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N.Y. Real Property Law Journal

A publication of the Real Property Law Section of the New York State Bar Association

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William J. Niebel

Historic Preservation and the Janus Effect of Preserving and Gentrifying Neighborhoods
Shelby D. Green

Basics of Co-GP Transactions
Bradford B. Lavender

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N.Y. Real Property Law Journal
Submission Guidelines

The *Journal* welcomes the submission of articles of timely interest to members of the Section in addition to comments and suggestions for future issues. For ease of publication, articles should be submitted via e-mail to any one of the Co-Editors. Accepted articles fall generally in the range of 7-18 typewritten, double-spaced pages. Please use endnotes in lieu of footnotes. The Co-Editors request that all submissions for consideration to be published in this *Journal* use gender-neutral terms where appropriate or, alternatively, the masculine and feminine forms may both be used. Please contact the Co-Editors regarding further requirements for the submission of articles.

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This *Journal* is published for members of the Real Property Law Section of the New York State Bar Association.

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Message From the Chair

A colleague who has been handling residential real estate transactions for more than 55 years recently shared with me that he had never seen anything like the volume and challenges of closings we've had this past summer. In the Capital District, where we practice, the pace has been frenetic, and the market has been hot. Purchasers need to be ready to make offers quickly and often find themselves in bidding wars against unknown entities with unknown resources. Emotions are high. Clients are anxious about their finances, making decisions with health and safety variables, and managing the move of their families and possessions. My colleague and I commiserated for a bit and took comfort in the realization that we were not alone in our experiences.

Michelle H. Wildgrube

In contrast to my colleague's perspective, my law clerk, just out of law school and fresh from taking the bar, has been thrust into the real estate arena, working with clients and brokers to get everyone to the closing table, whether virtually or in person. She has learned about appraisal clauses, carefully drafted attorney approval letters, all of the deadlines, and that the closing coordinators can be the most valuable players on our team. I've stressed to her the importance of getting involved with NYSBA and have shared resources with her along the way.

Our Communities page is a great first stop for newer attorneys, providing the virtual "attorney down the hall" for advice and resources. I am constantly impressed by the generosity of the Section's contributing members. Questions are posed and answered, information is posted on changes to the law, articles are referenced and published. I would urge you to stop by to read the most recent posts and even contribute with a question or an answer. Members can opt to have posts emailed as they happen or to receive summaries once a day or once a week. The email summaries from our Communities page are an easy way to stay up to date on the practice of real estate.

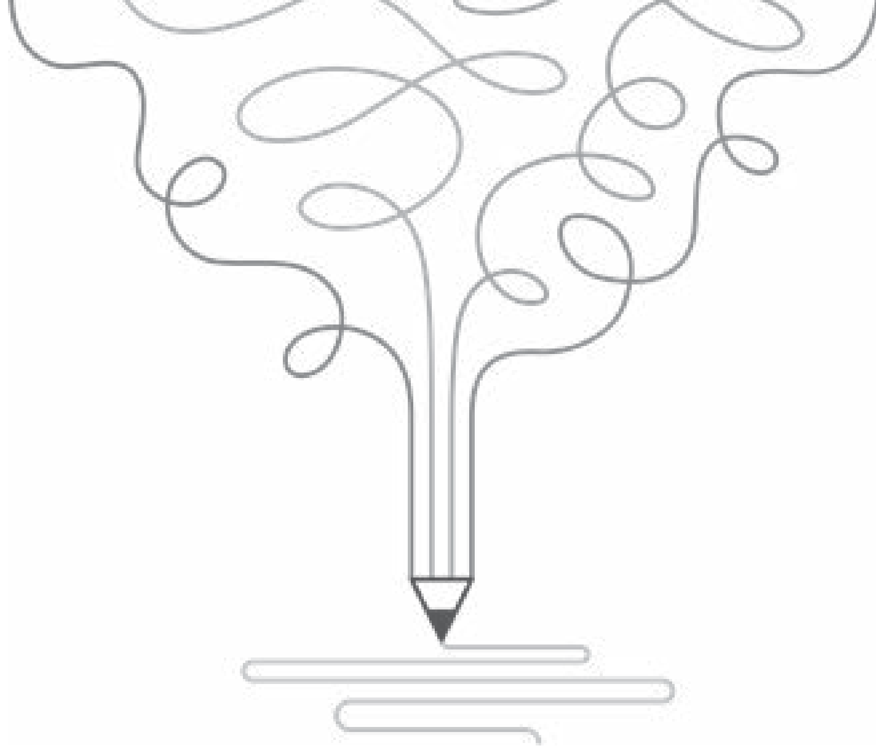
During the pandemic, our committees have been active. CLEs have been planned and presented, articles have been written for the *Journal*, and meetings have been held virtually. Committees provide the Section with breaking news and address practice challenges. If you aren't already involved with a committee, I'd recommend you try one out. Committee co-chairs are listed in the *Journal* and online and can be contacted directly for more information on the committee's activities.

As you already know, membership in the Real Property Law Section adds tremendous value to a NYSBA membership. The NYSBA membership committee often advises that attorneys will join NYSBA/Sections/Committees when invited by other members. Our Section is enhanced by our members. You can introduce others to our Section by sharing your experiences and inviting new associates and friends along to meetings and CLEs.

I am appreciative of the work of our members who have volunteered their time to present CLEs, work on various committees, and coordinate the activities of our Section. In particular, I'd like to recognize our immediate past chair, Ira Goldenberg, for his steady guidance, wisdom, and creativity in finding the Section's way through pandemic practices and issues. Also, I would be remiss were I not to recognize and extend our collective gratitude to our longstanding Section member Marvin Bagwell, who recently retired both from legal practice and from service on our Publications Committee, which oversees this very *Journal*.

Looking ahead, the Section's first vice chair, Spencer Compton, is planning our Annual Meeting. We will have a half-day CLE on January 24, 2022. Prior to the CLE, we will hold the Section's business meeting and present the Melvyn Mitzner Scholarship, the Lorrain Power Tharp Scholarship, the Section's Professionalism Award, and the Section's Community Contributor of the Year Award. Please save the date. I hope to see you there!

Michelle H. Wildgrube



Announcing the NYSBA Real Property Law Section Annual Student Writing Competition!

We are pleased to announce that the Real Property Law Section is now sponsoring an annual Student Writing Competition, open to all students who are candidates for the J.D. or L.L.M. degree at an accredited law school in New York State during the year in which the article is submitted. The student article that is judged to be the best, provided it is of publishable quality and otherwise meets the criteria of the competition, will be designated as "best article" and receive a cash prize of $500. At the discretion of the editors, the best article will also be published in the NYSBA *New York Real Property Law Journal*, the Section's official publication. In addition, one or more other student articles that are deemed worthy of recognition, provided they otherwise meet the criteria of the competition, may be designated as "outstanding submissions."

The Section reserves the right to decline to designate a "best article" and/or any "outstanding submissions" in any given year, depending on its determination of quality of submissions. All selections and determinations shall be final. Entries that do not qualify for an award may also be considered for publication in the *Journal*.

Submissions must be made no later than 11:59 PM Eastern Time on **March 1** of each year. Awardees will be announced no later than May 1 of each year.

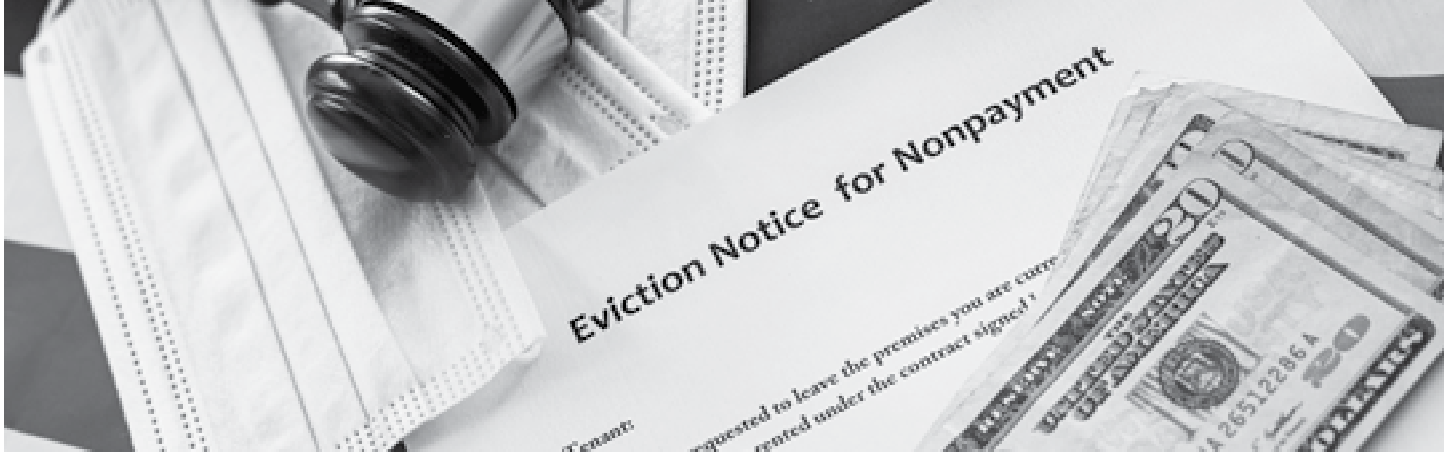
To be eligible for consideration, the topic of the article must relate to real property law (which shall be broadly construed and includes, without limitation: landlord-tenant, real estate financing, land use, housing, condominiums and cooperatives, construction, and environmental topics affecting real estate).

Articles submitted will be judged on the following criteria:

- Relevance to the *Journal*'s audience (New York real property lawyers)
- Timeliness of the topic
- Originality
- Quality of research, analysis and writing
- Clarity and conciseness

The manuscript should follow Bluebook citation format (using endnotes rather than footnotes) and be a minimum of 3,000 words (there is no maximum). All submissions become the property of NYSBA and *Real Property Law Journal*. By submitting an article, the student is deemed to consent to its publication, whether or not a prize or recognition is awarded, and is deemed to represent and warrant that the paper is the entrant's original work, has been written without substantial unattributed input from others, and has not previously been published.

