERNMENT, *supra* note 50, at 251; PLUNZ, *supra* note 14, at 223. Under limited circumstances and after compliance with appropriate procedures, the Board could authorize rents higher than the limits imposed by the statute. 1926 N.Y. Laws 1513, 1519.

⁶⁰ 1926 N.Y. Laws 1512 (restricting the use of eminent domain to cases where condemnation was approved by the State Board of Housing after a public hearing).

companies had to submit architectural and financial plans; and the board could order repairs, examine companies' books, inspect project sites, prescribe accounting methods, and require annual reports. The board was also expected to study statewide housing needs and best practices and offer technical assistance to local housing boards, limited dividend corporations, and associations seeking to finance cooperative projects.⁶¹

The housing law's limited dividend provisions were essentially superseded by the Redevelopment Companies Law and the Limited Profit Housing Companies Law (more commonly known as Mitchell-Lama), enacted in 1943 and 1955, respectively. These laws, as discussed below, offered more benefits and fewer restrictions.⁶²

C. Limited Dividend Housing Projects constructed under the State Housing Law

Within ten years of the State Housing Law's enactment, a dozen limited dividend housing projects with a total of about 6,000 apartments had been constructed in New York City.⁶³ These projects, however, often needed additional funding mechanisms, and most of the housing they produced was too expensive for the city's poorest residents.

The first limited dividend housing company, which was also one of the first cooperative housing ventures in the country,⁶⁴ was sponsored in 1927 by the Amalgamated Clothing Workers Union and financed by tenants' down payments as well as a mortgage from the Metropolitan Life Insurance Company. The project, known as the Amalgamated Housing Cooperative, was located in the Bronx and the first building was finished by the end of 1927.⁶⁵ In 1929, the Amalgamated Clothing Workers Union commenced another cooperative project on the Lower East Side, called the

⁶¹ *Id.* at 1507–18.

⁶² *See infra* Part V.F.

⁶³ POLETTI REPORT ON TAXATION AND FINANCE, *supra* note 14, at 413.

⁶⁴ Although cooperatives are known today for their exclusive nature, “[t]he original intent of the cooperative plan was actually quite utopian.” David A. Smith, *Affordable Hous. Inst.*, http://affordablehousinginstitute.org/blogs/us/2006/04/cradle_of_apart.html (last visited Jan. 17, 2011) (quoting STEVEN S. GAINES, *THE SKY'S THE LIMIT: PASSION AND PROPERTY IN MANHATTAN* 72 (2005)).

⁶⁵ *See* Rabinowitz, *supra* note 52, at 4; *see also* AMALGAMATED HOUSING COOPERATIVE, <http://www.amalgamated-bronx.coop/about.html> (last visited Jan. 17, 2011).

Amalgamated Dwellings. Its financial sponsors included then-Lieutenant Governor Herbert Lehman and Aaron Rabinowitz, a developer and recent appointee to the state housing board,⁶⁶ who were able to purchase the property for well below market value.⁶⁷

One of the largest projects to be built under the State Housing Law was Knickerbocker Village, which was also located on the Lower East Side and had close to 1,600 apartments.⁶⁸ It received most of its financing from the federal government's Reconstruction Finance Corporation,⁶⁹ and unlike the union-sponsored cooperatives, its developer, Fred Filmore French, made no pretenses about having benevolent motivations. He chose the limited dividend scheme because by 1934 no financing was available for his proposed "development for junior Wall Street executives." It was clear, moreover, that Knickerbocker Village would not provide housing for the persons living in the slum it replaced, which was the most dilapidated of Mr. French's holdings (it was called "Lung Block" due to its high tuberculosis mortality rates). The average rent per room in the slum had been \$5, a sum well below the \$12.50 maximum permitted under the State Housing Law.⁷⁰

D. Judicial Approval of Tax Exemption for Limited Dividend Housing

The tax exemption provisions of the State Housing Law were challenged as discriminatory in 1931, but were upheld by the Bronx County Supreme Court.⁷¹ The court recognized that "the State Housing Law was enacted in the interests of all the people of the state Restrictive measures as preventatives, while in

⁶⁶ Rabinowitz, *supra* note 52, at 3.

⁶⁷ See *First Model Homes to Rise on East Side*, N.Y. TIMES, Apr. 3, 1929; Letter from Herbert Lehman, Governor of N.Y., to 504-520 Grand Street Corp. (Dec. 15, 1948) available at LEHMAN ARCHIVES, *supra* note 52.

⁶⁸ See PLUNZ, *supra* note 14, at 207, 209-12 (discussing the architectural plan).

⁶⁹ *Id.* at 207 (explaining that it was one of only two projects financed by the Reconstruction Finance Corporation, and the financing program was later taken over by the Public Works Administration).

⁷⁰ See *Housing: Knickerbocker Village*, TIME, Oct. 15, 1934 [hereinafter *Knickerbocker Village*], available at <http://www.time.com/time/magazine/article/0,9171,747998,00.html>; see generally *Weinfeld v. Knickerbocker Vill., Inc.*, 25 N.Y.S.2d 759, 760 (App. Div. 1941), *aff'd*, *Weinfeld v. Hillside Housing Corp.*, 35 N.E.2d 933, 933 (N.Y. 1941) (discussing the project).

⁷¹ *Mars Realty Corp. v. Sexton*, 253 N.Y.S. 15, 23 (Sup. Ct. 1931).

a way beneficial, were inadequate to combat the evils of bad housing. Accordingly, the Housing Law was enacted as a progressive measure.”⁷² On this basis, and despite the lack of extensive authority supporting this sort of tax exemption, the court held that the legislation was rational and constitutional. “The wisdom of this legislation,” the court wrote, “rests solely with the law-making bodies of the State. Its novelty is no argument against its constitutionality.”⁷³

E. Judicial Approval of Tenant Income Restrictions

The State Housing Law was superseded by the Public Housing Law in 1939,⁷⁴ and then by the Private Housing Law in 1961,⁷⁵ but the original limited dividend housing companies were preserved and subject to mostly similar regulations.⁷⁶ One of the changes, however, was that if tenants’ incomes rose above a specified income to rent ratio, they would be subject either to eviction or a rent surcharge.⁷⁷ In 1953, a Knickerbocker Village resident challenged these provisions and lost, with the court explaining that fixing rents proportionate to tenants’ incomes was fair and reasonable.⁷⁸ When the New York Court of Appeals heard a similar case brought by a tenant in one of the Amalgamated cooperatives, it affirmed the holding that income restrictions were “reasonable revisions” of the original statute. As the court explained, the restrictions encouraged higher-income tenants to relocate to market-rate housing, and in doing so, the income restrictions opened up scarce affordable units for “those not as fortunate in lower income brackets, . . . and, in time, slum areas are lessened.”⁷⁹

⁷² *Id.*

⁷³ *Id.* (citation omitted).

⁷⁴ 1939 N.Y. Laws 1978.

⁷⁵ 1961 N.Y. Laws 2164; see WILLIAM C. THOMPSON, JR., COMPT’R, OFFICE OF THE N.Y.C. COMPT’R, AFFORDABLE NO MORE: NEW YORK CITY’S LOOMING CRISIS IN MITCHELL-LAMA AND LIMITED DIVIDEND HOUSING 7 (2004) [hereinafter LOOMING CRISIS], available at http://www.leota.org/documents/Feb18-04_Mitchell-Lama_Report.pdf.

⁷⁶ See N.Y. PRIV. HOUS. FIN. §§ 70–97 (McKinney 2002).

⁷⁷ See *Tropp v. Knickerbocker Vill.*, 122 N.Y.S.2d 350, 357–60 (Sup. Ct. 1953) (discussing the evolution of the income-rental ratio).

⁷⁸ *Id.* at 364–65.

⁷⁹ *Fruhling v. Amalgamated Hous. Corp.*, 175 N.E.2d 156, 159 (N.Y. 1961).

III. PUBLIC HOUSING

A. The Inadequacy of the Limited Dividend Housing Law

The limited dividend housing statute was deemed inadequate soon after it was enacted.⁸⁰ There was a growing belief that government had an obligation to play a more direct role in the development of affordable housing—both to improve housing conditions and to support the construction industry.⁸¹ Limited dividend companies, moreover, had failed to produce housing affordable to those in the lowest income brackets;⁸² they were simply not profitable enough to attract the level of investment needed to address the slum problem.⁸³

B. The Municipal Housing Authorities Law

Solutions to these problems could have taken the form of larger subsidies or relaxed profit restrictions (and they eventually would), but in the early 1930s an increasingly expansive view of the police power⁸⁴ and the lack of private capital or financing⁸⁵ instead supported a new type of housing program—one that would be government-financed and government-managed. Public housing supporters believed that “constructive, not restrictive legislation” would be necessary to fully address the housing problem, as private developers alone could not be relied on to build needed low income housing.⁸⁶ Perhaps most importantly, federal funding was then becoming available under New Deal programs for municipal housing construction.⁸⁷

⁸⁰ See, e.g., Letter from Mary K. Simkovitch, Chairman, Public Housing Conference, to Herbert H. Lehman, Lt. Governor of N.Y. (Dec. 3, 1932) [hereinafter SIMKOVICH LETTER], available at LEHMAN ARCHIVES, *supra* note 52; \$1,500,000,000 Plan for Housing Urged: City Advisory Group Seeks to Rush Ten-Year Program to Care for 31,000 Families, NY TIMES, Mar. 22, 1935 at 25.

⁸¹ POLETTI REPORT ON THE BILL OF RIGHTS, *supra* note 16, at 629–35.

⁸² POLETTI REPORT ON STATE AND LOCAL GOVERNMENT, *supra* note 50, at 251.

⁸³ See Rabinowitz, *supra* note 52, at 3 (stating that “we came to understand why rich men had not volunteered to supply the funds necessary. At best, it was an experiment. Wealth is timid. Model housing on a large scale had not been tried.”).

⁸⁴ See William E. Nelson, *The Growth of Distrust: The Emergence of Hostility Toward Government Regulation of the Economy*, 25 HOFSTRA L. REV. 1, 2 (1996).

⁸⁵ See, e.g., *Knickerbocker Village*, *supra* note 70.

⁸⁶ HENDERSON, *supra* note 2, at 51.

⁸⁷ See generally Lavine, *supra* note 10, at 436 (discussing various New Deal programs).

Charles Abrams was recruited by Fiorello LaGuardia (then a mayoral candidate) to help draft a public housing law, along with Ira Robbins and Carl Stern, who both had experience in the housing field.⁸⁸ The availability of federal funding helped secure the bill's passage,⁸⁹ despite uncertainties about how the public housing program would be implemented, and whether it would be successful.⁹⁰ Upon signing it into law, Governor Lehman called the Municipal Housing Authorities Law (MHAL) a "pioneering program."⁹¹ Indeed, it preceded enactment of the National Housing Act of 1934 by several months,⁹² and the New York City Housing Authority, created only weeks after the bill was signed, became one of the first public housing authorities in the country.⁹³

⁸⁸ HENDERSON, *supra* note 2, at 55, 58–59.

⁸⁹ 1934 N.Y. Laws 13. Legislation to establish municipal housing authorities was proposed as early as 1932. SIMKOVICH LETTER, *supra* note 80. Governor Lehman cited the availability of federal funding as one of the most significant reasons for enacting the legislation. See Memorandum from Governor Herbert H. Lehman to the New York State Legislature Recommending Legislation Permitting Cities to Create Municipal Housing Authorities (Aug. 3, 1933), in PUBLIC PAPERS OF HERBERT H. LEHMAN, 1933, at 143 (1934) [references to this collection are hereinafter PUB. PAPERS OF GOVERNOR HERBERT H. LEHMAN]; Memorandum from Governor Herbert H. Lehman to the New York State Legislature Renewing Recommendation to Permit Cities to Create Municipal Housing Authorities for Clearing Slums and Providing Low Cost Housing (Oct. 18, 1933), *id.* at 181; see also POLETTI REPORT ON TAXATION AND FINANCE, *supra* note 14, at 413–14.

⁹⁰ HENDERSON, *supra* note 2, at 58.

⁹¹ Memorandum from Governor Herbert H. Lehman to the New York State Legislature Approving the Municipal Housing Authority Law (Jan. 31, 1934), in Bill Jacket, L. 1934 c. 4. Although several other states had passed housing legislation authorizing municipal housing entities, the MHAL's approach was "*terra incognita*." HENDERSON, *supra* note 2, at 56 (emphasis in original).

⁹² The MHAL was enacted in January 1934. See 1934 N.Y. Laws 13. The federal law was not enacted until June. See National Housing Act of 1934, ch. 847, 48 Stat. 1246.

⁹³ N.Y.C. HOUS. AUTH., <http://www.nyc.gov/html/nycha/html/about/nych75.shtml> (last visited Jan. 17, 2011). Nationwide, the popularity of local housing authorities would remain somewhat limited until the 1937 United States Housing Act appropriated funds for municipal redevelopment projects. See also PHILA. HOUS. AUTH., <http://www.pha.phila.gov/aboutpha/> (created 1937) (last visited Jan. 17, 2011); CHI. HOUS. AUTH., http://www.thecha.org/pages/about_cha/18.php (created 1937) (last visited Jan. 17, 2011); S. F. HOUS. AUTH., <http://www.sfha.org/about-us.html?PHPSESSID=47d318be688acb58f9ba35cbfc4f5e62> (created 1938) (last visited Jan. 17, 2011); HOUS. AUTH. OF THE CITY OF PITTSBURGH, <http://www.hacp.org/global/aboutus.jsp?pageId=127000000011051456742443> (created 1937) (last visited Jan. 17, 2011); HOUS. AUTH. OF BALT. CITY, <http://www.baltimorehousing.org/inside.asp> (created 1937) (last visited Jan. 17, 2011); SEATTLE HOUS. AUTH., <http://www.seattlehousing.org/about/history/> (created 1939) (last visited Jan. 17, 2011). Some cities, however, experimented with municipal housing agencies before the 1937 Housing Act was

Under the MHAL, any city in the state could create a housing authority that would exist as a separate and distinct quasi-public entity. Housing authorities were given numerous and unprecedented powers, including the ability to determine the location of slum clearance projects and the power to devise and implement slum redevelopment plans. They could also redevelop slum areas, build low income housing, use eminent domain, and issue bonds.⁹⁴ As quasi-public entities, moreover, housing authorities were exempt from federal, state and local taxes.⁹⁵ Like limited dividend housing companies, however, they were subject to oversight from the State Board of Housing. They also had to receive permission either from the federal or local government, depending on the funding source, to condemn or otherwise acquire property.⁹⁶

Abrams believed that one of the law's most important aspects was the discretion given to housing authorities to determine the location of slum clearance and public housing construction projects, especially when combined with the availability of eminent domain.⁹⁷ This required Abrams to establish standards for identifying the slum areas that would be subject to redevelopment.⁹⁸ The law, as finally enacted, described them as areas where "there exist unsanitary and substandard housing conditions owing to over-crowding and concentration of population, improper planning, excessive land coverage, lack of proper light, air and space, unsanitary design and arrangement, or lack of proper sanitary facilities . . ." ⁹⁹ Although the legislation did not use the same terms, it borrowed from definitions of "slums" and "blight" that had been developed by planners beginning in the late 1920s.¹⁰⁰ What Abrams did not

passed. *See* *Wilmon v. Powell*, 266 P. 1029, 1031 (Cal. Ct. App. 1928) (upholding amendments to the Los Angeles City Charter creating a municipal housing commission); Lavine, *supra* note 10, at 435 (discussing establishment of the Washington, D.C. Alley Dwelling Authority in 1934); DETROIT HOUS. COMM'N, <http://www.dhcmi.org/Page.aspx?level=2&id=47> (created 1933) (last visited Jan. 17, 2011); CUYAHOGA METRO. HOUS. AUTH., <http://www.cmha.net/information/cmhahistory.aspx> (created 1933) (last visited Jan. 17, 2011).