To enter, the student should submit an original, unpublished manuscript in Word format to Robert J. Sein, member of the Publications Committee of the Real Property Law Section (seinr@stjohns.edu). The student should include a brief biography, including law school attended, degree for which the student is a candidate, and expected year of graduation.



The Process Due When Rent Is Due: Residential Nonpayment Evictions in New York After COVID-19

By William J. Niebel

As a result of moratoria at the state and federal levels, most evictions for unpaid rent in New York have been on hold since the beginning of the COVID-19 pandemic in March 2020.[1] While some financial assistance is available for rental arrears, this will only help a fraction of the tenants who need it. Therefore, as the bans on eviction begin to expire, a wave—or tsunami—of nonpayment cases is expected. At this critical juncture, to prevent homelessness and the unnecessary displacement of families, it is imperative to review New York nonpayment eviction law, with a focus on the procedural protections available to tenants.

Additionally, New York's Housing Stability and Tenant Protection Act (HSTPA) of 2019 dramatically changed the eviction process only months before the pandemic hit.[2] And laws enacted during COVID-19, such as the Tenant Safe Harbor Act,[3] will continue to affect housing practices going forward. Thus, for the benefit of judges and advocates alike, it is important to highlight the unsettled issues that must still be litigated.

This article will consider the New York nonpayment eviction process chronologically. It will first address the pre-commencement[4] notices to which tenants are entitled. Then it will discuss the court eviction proceeding and warrant[5] process, with an emphasis on tenant protections that are built into the law. Again, because some of these provisions are so new, this article will flesh out some arguments that are untested in the courts.

William J. Niebel

William J. Niebel is an adjunct professor of law at Cornell Law School, directing its tenants advocacy practicum. He is also a staff attorney at Legal Services of Central New York, where he has practiced since 2015. Professor Niebel was first admitted to the Iowa bar and began focusing on landlord-tenant law as a staff attorney at Iowa Legal Aid. He prevailed in the Iowa Supreme Court, in the landmark case of *War Eagle v. Plummer*, 775 N.W.2d 714 (2009). That decision invalidated the Iowa statute that allowed certified mail notice of an eviction hearing, as a violation of due process. Professor Niebel moved to New York and worked at the Legal Aid Society of Northeastern New York for three years, in Albany and Saratoga Springs, defending many evictions in city, town, and village courts.

A previous version of this article appeared in NYSBA's online News Center.

I. Pre-Commencement

Summary eviction proceedings in New York are governed by Article 7 of the Real Property Actions and Proceedings Law (RPAPL). Section 711 of the RPAPL provides: "No tenant or lawful occupant of a dwelling or housing accommodation shall be removed from possession except in a special proceeding."[6] This means that self-help eviction[7] of a tenant is illegal in New York. In fact, it is a crime under RPAPL § 768.[8] The only lawful way to evict a tenant for nonpayment of rent is through a summary proceeding based on RPAPL § 711(2), which contains the appropriate cause of action.[9]

A. The 14-Day Notice

Before commencing a nonpayment eviction case in court, a landlord must serve a written 14-day rent demand.[10] Since the HSTPA went into effect, landlords can no longer use a three-day notice of unpaid rent or an oral rent demand.[11] One might ask: What is the earliest date on which the 14-day notice can be served? Under the statutory language, a tenant must be in default when the notice is served.[12] If rent is due on the first of the month, the notice may not be served on the first—because the tenant is not in default until *after* the first. But is the tenant in default on the second day of the month? Multiple lines of reasoning suggest that the answer is no, and that the tenant is not in default until the seventh day of the month (six days after the rental due date). To understand why, it is necessary to first analyze a new provision created by the HSTPA—Real Property Law (RPL) § 235-e(d).[13]

B. The RPL § 235-e(d) Notice and the New Five-Day Grace Period

A landlord/lessor has a duty, under RPL § 235-e, to provide a written receipt for the payment of rent.[14] In addition, the new subsection (d) requires a landlord to provide a written notice, by certified mail, if rent is *not* received "within five days" of its due date.[15] This provision was enacted to improve and formalize rent record-keeping.[16] The legislature included an enforcement mechanism by providing that failure to give such a notice "may be used as an affirmative defense by such lessee [i.e., tenant] in an eviction proceeding based on the non-payment of rent."[17] If this defense is established by the tenant, the court should dismiss the case.[18] Courts should not allow landlords to evict for nonpayment if they fail to follow these enhanced record-keeping requirements, assuming the deficiency is raised as an affirmative defense. Ultimately, while this new notice (commonly called a "five-day notice"[19]) is not a predicate notice in the technical sense,[20] landlords should have properly served one (or more, for multiple months of unpaid rent) prior to commencing an eviction.

Significantly, this new statutory provision appears to recognize a *five-day grace period to pay rent*. If rent is due on the first of the month, the five-day notice cannot be given until the seventh because all the days up to and including the sixth are "within five days" of the rental due date.[21] One might ask: Can the 14-day notice simply be served six days after the rental due date, and thus double as the five-day "written notice stating the failure to receive such rent payment" under RPL § 235-e(d)?[22] No, for at least four reasons.

First, basic rules of statutory construction indicate that this new provision in the Real Property Law creates a new and additional notice.[23] The new provision must be read and understood in a way that gives it meaning, not one that renders it superfluous. Second, the notices serve different purposes. The five-day notice requirement applies to tenancies at all times, regardless of whether a nonpayment eviction is contemplated, and it functions to formalize rent record-keeping—to keep the landlord and tenant "on the same page." The 14-day notice sets the stage for a summary eviction proceeding. Third, the statutes require these notices to be served in different manners.[24] Fourth, if it could double as a five-day notice, this would essentially write the affirmative defense out of the statute—there would be virtually no scenario in which to raise it. This is because, in every viable nonpayment case, a 14-day notice will have been served. For all these reasons, the 14-day notice and five-day notice are separate and distinct, and both should be properly served prior to the commencement of a nonpayment eviction proceeding.

Next, let us consider additional statutory support for the new five-day rent grace period. The HSTPA also created RPL § 238-a, which limits certain fees that can be charged in the landlord-tenant context. Subsection 2 specifically provides that no late fee can be charged "unless the payment of rent has not been made *within five days* of the date it was due, and such payment, fee, or charge shall not exceed fifty dollars or five percent of the monthly rent, whichever is less."[25] Again, a five-day grace period is built into the law. This specific section indicates that rent is not "late" (in default) unless it is paid more than five days after the due date.[26] Reading all these statutes together, and harmonizing them, it is logical to conclude that the 14-day notice should not be served until at least six days after the rental due date, just like the five-day notice. If rent is due on the first day of the month, the earliest time at which these notices can be properly served is the seventh day. And if either notice is served prematurely, a subsequent nonpayment proceeding should be subject to dismissal.[27]

II. The Summary Proceeding

A summary eviction proceeding is commenced using a notice of petition and petition.[28] In city courts, the proceeding is commenced upon filing, with service to follow.[29] In justice (town and village) courts, the order is reversed; the case is commenced upon service, with filing to follow.[30]

A. What Is Rent?

The HSTPA made clear, by enacting RPAPL § 702, that "[n]o fees, charges or penalties other than rent may be sought in a summary proceeding."[31] Thus, only unpaid *rent* can be used as a basis for a nonpayment proceeding, and rent is defined as "the monthly or weekly amount charged in consideration for the use and occupation of a dwelling pursuant to a written or oral rental agreement."[32] In the recently decided case of *Beco v. Ritter*, the Appellate Division, Third Department, confirmed that late fees and other charges cannot be

disguised as rent and used as a basis for a nonpayment proceeding.[33]

In *Beco*, the landlord, specifically in response to the enactment of the HSTPA, attempted to raise his tenants' rent by $375 but stated that they would receive a "discount" of the same amount if they paid their rent by the 17th of the month.[34] The court found this an attempt to circumvent the late fee limitation in RPL § 238-a(2), and to build other administrative fees into the "rent" in an effort to recover these in a summary eviction proceeding. The court unanimously held this discount scheme illegal and unenforceable.[35]

B. Attorneys' Fees

When it comes to seeking attorneys' fees in particular, one could assume that this is not permissible, based on the plain language of RPAPL § 702,[36] and this may well be the case. However, RPL § 234 predates the HSTPA and continues to provide for a reciprocal right to recover attorney's fees in summary eviction proceedings. It states:

> Whenever a lease of residential property shall provide that in any action or summary proceeding the landlord may recover attorneys' fees and/or expenses incurred as the result of the failure of the tenant to perform any covenant or agreement contained in such lease, or that amounts paid by the landlord therefor shall be paid by the tenant as additional rent, there shall be implied in such lease a covenant by the landlord to pay to the tenant the reasonable attorneys' fees and/or expenses incurred by the tenant . . . .[37]

Significantly, the HSTPA added the following clause to the statute: "A landlord may not recover attorneys' fees upon a default judgment."[38] This all seems to indicate that a landlord can recover attorneys' fees in certain cases.[39] Still, RPAPL § 702 was enacted to end the practice of labeling items as "additional rent" in a lease, and this appears to invalidate one of the underpinnings of the reciprocal attorneys' fees law.[40] Ultimately, it seems clear that a court may not grant a nonpayment judgment and issue a warrant of eviction based on unpaid attorneys' fees. And a tenant may not be required to pay them to prevent eviction. However, a landlord (or tenant) may be able to obtain a money judgment for attorneys' fees, either as an ancillary judgment in a nonpayment proceeding or in a separate plenary action.

C. The Petition, Answer, and Motions

The petition must contain the elements found in RPAPL § 741, and shall be verified as required by that section, as well as the New York Civil Practice Law and Rules (CPLR) 3020-3022. Pursuant to the HSTPA, the notice of petition and petition must be served 10 to 17 days (instead of the previous 5- to 12-day range) before the time at which the petition is noticed to be heard.[41] The tenant can answer at the time of the hearing, or before, but may not be required to answer prior to the hearing.[42] The tenant may also make motions (for dismissal, summary judgment, etc.) at the time of the hearing or before.[43] If a written motion is filed before the hearing, the motion must be set for hearing at the same time as the petition.[44]

D. The Right to an Adjournment

The right to one mandatory (i.e., non-discretionary) adjournment, for a minimum of 14 days, was created by the HSTPA[45] and was a game-changer, primarily for tenants. Since tenants are usually unrepresented at the initial appearance, this adjournment provides them with an opportunity to seek counsel and more adequately prepare to raise defenses or counterclaims.[46] It also builds time into this summary process, for the tenant to come current with the rent or arrange to move out. Subsequent adjournment requests can also be made and granted in the court's discretion.[47]

The prefatory clause in RPAPL § 745 could be read to require that "triable issues of fact [be] raised" for the first adjournment to be granted. That said, since the statute also states that subsequent adjournment requests are discretionary, the implication is that the court does not have discretion to deny a first adjournment request. Further, in practice, some issue of fact almost always exists, unless the tenant appears and states: "I fully agree I should be evicted." And even in that unusual scenario, if the tenant requests an adjournment, it should be granted, so that the tenant can consult with an attorney to better understand whether there are relevant issues of fact, or other defenses, to raise. Considering the legislative purpose of protecting tenants, it would seem odd that those (especially unrepresented tenants) who do not artfully raise issues of fact would lose the right to an adjournment. For all these reasons, courts have not been requiring a detailed statement/showing of alleged issues of fact to support a request for a first adjournment.[48]

E. The Right to a Jury Trial

A related question arises with respect to the trial. A tenant generally has the right to a jury trial where there are issues of fact,[49] unless the right has been knowingly and voluntarily waived in the lease between the parties.[50] One must be requested "at the time the petition is noticed to be heard."[51] Before the HSTPA, the deadline for requesting a jury trial was understood to be the initial appearance in a nonpayment case, when the issue was joined and the case could potentially proceed straight to trial.[52] But, considering the new right to a mandatory adjournment, does a jury trial still need to be requested at the initial appearance in a nonpayment proceeding, lest it be waived? Or can it be requested at a subsequent appearance? Again, it is useful to consider this question from the perspective of an unrepresented

tenant, who may not even know about the right to a jury trial.

Should the tenant really be required to request a jury trial at the first appearance so as not to waive the right? If the tenant is represented by counsel at the initial appearance, it may make sense for the attorney to go ahead and assist the tenant in electing between a bench or jury trial, for the sake of judicial economy. However, the tenant should no longer be *required* to make this election at the first appearance if the case is adjourned pro forma. The adjournment effectively changes the time at which the petition is noticed to be heard (the deadline to request a jury trial). Thus, the tenant should be able to request a jury trial at a subsequent appearance, before the case proceeds to trial.

F. The Right to Pay and Stay

Pursuant to the HSTPA, if the tenant pays the full amount of rent due to the landlord at any time before the trial, it "shall be accepted by the landlord" and this payment "renders moot the grounds on which the special [nonpayment] proceeding was commenced."[53] Further, it is well established that full payment *at the time of trial* is a complete defense, resulting in dismissal.[54] But if the case is not resolved by payment, settled, or dismissed on other grounds, it comes on for trial. The court determines how much rent, if any, is owed to the landlord, and must consider defenses and potential offsets in making its decision.

G. The Tenant Safe Harbor Act of 2020

Generally, if some amount of rent is adjudged to be owed to the landlord and not paid at the time of judgment, a warrant of eviction may issue.[55] However, one defense that will be particularly relevant in many soon-to-be-heard nonpayment cases is found in the Tenant Safe Harbor Act (TSHA), which was enacted during the COVID crisis.[56] Under this law, tenants who "suffered a financial hardship during the COVID-19 covered period" shall not be evicted for "non-payment of rent that accrues or becomes due during" that period.[57] The covered period spans the time from March 7, 2020, to January 15, 2022.[58] So no tenant who suffered a financial hardship during that time period should face the issuance of a warrant of eviction for unpaid rent that accrued during the period.

The TSHA states that financial hardship can be raised "as a defense in a summary proceeding under article 7 of the real property actions and proceedings law."[59] Of note, if the tenant has completed a hardship declaration pursuant to the New York eviction moratorium (selecting the financial hardship option on the form), there is a rebuttable presumption that the tenant is experiencing a financial hardship for purposes of the TSHA.[60] Further, in determining whether the tenant has suffered a financial hardship, the court is required to consider the following, as well as "other relevant factors": (i) the tenant's income before the covered period; (ii) the tenant's income during the covered period; (iii) the tenant's liquid assets; and (iv) the tenant's eligibility for and receipt of cash assistance, supplemental nutrition assistance program, supplemental security income, the New York State disability program, the home energy assistance program (HEAP), unemployment insurance or benefits under state or federal law, or the emergency rental assistance program (ERAP).[61]

The TSHA specifically provides that the landlord may obtain a money judgment for unpaid rent that accrued during the covered period.[62] However, many nonpayment evictions will be prevented by application of this law. Additionally, it is possible that some holdover evictions[63] should also be stopped by the TSHA. Why? First, some holdover evictions will be clearly motivated by nonpayment of rent during the covered period, even though the landlord does not explicitly state this. In other words, some landlords will attempt to get around the TSHA ban on evictions for covered period nonpayment by bringing holdover evictions. The courts should not permit this. Second, as noted above, the affirmative defense language is very broad. The TSHA financial hardship defense can be raised in "a summary proceeding under article 7 of the real property actions and proceedings law."[64] By its own terms, this provision is not limited to nonpayment proceedings.[65] Third, courts have already held that the TSHA, as implemented by Executive Order 202.66, applies to holdover proceedings.[66]

H. The COVID-19 Emergency Rental Assistance Program of 2021

As part of the state fiscal year 2021-2022 budget, New York enacted the COVID-19 Emergency Rental Assistance Program (ERAP).[67] ERAP uses federal funding from the Consolidated Appropriations Act of 2021 and the American Rescue Plan of 2021 to provide monetary assistance for up to 12 months of rental and utility arrears for eligible tenants, with the money being paid directly to *cooperating* landlords.[68] Importantly, the legislation implementing ERAP includes a number of protections against eviction. First, neither a nonpayment nor a holdover eviction can be commenced against a tenant who has applied for ERAP, unless and until the tenant is found to be ineligible.[69] Relatedly, if an eviction proceeding has already been commenced, and the tenant applies for ERAP, the case must be stayed pending an eligibility determination.[70]

Tenants are also provided with protection against eviction in the event that the landlord does not cooperate and agree to accept ERAP benefits. The state agency administering the program, the Office of Temporary and Disability Assistance (OTDA), or its designee must make "reasonable efforts" to obtain the landlord's cooperation.[71] If the landlord will not cooperate but the tenant is otherwise eligible for ERAP assistance, the money to which the tenant is entitled is to be set aside for 180 days,[72] allowing the landlord time to change course and

agree to accept the funds.[73] It appears that the eviction stay continues in effect during this time period, which should persuade the landlord to cooperate. Additionally, the statute gives the tenant "an affirmative defense in any proceeding seeking a monetary judgment or eviction brought by a landlord for the non-payment of rent accrued during the same time period covered by the provisional payment."[74] This defense should further incentivize landlords to cooperate, especially since it exists for "twelve months from the determination of provisional eligibility." But, ultimately, "[i]f the landlord has not accepted such provisional payment within twelve months of the determination the landlord shall be deemed to have waived the amount of rent covered by such provisional payment," and the landlord is precluded from seeking eviction or a money judgment based on "the amount of rent covered by such provisional payment."[75] The statute is silent regarding whether a landlord can refuse to accept ERAP funds for an eligible tenant and then move forward with a holdover eviction.[76] However, allowing this would obviously run contrary to the purpose of the ERAP program—keeping as many tenants in their homes while making their landlords whole. It should also be noted that a landlord's refusal to accept ERAP funds may constitute illegal discrimination under New York human rights law because this money is considered a "lawful source of income."[77]

Moreover, there are substantial protections in the statute for tenants whose landlords cooperate and receive ERAP benefits. By accepting the funds, the landlord agrees that the arrears covered by the ERAP payment are satisfied "and will not be used as the basis for a non-payment eviction," and also "to waive any late fees due on any rental arrears paid" by ERAP.[78] Further, the landlord cannot raise the rent for at least "one year after the first rental assistance payment is received."[79] Neither can the landlord pursue a holdover eviction for one year after the first payment is received, with one small exception.[80] And the landlord must notify the tenant of all these protections.[81] Of note, the ERAP law was amended on September 2, 2021, to provide that, despite the eviction protections outlined above, tenants can still be evicted if they intentionally cause "significant damage to the property" or "persistently and unreasonably" engage in behavior that "substantially infringes on the use and enjoyment of other tenants or occupants or causes a substantial safety hazard to others."[82]

III. The Warrant

If the court finds that some amount of rent is owed to the landlord, it is not paid at the time of judgment, and neither the TSHA nor ERAP defenses prevent issuance of a warrant of eviction, then the warrant may issue. Pursuant to the HSTPA, the warrant must be served with a 14-day notice.[83] Notably, neither issuance of the warrant nor its service terminates the tenancy. The tenant still has the right to pay and stay.[84]

A. The Extended Right To Pay and Stay

Pursuant to RPAPL § 749(3), if the tenant tenders "the full rent due" to the landlord, or deposits it with the court, "the court shall vacate the warrant of eviction," unless the petitioner proves "that the tenant withheld the rent due in bad faith,"[85] which will be a rare case. Thus, the tenant has an extended right to pay and stay, even after service of the warrant, "at any time prior to execution"—final lockout by the sheriff or constable.[86]

Of course, this begs the question: What is "the full rent due?"[87] Is it the amount demanded in the petition, the amount due at the time of the hearing, the monetary judgment entered by the court, or something else? Does it include any money that comes due after the hearing? This is an especially important question when a new month (or other rental period) begins after the hearing but before the scheduled execution of the warrant. From a practitioner's perspective, it seems that this issue can be addressed by the court being abundantly clear in its decision, or in approving the terms of a settlement that involves the issuance of a warrant. Since a money judgment is not always issued at the same time as the warrant, and may not even be requested by the petitioner, the exact amount due that must be paid to vacate the warrant should ideally be included in the warrant itself.