⁹⁴ 1934 N.Y. Laws 17-23.

⁹⁵ *Id.* at 23.

⁹⁶ *Id.* at 19-23.

⁹⁷ HENDERSON, *supra* note 2, at 58; *see also* Pritchett, *supra* note 10, at 8 (discussing the importance of eminent domain in early slum clearance projects).

⁹⁸ HENDERSON, *supra* note 2, at 56.

⁹⁹ 1934 N.Y. Laws 14.

¹⁰⁰ Pritchett, *supra* note 10, at 15-16.

foresee was that over the years, successive acts and judicial interpretations would expand the meaning of “substandard” and “insanitary” well beyond their original meaning.

C. Housing Authorities as Public Authorities

One of the MHAL’s most significant innovations was its use of the public authority governmental structure. The legislature, because of restrictions in the New York State Constitution, could only issue bonds to finance costs not covered by federal slum clearance funding if the bonds were approved by the voters, and the voters generally did not want to authorize new debt.¹⁰¹ Local governments were also constrained by debt limits in the constitution.¹⁰² Public authorities, however, are classified as quasi-public (or quasi-private) corporations and are not subject to the constitution’s debt limits. They may issue bonds without voter approval, and because they are independent entities, the state and its municipalities are not technically liable for their debts.

In 1934, public authorities were a relatively new form of government, although existing authorities included the Port of New York Authority,¹⁰³ the New York State Bridge Authority,¹⁰⁴ the Jones Beach State Parkway Authority,¹⁰⁵ the Triborough Bridge Authority,¹⁰⁶ and the Bethpage Park Authority.¹⁰⁷ These authorities relied on fairly ascertainable revenue streams, such as tolls from roads and bridges, to secure their bond issues, and by doing so they could obtain financing for large scale public works projects that cities and state agencies could only undertake with voter approval.¹⁰⁸

¹⁰¹ N.Y. CONST. art. VII, § 11. For further discussion of state constitutional debt limits, see Richard Briffault, *The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 RUTGERS L. J. 907 (2003).

¹⁰² N.Y. CONST. art. VIII, § 2.

¹⁰³ 1921 N.Y. Laws 496.

¹⁰⁴ 1932 N.Y. Laws 1172.

¹⁰⁵ 1933 N.Y. Laws 105.

¹⁰⁶ *Id.* at 536.

¹⁰⁷ *Id.* at 1626. See *Gaynor v. Marohn*, 198 N.E. 13, 16 (N.Y. 1935) (listing public authorities existing in 1935).

¹⁰⁸ See N.Y. STATE MORELAND ACT COMM’N ON THE URBAN DEV. CORP. AND OTHER STATE FIN. AGENCIES, RESTORING CREDIT AND CONFIDENCE: A REFORM PROGRAM FOR NEW YORK STATE AND ITS PUBLIC AUTHORITIES 85 (1976) [hereinafter RESTORING CREDIT AND CONFIDENCE] (discussing the concept of revenue bonds); see also CARO, *supra* note 52, at 607–36 (discussing Robert Moses’ pioneering use of public authorities in New York).

Municipal housing authorities were rather different than these authorities. The MHAL, to begin with, did not limit housing authorities' activities to specific, identified projects, as had been the case with the most of the earlier authorities. Rather, housing authorities themselves could determine the location and number of projects they intended to complete.¹⁰⁹ It was also somewhat debatable whether housing authorities would actually have any revenues with which to secure their bonds, given the real and perceived financial risks associated with low income housing projects.¹¹⁰ Nevertheless, housing authority projects were described as "self-liquidating,"¹¹¹ and legislators supported the proposal because "neither state nor city governments were responsible for an authority's financial obligations."¹¹² They did not point out that the MHAL included a provision allowing cities to make substantial financial "advances" to housing authorities.¹¹³

The MHAL was also notable for using the public authority structure to insulate public housing programs from partisan politics. Charles Abrams and the other drafters of the MHAL included a variety of safeguards in the law to insulate housing authorities from intrusive elected officials, such as staggered terms for board members and limits on mayors' abilities to

¹⁰⁹ See 5 N.Y. STATE CONSTITUTIONAL CONVENTION COMM., NEW YORK CITY GOVERNMENT FUNCTIONS AND PROBLEMS 96 (1938) [hereinafter POLETTI REPORT ON NEW YORK CITY GOVERNMENT]; 11 N.Y. STATE CONSTITUTIONAL CONVENTION COMM., PROBLEMS RELATING TO HOME RULE AND LOCAL GOVERNMENT 238–39 (1938) [hereinafter POLETTI REPORT ON HOME RULE AND LOCAL GOVERNMENT].

¹¹⁰ See POLETTI REPORT ON NEW YORK CITY GOVERNMENT, *supra* note 109, at 106 (noting "many experts believe that low-rent housing development cannot be self sustaining and that under present conditions they should not be. Most plans now being considered, contemplate government subsidies whether by outright cash appropriation or by tax exemption or both"). Additionally, while infrastructure authorities might raise additional funds by increasing tolls or fees, raising rentals for housing authority projects would have negated the purpose of building them. See PLUNZ, *supra* note 14, at 208 (stating "[o]bviously, limitations on rents had to be enforced in order to fulfill the goals of the programs").

¹¹¹ See, e.g., POLETTI REPORT ON TAXATION AND FINANCE, *supra* note 14, at 414.

¹¹² HENDERSON, *supra* note 2, at 59; see also Memorandum from Governor Herbert H. Lehman to the New York State Legislature Renewing Recommendation to Permit Cities to Create Municipal Housing Authorities for Clearing Slums and Providing Low Cost Housing (Oct. 18, 1933), in PUB. PAPERS OF GOVERNOR HERBERT H. LEHMAN, *supra* note 89, at 181 (stating "[n]either the credit of the State nor that of its cities is involved by the creation of municipal housing authorities").

¹¹³ See 1934 N.Y. Laws 16–17.

remove board members.¹¹⁴ These provisions, however, were not especially effective. Mayor LaGuardia asserted his control over the New York City Housing Authority (NYCHA) soon after it was created, and as a result, Abrams resigned from the board and the chairman, Langdon Post, was dismissed.¹¹⁵ In designing authorities to be independent, Abrams and his colleagues also failed to consider the dangers of unrestrained autonomy and “[t]he possibility that nonelected officials, such as Robert Moses, might use authorities for their own questionable purposes”¹¹⁶

D. First Houses and New York City Housing Authority v. Muller

The first housing project to be completed under the MHAL was also one of the earliest in the United States, and it was aptly named “First Houses.”¹¹⁷ Located on East Third Street on the Lower East Side, First Houses resulted in another milestone when the Court of Appeals became the first state high court to approve the use of eminent domain for slum clearance and low-income housing.¹¹⁸ The case arose when NYCHA sought to acquire two adjoining old law tenements owned by Andrew and Rosa Muller. The housing authority had already acquired parcels on either side of the Mullers’ buildings, and at least by its account, the Mullers refused to sell their tenements “excepting at prices largely in excess of the true value thereof, and which [were] exorbitant . . . and which [NYCHA] would not be justified

¹¹⁴ HENDERSON, *supra* note 2, at 56–57.

¹¹⁵ *Id.* at 78–80.

¹¹⁶ *Id.* at 59. See also POLETTI REPORT ON HOME RULE AND LOCAL GOVERNMENT, *supra* note 109, at 244 (questioning whether authorities’ independence made “the lines of popular control...so indirect as to be almost nonexistent”).

¹¹⁷ See Maxwell H. Tretter, *Public Housing Finance*, 54 HARV. L. REV. 1325, 1325 n.2 (1941). For additional background on the project’s planning and financing, see HENDERSON, *supra* note 2, at 68–70.

¹¹⁸ *N.Y.C. Hous. Auth. v. Muller*, 1 N.E.2d 153, 154, 156 (N.Y. 1936); *Housing Act Valid, High Court Rules, Attacking Slums*, N.Y. TIMES, Mar. 18, 1936, at 1. While the Court of Appeals may have been the first state high court to determine that slum clearance and low income housing were public uses in the context of eminent domain, courts in California, New Jersey, and North Dakota had earlier reached similar results in taxing and spending challenges. *Willmon v. Powell*, 266 P. 1029, 1031 (Cal. Dist. Ct. App. 1928); *Simon v. O’Toole*, 155 A. 449, 452 (N.J. 1931); *Green v. Frazier*, 176 N.W. 11, 11–12 (N.D. 1920), *aff’d*, 253 U.S. 233, 243 (1920). For a listing of early state cases holding slum clearance and redevelopment to be public uses sufficient to support the use of eminent domain, see Lavine, *supra* note 10, at 438 n.69, 454 n.147.

in paying”¹¹⁹ The Mullers, indeed, seemed to fit the typical definition of “hold outs”; they did not raise any real objection to the claim that their buildings were substandard,¹²⁰ but they refused NYCHA’s first offer because it was not in cash, and when the authority returned with a cash offer in the same amount, the Mullers raised their price by about 30 percent.¹²¹ NYCHA then commenced condemnation proceedings, and the appraisers awarded the Mullers an amount well below the properties’ assessed value.¹²²

In affirming the condemnation order in *New York City Housing Authority v. Muller*, the Court of Appeals, possibly drawing on the “masterful” amicus brief submitted by Charles Abrams,¹²³ emphasized the social and economic liabilities caused by insanitary slum areas, including disease, crime, and the high costs of providing social services to residents. The court also pointed out that restrictive legislation was not enough, because viable solutions to the slum problem required both large scale clearance and the construction of low income housing—“the two things necessarily go together.”¹²⁴ As the court explained, eminent domain was necessary “to deal . . . with the occasional greedy owner seeking excessive profit by holding out. The cure is to be wrought, not through the regulated ownership of the individual, but through the ownership and operation by or under the direct control of the public itself.”¹²⁵

First Houses was completed in 1935, before the Court of Appeals issued its decision. Average rentals for the project’s first residents were slightly more than six dollars a room, and more than 4,000 people applied for its 120 apartments.¹²⁶ The project was praised as groundbreaking by Mayor LaGuardia, Governor Lehman, President Franklin Roosevelt and First Lady Eleanor,

¹¹⁹ Amended Petition for Condemnation and Apportionment of Commissioners on Appraisal at 29, *N.Y.C. Hous. Auth. v. Muller*, 1 N.E.2d 153 (N.Y. 1936) [hereinafter AMENDED PETITION FOR CONDEMNATION].

¹²⁰ ABRAMS AMICUS BRIEF, *supra* note 15, at 5.

¹²¹ HENDERSON, *supra* note 2, at 72 (describing the negotiations between NYCHA and the Mullers).

¹²² Order Confirming Report of Commissioners of Appraisal at 8–9, *N.Y.C. Hous. Auth. v. Muller*, 1 N.E.2d 153 (N.Y. 1936).

¹²³ HENDERSON, *supra* note 2, at 73.

¹²⁴ *Muller*, 1 N.E.2d at 155; *see also* ABRAMS AMICUS BRIEF, *supra* note 15, at 54 (stating “construction is a necessary corollary of slum clearance”).

¹²⁵ *Muller*, 1 N.E.2d at 155.

¹²⁶ *City-Built Homes Will Open Dec. 3*, N.Y. TIMES, Nov. 21, 1935, at 3.

Robert Moses, and many other notables.¹²⁷ However, the housing authority focused on quality more than cost in its pilot project, making First Houses “an anachronism and atypical of what was to come in the following three decades of public housing.”¹²⁸

Despite acclaim for First Houses and frequent citation to *New York City Housing Authority v. Muller*, it should not be forgotten that public housing in New York was segregated in the 1930s. NYCHA’s second project and the First Houses’ counterpart for black residents, the Harlem River Houses,¹²⁹ was completed in 1937, marking the city’s first real (if begrudging) acknowledgment of the racial issues intimately related to the slum problem.¹³⁰ Although Abrams would later point to public housing projects as evidence supporting the viability and validity of integrated housing, his support for civil rights during the 1930s was uncommon.¹³¹

In 1939, however, New York became the first state to prohibit discrimination in public housing.¹³² This would become increasingly important for minority residents as discriminatory housing practices became more prevalent in the 1940s and 1950s.¹³³ NYCHA also created a progressive integration program, although it would prove to be “quixotic” during the most intensive years of urban renewal in the 1950s and 1960s.¹³⁴ Today, the public housing program in New York City is viewed as successful, at least in comparison to the well-publicized failures in cities like Chicago and St. Louis; indeed, the New York City Housing Authority’s holdings account for 10% of the public housing stock in the entire country. Ironically, the city’s success may be attributable in part to the extent of its early slum problem, as the tenements, contrasted with the city’s better managed middle class apartments, gave early public housing administrators the

¹²⁷ *First Houses’ Open, Roosevelt Hails New Slum Policy*, N.Y. TIMES, Dec. 4, 1935, at 1.

¹²⁸ See PLUNZ, *supra* note 14, at 209.

¹²⁹ See *id.* at 215–16 (discussing the architecture).

¹³⁰ See POLETTI REPORT ON TAXATION AND FINANCE, *supra* note 14, at 415. The housing authority did not give serious attention to building the Harlem River Houses until race riots broke out in Harlem in 1935. See BLOOM, *supra* note 11, at 32; see also 2 ENCYCLOPEDIA OF AFRICAN AMERICAN HISTORY 1896 TO THE PRESENT 377 (Paul Finkelman ed., 2009).

¹³¹ HENDERSON, *supra* note 2, at 132.

¹³² 1939 N.Y. Laws 2038.

¹³³ See BLOOM, *supra* note 11, at 169.

¹³⁴ See *id.* at 168–80.

experience necessary to maintain management quality.¹³⁵

IV. THE HOUSING ARTICLE OF THE 1938 NEW YORK CONSTITUTION

A. Constitutional Limitations on State and Local Housing Programs

While *Muller* became a landmark case for its holding that slum clearance and public housing were public uses sufficient to support the use of eminent domain, the case did not raise the opportunity for the court to rule on the various legal issues surrounding housing authority bonds and state and city funding for public housing.¹³⁶ Although housing authorities technically did not use the “credit” of the state or local governments, they were not, as some may have believed, financially self-supporting. Rather, it quickly became apparent that large state and local subsidies would be necessary for housing authorities to make any demonstrable impact on the state’s continuing housing problems. And although the 1937 U.S. Housing Act provided some federal funding, it simply was not enough.¹³⁷

Direct state and local funding for housing, as mentioned above, raised a number of constitutional problems. First, the New York Constitution prohibited the state from giving or loaning its credit to “corporations.” While legal scholars disagreed as to whether this provision applied to municipal housing authorities, or even local governments, which are technically *public* corporations, it was generally agreed that the constitution prohibited grants and loans to limited dividend housing companies.¹³⁸ A similar gift/loan clause applied to local governments.¹³⁹ The constitution also strictly limited the amount of debt that could be undertaken

¹³⁵ *See id.* at 3.