But consider the scenario where the judge simply rules from the bench that some amount of rent—say $1,000—is owed and, thus, a warrant issues. Suppose rent is $500/month, the tenancy runs from the first day of the month to the last, the warrant is issued on the 25th of the month, and it does not specify how much rent must be paid, to vacate the warrant. If the tenant wants to pay and stay a week later—a couple days into the new month—what is "the full rent due" that must be paid? Is it $1,000 or $1,500 (including rent for the subsequent month), or some amount in between (including, for example, a per diem amount after issuance of the warrant)? There is a strong statutory basis for concluding that the answer is $1,000 and no more. In RPAPL § 749(3), immediately after the provision that allows for paying the full rent due at any time prior to execution of the warrant, the very next sentence indicates that the petitioner is entitled to recover only the sum of money owed for two discrete time periods: Money owed "at the time when the special proceeding was commenced" and for the time between commencement and when the warrant is issued.[88] Thus, "the full rent due" should be the amount of rent owed at the time the court issues the warrant. It should not include any amount that accrues after that. Indeed, at least one court has already come to this conclusion.[89]

B. The Hardship Stay

One procedural protection for tenants that was greatly expanded by the HSTPA is the so-called hard-

ship stay. Under the previous version of RPAPL § 753(1), courts *in New York City only* could discretionarily stay issuance of the warrant of eviction for up to six months in holdover cases.[90] However, as modified by the HSTPA, this subsection now makes this discretionary stay available in nonpayment cases as well, throughout New York State, and for up to one year.[91] In exercising its discretion to stay an eviction, the court must consider a number of factors, including illness, exacerbation of an ongoing condition, a child's enrollment in a local school, and any other extenuating circumstance affecting the ability of the applicant or the applicant's family to relocate and maintain quality of life. In deciding whether to grant the stay or in setting the length or other terms of the stay, the court is also required to consider any "substantial hardship"[92] the stay might impose on the landlord.[93] The stay must be conditioned on payment of the amount due for occupation of the premises during the stay, but the court may permit installment payments.[94] Before the HSTPA, the payment of all unpaid rent was required before a stay could be granted.[95] However, this is no longer mandatory; it is within the court's discretion.[96]

IV. Conclusion

As applicable moratoria expire, a wave of evictions will begin in New York. Tenants will have to avail themselves of procedural protections in the law, some of which are currently unsettled because they went into effect only a short while before the COVID-19 pandemic hit. Yet, this presents an opportunity for these issues to be litigated, and the protections to be firmly established. Foremost among these are the rights to a five-day rent grace period, to raise the connected affirmative defense for failure to provide the five-day notice, and to request a jury trial—even after the first appearance. Additionally, many tenants will seek to use the TSHA or ERAP defenses to prevent eviction in nonpayment cases, and these may also provide protection in holdover proceedings. In those cases where a warrant of eviction will issue, it will be critical to confirm the exact amount of rent that must be paid to prevent execution of the warrant, and to ensure that it does not include any post-judgment amounts. Finally, the hardship stay available under RPAPL § 753(1) can be applied as a "safety net" to prevent eviction in many other cases. All these tenant protections, when properly utilized and applied by the courts, will delay and, in many cases, *prevent* homelessness and the unnecessary displacement of families.

Endnotes

1. The current New York moratorium (the COVID-19 Emergency Eviction and Foreclosure Prevention Act) is in effect until January 15, 2022. The most recent federal eviction ban, issued by the Centers for Disease Control and Prevention (CDC), was nullified by the United States Supreme Court on August 26, 2021. *Alabama Association of Realtors, et al. v. Dep't of Health and Human Servs., et al.,* 141. S.Ct. 2320 (2021).
2. *See generally*, Gerald Lebovits et al., *New York's Housing Stability and Tenant Protection Act of 2019: What Lawyers Must Know*, 24 J. Affordable Housing & Community Dev. L. 75 (2020).
3. *See* L. 2020, ch. 127, eff. June 30, 2020, amended by L. 2021, ch. 417, September 2, 2021.
4. That is, before the eviction case is commenced in court.
5. The warrant of eviction is the court order authorizing a law enforcement officer to actually remove the tenant from his or her home
6. N.Y. Real Prop. Act. & Pro. Law § 711.
7. That is, the landlord evicting the tenant without using the court process, such as by changing the locks.
8. Enacted by the HSTPA, pt. M, sec. 24. Self-help eviction is also a crime in New York City, under N.Y.C. Admin. Code § 26-521.
9. N.Y. Real Prop. Act. & Pro. Law § 711(2).
10. *Id*.
11. Section 711(2) previously required that "a demand of the rent ha[d] been made, or at least three days' notice in writing" had been given, before a summary eviction proceeding could be commenced.
12. N.Y. Real Prop. Act. & Pro. Law § 711(2).
13. Enacted by the HSTPA, pt. M, sec. 9.
14. Subsection (a) specifies the required contents of the receipt and subsections (b) and (c) address particular payment scenarios.
15. Though the statute refers to a "lease agreement" being in effect, it does not say written lease agreement. Lease agreements can be either oral or written. Andrew Scherer, Residential Landlord-Tenant Law in New York § 2:1 (2020).
16. The Summary of Provisions on the New York Senate website states that RPL § 235-e(d) "provides more robust record-keeping" than was previously required.
17. N.Y. Real Prop. Law § 235-e(d).
18. One city court suggested that the defense can be raised "only where there is a genuine issue of a fact in a non-payment proceeding," which would "permit the court to preclude the collection of rent as a consequence for non-compliance." *Lawler v. Canfield*, 66 Misc. 3d 312, 114 N.Y.S.3d 621 (Watertown City Ct., 2019). However, the statutory language places no such limitation on the defense.
19. This is misleading, in the sense that the notice does not provide the tenant with five days to do anything. By comparison, a 14-day notice gives the tenant 14 days to pay or vacate. Nevertheless, this article will use the phrase "five-day notice" for readability and because it is familiar to practitioners.
20. That is, failure to serve this notice does not deprive the court of jurisdiction or authority to entertain the summary eviction proceeding; it must be raised as an affirmative defense.
21. N.Y. Real Prop. Law § 235-e(d).
22. *Id*.
23. *See, e.g., Bolden v. Blum*, 68 A.D.2d 600, 418 N.Y.S.2d 229, 230-31 (3rd Dep't 1979) ("The rule is well established that in statutes, words of ordinary import are to be given their usual and commonly understood meaning . . . and every word is to be given effect.") (citations omitted).
24. The 14-day notice must be served as prescribed in RPAPL § 735. The § 235-e(d) notice is served by certified mail.
25. N.Y. Real Prop. Law § 238-a(2) (emphasis added).
26. *Id*.
27. Scherer, *supra* note 15, at § 9:17.
28. N.Y. Real Prop. Act. & Pro. Law § 731(1).
29. N.Y. Uniform City Ct. Act § 400(1).
30. N.Y. Uniform Justice Ct. Act § 400.

31. NY Real Prop. Act. & Pro. Law § 702.
32. *Id*.
33. 140 N.Y.S.3d 294 (3rd Dep't 2021).
34. *Id*.
35. *Id*.
36. Stating that "[n]o fees, charges or penalties other than rent may be sought in a summary proceeding."
37. N.Y. Real Prop. Law § 234.
38. *Id*.
39. Such as where attorneys' fees are provided for in the lease and not requested upon a default judgment.
40. Prior to the HSTPA, other fees could be designated as "additional rent" in the lease and sought in a nonpayment eviction.
41. N.Y. Real Prop. Act. & Pro. Law § 733.
42. N.Y. Real Prop. Act. & Pro. Law § 743.
43. Scherer, *supra* note 15, at §§ 13:1-13:2.
44. N.Y. CPLR Rule 406.
45. NY Real Pro. Act. & Pro. Law § 745(1).
46. Courts should advise unrepresented tenants of their rights to an adjournment and to seek counsel.
47. *Id*.
48. In the experience of the author and his colleagues.
49. N.Y. Real Prop. Act. & Pro. Law § 745(1).
50. Scherer, *supra* note 15, at § 10:23.
51. NY Real Prop. Act. & Pro. Law § 745(1).
52. Scherer, *supra* note 15, at §§ 10:15-10:16 (2020).
53. N.Y. Real Prop. Act. & Pro. Law § 731(4).
54. *Albany v. White*, 46 Misc.2d 915, 261 N.Y.S.2d 361 (Civ. Ct. N.Y. Cty. 1965).
55. Scherer, *supra* note 15, at §§ 15:1-15:2, 15:28.
56. *See* L. 2020, ch. 127, eff. June 30, 2020, amended by L. 2021, ch. 417, September 2, 2021.
57. *Id*.
58. The COVID-19 covered period was originally defined as "March 7, 2020 until the date on which none of the provisions that closed or otherwise restricted public or private businesses or places of public accommodation or required postponement or cancellation of all non-essential gatherings of individuals of any size for any reason in [the relevant Executive Orders] . . . continue to apply in the county of the tenant's or lawful occupant's residence." The applicable Executive Orders were rescinded by the Governor, effective June 25, 2021. However, on September 2, 2021, the statute was amended to state that the COVID-19 covered period "means March 7, 2020 until January 15, 2022." *See* L. 2021, ch. 417.
59. *See* L. 2020, ch. 127, amended by L. 2021, ch. 417, September 2, 2021.
60. *See* L. 2021, ch. 417.
61. *See* L. 2020, ch. 127, amended by L. 2021, ch. 417, September 2, 2021.
62. *Id*.
63. That is, evictions based on a claim that the lease has expired, or the tenancy has been terminated, usually without any stated reason. These kinds of evictions do not generally allege nonpayment of rent.
64. *Id*.
65. A holdover eviction proceeding is also a summary proceeding under article 7 of the real property actions and proceedings law.
66. *SRI Eleven 1407 Broadway Operator, LLC v. Mega Wear Inc.*, 71 Misc. 3d 779, 144 N.Y.S.3d 289 (Civ. Ct., N.Y. Cnty. 2021); *Matter of Cabrerav. Humphrey*, 192 A.D.3d 227, 140 N.Y.S.3d 609 (3d Dep't 2021).
67. *See* L. 2021, ch. 56, eff. April 16, 2021, amended by L. 2021, ch. 417, September 2, 2021.
68. *Id*.
69. *Id*. at § 8.
70. *Id*.
71. *Id*. at § 9(2)(b). Such outreach efforts can be "considered complete if: (i) a request for participation has been sent in writing, by mail, to the landlord or utility provider and the addressee has not responded to the request within 14 calendar days after mailing; or (ii) at least 3 attempts by phone, text, or e-mail have been made over a 10 calendar day period to request the landlord's or utility provider's participation; or (iii) a landlord or utility provider confirms in writing that the landlord or utility provider does not wish to participate. The outreach attempts or notices to the landlord or utility provider shall be documented and shall be made available to the tenant."
72. The 180 days can be extended by OTDA or its designee upon a showing of "good cause." *Id.*
73. *Id*. at § 9(2)(c).
74. *Id*.
75. *Id*.
76. As noted above, holdover evictions are only explicitly barred or stayed during the application/review period, that is, until an eligibility determination is made.
77. *Id*. at § 10; N.Y. Exec. Law § 296(2-a).
78. *Id*. at § 9(2)(d).
79. *Id*.
80. *Id*. An exception is provided for situations where "the dwelling unit . . . is located in a building that contains 4 or fewer units, in which case the landlord may decline to extend the lease or tenancy if the landlord intends to immediately occupy the unit for the landlord's personal use as a primary residence or the use of an immediate family member as a primary residence."
81. *Id*.
82. *Id*. at § 9-a (added to the law by L. 2021, ch. 417, eff. September 2, 2021).
83. N.Y. Real Prop. Act. & Pro. Law § 749(2)(a).
84. RPAPL § 749(3) previously provided that "[t]he issuing of a warrant for the removal of a tenant cancels the agreement under which the person removed held the premises, and annuls the relation of landlord and tenant." The HSTPA removed this language.
85. N.Y. Real Prop. Act. & Pro. Law § 749(3).
86. *Id*.
87. *Id*.
88. *Id*.
89. *636 Apt. Assoc., JV v. Mayo*, 69 Misc. 3d 878, 130 N.Y.S.3d 649 (City Ct., Mount Vernon 2020).
90. HSTPA, pt. M, § 21.
91. *Id*.
92. *Id*. Not just any hardship, but a "substantial" hardship is required.
93. N.Y. Real Prop. Act. & Pro. Law § 753(1).
94. N.Y. Real Prop. Act. & Pro. Law § 753(2).
95. HSTPA, pt. M, § 21.
96. N.Y. Real Prop. Act. & Pro. Law § 753(2); HSTPA, pt. M, § 21.

Historic Preservation and the Janus Effect of Preserving and Gentrifying Neighborhoods in New York City: What We Can Do To Ensure Inclusive Communities

By Shelby D. Green

"Cities are man-made things, and because they are man-made, we can recognize a continuity of the ideas that went into their making."

—Witold Rybczynski, *City Life*, 50 (1996)

I. Making Cities

Cities are the responses of urban design. "Urban design [has become] shorthand for the composition of architectural form and open space in a community context," finding meaning and purposes from physical spaces, social equity and economic viability, toward the making of places of beauty, function and distinct identity.[1] The morphology of urban planning and design cannot be reduced to a single metric, but consists of "art, social science, political theory, engineering, geography and economics," as great cities are defined as much by their qualitative characteristics—public spaces, diversity of population, architectural styles.[2] Urban design is about constructing cities, guiding growth, and creating patterns of development to improve the quality of life. It plays a critical role in the global response to climate change because planning and design are forward-looking and can survive over time and political challenges.

Urban design begins with zoning ordinances, which are enacted based upon comprehensive plans that become law. Comprehensive plans are visioning documents that seek to assess the state of the community and to project a future based on community values and demographics. Comprehensive plans typically con-

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tain current and future land use maps. These land use maps serve to provide city leaders with mechanisms to carry out citywide decisions on the allocation of land use, resisting pressures to make political deals and work to encourage rational development, since information costs are reduced by *ex ante* decisions on what can be built as-of-right and where.[3] The zoning ordinances that come out of the comprehensive plans regulate the intensity and location of uses pursuant to the vision laid out in the plans.[4] The rootedness of urban planning and design in the enacted law and the concomitant repertoire of strategies and tools means that decisions on urban form will have long-term consequences.

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Police Powers as the Predicate for Land Use Regulation

The essence of most residential zoning, from the time of its inception a century ago, is the use of the state's police powers to separate housing by its type and cost. This has led, both intentionally and unintentionally, to the segregation of residents by their income, and by extension, their race, ethnicity, and national origin. Police powers, inherent in governments, operate to serve the public safety, health, general welfare, and morals. In the zoning context, these powers were upheld by the United States Supreme Court in *Village of Euclid v. Ambler Realty.*[5] The powers are broad and protean and can be exercised not only to eradicate the ugly, but also to be aspirational for creating desirable communities.[6] The traditional challenges to zoning and urban design decisions have claimed that they fell outside the police powers and violated due process and equal protection provisions. Discriminatory zoning can be addressed under the 14th Amendment if there is discriminatory intent,[7] and under the Fair Housing Act if there is either discriminatory intent or disparate impact.[8]

Early Urban Design Programs

The City Beautiful Movement began in the mid-to-late 1800s and sought "purposeful intervention of government to achieve urban beautification."[9] It emerged in response to the 1893 World's Columbian Exposition in Chicago. The fundamental idea expounded at the fair was that the city was not just the manifestation of economic development and industrialization; instead, it should strive to enhance the aesthetic environment for the people who lived in it. Well-celebrated New York architects—Richard Morris Hunt, McKim, Mead, and White—as well as the Chicago school of architects—Louis Sullivan and Daniel Burnham—imagined the ideal city made up of classically designed monumental buildings. The ideal convinced them that cities could be planned to achieve beauty. When the artists and architects returned to their home towns of New York, Detroit, and Washington, D.C., they were moved by the "austere and cluttered landscapes."[10] The Industrial Revolution was driven by profit motives and technological advancement, and had little regard for the visual impacts on the cities. The billowing smokestacks and soot-blackened buildings were celebrated as symbols of industrial progress. After seeing these impacts, city planners set out to incorporate aesthetic design and art projects to beautify their cities. The major obstacle was the general absence of governmental regulation of urban infrastructure. Massive immigration to the city, combined with overcrowded tenement housing, created the vision of a discordant urban environment marked by poverty and social injustice. Jacob Riis's telling portrayal of tenement living in *How the Other Half Lives*, published in 1891, described the urban plight of emigrant slums, which characterized American cities during this time period. The City Beautiful Movement led to the formation of the Municipal Art Society in New York City, with a mission of promoting public art for all. Legislation enacted in 1916 and then in 1956, enabled the regulation of aesthetics, and in particular the proliferation of billboards. The fundamental idea animating the City Beautiful movement was that the livability was essential for health, welfare, and safety of the city's inhabitants. By beautifying the city, the government was providing a benefit to the public overriding private interests. The "police powers" were extended to mean that the regulation of the physical environment promoted the health, safety, and welfare of the people. In 1965, the New York City Landmarks Law was enacted to protect historic buildings and sites, toward enhancing city blocks and promoting a charming feel to neighborhoods.[11]

In the 1940s, urban renewal was urged on by the effects of the Great Depression, which caused society to see and evaluate the plight of the poor. The elimination of slums and redevelopment of central cities became prominent objectives. The goal of building new housing went hand-in-hand with slum clearance. In 1941, the Federal Housing Administration (FHA) adopted plans for slum clearance and urban redevelopment; but the clearance wiped away all that was valuable and historic along with what was ugly. It was indiscriminate.[12] The original Act focused on clearance and redevelopment of a "predominantly residential" character.[13] The theory was that by knocking down relatively low-quality housing and commercial buildings, the overall building quality would appear to improve.[14] Improving the physical condition of specific areas was believed to benefit the city "through a virtuous circle (e.g., less

blight, less outmigration, and higher property values across the city), or at least by short-circuiting the process of deterioration."[15] Urban renewal attempted to make central-city locations more attractive to businesses as well as to residents. Firms and workers were willing to pay more to locate there for higher levels of "productive amenities," thus raising property values.[16] All the while, communities, their cultural references, their monuments were destroyed.[17]

The general consensus is that urban renewal was a social policy and fiscal failure.[18] One estimate indicates that over 2 million persons were displaced by urban renewal and highway programs between 1964 and 1972.[19] Jane Jacobs described urban renewal, by its wholesale razing of communities and the erection of dull middle-income housing and putting up luxury housing projects with vapid vulgarity, rather than renewing, as the "sacking of cities."[20] During the 1960s, many civil rights leaders organized sit-ins against the program. Architects also questioned the merits of urban renewal as city streetscapes changed so dramatically. Preservationists came to criticize the seeming indiscriminate erasure of all that was good and worthy of celebration along with all that was awful. They believed that by saving some of the structures within the cities, the disengagement to the past could be avoided. They urged planners to focus more on rehabilitation than demolition and planners began to listen. The force of this appeal became stronger with the enactment of the National Historic Preservation Act in 1966 (NHPA).[21] At the same time, the passage of the Demonstration Cities and Metropolitan Development Act of 1966[22] enhanced the powers of preservation within urban renewal projects. Title VI, entitled Preservation of Historic Structures, "amend[ed] the urban renewal law to provide recognition of historic and architectural preservation in urban renewal plans and to authorize preservation activities and planning therefor as eligible project costs." Not only was preservation to be included in redevelopment projects, but funding was to be provided as well. Legal challenges had a firm footing.[23] Ada Louise Huxtable, architecture critic for the New York Times, commented:

> there has been a near-total reversal of attitudes toward the past. Preservation, the woolly, sentimental cause of those little old ladies in tennis shoes, is now endorsed by astute developers everywhere in an avalanche of imaginative recycling of old structures of diversity and dignity. This is being done with taste, wit, educated judgment, and a firm grasp of such esoterica as historical and cultural relevance and urban variety and enrichment. It isn't just a movement; it's a mild stampede.[24]

While large-scale displacement has declined since the abandonment of urban renewal programs, certain populations are still being forced out of their communities under both federally funded community development programs, housing rehabilitation projects and private development projects.[25]

II. Preserving and Designing Communities Through Historic Preservation

Historic preservation has come to mean identifying and keeping safe the monuments of history and evolving civilization. The monuments enfolded within this enterprise are not just physical things, like buildings and bridges, but also places that were eventful, like battlegrounds and protests and places to be kept uneventful, like landscapes and burial grounds. These monuments are protected not simply because they are old, but especially because they tell a story of living, of commerce, of strife, of discovery, of creativity, of wonder, of grief.