¹³⁶ While the Mullers did assert that the city would have to appropriate funds to the authority to make the authority’s projects financially feasible, they made this point only in passing and did not specifically raise the question of whether the city’s contributions might violate the state constitution’s local debt or credit provisions. Brief of Defendant-Appellants at 27–28, *N.Y. City Hous. Auth. v. Muller*, 1 N.E.2d 153 (N.Y. 1936).

¹³⁷ POLETTI REPORT ON STATE AND LOCAL GOVERNMENT, *supra* note 50, at 252–53.

¹³⁸ POLETTI REPORT ON TAXATION AND FINANCE, *supra* note 14, at 416–17; POLETTI REPORT ON THE BILL OF RIGHTS, *supra* note 16, at 620–21.

¹³⁹ POLETTI REPORT ON TAXATION AND FINANCE, *supra* note 14, at 419 (noting the differences between the gift/loan clauses applicable to state versus local governments).

by local governments to 10% of the assessed value of the property within their borders, and most local governments had already “practically exhausted” their debt margins.¹⁴⁰ Legal scholars agreed that these debt limits would in many cases prevent loans to both municipal housing authorities and limited dividend housing companies,¹⁴¹ and some believed that a housing authority’s bonds might even be deemed municipal debt for purposes of the constitutional limits.¹⁴²

A closely related question was whether a city might be held liable if its housing authority defaulted on its debts. Although the MHAL disclaimed any government liability for municipal housing authority bonds,¹⁴³ the Court of Appeals had recognized in 1926 that the state might be held responsible based on its “moral obligation,” even in the absence of any legal basis for liability.¹⁴⁴ A 1935 decision suggested that the MHAL’s non-liability provision would be upheld against any assertion of a moral obligation,¹⁴⁵ but a number of factual distinctions¹⁴⁶ and the possibility of mortgage (as opposed to bond) debt¹⁴⁷ left the exact status of housing authority obligations unclear.

B. The 1938 Housing Article

These constitutional problems were disposed of in 1938, when

¹⁴⁰ *Id.* at 421; *see also* *Robertson v. Zimmerman*, 196 N.E. 740, 741–42 (N.Y. 1935) (explaining that the city favored the creation of a sewer authority over constructing new infrastructure itself because it had exhausted its constitutional debt limit).

¹⁴¹ *See* POLETTI REPORT ON TAXATION AND FINANCE, *supra* note 14, at 420–23.

¹⁴² POLETTI REPORT ON NEW YORK CITY GOVERNMENT, *supra* note 109, at 106.

¹⁴³ 1934 N.Y. Laws 23.

¹⁴⁴ *Williamsburgh Sav. Bank v. State*, 153 N.E. 58, 63 (N.Y. 1926).

¹⁴⁵ *Robertson*, 196 N.E. at 744; *see* POLETTI REPORT ON NEW YORK CITY GOVERNMENT, *supra* note 109, at 104.

¹⁴⁶ *Robertson* involved the Buffalo Sewer Authority, which was authorized to assess charges against all properties served by the completed sewer project—a revenue stream more akin to the tolls of bridge and highway authorities than to the rents collected by municipal housing authorities. *Robertson*, 196 N.E. at 741. Moreover, *Robertson* involved only a facial challenge to the Buffalo Sewer Authority enabling legislation; it did not contemplate the equitable considerations that would be raised in the case of an actual default, as in *Williamsburgh Savings Bank*. *Compare Robertson*, 196 N.E. at 741 with *Williamsburgh Sav. Bank*, 153 N.E. at 61.

¹⁴⁷ *See* POLETTI REPORT ON TAXATION AND FINANCE, *supra* note 14, at 422–23 (quoting E. H. Foley, Jr., *Low-Rent Housing and State Financing*, 85 U. PA. L. REV. 239, 255 (1937)); POLETTI REPORT ON HOME RULE AND LOCAL GOVERNMENT, *supra* note 109, at 243.

the voters approved a new state constitution. An entirely new housing article was added to the constitution, declaring in unequivocal terms that slum clearance and low-income housing were public uses. The housing article gave the legislature and local governments the authority to give or loan monies to housing authorities and limited dividend housing companies, and also allowed them to issue bonds and contract indebtedness. Cities were permitted to incur debt to 2% above their general debt limits to finance low-income housing, and tax exemptions and the use of eminent domain were also authorized. Additionally, the housing article specifically permitted excess condemnation,¹⁴⁸ and a separate provision was added in the corporations article to ensure that public authority debt would not be considered an obligation of the state or any city government.¹⁴⁹ Concurrently, the voters authorized the state to spend up to \$300 million on slum clearance and housing.¹⁵⁰

V. REDEVELOPMENT COMPANIES

A. The 1941 Urban Redevelopment Corporations Law

In the early 1940s, legislation began to take shape that would reaffirm New York's status as "the cradle of the slum clearance and housing movement."¹⁵¹ Business leaders wanted to see slum areas cleared for market rate as well as non-residential redevelopment projects, and they lobbied for the subsidies that would be necessary for large-scale clearance projects that could compete with cheap and increasingly accessible suburban areas.¹⁵² Although rarely acknowledged outright, the desire to completely reshape urban areas also had to do with removing many of the people who lived there, as discriminatory lending

¹⁴⁸ N.Y. CONST. art. XVIII, § 8.

¹⁴⁹ N.Y. CONST. art. X, § 5.

¹⁵⁰ N.Y. CONST. art. XVIII, § 3; see HISTORICAL SOCIETY OF THE COURTS OF THE STATE OF NEW YORK, VOTES CAST FOR AND AGAINST PROPOSED CONSTITUTIONAL CONVENTIONS AND ALSO PROPOSED CONSTITUTIONAL AMENDMENTS 20 (1990) [hereinafter VOTES CAST FOR AND AGAINST PROPOSED CONSTITUTIONAL AMENDMENTS], available at <http://www.nycourts.gov/history/constitutions/votes/pg1.htm>.

¹⁵¹ SAMUEL ZIPP, MANHATTAN PROJECTS: THE RISE AND FALL OF URBAN RENEWAL IN COLD WAR NEW YORK 79 (2010).

¹⁵² See Memorandum from the Merchs. Ass'n of N.Y. on the Proposed Urban Redevelopment Corporations Law (Jan. 1941) [hereinafter MERCHS. ASS'N MEMO], in Bill Jacket, L. 1941 c. 892.

practices made mortgages and loans all but impossible to secure in racially diverse areas and neighborhoods characterized by older buildings.¹⁵³ Abrams was wary of increasing private control over the redevelopment process, and although he understood that private funding was necessary, he favored public housing authorities and strict regulations on subsidized developers. His view, however, was in the minority.¹⁵⁴

Legislation authorizing the creation of private redevelopment companies was proposed as early as 1934, but the state's Urban Redevelopment Corporations Law (URCL) was not passed until 1941.¹⁵⁵ The law was drafted primarily by the Merchants' Association of New York and, similar to the provisions for limited dividend housing companies, it permitted the formation of specially regulated redevelopment companies that would be eligible for tax exemptions and could condemn property.¹⁵⁶ To prevent private companies from gaining windfalls, the legislation contained a number of safeguards,¹⁵⁷ including a requirement

¹⁵³ See JOEL SCHWARTZ, *THE NEW YORK APPROACH: ROBERT MOSES, URBAN LIBERALS, AND REDEVELOPMENT OF THE INNER CITY* 296 (1993); Lavine, *supra* note 10, at 439 (discussing redlining); MERCHS. ASS'N MEMO, *supra* note 152.

¹⁵⁴ HENDERSON, *supra* note 2, at 125.

¹⁵⁵ 1941 N.Y. Laws 2039; *see also* Letter from Holden, McLaughlin, and Assocs., Architects, to Herbert H. Lehman, Governor of N.Y. State (Apr. 10, 1941), in Bill Jacket, L. 1941 c. 892 (noting that Albert Wald introduced non-housing redevelopment legislation in 1934). Another bill, drafted primarily by Robert Moses, was proposed in 1940, but was vetoed by Governor Lehman. HENDERSON, *supra* note 2, at 125.

¹⁵⁶ Redevelopment companies were also subject to profit restrictions, but the method of calculating the maximum dividend was more favorable to investors. Some critics complained that the legislation did not contain any way for a city to recoup part of its tax exemption if the project became extremely profitable. *See* Letter from George Hallett, Sec'y, Citizen's Union, to Herbert H. Lehman, Governor of N.Y. State (Apr. 24, 1941) [hereinafter HALLETT LETTER], in Bill Jacket, L. 1941 c. 892; Letter from Edward Weinfeld, N.Y. State Comm'r of Housing, to Nathan Sobel, Counsel to the Governor of N.Y. State (Apr. 25, 1941) [hereinafter WEINFELD 1941 LETTER], in Bill Jacket, L. 1941 c. 892.

¹⁵⁷ There was still considerable concern that the URCL would result in undue subsidies. *See* HALLETT LETTER, *supra* note 156; WEINFELD 1941 LETTER, *supra* note 156; Letter from The Sav. Banks Ass'n of the State of N.Y., to Herbert H. Lehman, Governor of N.Y. State (Apr. 23, 1941), in Bill Jacket, L. 1941 c. 892; Letter from Louis H. Pink, N.Y. State Ins. Dep't, to Herbert H. Lehman, Governor of N.Y. State (Apr. 21, 1941), in Bill Jacket, L. 1941 c. 892; Letter from Fiorello LaGuardia, Mayor, N.Y. City, to Herbert H. Lehman, Governor of N.Y. State (Apr. 19, 1941), in Bill Jacket, L. 1941 c. 892; Letter from N.Y. State Indus. Union Council, to Herbert H. Lehman, Governor of N.Y. State (Apr. 18, 1941), in Bill Jacket, L. 1941 c. 892; Letter from Eugene Connolly, Chairman, American Labor Party, to Herbert H. Lehman, Governor of N.Y. State (Apr. 15, 1941), in Bill Jacket, L. 1941 c. 892; Letter from Joseph Curran, President,

that redevelopment plans receive approval by the planning commission and the local legislative body. Findings also had to be made that the area was substandard or insanitary, that adequate public facilities were available or would be provided, that the plan was consistent with any existing comprehensive plans, and that the proposed financing was feasible.¹⁵⁸ Based upon the belief that only large-scale investments should deserve subsidy, minimum size requirements were also set for redevelopment areas,¹⁵⁹ and to prevent speculation, eminent domain was only permitted if the redevelopment company owned at least half of the property (measured by land area and assessed valuations).¹⁶⁰ Significantly, the URCL required the planning commission to find, after a public hearing, that adequate and substantially similar housing would be available to residents displaced from project sites, and it allowed cities to impose relocation costs on redevelopment companies.¹⁶¹

B. *The 1942 Redevelopment Companies Law*

The URCL, although “well conceived and integrated,” would prove to be ineffective.¹⁶² While the Merchants’ Union was drafting it, a similar bill was taking shape behind the scenes, largely through the skilled maneuvering of Robert Moses (New York’s infamous “master builder”)¹⁶³ and largely to suit the needs of insurance companies.¹⁶⁴ These corporations needed investment

Greater N.Y. Indus. Union Council, to Herbert H. Lehman, Governor of N.Y. State (Apr. 10, 1941), *in* Bill Jacket, L. 1941 c. 892; Letter from Max Goldfrank, Executive Sec’y, Int’l Fed’n of Architects, Engineers, Chemists, and Technicians, to Herbert H. Lehman, Governor of N.Y. State (Apr. 10, 1941), *in* Bill Jacket, L. 1941 c. 892; Letter from George Mand, President, Bronx Chamber of Commerce, to Herbert H. Lehman, Governor of N.Y. State (Mar. 26, 1942) *in* Bill Jacket, L. 1941 c. 892.

¹⁵⁸ 1941 N.Y. Laws 2044–47.

¹⁵⁹ *Id.* at 2039.

¹⁶⁰ *See id.* at 2043, 2055–2056 (providing a definition of “minimum condemnation requirement”).

¹⁶¹ *See id.*; *see also* WEINFELD 1941 LETTER, *supra* note 156.

¹⁶² Eugene J. Morris, *The Development of New Middle Income Housing in New York*, 10 N.Y.L.F. 492, 498 (1964).

¹⁶³ *See* CARO, *supra* note 52, at 10.

¹⁶⁴ Moses drafted the legislation with the aid of insurance company representatives, and had been in discussions with several insurance companies about more specific project proposals prior to the bill’s enactment. *See* HENDERSON, *supra* note 2, at 126; Robert Moses, Letter to the Editor, *Stuyvesant Town Defended*, N.Y. TIMES, June 3, 1943, at 20; Memorandum from C.S.S. Comm. on Hous. (Feb. 20, 1942), *in* Bill Jacket, L. 1942 c. 845 (stating that the

opportunities and they stood to benefit secondarily from improving the sanitation of their policy holders' dwellings.¹⁶⁵ Due to their fiduciary responsibilities, however, many of them were wary of the financial risks associated with affordable housing projects.¹⁶⁶ Moses knew that the large investment power of these corporations could be used to undertake slum clearance projects of unprecedented size, a proposition that was alluring for its audacity and because it might finally rid the city of its worst slum areas. Moses also knew that the restrictions in the URCL were too onerous for the insurance companies' liking,¹⁶⁷ and for that reason, he set about drafting new legislation. The result was the Redevelopment Companies Law (RCL) of 1942.¹⁶⁸

Although similar in its framework to the URCL, the RCL was less restrictive regarding corporate dividends and it limited projects to primarily residential development, regardless of whether commercial or industrial redevelopment might be preferable. The RCL also had no minimum area requirement or 50% ownership prerequisite to condemnation, and while retaining the requirement that plans had to assure the availability of adequate replacement housing, it did away with the public

bill "was drafted with the cooperation of representatives of insurance companies"); Letter from Alfred E. Smith, President, Empire State, Inc., to Hon. Herbert H. Lehman, Governor of N.Y. State (Apr. 8, 1942), *in* Bill Jacket, L. 1942 c. 845 ("This bill, as you probably know, was drafted by the State Superintendent of Insurance, Bob Moses and various others in the city interested in housing and also had the approval of counsel for various insurance companies, as well as Mayor LaGuardia."); Memorandum from Robert Moses, Comm'r, City of N.Y. Dep't of Parks, to the Herbert H. Lehman, Governor of N.Y. State (Apr. 22, 1942), *in* Bill Jacket, L. 1942 c. 845. Moses and the bill's other supporters contended that the bill was primarily needed to allow the participation of insurance companies in the formation and operation of redevelopment corporations. *See* ZIPP, *supra* note 151, at 77; Memorandum from Louis H. Pink, Superintendent, State of N.Y. Ins. Dep't, to the Governor of N.Y. (Apr. 30, 1942), *in* Bill Jacket, L. 1942 c. 845. This was debatable because existing laws permitted insurance companies to invest in redevelopment and housing projects in several ways. *See* Memorandum from Nathan R. Sobel, Counsel to the Governor of N.Y. State (May 12, 1942) [hereinafter SOBEL MEMO], *in* Bill Jacket, L. 1942 c. 845. The Metropolitan Life Insurance Company had, in fact, already issued mortgages to limited dividend housing companies, and by 1942 it had commenced the massive and completely unsubsidized Parkchester development in the South Bronx. The more plausible reasoning behind the RCL was simply that insurance companies believed that the URCL was too restrictive.