Historic preservation ordinances were upheld as a valid exercise of police powers in *Pennsylvania Transp. Co. v. New York City*.[26] By this ruling landmarking private property is not a *per se* taking.

What Is Preserved by Historic Preservation Ordinances

The subject matter for historic preservation ordinances includes buildings, exteriors, interiors, landscapes, objects, statues, and districts. Preserving these things occurs on three levels of government. On the federal level, there are, *inter alia,* the National Historic Preservation Act of 1966,[27] the National Register of Historic Places, National Historic Landmarks, Historic Preservation Tax Credits, and the Transportation Act.[28] On the state levels, there are, *inter alia*, state historic preservation acts and policies,[29] state registers of historic properties, and state historic preservation tax credits. The local level is the place where the most substantial preservation occurs, through preservation ordinances.[30]

How Federal Preservation Works

Nominations to the National Register of Historic Places come from the state historic preservation officer and are made to the keeper of the list, who is appointed by the president. The criteria for listing are promulgated by National Park Service.[31] In general, the property must have significance to a person, an event, architecture, or must promise valuable information.[32]

The benefits of being on the list, apart from eligibility for historic tax credit,[33] are largely procedural. In the case of a federal undertaking (involving federal funding or permitting), § 106 of NHPA requires the agency to consider adverse effects of the undertaking on the property and to consult with the Advisory Council on Historic Preservation.[34] In the case of highway projects, § 4(f) of the Transportation Act,[35] requires that Secretary of Transportation to make a determination that there are no other feasible and prudent alternatives to the

proposed highway project which might impact historic properties.

How Local Preservation Operates

A property is nominated for landmarking. Before making a determination, the New York City Landmarks Preservation Commission, charges its staff to evaluate the nomination in accordance with the criteria in the ordinance. The ordinance states that a property eligible for landmarking is one having: "a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation," and is at least 30 years old.[36]

A historic district is an area that "represents one or more periods or styles of architecture typical of one or more eras in the history of the city; and cause such area, by reason of such factors, to constitute a distinct section of the city."[37] The commission holds a public hearing before making a determination.[38] The commission's decisions are given wide deference by the courts.[39]

Effect of Local Landmarking

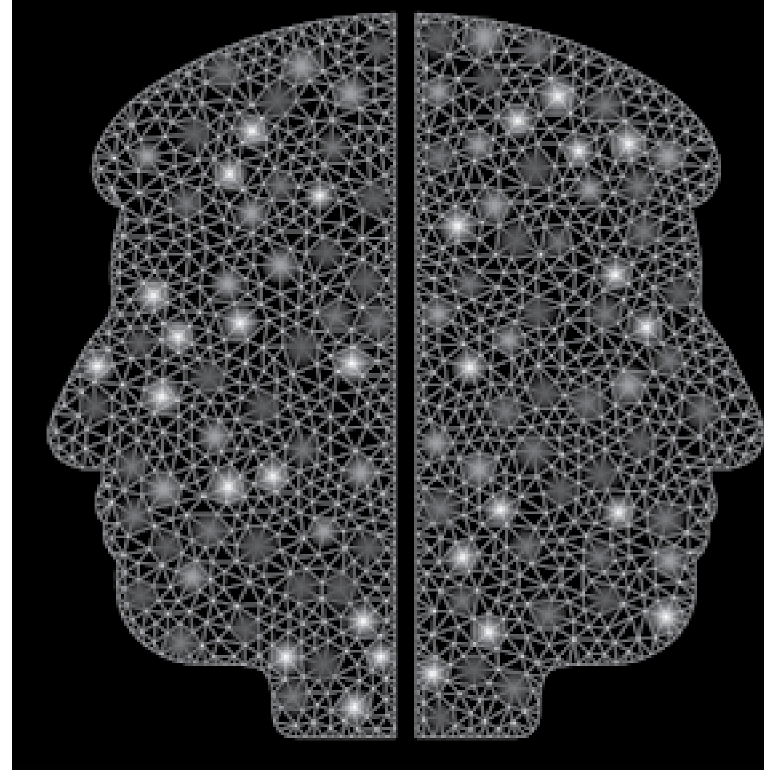
An owner of a landmarked property cannot demolish or alter any character-defining attributes without permission from the commission. In the case of historic districts, owners may not demolish existing structures, and may not introduce new development into the district without the commission's permission. On such proposals, the commission may issue a Certificate of No Effect or a Certificate of Appropriateness, allowing the change.[40] Owners must maintain the landmarked property in "good repair."[41]

Composition of Landmarks Preservation Commission and Decision Making

The Landmarks Preservation Commission is comprised of 11 commissioners, appointed by the mayor of New York City. A full-time staff supports the commissioners in the work of protecting the city's architectural and cultural heritage. By law, the commission must be comprised of at least three architects, one historian qualified in the field, one city planner or landscape architect, one architect, and one realtor. The commission must include at least one resident of each of the five boroughs.[42] Most of the current commissioners are male and most are white.[43]

Historic Preservation in New York City

Among New York City's landmarks are: Grand Central Terminal, the Chrysler Building, Gracie Mansion, the Empire State Building, St. Patrick's Cathedral, the Apollo Theater, 359 Broadway (where the photographer Mathew Brady had a studio), the Hopper-Gibbons House (used as a safe house for fugitive slaves).[44] There is also Street Design: The Downtown Dutch Street Pattern in lower Manhattan. Some well-known interiors include the Waldorf Astoria Hotel. Of the many districts



are Greenwich Village, the Upper East Side, Brooklyn Heights, Carnegie Hill, Cobble Hill, Greenpoint, Mott Haven, and the Fiske Terrace-Midwood Park Historic District.

Scope/Size of Landmarking

There are 149 historic districts, most in Manhattan.[45] The total area of historic districts covers less than 4% of the lots and lot area in the city. Five percent of New York's population and 8.4% of jobs are within historic districts.[46]

III. One Side of the Janus

Intangible Benefits from Landmark Historic Designation

The creation of historic districts may help to strengthen neighborhood identity and encourage social cohesion. Preserving history has the power to generate feelings of community through a shared narrative of place-making. More fundamentally, preservation protects critical architectural and historical assets for future generations and provides a tangible link to our past, celebrating cultural and historical connections and remembrances. A historic district designation preserves a neighborhood's character and creates neighborhood stability as the regulatory limits on alterations reduce uncertainty for property owners.

Economic Benefits

Historic districts are the location of choice for a wide range of businesses. Historic preservation works to achieve revitalization and economic stability in communities. More than $800 million is invested annually in New York's historic buildings. Younger workers are

more likely to have jobs in historic districts. Historic preservation accounts for jobs for 9,000 New Yorkers, with paychecks over $500 million each year. The rapidly growing high-tech industry as well as the long-established arts and entertainment industries are particularly drawn to historic districts. Businesses owned by women and minorities are disproportionately located in historic districts. City residents and tourists are drawn to visit, discover and learn from the architectural examples and cultural landscapes preserved through historic designation. Heritage tourism is a major component of New York's visitor industry. [47]

The rehabilitation of historic structures generates a considerable economic activity and contributes to meeting housing needs.[48] Far from being energy inefficient, older and historic buildings are proving much more environmentally responsible than their 21st century green cousins and have been so for 100 years.[49]

Social and Demographic Effects of Historic District Preservation

Studies have found both positive and negative impacts on communities from historic district landmarking.[50]

•Education Levels

Historic districts have more college-educated residents, by 5% to 10% (8% to 11% higher for tracts outside Manhattan).[51]

•Household Income

On average, household income increased by 14% after designation (9% to 16% higher for tracts outside Manhattan) and growing 4 to 6% in years after designation.[52]

•Homeownership Rates

Rates increased by 12% after designation.[53]

•Housing Supply

Some reductions have resulted from limits on demolition and new construction. Owners may convert two-to-four family rental buildings into single-family homes. Critics contend that preservation policies restrict the buildable capacity of neighborhoods, eliminating opportunities for new construction, and inhibit the redevelopment of residential soft sites.[54] Although new construction is less common on sites within historic areas than on other sites, even before they are designated as districts, the district designation widens the gap. This means that after designation, sites within historic districts are significantly less likely to see new construction than they were before designation, even after controlling for development trends in the surrounding neighborhood.[55] Historic districts constrain density only to the extent that development is unconstrained by other regulatory tools. Studies show that "allowable" residential square footage would be more likely to be built in the absence of designation.[56]

•Property Values

Designation appears to raise property values within historic districts, but only in the lower-valued boroughs outside Manhattan. Properties located in the immediate neighborhood surrounding the historic district, defined by a 250-foot buffer, also show increases in property values following designation. These nearby homes enjoy many of the benefits of preservation, including neighborhood continuity and minimal risk of new development, without the restrictions imposed on individual property owners.[57]

•Poverty Rates

Studies report a 2% to 4% drop in the poverty rate following designation.[58] The poverty rates in census tracts made up mostly of historic districts are significantly lower than the rates in nearby tracts within the same community district, and the share of the population with college degrees is substantially higher.[59]

IV. The Other Face of the Janus

The other side of the Janus reveals some concerning impacts on other people from historic district designation.