¹⁶⁵ *See* ZIPP, *supra* note 151, at 75, 78.

¹⁶⁶ *See* HENDERSON, *supra* note 2, at 126.

¹⁶⁷ *See supra* note 164.

¹⁶⁸ 1942 N.Y. Laws 1855.

hearing provision.¹⁶⁹

Because of these changes, the RCL was strongly criticized by a variety of government officials and public interest groups.¹⁷⁰ In Abrams' view, the subsidies outlined in the bill would "assure [the insurance companies] of a handsome profit at taxpayers' expense."¹⁷¹ One of the most serious criticisms of the bill, raised in a letter to the Governor from the State Housing Commissioner, Edward Weinfeld, was that it would substantially undercut the incentives available for limited dividend housing companies, which unlike redevelopment companies, had maximum rent limits.¹⁷² The Governor's counsel, Nathan Sobel, wrote a lengthy memo outlining the bill's deficiencies, and although Sobel recommended that Governor Lehman sign the bill, he stated that he "wouldn't brag about it."¹⁷³

C. 1943 Amendments to the Redevelopment Companies Law

Despite Moses' entreaties to the insurance companies and passage of the 1942 RCL, most of the insurance companies were

¹⁶⁹ See *id.* Additionally, the RCL gave the State Commissioner of Housing no role in the supervision of redevelopment corporations, but instead gave this responsibility to the State Superintendent of Insurance. Critics warned that this would split substantially similar responsibilities between two state officials, which could result in differences in housing and planning policies as well as unnecessary and duplicative costs. Letter from Edward Weinfeld, N.Y. State Comm'r of Housing, to Nathan Sobel, Counsel to the Governor of N.Y. State (Apr. 24, 1942) [hereinafter WEINFELD 1942 LETTER], in Bill Jacket, L. 1942 c. 892. The Governor's Counsel also warned that "the Superintendent [of Insurance] is not qualified to give these projects the supervision they require." SOBEL MEMO, *supra* note 164. Mr. Pink, the Superintendent of Insurance at the time the bill was passed, actually had extensive background in the housing field. He had served on the State Housing Board in 1927 and later on the board of the New York City Housing Authority. *Special Issue Dedicated to Mr. Pink*, INSIDE AHS, (Assoc. Hosp. Serv. of N.Y.), Dec. 1952, at 3, 5, available at http://www.columbia.edu/cu/lweb/digital/collections/rbml/lehman/pdfs/0734/ldpd_leh_0734_0072.pdf.

¹⁷⁰ See Letter from George H. Hallett, Sec'y, Citizens Union of the City of N.Y., to Herbert H. Lehman, Governor of N.Y. (Apr. 28, 1942), in Bill Jacket, L. 1942 c. 845; WEINFELD 1942 LETTER, *supra* note 169 (explaining that "sufficient time [had] not elapsed to permit any developments under it. Until a fair opportunity has been given to determine whether or not the objectives of the [URCL] can be achieved, the [RCL], due to its omission of numerous provisions necessary to protect the public interest, should not become law"); SOBEL MEMO, *supra* note 164.

¹⁷¹ HENDERSON, *supra* note 2, at 127.

¹⁷² WEINFELD 1941 LETTER, *supra* note 156.

¹⁷³ SOBEL MEMO, *supra* note 164.

uninterested.¹⁷⁴ Frustrated with this “corporate shortsightedness,”¹⁷⁵ Moses began negotiations with the Metropolitan Life Insurance Company in the fall of 1942, and offered to obtain additional amendments to the RCL.¹⁷⁶ These amendments were enacted in the spring of 1943, although Governor Dewey, upon signing them into law, stated that he was “doubtful” about some of the provisions.¹⁷⁷ The changes, aside from altering various stock and dividend provisions,¹⁷⁸ subtly modified the RCL’s description of blight to clearly encompass nonresidential substandard areas,¹⁷⁹ and declared redevelopment

¹⁷⁴ Brief for Petitioners-Appellants at 3, *Murray v. LaGuardia*, 52 N.E.2d 884 (N.Y. 1943) [hereinafter MURRAY BRIEF]; Robert Moses, *Stuyvesant Town Defended: Commissioner Moses Sees Merit in the Proposed Housing Project*, N.Y. TIMES, June 2, 1943; Letter from Robert Moses, Comm’r, City of N.Y. Dep’t of Parks, to F.H. LaGuardia, Mayor of City of N.Y. (Sept. 26, 1942) (explaining that “the New York Life people . . . are not prepared to proceed with anything at this time.”) (on file with author).

¹⁷⁵ SCHWARTZ, *supra* note 153, at 298; *see* ZIPP, *supra* note 151, at 80; HENDERSON, *supra* note 2, at 126.

¹⁷⁶ Met Life’s president, Frederick H. Ecker, was a shrewd businessman, and “[u]nlike his predecessors, he would not be so leery of public aid; in fact, he would demand it, and in quantity sufficient enough to guarantee the safety of the long-sought vision of private redevelopment through eminent domain.” ZIPP, *supra* note 151, at 78 (citation omitted); *see* Letter from Robert Moses, Comm’r, City of N.Y. Dep’t of Parks, to F.H. LaGuardia, Mayor of N.Y. (Oct. 29, 1942) (reporting on a discussion Moses had with Frederick H. Ecker) (on file with author); Letter from Robert Moses, Comm’r, City of N.Y. Dep’t of Parks, to Frederick H. Ecker, President, Metro. Life Ins. Co. (Dec. 24, 1942) (stating that “I talked to the Mayor again about the proposed East Side housing project and also to Mr. Evarts and Mr. Leibold who prepared a rough draft of a proposed agreement and several amendments of Chapter 845 of the Laws of 1942”) (on file with author); Letter from Robert Moses, Comm’r, City of N.Y. Dep’t of Parks, to Frederick H. Ecker, President, Metro. Life Ins. Co. (Dec. 30, 1942) (discussing Mr. Ecker’s desire for less oversight from the State Superintendent of Insurance and the Planning Commission, and agreeing to seek “reasonable amendments,” but not to seek amendments to the Multiple Dwelling Law) (on file with author); Letter from Robert Moses, Comm’r, City Planning Comm’n, to Honorable Thomas E. Dewey, Governor of N.Y. (Mar. 22, 1943) (stating that “[t]here is no secret either as to [the amendments]’ origin or as to their purpose . . .”), *in* Bill Jacket, L. 1943 c. 234.

¹⁷⁷ 1943 N.Y. Laws 693; STATE OF N.Y., PUBLIC PAPERS OF THOMAS E. DEWEY: FIFTY-FIRST GOVERNOR OF THE STATE OF NEW YORK 218 (1944); *see Problem in Housing*, N.Y. TIMES, Mar. 19, 1943, at 18 (discussing support and opposition for the amendments).

¹⁷⁸ Letter from Jeremiah W. Evarts, Assistant Corp. Counsel, City of N.Y. Law Dep’t, to Charles D. Breitell, Esq., Counsel to the Governor (Mar. 5, 1943) (explaining that these changes permitted for higher returns), *in* Bill Jacket, L. 1943 c. 234.

¹⁷⁹ 1943 N.Y. Laws 694–95.

to be a “superior public use” for condemnation purposes.¹⁸⁰ The amendments also extended the maximum length of tax exemptions from twenty to twenty-five years, made it easier for redevelopment companies to dissolve prior to expiration of their tax exemptions,¹⁸¹ and clarified that the RCL’s restrictions would no longer apply if a company chose the early repayment and dissolution option.¹⁸² Finally, the amendments reduced even further the requirements for rehousing displaced persons¹⁸³ and weakened the already minimal role of local planning commissions.¹⁸⁴

D. Stuyvesant Town, Murray v. La Guardia, and Dorsey v. Stuyvesant Town

After the 1943 amendments were enacted, Met Life created the Stuyvesant Town Redevelopment Company and submitted a plan covering an eighteen-block area in the gas house district.¹⁸⁵ The neighborhood still had many old law tenements, and inflated land prices had inhibited new development. According to Metropolitan, it had “slowly lapsed into obsolescence” although others, including residents, focused on the district’s more positive traits, especially its location, diverse ethnic character, and affordability.¹⁸⁶ Regardless of the neighborhood’s relative merits, Met Life planned to tear down the tenements and replace them with thirty-five geometrically arranged residential high rises, to be known as Stuyvesant Town. The 11,000 mostly low and middle income residents of the gas house district were to be relocated, and once the project was finished, they would be replaced by more than twice as many residents of a distinctly higher income bracket. Stuyvesant Town would also abut a

¹⁸⁰ *Id.* at 704–05.

¹⁸¹ *Id.* at 706, 708.

¹⁸² *Id.* at 696–97.

¹⁸³ *Id.* at 701–03. Charles Abrams called the failure to include any re-housing provisions in the 1943 amendments “vicious.” HENDERSON, *supra* note 2, at 127.

¹⁸⁴ 1943 N.Y. Laws 701–03 (removing language allowing planning commissions to develop rules and regulations for project applications; removing provision allowing planning commission to require a dedication of land for park or recreation purposes; and providing that all planning commission and supervisory agency oversight would end (for insurance companies) upon finalization of redevelopment contract); *id.* at 703 (giving local legislative body the ability to override (by supermajority) a planning commission’s rejection).

¹⁸⁵ See MURRAY BRIEF, *supra* note 174, at 4–5.

¹⁸⁶ ZIPP, *supra* note 151, at 89.

similar privately financed and slightly higher rent Metropolitan project called Peter Cooper Village, and together they would create more than 10,000 apartments.¹⁸⁷ The project was unprecedented, and was described either as a “suburb in the city,” by its supporters, or a “medieval walled city,” by critics.¹⁸⁸ It would also “demonstrate[] for the first time [Moses’] capacity to implement what came to be called the ‘bulldozer approach’ to urban renewal.”¹⁸⁹

Stuyvesant Town did not go unchallenged. In the spring of 1943, a group of residents in the gas house district, led by Mary Murray, challenged the constitutionality of the RCL and sought to enjoin the city from condemning their property.¹⁹⁰ They first claimed that the RCL disregarded and violated the constitutional limitations imposed on slum clearance and housing projects in the 1938 constitution because redevelopment companies were not truly “regulated by law as to rents, profits, dividends and disposition of [their] property.”¹⁹¹ In particular, they explained that under the 1943 amendments to the RCL, a redevelopment company could use eminent domain to acquire property and then “shake off” all of the law’s regulations by repaying its tax exemption.¹⁹² Additionally, the property owners argued that the project would not serve a public purpose because, as conceded by Met Life, it would not include any low income housing.¹⁹³ Contrary to Met Life’s position, they claimed that “[t]he prime purpose [of the housing article] was to help the slum dwellers and not to evict them for the benefit of tenants who do not live in slums and who can afford to pay rentals in apartments available

¹⁸⁷ See *New Housing Units for 12,000 Families*, N.Y. TIMES, Oct. 21, 1945.

¹⁸⁸ *East Side ‘Suburb in City’ to House 30,000 After War*, N.Y. TIMES, Apr. 19, 1943, at 1; *Housing Plan Seen as a ‘Walled City’*, N.Y. TIMES, May 20, 1943; ZIPP, *supra* note 151, at 115.

¹⁸⁹ PLUNZ, *supra* note 14, at 255.

¹⁹⁰ See Petition, Read in Support of Motion at 12, 21, 24, Murray v. LaGuardia, 43 N.Y.S.2d 408 (Sup. Ct. 1943). Another suit was brought alleging that the contract for slum clearance and redevelopment was actually a franchise requiring approval under separate procedures. The claim was rejected by the New York County Supreme Court in *Goldstein v. LaGuardia*, 43 N.Y.S.2d 202, 204 (Sup. Ct. 1943), *aff’d*, 42 N.Y.S.2d 612 (App. Div. 1943), *aff’d*, 52 N.E.2d 884 (N.Y. 1943).

¹⁹¹ MURRAY BRIEF, *supra* note 174, at 14.

¹⁹² *Id.*; see Letter from Ira S. Robbins, Acting State Comm’r of Hous., to Charles D. Breitel, Counsel to the Governor (Mar. 6, 1943), in Bill Jacket, L. 1943 c. 234 (raising similar questions).

¹⁹³ See MURRAY BRIEF, *supra* note 174, at 38.

in non-slum areas.”¹⁹⁴

The New York County Supreme Court ruled against the property owners,¹⁹⁵ and the Board of Estimate gave Stuyvesant Town final approval the next day.¹⁹⁶ The appellate division affirmed, although one judge dissented, agreeing with the property owners that private corporations receiving the benefit of eminent domain were required, under the 1938 housing article, to be regulated by law throughout their existence. “I cannot believe,” he explained, “that these salutary provisions of the Constitution are satisfied by restrictions from which the corporation may escape at will.”¹⁹⁷

When the case, *Murray v. LaGuardia*,¹⁹⁸ was decided by the New York State Court of Appeals, it set a broad precedent for the use of eminent domain for redevelopment. The court rejected the argument that Stuyvesant Town was not adequately regulated, holding, with one dissent on the point,¹⁹⁹ that the housing article only required companies to be regulated as to rents and profits if they were directly authorized to condemn property. Regulations would not be required where, as with Stuyvesant Town, the property was to be condemned by the city and then transferred to the developer. The court also held that there was no violation of the state constitution’s public use clause, regardless of whether the project might carry incidental private benefits for Metropolitan.²⁰⁰ Perhaps most significantly, the court determined that the 1938 housing article authorized slum clearance “or” low income housing as separate and distinct public uses.²⁰¹ Using a rule of statutory construction to resolve the issue was arguably inappropriate given that the constitutional record and debates illustrated different opinions on the issue.²⁰² The New York Court

¹⁹⁴ *Id.*

¹⁹⁵ *Murray v. LaGuardia*, 43 N.Y.S.2d 408, 412 (Sup. Ct. 1943) *aff'd*, 42 N.Y.S.2d 612 (App. Div. 1943), *aff'd*, 52 N.E.2d 884 (N.Y. 1943).

¹⁹⁶ *Stuyvesant Town Approved By Board*, N.Y. TIMES, June 4, 1943, at 23.

¹⁹⁷ *Murray*, 42 N.Y.S.2d at 614 (App. Div. 1943) (Untermeyer, J., dissenting).

¹⁹⁸ 52 N.E.2d 884 (N.Y. 1943).

¹⁹⁹ *Id.* at 889 (Lehman, J., dissenting.)

²⁰⁰ *Id.* at 888.

²⁰¹ *Id.* at 889.