Market Losses from Historic Preservation

It is often claimed that historic preservation stifles development and creative design, as new designs must be in sync with buildings in historic districts. Historic preservation places constraints on a city's ability to grow and develop by limiting the opportunity to construct new buildings or increase density on protected sites. These restrictions could limit the growth and economic development of cities as businesses seek out other places with lower housing costs and wages.[60] The establishment of historic districts is also likely to constrain overall development in the city, especially as additional districts are added.[61]

Higher Housing Prices

By imposing supply restrictions, the preservation process may lead to higher housing prices and rents, both citywide and within individual districts. Limiting the supply of rental housing through restrictions on new construction activity, drives overall prices up across the city. The requirements for higher-cost building materials in historic districts translates into higher rents, creating barriers for low- and moderate-income households to live in these neighborhoods.[62]

Racial Demographics of Historic District Residents

Neighborhoods covered mostly by historic districts have larger non-Hispanic white population shares than

other neighborhoods. In Manhattan where in tracts mostly included in historic districts, 73% of the residents were non-Hispanic white, but only 7% of residents were African American. By contrast, in tracts fully outside of historic districts, only 39% of residents were non-Hispanic white and nearly 14% were African American.[63]

Exclusionary Effects of Historic Districts Designations

Historic districts provide many of the same benefits to incumbent homeowners as strict land use regulations. Historic districts also create opportunities for alliances between property owners who want to protect their investment from outsiders and preservationists who can provide cover behind a veil of protecting history. Proponents of historic designation may claim it is needed to protect the city's history, culture, or some undefined "quality of space." But this may only be a pretext for keeping out certain persons and particular housing options, by limiting the types of buildings that can be constructed and the alterations that can be made to existing buildings. In the Brooklyn neighborhood, Flatbush, some homeowners worked to get their rowhouses landmarked to prevent ". . . development that would alter its historic character."[64]

Historic district designation can retard a city's growth and widespread historic designations may impede adaptation and result in a city's past controlling its future. A city's built environment—housing, roads, parks, commercial buildings—is an important part of its economy and it needs to be flexible to adapt to broader economic changes. The population of young college-educated people is growing in many cities and old factories and warehouses are being turned into apartments and mixed-use residential/retail space to accommodate them. By design, this transition is either not occurring or is happening much slower in historic districts. This is especially problematic when historic districts are concentrated in the most walkable areas of a city. There is evidence that people value walkable neighborhoods and cities looking to increase population growth should enable developers to accommodate them.

People have different tastes. Old homes can be charming, but some people like ultra-modern homes, while others just want to rent an apartment in a new building with modern amenities. For people who want something other than a 100-year-old home, historic districts are not an option.

Historic District Designation and the Gentrification

Historic preservation is often blamed for sparking the gentrification process, attracting investments and the resulting externalities. Gentrification means the process of renewal and rebuilding that accompanies the influx of middle-class or affluent people into deteriorating areas. Tangible signs of gentrification include increased requests for construction and renovation permits in previously built-out and stagnant growth areas.

Positive Effects From Gentrification

The influx of new residents deconcentrates poverty by diversifying the neighborhood with different economic classes. Residents who are able to stay benefit from the transition of the neighborhood in many ways. If a resident owns his or her home, the market value of that home and the homeowners'equity in it will increase. Historic rehabilitation generates jobs for the community as well. Other gains include increased property tax revenue for the city, reuse or recycling of existing housing stock and improved stability in previously decaying neighborhoods. New residents bring monetary capital and often political capital as well. Reuse of existing infrastructure can help reduce urban sprawl and minimize the strain that sprawl places on a city's budgets in the form of expanding new roads, fire and police protection, and general services such as trash pickup or snow removal.

The Disruptive and Displacement Effects of Gentrification

Gentrification has been proven to cause displacement of previous residents who are priced out of the market as property values increase. A sudden increase in property taxes and increased competition for housing, ultimately leads to fewer affordable housing units for low-income residents and an increase in the concomitant housing-related problems of overcrowding and declining quality. Yet, a quick rise in property values could also allow low-income households to sell their homes for a profit and move to a neighborhood with more stable property values. Gentrification can also put pressure on the already strained organizations, charities and social services dealing with the homeless and those in need of affordable housing.

A recent study of gentrification in various census tracts from 2000 to 2013 found it closely associated with displacement. The effect was more intense in the largest urban areas (New York City, Denver, Philadelphia, Baltimore, Austin). Displacement of minorities was high in gentrifying tracts and was associated with high levels of cultural displacement. Cultural displacement results when the tastes, norms and desires of newcomers supplant and replace those of the incumbent residents and can also entail the loss of historically and culturally significant institutions for a community.[65]

New York City Landmarks Preservation Commission Commitment to Equity and Inclusion

The Landmarks Preservation Commission has stated that the "policy goals of equity and diversity have been a touchstone of Mayor de Blasio's mayoralty and addressing equity in every aspect of LPC's work has been [the] Chair['s] priority throughout her tenure. This includes enhancing transparency and accessibility in [the] regulatory work, and prioritizing designations that represent New York City's diversity and in areas less

represented by landmarks. Recent designations reflect that prioritization, and LPC regularly assesses its work to ensure [it] is continuing to address equity issues and tell the story of all New Yorkers."[66] These initiatives have resulted in the recent recognition of several culturally diverse properties.[67]

V. Merging the Two Faces: Creating Inclusive Communities

While the Landmarks Preservation Commission's policy of embracing diverse narratives to celebrate, there is much that needs to be done to accommodate the sometimes opposed objectives of preserving and neighborhood growth. We should start by efforts to ensure that historic preservation values are integrated into planning decisions and vice versa. At the same time, it is necessary to ensure that the Landmarks Preservation Commission examine the motives of proponents of historic district designation where the impacts may fall disproportionately on certain population groups. It is imperative in this vein to consider legal challenges to the subtle exclusionary effects from historic preservation and gentrification. Although no reported cases have found illegal discrimination from historic district designation, under the disparate impact theory for Fair Housing Act violations, recently upheld by the Supreme Court, a claim conceivably could be made. [68]

Housing developers should ask for certificates of appropriateness for changes to allow introduction of affordable housing in historic districts. The standard for granting a COA is:

> [i] n making such determination with respect to any such application for a permit to construct, reconstruct, alter or demolish an improvement in an historic district, the commission shall consider (a) the effect of the proposed work in creating, changing, destroying or affecting the exterior architectural features of the improvement upon which such work is to be done, and (b) the relationship between the results of such work and the exterior architectural features of other, neighboring improvements in such district.[69]

While the standard of review of the LPC's decision is rational basis,[70] the attorneys challenging a decision should insist that decisions are consistent with the overall mission of historic districting, including ensuring that the historic character is informed by diversity of culture as well as architecture; having regard for the reality that gentrification may operate to cause a community to lose its historic character without a certificate of appropriateness. Collaboration between affordable housing agencies and organizations is necessary to ensure that affordable housing options are allowed and preserved within historic neighborhoods.

Community leaders and developers alike should explore advocate adaptive reuse, taking advantage of tax credits (20% at both federal and state levels) for rehabilitating existing structures for housing for diverse and inclusive communities within historic districts.[71]

VI. Conclusion

Overall, we must embrace the idea that land use law must serve the ends of community. Historic preservation can play a large role toward this goal. It resides in the middle of a complex and dynamic legal regime. Many factors go into creating and maintaining healthy and vibrant communities, important among which are economic and cultural diversity, stability of ownership, references to and reverences of the past.

Endnotes

1. Evyatar Erell, David Pearlmutter, & Terrence Williamson, Urban Microclimate: Designing the Space Between Buildings 2 (2012).
2. *Id*. at 7; *see also* Peter Calthorpe, Urbanism in the Age of Climate Change 17-18 (2011).
3. *See generally* Dawn Jourdan & Eric J. Strauss, Planning for Wicked Problems, A Planner's Guide to Land Use Law 3-4 (2014).
4. *Id*. at § 3.16.
5. 272 U.S. 365, q387-395 (1926). In 1866, New York adopted the Metropolitan Health Act to regulate unsanitary conditions on private property at the urging of architects, seeking more aesthetics in building construction. The city of Los Angeles became the first city to enact a comprehensive zoning ordinance in 1909. The ordinance divided the city into districts—one residential and seven industrials. New York City followed in 1916, with an ordinance that regulated not only uses by zones, but also limited the size and height of buildings.
6. *Berman v. Parker*, 348 U.S. 26, 33 (1954).
7. *Village of Arlington Heights v. Metro Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977).
8. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 545, 558 ((2015); *Mhany Mgmt. v. Cnty. of Nassau*, 819 F.3d 581, 600 (2d Cir. 2016).
9. Charles M. Haar, Reflections on Euclid: Social Contract and Private Purpose, Zoning and the American Dream: Promises Still To Keep 333, 339 (Charles M. Haar & Jerold S. Kayden eds., 1989; *see also* City Beautiful Movement, https://www.nypap.org/preservation-history/city-beautiful-movement/.
10. *Id.*
11. City Beautiful Movement, *supra,* note 9.
12. William J. Collins & Katharine L. Shester, *Slum Clearance and Urban Renewal in the United States*, Working Paper 17458, http://www.nber.org/papers/w17458, National Bureau of Economic Research 4-7 (September 2011). ("In 1949, Congress authorized the Housing and Home Finance Agency (HHFA) to assist locally planned urban renewal projects with grants of two-thirds (or in some cases three-fourths) of the net project cost to the city, where the net cost was defined as the difference between the total cost

of acquiring and clearing properties and the income received from selling the cleared land."); *see also* Henry W. McGee, Jr. & Donald C. Bryant, Jr., *Gentrification and the Law: Combatting Urban Displacement*, 25 Wash. U. J. Urb. & Contemp. L. 43 (1983), http://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1439&context=law_urbanlaw (citing D. Mandelker, C. Daye, O. Hetzel, J. Kushner, H. McGee, & R. Washburn, Housing & Community Development 520 (1981); *see also* Chester W. Hartman, *Relocation: Illusory Promises and No Relief*, 57 Va. L. Rev. 745, 745 (1971) (offering similar assessments based on date from the National Commission on Urban Problems and National Association of Home Builders).