²⁰² See POLETTI REPORT ON THE BILL OF RIGHTS, *supra* note 16, at 620–21 (discussing objections to the proposed constitutional amendment’s thirty-year limit for state bonds and supporting longer periods because “the consequent necessity of amortizing loans to public corporations within thirty years would very seriously militate against the achievement of rentals within the financial reach of slum dwellers.”); *id.* at 622–23 (explaining why annual contributions were considered preferable to capital grants for purposes of reducing rentals and

of Appeals itself, only seven years earlier, had proclaimed in *New York City Housing Authority v. Muller* that “the two things necessarily go together.”²⁰³ In separating the goals of slum clearance and low income housing, *Murray* thus marked a clear shift in the emphasis of redevelopment away from social welfare and toward economic growth. Moreover, “[b]y conflating the two steps—slum clearance and redevelopment—courts made the dramatic expansion of eminent domain powers appear unexceptional.”²⁰⁴ Charles Abrams more bluntly described it as a “‘perversion’ of public policy”²⁰⁵

Many people liked Stuyvesant Town when it was completed,²⁰⁶ but the project also raised criticisms for displacing thousands of people,²⁰⁷ and for its architecture,²⁰⁸ unaffordability,²⁰⁹ and lack of an on-site school.²¹⁰ The development’s most controversial aspect, however, was the fact that Stuyvesant Town refused to rent units to African Americans and other minorities, claiming that integration would make the project less marketable. At the urging of City Councilmen Stanley Isaacs and Adam Clayton Powell Jr., Abrams drafted an anti-discrimination ordinance that would have extended the state’s ban on racial discrimination in *public* housing to cover housing built by redevelopment companies.²¹¹ Met Life was politically connected, though, and the ordinance was amended by the City Council to include an

stating that, “[p]ublic expenditures for low-rent housing and slum clearance, [experts] claim, rest upon the social purpose of enabling poor families to meet the annual rent charges of safe and sanitary dwellings.”); POLETTI REPORT ON STATE AND LOCAL GOVERNMENT, *supra* note 50, at 253; MURRAY BRIEF, *supra* note 174, at 9 (referring to debates in the constitutional convention record).

²⁰³ N.Y. City Hous. Auth. v. Muller, 1 N.E.2d 153, 155 (N.Y. 1936).

²⁰⁴ Pritchett, *supra* note 10, at 40.

²⁰⁵ HENDERSON, *supra* note 2, at 63; *see also id.* at 139 (discussing Abrams reaction to an adverse ruling in the case).

²⁰⁶ *See New York: New Nightmares for Old?*, TIME, Dec. 13, 1948, available at <http://www.time.com/time/magazine/article/0,9171,799451,00.html> (last visited Jan. 17, 2011).

²⁰⁷ CARO, *supra* note 52, at 968; ZIPP, *supra* note 151, at 122; Lee E. Cooper, *Uprooted Thousands Starting Trek from Site for Stuyvesant Town*, N.Y. TIMES, Mar. 3, 1945, at 15.

²⁰⁸ *Housing Plan Seen as a ‘Walled City’*, *supra* note 188; *New York: New Nightmares for Old?*, *supra* note 206.

²⁰⁹ Cooper, *supra* note 207, at 26.

²¹⁰ ZIPP, *supra* note 151, at 95, 102; *see* Arthur R. Simon, *New Yorkers Without a Voice: A Tragedy of Urban Renewal*, ATLANTIC MONTHLY, Apr. 1966, available at <http://www.theatlantic.com/past/docs/issues/97jan/urban/simon.htm> (last visited Jan. 17, 2011).

²¹¹ HENDERSON, *supra* note 2, at 135.

exception for Stuyvesant Town.²¹² From Abrams' perspective, Stuyvesant Town's discrimination policy and the city's reaction were symptomatic of the blurring of public and private redevelopment roles that underlay the RCL. As he explained, "[a]s long as government and private activities functioned in separate spheres . . . they also functioned under separate levels of ethics."²¹³ As public programs became more reliant on their private partners, their ethical standards and goals relaxed to conform with business priorities—in this case, fears that integration would damage the project's marketability.

Stuyvesant Town's discrimination policies were challenged as equal protection violations, and in a decision that can only be seen as odious and incorrect under the modern doctrine of state action, the New York Court of Appeals held in favor of Stuyvesant Town. In a poorly reasoned opinion, the majority approved publicly subsidized discrimination by claiming that Stuyvesant Town was a private project, despite *Murray's* holding that the project was a public use, and despite the project's significant tax exemptions and other subsidies.²¹⁴ The case, *Dorsey v. Stuyvesant Town*, was seemingly at odds with *Shelley v. Kraemer*,²¹⁵ which had been decided the year before, but the U.S. Supreme Court denied certiorari.²¹⁶ It was surely an immeasurable disappointment for Abrams, who represented the civil rights plaintiffs (along with future U.S. Supreme Court Justice Thurgood Marshall), especially because the courts cited to *Muller* to justify the use of eminent domain.²¹⁷ Shortly after the case was decided, however, the state legislature extended the ban on racial discrimination in public housing to all publicly *assisted* housing.²¹⁸

²¹² *Dorsey v. Stuyvesant Town Corp.*, 87 N.E.2d 541, 553 (Fuld, J., dissenting).

²¹³ HENDERSON, *supra* note 2, at 148.

²¹⁴ *Dorsey*, 87 N.E.2d at 551 (N.Y. 1949) (majority opinion). Robert Moses described the public subsidies as "minimum inducements." HENDERSON, *supra* note 2, at 128.

²¹⁵ 334 U.S. 1, 13 (1948) (holding that the courts could not enforce racially-based restrictive covenants because the court action would constitute state action).

²¹⁶ *Dorsey v. Stuyvesant Town Corp.* 339 U.S. 981 (1950).

²¹⁷ See Charles Abrams, *Slum Clearance Boomerangs*, THE NATION, July 29, 1950, at 106; HENDERSON, *supra* note 2, at 139.

²¹⁸ *New York State Commission Against Discrimination v. Pelham Hall Apartments, Inc.*, 170 N.Y.S.2d 750, 755 (N.Y. Sup. Ct. 1958) (discussing *Dorsey's* aftermath).

Surprisingly, *Dorsey* has yet to be expressly overturned. In fact, the New York Court of Appeals cited it in 2009.²¹⁹ The court's statement that *Dorsey* "did not concern a project to which state funds had been committed"²²⁰ can be interpreted as implicitly affirming *Dorsey*, which relied on the fiction that Stuyvesant Town was a private project not involving any state action. Most likely, the inclusion of the citation was not intended to support *Dorsey*'s holding, but there was no reason for the court to cite *Dorsey* at all,²²¹ and it certainly should not have been cited in a manner that could be mistaken for an affirmance of the racist opinion. It must be hoped that this was simply an example of judicial carelessness, and that the Court of Appeals will find another opportunity to formally denounce the case.

E. Other Redevelopment Company Projects

Under pressure regarding Stuyvesant Town's racial policies, Met Life organized a second redevelopment company to build a project in Harlem for non-white residents.²²² Aside from these projects, however, the RCL was primarily used for middle income cooperative housing projects.²²³ Like Stuyvesant Town, these were "tower in the park" type developments, and they displaced large numbers of residents. Relocation efforts at some sites were anemic,²²⁴ but by at least some accounts, requirements prescribed by the Federal Home Finance Agency and the City Slum Clearance Committee mitigated displacement impacts. At the Seward Park Cooperative, for example, more than ninety percent of the site families either self-relocated (with a bonus cash payment), accepted housing found by the sponsor, moved into

²¹⁹ *Goldstein v. N.Y. State Urban Dev. Corp.*, 921 N.E.2d 164, 174 (N.Y. 2009).

²²⁰ *Id.* (citations omitted).

²²¹ *Goldstein v. New York State Urban Development Corp.* concerned the use of eminent domain for the Atlantic Yards Project and did not involve any questions about state action. Regardless, citation to *Murray* alone would have sufficed. *Id.*

²²² PLUNZ, *supra* note 14, at 256.

²²³ See Morris, *supra* note 162, at 500. On the Lower East Side, for example, several projects modeled after the Amalgamated cooperatives were built in the 1940s and 50s, including the Hillman, East River Housing, and Seward Park cooperatives. See Cooperative Village Online Community, About Us, <http://www.lesonline.org/cv/aboutus.htm> (last visited Jan. 17, 2011); see also Abraham E. Kazan, *The Original Story of the Seward Park Cooperative* (1961), http://www.berlin.heimat.de/home/ifau/aktuell/Form_Groups.pdf.

²²⁴ CARO, *supra* note 52, at 965.

public housing, or remained on the site and moved into Seward Park when the new buildings were completed. Of the remainder, most were unaccounted for, and only five families had to be evicted.²²⁵ Seward Park and the other union sponsored cooperatives also benefited from the leadership of Abraham Kazan, who made affordable housing a priority over profits. Kazan built on the self-help concept of earlier cooperatives, making the residents themselves the only shareholders in the redevelopment company and imposing restrictions on the sale of cooperative units to maintain affordability.²²⁶

F. Mitchell-Lama Projects and Later Privatization

High land acquisition costs and financing charges began to make the RCL less desirable in the 1950s, and the Limited Profit Housing Companies Law, more commonly known as Mitchell-Lama, was enacted as a further inducement to land clearance and housing development.²²⁷ The law, for the first time, authorized state and local low cost loans for private middle income housing developments, in addition to condemnation and tax exemptions, and it appropriated fifty-million dollars for this purpose. Unlike redevelopment companies, Mitchell-Lama projects were subject to rental restrictions similar to those imposed on limited dividend housing projects. Combined with the extensive federal subsidies available under Title I of the 1949 Housing Act, the Mitchell-Lama program became very successful, eventually producing 269 developments across the state with more than 105,000 units.²²⁸ However, Mitchell-Lama, along with other redevelopment programs, also led to widespread displacement. In New York City alone, it has been estimated that at least 170,000 families, and likely many more, were displaced for redevelopment projects in the 1950s and 1960s.²²⁹

In 1961, the statutes governing limited dividend projects, urban redevelopment corporations, redevelopment companies, and Mitchell-Lama projects were recodified under a single title,

²²⁵ Kazan, *supra* note 223

²²⁶ *Id.*

²²⁷ Morris, *supra* note 162, at 501–02; see 1955 N.Y. Laws 1061–73.

²²⁸ N. Y. State Div. of Hous. & Cmty Renewal, About the Mitchell-Lama Housing Program, <http://www.dhcr.state.ny.us/Programs/Mitchell-Lama/> (last visited Jan. 17, 2011) [hereinafter Mitchell-Lama].

²²⁹ CARO, *supra* note 52, at 965–67 (explaining that this is a conservative estimate).

the Private Housing Finance Law.²³⁰ Since then, many of the RCL cooperatives and Mitchell-Lama buildings have become privatized.²³¹ Met Life's 2006 sale of Stuyvesant Town and Peter Cooper Village for \$5.4 billion, at the height of the real estate bubble, became the largest real estate deal in American history.²³² Although no longer owned by a redevelopment company, Stuyvesant Town continues to be subject to rent control and stabilization regulations,²³³ and the same is true for many other privatized buildings.²³⁴ However, even though the legislature authorized the voluntary dissolution of limited dividend housing companies organized after 1962,²³⁵ recent litigation has established that projects built prior to 1962 may only be transferred to public entities or other limited dividend housing corporations, which essentially prevents their privatization.²³⁶

VI. THE EXPANSION OF URBAN REDEVELOPMENT PROGRAMS

A. Municipal Urban Renewal Legislation

Murray greatly increased the permissible scope of urban renewal projects by removing any real limitation on what could be built on former slum land, so long as the slum conditions themselves were removed. When federal funding for site acquisition and clearance became available under Title I of the 1949 and 1954 Housing Acts, moreover, municipal urban renewal projects became financially feasible.²³⁷ In the years that followed,

²³⁰ See generally 1961 N.Y. Laws 2167–85 (codified as amended at N.Y. PRIV. HOUS. FIN. LAW §§ 1–1222 (McKinney 2009)).

²³¹ See Mitchell-Lama, *supra* note 228. Projects that have left these programs may still be subject to rent control and stabilization. See Raymond H. Brescia, *Line in the Sand: Progressive Lawyering, "Master Communities," and a Battle for Affordable Housing in New York City*, 73 ALB. L. REV. 715, 717 (2010): CO-OP VILLAGE ONLINE CMTY., About Us, <http://www.lesonline.org/cv/aboutus.htm> (last visited Jan. 17, 2011).

²³² Charles V. Bagli, *\$5.4 Billion Bid Wins Complexes in New York Deal*, N.Y. TIMES, Oct. 18, 2006, at A1.

²³³ *Roberts v. Tishman Speyer Props.*, No. 0100956/2007, 2007 WL 2815093 (N.Y. Sup. Ct. Aug. 16, 2007), *rev'd*, 874 N.Y.S.2d 97 (App. Div. 2009), *aff'd*, 918 N.E.2d 900 (N.Y. 2009).

²³⁴ Rent control and stabilization are beyond the scope of this article. For additional information, see Brescia, *supra* note 231, at 717.

²³⁵ See 1962 N.Y. Laws 3424–25.

²³⁶ *Knickerbocker Vill. Tenants Ass'n v. Calogero*, 827 N.Y.S.2d 475, 477–80 (Sup. Ct. 2006), *aff'd*, 844 N.Y.S.2d 42 (App. Div. 2007); see also LOOMING CRISIS, *supra* note 75.

²³⁷ The 1949 and 1954 Housing Acts did impose various restrictions on slum

the legislature enacted a patchwork of laws intended to foster both public and private participation in redevelopment projects.

Local governments in New York were given statutory authority to condemn property for the “clearance, re-planning, reconstruction, and neighborhood rehabilitation of substandard and insanitary areas” in 1945, although cities could condemn slum properties on behalf of redevelopment companies and housing authorities under earlier legislation.²³⁸ In 1949, municipalities were given the ability, after a public hearing and approval from the planning commission, to acquire land for private slum clearance and redevelopment projects.²³⁹ Local governments were expressly authorized to issue bonds for slum clearance projects and to participate in federal funding programs in 1950,²⁴⁰ and in 1956, they were authorized to engage in pilot programs and accept funding provided under the 1954 U.S. Housing Act.²⁴¹

Significantly, in 1957, the legislature determined that preventive measures, rather than just remedial measures, were needed to fight the slums. By authorizing municipalities to clear and redevelop “deteriorating areas” in addition to full fledged slums,²⁴² the legislature expanded the definition of “substandard” and “unsanitary” that was first drafted into law in the Municipal Housing Authorities Law by Charles Abrams.²⁴³ The legislation also created new criteria for defining substandard areas, such as zoning violations, depreciating property values, reduced private investment, reduced tax revenues, inappropriately subdivided land, diverse ownership, and title problems.²⁴⁴

In 1961, the various statutes governing municipal urban renewal projects were consolidated into a new article in the

clearance projects, including requirements for planning and public participation. See HENDERSON, *supra* note 2, at 194-197.

²³⁸ 1945 N.Y. Laws 2026; *see supra* Parts II.B, V.C.

²³⁹ 1949 N.Y. Laws 1743-44.

²⁴⁰ 1950 N.Y. Laws 2202.

²⁴¹ 1956 N.Y. Laws 1378-79.

²⁴² 1957 N.Y. Laws 1482. Before a project could go forward, the site had to be designated as “deteriorating” by the planning commission, following a public hearing, and a preliminary plan had to be approved following a second public hearing. *Id.* Approval also had to be obtained from the local governing body. *Id.* at 1483-84. Once the plan was in place, the local government could acquire and clear the land, or sell or lease it to private developers for clearance and redevelopment pursuant to the approved plan. *Id.* at 1485.

²⁴³ *See supra* Part III.B.

²⁴⁴ 1957 N.Y. Laws 1482.

General Municipal Law,²⁴⁵ and similar enabling legislation was enacted for municipal urban renewal authorities in 1962.²⁴⁶

B. The Expanded Meaning of Blight and Kaskel v. Impelliteri

In practice, the concept of blight expanded to include underutilized property years before new definitions and criteria were enacted.²⁴⁷ The influence of business welfare policies was evident. As law professor Wendell Pritchett explained: “Because the term was so poorly defined, blight became a useful rhetorical device—a means by which real estate interests could reorganize property ownership by separating ‘productive’ and ‘unproductive’ land uses. The development of the discourse of blight provided real estate investors with a means to rationalize urban land ownership.”²⁴⁸ Redevelopment projects in New York increasingly focused on the revenue-generating possibilities of project sites, rather than the severity of dwelling conditions faced by residents. “These kinds of projects,” New York City historian Samuel Zipp wrote, “confirmed that the primary objective of redevelopment had become keeping white and middle-class residents, shoppers, and . . . audiences in town, thereby offsetting suburbanization, propping up central business districts, and easing the fiscal troubles of cities. This was the ultimate endgame for the ethic of city rebuilding.”²⁴⁹ Increasingly broad blight determinations were also made possible by the growing importance of administrative discretion, which the courts were reluctant to question. As Abrams explained, this contributed to an “unrestricted exercise of public power on behalf of private interests . . . [that] transformed social reforms into tools of oppression.”²⁵⁰

This pattern of vague standards, administrative discretion, and private subsidy played out in 1953 when the New York Court of Appeals upheld a broad definition of blight in *Kaskel v. Impellitteri*.²⁵¹ The case involved a taxpayer’s claim that land

²⁴⁵ 1961 N.Y. Laws 1402–03.

²⁴⁶ 1962 N.Y. Laws 3762–63.

²⁴⁷ See Pritchett, *supra* note 10, at 3, 16, 26–28.

²⁴⁸ Pritchett, *supra* note 10, at 18; see also Richard Longstreth, *The Difficult Legacy of Urban Renewal*, 3 J. HERITAGE STEWARDSHIP 1 (2006), http://crmjournal.cr.nps.gov/02_viewpoint_sub.cfm?issue=Volume%203%20Number%201%20Winter%202006&page=1&seq=1.

²⁴⁹ ZIPP, *supra* note 151, at 163.

²⁵⁰ HENDERSON, *supra* note 2, at 134.

²⁵¹ 115 N.E.2d 659, 662–63 (N.Y. 1953).

near Columbus Circle in Manhattan was not sufficiently blighted to warrant clearance and redevelopment.²⁵² The plaintiff claimed that the purpose of the condemnation was not primarily to eliminate tenements on the western portion of the redevelopment area, but to acquire the more valuable portion closer to Columbus Circle in order to build the New York Coliseum. As to the existence of blight, the plaintiff argued that a third of the area had already been cleared and was being used merely as parking lots—ready for redevelopment by private enterprise without subsidy—and that nearly forty percent of the area was built up with commercial buildings that were not considered substandard or insanitary. The plaintiff also cited a report made by a former NYCHA chief of planning, which found that most of the tenements had been brought up to code standards and only two percent of the site was actually substandard or insanitary.²⁵³

The court, however, deferred to the city's determination that the entire area was a slum and granted the city's motion for summary judgment. As the court explained, it was not necessary for blighted areas to be "as noisome or dilapidated" as more traditional slums in order to be considered "'substandard and insanitary' by modern tests."²⁵⁴ The local government's blight determination, the court emphasized, would be upheld so long as it was not made "corruptly or irrationally or baselessly."²⁵⁵ Judge Van Voorhis authored a strong dissent, arguing that the plaintiff

²⁵² *Id.* at 661. C. Clarence Kaskel, the title plaintiff in the case, was a jewelry/pawn shop owner and owned property on the site, in addition to being a general taxpayer. *Clarence Kaskel, Jeweler, 72, Dies, Ex-Head of Loan Brokerage Aided Crippled Children*, N.Y. TIMES, Feb. 8, 1962.

²⁵³ *Kaskel*, 115 N.E.2d at 664 (Van Voorhis, J., dissenting).

²⁵⁴ *Id.* at 661 (majority opinion).

²⁵⁵ *Id.* While the court concluded that the plaintiff had to submit evidence of fraud or illegality in order to be able to challenge the decision, the plaintiff in *Kaskel* brought suit as a taxpayer, not a condemnee. The taxpayers' cause of action is authorized by a statutory provision, section 51 of the General Municipal Law, which necessitates that "fraud or illegality in the sense of a public expenditure totally beyond the power of an agency . . . are the only grounds on which otherwise uninjured taxpayers are permitted standing . . ." *Yonkers Cmty. Dev. Agency v. Morris*, 335 N.E.2d 327, 333 (N.Y. 1975). Today, the standing requirements to challenge a condemnation are located in the Eminent Domain Procedure Law, which provides that any person aggrieved by a condemnor's determination and findings may petition for suit, and review will be limited to: (1) procedural due process claims; (2) whether the condemnor acted within its authority; (3) whether SEQRA review was properly conducted; and (4) whether there would be a public use. The requirements of fraud and illegality are not included in this statute. N.Y. EM. DOM. PRO. LAW § 207 (McKinney 2002).

had produced enough evidence to survive summary dismissal.

The coliseum project, in fact, had been taken over by Robert Moses under the guise of the Triborough Bridge Authority. Moses was also in charge of the Slum Clearance Committee, which had deemed the site to be in need of redevelopment. He drew the boundaries of the redevelopment area so that fifty-three percent of the area to be cleared was housing—barely enough to qualify for Title I funding—and a twenty-story office tower was added to the project to produce extra revenue. The redevelopment had distinct racial impacts,²⁵⁶ and was considered by many to be an architectural low point for New York. The coliseum was functionally obsolete within a decade, with calls to demolish it being made throughout the 1980s. It was finally redeveloped, for a second time, in 2000.²⁵⁷ Where the coliseum failed, however, the nearby Lincoln Center, which was also built on a slum clearance site, has proven to be a more successful example of cultural redevelopment.²⁵⁸

C. Vacant Land Blight Clearance and Cannata v. New York City

The meaning of blight was further stretched by 1958 amendments to the municipal urban renewal statutes that permitted the condemnation of vacant and predominantly vacant areas.²⁵⁹ Although the amendments were primarily intended to facilitate commercial and industrial interests by making it easier to assemble land,²⁶⁰ the law's ostensible purpose, included to

²⁵⁶ ZIPP, *supra* note 151 at 165 n.13 (citing SCHWARTZ, *supra* note 153, at 175).

²⁵⁷ David W. Dunlap, *Built, but Not Destined, to Last: A Robert Moses Legacy, Coliseum is Coming Down*, N.Y. TIMES, Feb. 20, 2000, at 39; Christopher Gray, *STREETSCAPES: THE COLISEUM; The 'Hybrid Pseudo-Modern' on Columbus Circle*, N.Y. TIMES, Apr. 26, 1987, at 14.

²⁵⁸ Like Stuyvesant Town and the coliseum, Lincoln Center was a Robert Moses project, and it was part of his "vision of a reborn West Side." ZIPP, *supra* note 151 at 169.

²⁵⁹ 1958 N.Y. Laws 2050; *see also* *Lama Has Bill For Acquiring Business Sites*, N.Y. DAILY NEWS, Mar. 14, 1958, at K9; Letter from John Cashmore, President, Borough of Brooklyn, to the Honorable Averell Harriman, Governor of N.Y. (Mar. 4, 1958), *in* Bill Jacket, L. 1958 c. 924; Letter from John Cashmore, President, Borough of Brooklyn, to Senator (Feb. 24, 1958), *in* Bill Jacket, L. 1958 c. 924; Memorandum from the State Bldg. Code Comm'n on Intent of Bill to Amend the General Municipal Law (Apr. 3, 1958), *in* Bill Jacket, L. 1958 c. 924; Letter from Robert Wagner, Mayor of N.Y. City, to the Honorable Averell Harriman, Governor of N.Y. (Apr. 14, 1958), *in* Bill Jacket, L. 1958 c. 924.

²⁶⁰ *See Lack of Room Here Called Major Cause of Industry Moves*, N.Y. TIMES, Oct. 21, 1963, at 17 (discussing lack of expansion space as motivation for

ensure its constitutionality,²⁶¹ was to prevent the formation of slums and blighted areas. It listed a variety of rather vague factors that could be found as evidence of blight, and indicated that evidence of tangible physical blight was unnecessary.²⁶²

The vacant land redevelopment law was challenged in the 1962 case, *Cannata v. City of New York*.²⁶³ Sixty-eight homeowners in the “predominantly vacant” project site, located in the Canarsie section of Brooklyn, challenged plans to redevelop the area as an industrial park.²⁶⁴ As required by the statute, the city had made findings regarding the area’s predominantly vacant character, and it had also identified the presence of three of the statute’s blight criteria.²⁶⁵ The court ruled in favor of the city, explaining that “an area does not have to be a ‘slum’ to make its redevelopment a public use nor is public use negated by a plan to turn a predominantly vacant, poorly developed and organized area into a site for new industrial buildings.”²⁶⁶

Judge Van Voorhis dissented, as he had in *Kaskel*, establishing himself as an insistent opponent to expansive powers of eminent domain. He pointed out that the residences were neither physically deteriorated nor located in such a way as to interfere with the assembly of contiguous parcels.²⁶⁷ He looked to the constitutional amendments of 1938 to support his opinion, contending that the statute at issue involved neither slum clearance nor low income housing.²⁶⁸ Van Voorhis also questioned the validity of relying on intangible or speculative characteristics of blight.²⁶⁹ As he put it, the statute “provides for the elimination of potential slums, which means anything that city planners think does not conform to their designs.”²⁷⁰ Van Voorhis also called on his colleagues to limit their deference to the city and to

employer relocation).

²⁶¹ See Letter from Louis J. Lefkowitz, Att’y Gen. of N.Y. State, to the Honorable Averell Harriman, Governor of N.Y. (Apr. 16, 1958), in Bill Jacket, L. 1958 c. 924; Memorandum from the Comm. on Real Prop. Law on the Act to Amend the General Municipal Law (Mar. 20, 1958), in Bill Jacket, L. 1958 c. 924.

²⁶² 1958 N.Y. Laws 2050–51.

²⁶³ 182 N.E.2d 395 (N.Y. 1962).

²⁶⁴ *Id.* at 396.

²⁶⁵ *Id.* at 397.

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 397–98 (Van Voorhis, J., dissenting).

²⁶⁸ *Id.*

²⁶⁹ *Id.* at 398–99.

²⁷⁰ *Id.* at 399.

consider the broader policy implications of their decision: “I see no escape from the duty and responsibility of courts . . . to weigh the social values which are involved, including the social value of ownership of private property, in order to determine whether the Legislature has exceeded its power under the Federal and State Constitutions.”²⁷¹ He rounded out his dissent with a striking parable:

When asked whether a ruler should compel a subject whose coat was too large for him to trade it with another whose coat was too small, if one of them objected to the exchange, the young future ruler replied in the affirmative, for the reason that then each would have a coat that fitted him. The mentor told him that he was wrong, since he had confused expediency with justice. The question here, it seems to me, is where to draw the line between supposed expediency and justice.²⁷²

The project involved in *Cannata* was the first city-sponsored industrial project in New York. Although the project was controversial, and at one point was almost abandoned, the Flatlands Urban Industrial Park was completed in 1969.²⁷³ By 1970, it had leased space to a plastics factory, an electronics manufacturer, and an assembly plant.²⁷⁴ It was considered a success, as it created (or retained) thousands of jobs and boosted tax revenues sevenfold.²⁷⁵ Today, the site is located in one of New York City’s last remaining industrial areas.²⁷⁶

*D. Municipal Urban Redevelopment Agencies and Yonkers
Community Redevelopment Agency v. Morris*

The New York Court of Appeals continued to expand the scope of blight redevelopment and administrative discretion in the 1975 case *Yonkers Community Redevelopment Agency v. Morris*,²⁷⁷ which involved the condemnation and clearance of a “substandard” area in order to assemble land for the Otis Elevator Company, a major employer in the city. The landowners and tenants claimed that their properties were not substandard

²⁷¹ *Id.* at 398.

²⁷² *Id.* at 399.

²⁷³ Glenn Fowler, *Flatlands Industrial Park, Year Old, Making Strides*, N.Y. TIMES, Sept. 6, 1970, at 1.

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 1–2.

²⁷⁶ See NYC.gov, Flatlands-Fairfield Industrial Business Area (2006), http://www.nyc.gov/html/imb/downloads/pdf/flatlands_fairfield_map.pdf.

²⁷⁷ 335 N.E.2d 327 (N.Y. 1975).

and that the taking's primary purpose was to confer a private benefit on Otis.²⁷⁸ Relying on *Kaskel*, the lower court found that a trial was unnecessary because the defendants could not "present evidence sufficient to sustain a charge of fraud" and the appellate division affirmed.²⁷⁹

The New York Court of Appeals began its analysis of the case with a recognition that the purposes of urban renewal were not fixed and could change over time. The court then explained that taking substandard land "for urban renewal is for a public purpose, just as it would be if it were taken for a public park, public school or public street," and so long as the land was deemed substandard, it was irrelevant that it would be redeveloped by a private company.²⁸⁰ Only if the land was not substandard, the court explained, would another (predominant) public purpose have to be demonstrated.²⁸¹ The court then explained that it was immaterial that Otis' purpose in redeveloping the land was self serving; if the city had determined that subsidizing Otis was a public purpose, it would defer to that decision.²⁸² No cost benefit comparison of the city's subsidies and Otis' projected contribution to the public welfare was necessary,²⁸³ nor was there any need to compare the public benefit of the plan with the amount of profits Otis expected to earn. The general public purposes of redeveloping substandard land and attracting industry, in effect, precluded the bringing of an as-applied challenge.

The *Yonkers* court then proceeded to the question of whether the land was, in fact, substandard. The court mentioned the "liberal rather than literal definition of a 'blighted' area" and explained that it was not "necessary that the degree of deterioration or precise percentage of obsolescence . . . be arrived at with precision, since the combination and effects of such things are highly variable."²⁸⁴ As the court stated, "extensive authority to make the initial determination that an area qualifies for renewal as 'blighted' has been vested in the agencies and the

²⁷⁸ *Id.* at 330–32.

²⁷⁹ *Id.* at 330.

²⁸⁰ *Id.* at 331.

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ This type of balancing was undertaken in *Denihan v. O'Dwyer*, 302 N.Y. 451 (1951), discussed *infra* Part VI.F. Unlike the *Yonkers* case, however, *Denihan* did not involve blight redevelopment.

²⁸⁴ 335 N.E.2d at 332.

municipalities; courts may review their findings only upon a limited basis.”²⁸⁵

Just as New York City failed to anticipate Met Life’s racial discrimination at Stuyvesant Town, or simply caved to Met Life’s insistence that integrated housing would hurt profits too much,²⁸⁶ Yonkers missed a crucial opportunity to impose restrictive conditions on the approval of Otis’ project. After relying on threats that it would abandon Yonkers in order to convince the city to condemn an expansion site, Otis left the city in 1982, just seven years after the eminent domain case was decided. The city sued Otis in 1988, trying to hold the company to an implied promise that it would stay in Yonkers,²⁸⁷ but the case was decided by a federal court in favor of Otis.²⁸⁸ No consideration was given to the question of whether the condemnation should have been permitted in the first place.²⁸⁹

E. Economic Development as a Public Purpose

The project involved in *Yonkers* had obvious economic motivations, but it was simultaneously related to the clearance of “substandard” land. Whether redevelopment was equally justifiable for non-blighted land was a more difficult question—such projects, after all, would not be for either slum clearance or affordable housing, the two purposes of the 1938 housing article and the justification for most redevelopment projects. In a 1951 case, *Denihan Enterprises v. O’Dwyer*,²⁹⁰ the New York Court of Appeals reviewed a condemnation for a parking garage and held in favor of the property owner. Unlike urban renewal projects, the proposed parking garage was authorized under a separate provision of the General Municipal Law and was not intended to remove blight or slums. Without the guaranteed public use of slum clearance to support it, the court found that the actual purpose of the garage—to provide parking for an apartment building located across the street—was predominantly private.²⁹¹

In subsequent years, however, the Court of Appeals began to accept commercial and industrial developments as public uses in

²⁸⁵ *Id.*

²⁸⁶ *See supra* Part V.D.

²⁸⁷ *City of Yonkers v. Otis Elevator Co.*, 844 F.2d 42, 46 (2d Cir. 1988).

²⁸⁸ *Id.* at 47–48.

²⁸⁹ *See id.* at 48.

²⁹⁰ 99 N.E.2d 235 (N.Y. 1951).

²⁹¹ *Id.* at 238.

and of themselves. *Courtesy Sandwich Shop, Inc. v. Port of New York Authority*,²⁹² for example, involved the use of eminent domain for construction of the World Trade Center. The project was conceived of by the Port Authority both to make transportation improvements to the Hudson & Manhattan railroad system (a given public use authorized in the Port Authority's enabling legislation), and to provide commercial facilities to centralize port business and contribute to the world trade of goods and services.²⁹³ The appellate division held the taking to be invalid, finding that the commercial portions of the project, which were designed primarily to raise revenue for the transportation projects, did not have any public purpose.²⁹⁴

The Court of Appeals reversed and upheld the taking, first explaining that promoting trade was a public use. The court also held that it was perfectly lawful for eminent domain to be used to facilitate financing, and it explained that the lower court misread the statute as "allowing unfettered erection of structures that are solely revenue producing."²⁹⁵ As the court explained, the law should have been interpreted to authorize only those incidental revenue-producing uses needed to effectuate/finance the public purpose.²⁹⁶ As in *Kaskel* and *Cannata*, Judge Van Voorhis dissented, opining that the statute "grant[ed] to the Port Authority extensive and uncontrolled governmental power to condemn and manage private real property for private purposes as a major object of the act."²⁹⁷

VII. THE URBAN DEVELOPMENT CORPORATION

A. *The Housing Finance Agency and Moral Obligation Bonds*

By 1960, state funding for housing and slum clearance was pushing the limits authorized under the 1938 Constitution, and the legislature, rather than going through the referendum process required to issue additional debt, created the Housing Finance Agency (HFA).²⁹⁸ The HFA was created as a public

²⁹² 190 N.E.2d 402 (N.Y. 1963).

²⁹³ *Id.* at 404.

²⁹⁴ *Courtesy Sandwich Shop, Inc. v. Port of N.Y. Auth.*, 237 N.Y.S.2d 820, 828 (App. Div. 1963), *rev'd*, 190 N.E.2d 402 (N.Y. 1963).

²⁹⁵ *Courtesy Sandwich Shop, Inc.*, 190 N.E.2d at 405.

²⁹⁶ *Id.* at 406.

²⁹⁷ *Id.* at 407 (Van Voorhis, J., dissenting).

²⁹⁸ RESTORING CREDIT AND CONFIDENCE, *supra* note 108, at 106–108; Morris,

authority, similar to municipal housing authorities but with state-wide jurisdiction. As discussed above, however, “housing was not easily susceptible to ordinary revenue bond financing.”²⁹⁹ As a result, the HFA issued so called “moral obligation bonds.” These bonds were backed by reserve funds that, when depleted, could be replenished by annual appropriations made by the legislature. Future legislatures, however, were only “morally,” and not legally, obligated to make these appropriations.³⁰⁰ The questionable arrangement³⁰¹ allowed the legislature to circumvent the constitution’s debt provisions, as well as the restriction, added in 1938, prohibiting the state from assuming public authorities’ debts.³⁰²

B. Debt Risks and the Creation of the Urban Development Corporation

The HFA understood that the state’s moral obligation was designed to be used only in extraordinary circumstances, and it undertook a conservative lending program that would allow it to become self-sustaining. The financial studies that it was required to complete prior to issuing mortgage loans were lengthy, however, and tended to exclude risky projects located in inner city and low income areas.³⁰³ To solve this financing gap, Governor Rockefeller proposed the creation of the Urban Development Corporation (UDC), which in addition to having financing powers like the HFA, would also be able to initiate, build, and operate its

supra note 162, at 508; Douglas Dales, *Rockefeller Urges New State Agency on Housing Loans*, N.Y. TIMES, Feb. 22, 1960, at 1. In fact, “[f]ive separate attempts to gain the approval of a majority of New York’s voters for state-financed housing projects, drafted into referendums between 1962 and 1965, had all proved unavailing.” John E. Osborn, *New York’s Urban Development Corporation: A Study on the Unchecked Power of a Public Authority*, 43 BROOK. L. REV. 237, 260 (1977). While housing may have been an unpopular proposal, the voters in 1961 passed a constitutional amendment to create and fund another public authority, the Job Development Authority, to create jobs and encourage industrial growth. See VOTES CAST FOR AND AGAINST PROPOSED CONSTITUTIONAL AMENDMENTS, *supra* note 150; N.Y. Const. art. VII, §8(3).

²⁹⁹ RESTORING CREDIT AND CONFIDENCE, *supra* note 108, at 86, 108-09.

³⁰⁰ See generally *id.* at 84–86, 92–99 (discussing types of public authority debt); Osborn, *supra* note 298, at 249–254 (discussing moral obligation financing).

³⁰¹ See RESTORING CREDIT AND CONFIDENCE, *supra* note 108, at 113; *Levitt Contends Governor Hurts Credit of State*, N.Y. TIMES, Jun. 10, 1963; *Wein v. State*, 39 N.Y.2d 136 (1976) (Jasen, J. dissenting).

³⁰² RESTORING CREDIT AND CONFIDENCE, *supra* note 108, at 86, 109. e

³⁰³ See *id.* at 114.

own projects. It could act as the primary developer, or collaborate with private businesses in redevelopment, and unlike the HFA, it would also be able to fund commercial and industrial projects.³⁰⁴

The UDC's enabling legislation, which was passed in 1968 just after Martin Luther King's assassination, gave the authority a suite of impressive features, including "the power to override local zoning laws and building codes, the freedom from various restrictions that would prevent rapid development, and a particularly flexible and independent financing mechanism."³⁰⁵ These vast powers were unprecedented and raised serious concerns about home rule and accountability. Moreover, it was questionable whether the UDC would actually be able to become self-sufficient. But the bill's passage was ensured by Rockefeller's intense lobbying,³⁰⁶ as well as by legislators' perhaps less-than-complete understanding of the proposal's financial implications.³⁰⁷ The optimistic view promoted by Governor Rockefeller was that the UDC would become self-sustaining and would be able to speed development projects by cutting bureaucratic red tape and acting as a one-stop-shop. It would also target its efforts toward the urban areas neglected by HFA and private investment, thereby creating jobs, revitalizing marginal neighborhoods, and attracting new investments.³⁰⁸ Additionally, it was intended that UDC would use its zoning override powers to force unwelcoming suburban communities to accept their fair share of affordable housing. The authority would also pursue inclusionary (i.e., mixed income) housing for all of its projects and place a premium on architectural design.³⁰⁹

While the UDC was created primarily to build housing, the legislature created Industrial Development Agencies (IDAs) in 1969 to pursue commercial and industrial projects.³¹⁰ Like the

³⁰⁴ See, e.g., Homer Bigart, *Rockefeller Asks Creation of Unit to Rebuild Slums*, N.Y. TIMES, Aug. 27, 1967, at 1.

³⁰⁵ RESTORING CREDIT AND CONFIDENCE, *supra* note 108, at 118.

³⁰⁶ Rockefeller, for example, drew on the emotional toll of Martin Luther Kings' assassination to gain support for the bill. It was a "marvel of public relations." In retrospect, however, it is clear that Rockefeller was aware of the risks of the moral obligation scheme. Osborn, *supra* note 298, at 263-264.

³⁰⁷ See RESTORING CREDIT AND CONFIDENCE, *supra* note 108, at 120; Osborn, *supra* note 298, at 262-64.

³⁰⁸ Bigart, *supra* note 304, at 1; Alan K. Campbell, *The Big Goals of the U.D.C.*, N.Y. TIMES, Mar. 2, 1975, at 176; David K. Shipler, *Across the State, Renewal Hopes Rise*, N.Y. TIMES, Apr. 18, 1969, at 45.

³⁰⁹ RESTORING CREDIT AND CONFIDENCE, *supra* note 108, at 104.e

³¹⁰ 1969 N.Y. Laws 2565-67. See Memorandum from Gov. Nelson Rockefeller

UDC, IDAs were designed as public authorities, but they were to operate on the local level, and their powers were not as extensive. The legislation gave IDAs the power to subsidize business projects through tax exemptions,³¹¹ tax exempt bond financing,³¹² straight lease transactions,³¹³ and project site acquisitions.³¹⁴

The UDC did not waste time in deploying its development powers, and in less than two years it had more than 45,000 units of housing in the pipeline along with several commercial and industrial projects.³¹⁵ However, when UDC attempted to build affordable housing in nine towns in Westchester County, Governor Rockefeller caved to political pressure and blocked the suburban projects.³¹⁶ The incident belied UDC's independence from politics and lobbying, as well as its ability to achieve its social goals.

C. The UDC's Default and Near-Collapse

The UDC was essentially created to take on risky projects—those that the HFA would not—and there was an inherent conflict between its mission to aid inner cities and the expectation that it would become self-sustaining.³¹⁷ Its decision to fast-track a large number of projects in its early years turned out to be riskier than expected, and coupled with poor oversight (both internal and external) and a moratorium on federal funding, the

on Approval of Assembly Bill Number 5367 (Feb. 17, 1969), *in* Bill Jacket, L. 1969 c. 1030.

³¹¹ N.Y. GEN. MUN. LAW § 874 (McKinney 1999); *see* Pyramid Co. of Watertown v. Tibbets, 556 N.E.2d 419, 420 (N.Y. 1990) (discussing the tax benefits available under the IDA Act).

³¹² N.Y. GEN. MUN. LAW § 864; *see* Wegmans Food Mkts., Inc. v. Dep't of Taxation & Fin. of N.Y., 481 N.Y.S.2d 298, 300 (Sup. Ct. 1984) (explaining typical bond financing arrangements).

³¹³ N.Y. GEN. MUN. LAW § 868(9); N.Y. GEN. MUN. LAW § 854 (defining "straight lease transaction"). *See* Brian T. McMahon and Michael O'Shea, Esq., *Industrial Development Agencies and the 504 Loan Program: Great Economic Development Partners*, <http://www.nybdc.com/December2006Newsletter/partnerpageDec2006.htm>; Amy Lavine, *Getting Past the Prisoners' Dilemma: Transparency and Accountability Reforms to Improve New York's Industrial Development Agencies*, 11 N.Y. ST. B.A. GOV'T L. & POL'Y J. 75, 75 (2009).

³¹⁴ N.Y. GEN. MUN. LAW § 858(4); *see* Ne. Parent & Child Soc'y, Inc. v. City of Schenectady Indus. Dev. Agency, 494 N.Y.S.2d 503, 504 (App. Div. 1985).

³¹⁵ RESTORING CREDIT AND CONFIDENCE, *supra* note 108, at 103–04, 125.

³¹⁶ Martin F. Nolan, *The City Politic: Showdown Vote in Northern Westchester*, N.Y. MAG., June 4, 1973, at 5.

³¹⁷ *See* RESTORING CREDIT AND CONFIDENCE, *supra* note 108, at 124, 223; Osborn, *supra* note 298, at 239.

UDC went into a downward financial spiral in the early 1970s.³¹⁸ The situation came to a head in February 1975, when UDC's president was forced to resign and an investigation was commenced regarding the authority's default on more than \$100 million of bonds.³¹⁹ After a complex state bailout and corporate re-haul, the UDC survived its near-bankruptcy.³²⁰ The debacle, however, had a ripple effect throughout the state, damaging the credit of other authorities that used moral obligation financing and nearly forcing New York City into receivership.³²¹ In response, legislation was passed to curb moral obligation spending³²² and the New York Court of Appeals held that clauses in bond issues disclaiming the existence of a moral obligation would be honored, even in situations where a disclaimer might not seem particularly genuine.³²³

Financial realities forced UDC to reevaluate its program goals and cut back its ambitious social programs; it would have to become more like the HFA and operate as "a cautiously run real-estate enterprise rather than a daring spearhead for social betterment."³²⁴ Accordingly, while it had originally functioned primarily as a low income housing developer,³²⁵ after the default

³¹⁸ See RESTORING CREDIT AND CONFIDENCE, *supra* note 108, at 124–25; see also Osborn, *supra* note 298, at 246–47 (discussing how the UDC's unchecked powers led to major financial problems).

³¹⁹ See Osborn, *supra* note 298, at 246–47; Robert J. Cole, *Default by U.D.C. Hits Bond Market*, N.Y. TIMES, Feb. 26, 1975, at 20; Joseph P. Fried, *Hard Times for U.D.C. and How They Came About*, N.Y. TIMES, Feb. 6, 1975, at 20; Linda Greenhouse, *Fiscal Collapse of U.D.C. Was Result of 3 Wrong Moves*, Panel Concludes, N.Y. TIMES, May 27, 1976, at 39; Linda Greenhouse, *Governor Orders Inquiry to Save Faltering U.D.C.*, N.Y. TIMES, Feb. 6, 1975, at 1, 20.

³²⁰ See Osborn, *supra* note 298, at 256; Linda Greenhouse, *After 5 Months the Crisis Mood at U.D.C. Gives Way to a Steady Salvage Operation*, N.Y. TIMES, July 24, 1975, at 62; Linda Greenhouse, *Albany Approves a Bill to Rescue Insolvent U.D.C.*, N.Y. TIMES, Feb. 27, 1975, at 1.

³²¹ See *Flushing Nat'l Bank v. Mun. Assistance Corp.*, 358 N.E.2d 848, 850 (N.Y. 1976); *Wein v. State*, 347 N.E.2d 586, 586 (N.Y. 1976); Osborn, *supra* note 298, at 246–47; MUN. ASSISTANCE CORP. FOR N.Y. CITY, ANNUAL REPORT 3 (1976), available at http://newman.baruch.cuny.edu/digital/2003/amfl/mac/pdf_files/Ann_Reports/1976.pdf.

³²² 1976 N.Y. Laws 158. See also Linda Greenhouse, *Bills Signed to End 'Moral Obligation' Financing*, N.Y. TIMES, Mar. 16, 1976, at 40.

³²³ See *Wein v. City of N.Y.*, 331 N.E.2d 514, 560–61 (N.Y. 1975).

³²⁴ Joseph P. Fried, *Goodbye, Slum Razing; Hello, Grand Hyatt*, N.Y. TIMES, July 15, 1979, at E6.

³²⁵ It was conceived as more of an industrial development agency, but its focus on housing was mandated by IRS tax exemption rules. Additionally, UDC's first president "was a housing man and his enthusiasm for housing was clearly matched by that of Governor Rockefeller." RESTORING CREDIT AND

it dramatically increased its investments in commercial, industrial, and civic projects.³²⁶ As had occurred with municipal urban renewal agencies, UDC also began focusing its energies on redeveloping valuable but under-built property, rather than concentrating on truly marginal areas.³²⁷

D. The Empire State Development Corporation

As the UDC matured, it became known as the Empire State Development Corporation (ESDC), and the scope of its “truly amazing powers” also become more apparent.³²⁸ As Abrams would have predicted, these powers often proved especially helpful to the authority’s private partners. The Times Square redevelopment, for example, was facilitated by ESDC’s use of eminent domain³²⁹ and its override of New York City’s land use approval process.³³⁰ More recently, the Brooklyn Atlantic Yards project similarly benefited from eminent domain and an override of New York City’s zoning and planning laws. In the case of Atlantic Yards, moreover, ESDC demonstrated its ability to work cooperatively with a favored developer to all but ensure project approval and escape public scrutiny.³³¹

IDAs have also proliferated and raised criticisms of their own.³³² Excessive discretion and ill-defined subsidy standards, for example, have led to agencies awarding larger subsidies than necessary to attract or retain businesses.³³³ Another problem is

CONFIDENCE, *supra* note 108, at 104.

³²⁶ Fried, *supra* note 324, at E6.

³²⁷ *See id.*

³²⁸ Norman Oder, Atlantic Yards Report, <http://atlanticyardsreport.blogspot.com/2007/02/planner-garvin-udc-esdc-has-truly.html>? (Feb. 7, 2007, 06:36 EST) (quoting ALEXANDER GARVIN, *THE AMERICAN CITY: WHAT WORKS WHAT DOESN'T* 357 (2002)).

³²⁹ Rosenthal & Rosenthal Inc. v. N.Y. State Urban Dev. Corp., 605 F. Supp. 612, 616–17 (S.D.N.Y. 1985), *aff'd*, 771 F.2d 44 (2d Cir. 1985); Jackson v. N.Y. State Urban Dev. Corp., 494 N.E.2d 429, 432–33 (N.Y. 1986); W. 41st St. Realty v. N.Y. State Urban Dev. Corp., 744 N.Y.S.2d 121, 123 (App. Div. 2002).

³³⁰ Waybro Corp. v. Bd. of Estimate of N.Y., 493 N.E.2d 931, 933–35 (N.Y. 1986).

³³¹ *See* Amy Lavine & Norman Oder, *Urban Redevelopment Policy, Judicial Deference to Unaccountable Agencies, and Reality in Brooklyn’s Atlantic Yards Project*, 42 URB. LAW. 287, 306–08 (2010).

³³² Currently, there are 115 IDAs in New York. OFFICE OF N.Y. STATE COMPTROLLER, ANNUAL PERFORMANCE REPORT ON NEW YORK STATE’S INDUSTRIAL DEVELOPMENT AGENCIES 4 (2010), *available at* <http://www.osc.state.ny.us/localgov/pubs/research/idareport2010.pdf>.

³³³ *See* Lavine, *supra* note 313, at 76; *see also* Press Release, Jobs With

posed by projects that merely “poach” jobs from other parts of the state.³³⁴ Some critics have said that there are too many IDAs, and that the competition they have created has led to a race to the bottom.³³⁵

ESDC has also continued to expand the meaning of blight and the permissible bounds of redevelopment. Most recently, the New York Court of Appeals upheld ESDC’s condemnation of property in West Harlem for a campus expansion planned by Columbia University.³³⁶ The court refused to consider voluminous evidence presented by the property owners challenging the designation of their property as blighted, and it similarly deferred to ESDC’s conclusion that a private university qualified as a “civic” project under its enabling legislation.³³⁷ As a result of the extraordinary deference given to ESDC in this case and others, property owners wishing to contest the condemnation of their land for use in redevelopment projects have dismal chances of winning.³³⁸

Oversight is another problem. While appointed boards may be responsive to political pressure and private interests, they are largely unaccountable to the voters.³³⁹ Additionally, because of the questionable conclusion of the Court of Appeals that public authorities’ debt is separate from the state’s,³⁴⁰ it is not clear whether ESDC is even subject to taxpayers challenges.³⁴¹ ESDC

Justice New York, New York’s Economic Development Efforts Fail According to New Report (Aug. 18, 2010), <http://www.nyjwj.org/posts/press/2010/08/new-yorks-economic-development-efforts-fail-according-to-new-report/> [hereinafter Jobs With Justice] (last visited Jan. 17, 2010).

³³⁴ It is unclear how common failures are. See Lavine, *supra* note 313, at 76.

³³⁵ *Id.* at 75; Jobs With Justice, *supra* note 333.

³³⁶ *Kaur v. N.Y. State Urban Dev. Corp.*, 933 N.E.2d 721 (N.Y. 2010), *cert. denied*, 2010 WL 3712673, at *1 (U.S. Dec. 13, 2010) (No. 10-402).

³³⁷ *Kaur*, 933 N.E.2d at 733–34; *see also* *Goldstein v. N.Y. State Urban Dev. Corp.*, 921 N.E.2d 164, 171–72 (N.Y. 2009) (refusing to review the use of eminent domain for the Brooklyn Atlantic Yards stadium and redevelopment project).

³³⁸ The possibility of proving that a project’s asserted benefits are “illusory” or “pretextual” remains open, but the *Goldstein* and *Kaur* cases suggest that it is all but impossible where the land involved has been declared blighted. The few New York cases that have held in favor of property owners have not involved blighted property. *See, e.g.*, *Denihan Enters. v. O’Dwyer*, 99 N.E.2d 235, 237 (N.Y. 1951) (taking for a parking lot); *49 WB, LLC v. Vill. of Haverstraw*, 839 N.Y.S.2d 127, 130 (App. Div. 2007) (taking for affordable housing); *Syracuse Univ. v. Project Orange Assocs. Servs. Corp.*, 897 N.Y.S.2d 335, 336 (App. Div. 2010) (taking for utility).

³³⁹ *See* Lavine & Oder, *supra* note 331, at 289.

³⁴⁰ *See* *Schulz v. State*, 84 N.Y.2d 231 (1994).

³⁴¹ *See* N.Y. STATE FIN. LAW §123-b (McKinney2009) (authorizing taxpayers cause of action for misuse of “state funds or state property”) (emphasis added).

and IDAs have also taken up complex and non-transparent financing methods intended to circumvent the minimal limitations imposed on them by state law.³⁴² The legislature has made some progress in creating accounting and operating requirements for public authorities,³⁴³ but it has yet to enact legislation imposing stricter limitations on eminent domain and other discretionary powers.

CONCLUSION

After fighting to end discrimination at Stuyvesant Town, Charles Abrams served as the chairman of the State Commission Against Discrimination³⁴⁴ and provided guidance on housing policies to 21 countries through work with the United Nations.³⁴⁵ He remained a vocal critic of housing and redevelopment policies, and worked with both Democratic and Republican politicians to effect improvements.³⁴⁶ During much of this time, he also took on teaching positions and wrote prolifically.

When Abrams died in 1970, he had already seen how his early support for eminent domain and public authorities had paved the way for business welfare policies and the mission creep that transformed low income housing programs into semi-commercial enterprises. Along with other urban thinkers, Abrams helped to

³⁴² In particular, ESDC has avoided the requirement that its bond issues receive approval from the state Public Authorities Control Board by setting up private local development corporations to issue bonds on its behalf. In addition to violating the spirit of the law, which exists to prevent imprudent investments, the practice is questionable because ESDC cannot create local development corporations itself. Rather, it relies on the Job Development Authority (JDA), a separate but mostly defunct public authority that ESDC controls for all intents and purposes. See Norman Oder, Atlantic Yards Report, <http://atlanticyardsreport.blogspot.com/2010/07/job-development-authority-creator-of.html> (July 13, 2010, 07:24 EST) (explaining how ESDC may have avoided review requirements for the Atlantic Yards project and discussing the JDA's noncompliance with statutory reporting requirements); see also Empire State Dev. Corp., Request for Authorization to Enter into Amended Relicensing Settlement Agreement; Authorization to Take Related Actions, Aug. 16, 2010, available at http://www.nylovesbiz.com/AboutUs/Data/BoardMaterials/August2010/02_CanalSide_Land_Use_Improvement_Project.pdf (explaining that an ESDC subsidiary in Buffalo directed the Job Development Authority to create a local development corporation to "monetize" its revenue streams). Local development corporations have also been used by IDAs to evade statutory restrictions. See *Jobs With Justice*, *supra* note 333.

³⁴³ See 2005 N.Y. Laws 1789; 2009 N.Y. Laws 1363.

³⁴⁴ HENDERSON, *supra* note 2, at 158.

³⁴⁵ *Id.* at 173.

³⁴⁶ *Id.* at 193.

demonstrate how these policies contributed to inequitable, discriminatory and often ineffective urban renewal programs during the 1950s and 1960s.³⁴⁷ Yet, forty years after his death, urban renewal programs continue to exhibit the key aspects of the business welfare state: the influence of partisan politics and business lobbies; excessive administrative discretion; and blurred distinctions between the roles of public redevelopment agencies and their private partners. Unsurprisingly, urban renewal remains one of the most important civil rights issues today.³⁴⁸

Many of the statutes discussed in this article were acknowledged by their drafters and supporters to be experiments. Their results, however, have often been ignored. When limited dividend housing companies and municipal housing authorities failed to produce as much housing as they hoped they could, legislators did not respond by seeking new approaches to building low income housing, but instead sought out new ways to attract private investment for middle income and market rate housing.³⁴⁹ When urban problems began to focus more on the need to assemble large areas of property for industrial development, and less on insanitary and unsafe physical conditions, the legislature used the same blight language that had been created to describe tenement slums, instead of creating new standards.³⁵⁰ In the late 1960s, when the failures of urban renewal were becoming apparent, the legislature did not acknowledge the inherent unprofitability of low income housing but instead created the UDC and gave it the likely impossible task of building affordable housing that would be self-sustaining. Even the UDC's default and failure did not lead to a thorough reexamination of its enabling statute. Despite creating new mechanisms to rein in the authority's finances, nothing was done to prevent it from inventing loopholes to avoid those regulations.³⁵¹ Nor has the

³⁴⁷ See, e.g., Herbert J. Gans, *The Failure of Urban Renewal*, in URBAN RENEWAL: THE RECORD AND THE CONTROVERSY 537, 539 (James Q. Wilson ed., 1966); MINDY THOMPSON FULLILOVE, M.D., ROOT SHOCK: HOW TEARING UP CITY NEIGHBORHOODS HURTS AMERICA, AND WHAT WE CAN DO ABOUT IT 20 (2004); MARTIN ANDERSON, THE FEDERAL BULLDOZER 64–65 (1964); Pritchett, *supra* note 10, at 6; ARNOLD R. HIRSCH, MAKING THE SECOND GHETTO: RACE AND HOUSING IN CHICAGO, 1940–1960, at 168–69 (1983).

³⁴⁸ See Norman Oder, Atlantic Yards Report, <http://atlanticyardsreport.blogspot.com/2010/01/scolding-from-norman-siegel-about.html> (Jan. 18, 2010, 06:05 EST).

³⁴⁹ See *supra* Part III.A.–B.

³⁵⁰ See *supra* Part IV.B.

³⁵¹ See *supra* Part VII.C.

legislature responded to popular outcry over the increasingly corporate character of redevelopment projects and (real or perceived) abuse of eminent domain.³⁵²

The statutory system, moreover, is convoluted. The General Municipal Law, for example, contains separate provisions for municipal urban renewal programs, municipal urban renewal agencies, and industrial development agencies, and the Private Housing Finance Law contains separate provisions for limited-profit housing companies, limited dividend housing companies, redevelopment companies, and urban redevelopment corporations. ESDC operates under separate enabling legislation. Meanwhile, these programs may be overseen by the Department of State, the Department of Housing and Community Renewal, or the Department of Economic Development.

Throughout his life, Abrams continued to believe that government redevelopment programs could be successful, and he often advocated for the expansion of government programs rather than repeal.³⁵³ He emphasized the successes of urban renewal, as well as the failures, and pressed for subsidies to be directed where they were actually needed rather than where they best suited the needs of private developers. He also sought legislation that would better articulate the goals of redevelopment and impose clear standards on its instrumentalities, both public and private.³⁵⁴ And he argued that programs should involve more community participation, and that they should focus on actual needs rather than grand possibilities.³⁵⁵ Abrams, in short, looked to his long experience in housing, law, and civil rights to devise

³⁵² The Supreme Court's decision in *Kelo v. New London*, 545 U.S. 469 (2005), led to widespread public opposition over the use of eminent domain for economic development. See, e.g., Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100 (2009). Similar opposition has arisen in New York in relation to projects such as Atlantic Yards, the Columbia University expansion, and the Buffalo waterfront redevelopment project, all of which rely on large private developers and various government subsidies. See generally DANA BERLINER, INST. FOR JUST., BUILDING EMPIRES, DESTROYING HOMES: EMINENT DOMAIN ABUSE IN NEW YORK (2009), available at <http://www.castlecoalition.org/component/content/2430?task=view> (discussing eminent domain abuse in New York State); Bruce Fisher, *Can the Tide be Turned on Development of the City's Waterfront?*, http://artvoice.com/issues/v9n46/two_weeks_in_timeout (discussing the plans for Buffalo's waterfront redevelopment, and the opposition to including a heavily-subsidized Bass Pro as the anchor tenant) (article last modified Nov. 17, 2010).

³⁵³ HENDERSON, *supra* note 2, at 193.

³⁵⁴ *Id.* at 201.

³⁵⁵ *Id.* at 206.

practical and effective reforms. He may have seen business welfare policies as a perversion of redevelopment programs, but he attempted to modify those policies rather than undo them.

Redevelopment and economic development programs can be successful.³⁵⁶ New York, as a historic leader in the field, should take the initiative to study the successes and devise workable programs to balance public and private needs. This will require a clear articulation of the goals of redevelopment; if economic development is the aim, it should not be pursued under the guise of “blight,” and if affordable housing is the aim, it should not be pursued under the guise of economic development. Better redevelopment programs will also need more targeted subsidies to reach those goals, and redevelopment agencies will need clear standards to prevent untoward discretion and excessive private benefits. Developing effective reforms will be a difficult task, but it is necessary, for even small changes can go far. As Abrams once remarked, redevelopment “can be accomplished as often by the lifting of the human spirit as the razing of buildings.”³⁵⁷

³⁵⁶ See, e.g., Lavine & Oder, *supra* note 331, at 291 (discussing the Melrose Commons development located in the Bronx).

³⁵⁷ HENDERSON, *supra* note 2, at 198.