13. Collins & Shester, *supra* note 12, at 4-5.
14. *Id*. at 6.
15. *Id*.
16. *Id*. at 6-7. These amenities were found to have an "ambiguous effect on wages, however, because for any given rent level, workers are willing to accept lower wages to have access to the amenity, but firms are willing to pay higher wages."
17. 12 U.S.C. § 1706(e) (repealed 1990).(The Housing and Community Development Act of 1974 substituted block grants to cities, giving them wide discretion over how to build communities, other than by slum clearance; *see also* Henry W. McGee, Jr. & Donald C. Bryant, Jr., *Gentrification and the Law: Combatting Urban Displacement*, 25 Wash. U. J. Urb. & Contemp. L. 43, Jan. 1983, at 50, 104.
18. Amy Lavine, *Urban Renewal and the Story of Berman v. Parker*, 42 Urb. L. 423, 469 (2010); John R. Logan & Harvey L. Molotch, Urban Fortunes: The Political Economy of Place 167-69 (2d Ed.2007); *see also* William Alonso, *Cities, Planners,* 92 Daedalus 824, 828-29 (1963).
19. Henry W. McGee, Jr. & Donald C. Bryant, Jr., *Gentrification and the Law: Combatting Urban Displacement*, 25 Wash. U.J. Urb. & Contemp. L. 43, 47 n.9 (1983). *see also* Chester W. Hartman, *Relocation: Illusory Promises and No Relief*, 57 Va. L. Rev. 745, 745 (1971) (offering similar assessments based on date from the National Commission on Urban Problems and National Association of Home Builders).
20. Jane Jacobs, The Death and Life of Great American Cities 4 (Vintage Books, 1961).
21. 54 U.S.C. § 3 06108.
22. PL 89-754, November 3, 1966, 80 Stat. 1255.
23. *WATCH (Waterbury Action to Conserve Our Heritage, Inc.) v. Harris*, 603 F.2d 310 (2d Cir. 1979).
24. Ada Louise Huxtable, Kicked A Building Lately?, xiii-xv, (New York: Quadrangle Books, 1976).
25. *See* Henry W. McGee, *Seattle's Central District, 1990-2006: Gentrification or Displacement?*, 39 Urb. Law. 167 (2007).
26. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 98 S. Ct. 2646. 57 L. Ed 631 (1978).
27. 54 U.S.C. § 306108.
28. 49 U.S.C.A. 303(c).
29. For example, New York State Office of Parks Recreation and Historic Preservation; New York State Parks Rec. & His. Preserv. L.; New York State Historic Preservation Plan 2015-2020, www.nysparks.com/shpo.
30. New York City Landmarks Preservation Law, N.Y. Admin. Code § 25-301, (2019).
31. 36 C.F.R. § 63.2.
32. *Id*.
33. Int. Rev. Code § 47, 36 C.F.R § 67. Rehabilitations must comply with Secretary of Interior's Standards, https://www.nps.gov/tps/standards.html.
34. 16 U.S.C. § 470f [since recodified at 54 U.S.C. §306108].
35. 49 U.S.C. § 303(c).
36. N.Y.C. Admin Code § § 25-302(n).
37. N.Y.C. Admin Code § § 25-302(h).
38. N.Y.C. Landmarks Preservation Commission, https://www.1.nyc.gov/site/lpc/about-lpc.page. *See* Related Organizations involved in historic preservation, http://nyclandmarks50.org/landmark_issues.html.
39. *Society for Ethical Culture v. Spratt*, 68 A.D.2d *aff'd*, 51 N.Y.2d 449 (LPC decisions are evaluated under rational basis review); *Shubert Organization v. Landmarks Preservation Committee*, 166 A.D.2d 115 (holding a court may not substitute its judgment for that of the administrative body and findings and determinations of the LPC are accorded considerable deference, based on the historical and architectural expertise of the LPC's members); *see also Comm. to Save the Beacon Theatre v. City of New York*, 146 A.D.2d 397, 405 (1st Dep't 1989) (LPC is body of historical and architectural experts to whom deference should be given).
40. N.Y.C. Admin Code § § 25-305.
41. N.Y.C. Admin Code § § 25-311; 302(x)(2).
42. N.Y.C. Charter, Landmarks Preservation Commission § 3020.
43. N.Y.C. Landmarks Preservation Commission, http://www.nyc.gov/html/lpc/html/about/about.shtml.
44. *See* Discover New York City Landmarks, https://nyclpc.maps.arcgis.com/apps/webappviewer/index.html?id=93a88691cace4067828b1eede432022b; see Matt A.V. Chaban, *Landmark Status Is Urged for 30 New York City Properties*, N.Y. Times. (Feb. 23, 2016)(including the neon Pepsi sign on the Queens waterfront, the Bergdorf Goodman department store on Fifth Avenue and parts of the Green-Wood Cemetery in Brooklyn); *see also* The Editorial Board, *New York City Landmarks Law at 50*, N.Y Times, (Apr. 17, 2015), https://www.nytimes.com/2015/04/18/opinion/new-york-citys-landmarks-law-at-50.html#slideshow/100000003664679/100000003635262.
45. New York City Landmarks Preservation Commission, https://www1.nyc.gov/site/lpc/about/about-lpc.page; *see* Ingrid Gould Ellen & Brian J. McCabe, *Balancing the Costs and Benefits of Historic Preservation*, https://www.cambridge.org/core/books/evidence-and-innovation-in-housing-law-and-policy/housing-as-community-stability-change-and-perceptions/0D2F1E2CB35E1CBB9112E629587BDA09/core-reader. "In Manhattan, more than 25 percent of lots and nearly 15 percent of lot area were located in historic districts by 2014. These totals amounted to more than 50 million square feet of land on 10,762 lots. Core at 90. In Brooklyn, only 4.4 percent of lots —and 3.4 percent of lot area—were regulated through historic districts by 2014. This includes approximately 37 million

square feet of land located on 12,276 individual lots in the borough. In Queens, only 1.1 percent of lots and 1.5 percent of lot area were included in historic districts at the end of 2014.”; *Id*. at 92.

46. PlaceEconomics, *Realty and Recovery: Historic Preservation in the City of New York*, https://nylandmarks.org/wp-content/uploads/2020/09/Reality-and-Recovery-2020.pdf. (Jul. 2020).
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49. Ingrid Gould Ellen, Brian J. McCabe, Eric Edward Stern, *White Paper, Fifty Years of Historic Preservation in N.Y. City* N.Y.U. Fuhrman Center, www.furnmancenter.org (However, it might be noted that, restrictions on what owners can do with their property, may preclude adding modern home design features and in some cases the use of new technologies, such as solar panels._
50. *Balancing*, at 91.
51. *Id*. at 105.
52. *Id*.
53. *Id*. at 142.
54. *Balancing*, at 94.
55. *Id*. at 98.
56. *Id*. at 99.
57. *Id*. at 93.
58. *Id*. at 140.
59. *Id*. at 100; *see also* McCabe and Ellen, *supra* note 43, at 140.
60. *Balancing*, at 87.
61. *Id*. at 92.
62. *Id*. at 88.
63. *Id*. at 67.
64. Lore Croghan, *Flatbush Residents Hope to Save Historic Character By Landmarking Their Block*, Brooklyn Daily Eagle, (Nov. 19, 2019.) https://brooklyneagle.com/articles/2019/11/19/flatbush-residents-hope-to-save-historic-character-by-landmarking-their-block/. In the community that is more than 86% black with Caribbean culture, “Residents . . . have watched their neighborhood rapidly change as brownstones and limestones are torn down in favor of tall, steely new developments. In 2018, East Flatbush had 227 [housing] units authorized by new building permits. . . This number jumped to 678 in 2019, a significant increase in the construction of units in just one year; Sarah Malano, *East Flatbush Wants Landmark Status to Fight Development: Will Others Follow?*, (Oct. 16. 2020) https://bklyner.com/east-flatbush-landmarking-development/. On November 12, 2020, the Landmarks Commission designated the 56 structure East Flatbush area as a historic district; https://www1.nyc.gov/site/lpc/about/pr2020/lpc-designates-its-first-historic-district-in-east-flatbush.page.
65. Jason Richardson, Bruce Mitchell Ph.D., Juan Franco, *S*hifting Neighborhoods: Gentrification and Cultural Displacement in American Cities, at 4 (March 19, 2019).
66. Email exchange on file with author.
67. Timothy Frye & Kate Lemos McHale, *Demonstrating Culturally Significant Properties at the Local Level from the New York City Landmarks Preservation Commission*, (Mar. 31, 2021), https://forum.savingplaces.org/blogs/special-contributor/2020/03/31/designating-culturally-significant-properties-nyc.; *see also* Explore Harlem, https://www.arcgis.com/apps/MapJournal/index.html?appid=8f65e23566e4436b81f06e2fb15e110c.
68. *Texas Dep’t of Hous. & Cmty Affairs v. Inclusive Cmtys*, 576 U.S. 519 (2015). Under the Fair Housing Act (FHA), it is unlawful to “refuse to sell or rent . . . ***or otherwise make unavailable*** or deny, a dwelling to a person because of race” or other protected characteristic. 42 U.S.C. § 3604(a). In upholding the disparate impact theory for proving a violation of the FHA, the Court stated that the act aims to ensure that governmental priorities can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation.” But, “[r]ecognition of disparate-impact liability under the FHA … plays a role in uncovering discriminatory intent: It permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment. In this way disparate-impact liability may prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping. *Id*. at 536. The court stated that “[g]overnmental or private policies are not contrary to the disparate-impact requirement unless they are ‘artificial, arbitrary, and unnecessary barriers.’” *Id*. at 537.; *See* e.g., *Tenth St. Residential Ass’n v. City of Dallas*, 968 F.3d 492 (5th Cir. 2020) (challenging the administration of historic preservation policies. There, the community association complained that city’s demolition and historic tax credit policies (1) made it more difficult for the community to fulfill its organizational role; (2) detrimentally impacted the ambiance of the historic neighborhood, reduced property values, and threatened the neighborhood’s designation as a historic district; and (3) posed an imminent threat to each member’s home. The case was dismissed on standing and a lack of imminent threatened injury.).
69. 25 N.Y.C. Admin. Code § 307(2)(1).
70. *Citineighbors Coalition of Historic Carnegie Hill v. N.Y. City Landmarks Pres. Comm’n*, 306 A.D.2d 113, 762 N.Y.S.2d 59 (App. Div. 1st Dept 2003).; *Matter of Save Gansevoort, LLC v. City of New York*, 2017 N.Y. Misc. LEXIS 1033 (Sup. Ct. N.Y. Co. March 17, 2017).; *Metropcs N.Y., LLC v. Incorporated Vil. Of Southampton*, 2013 N.Y. Misc. LEXIS 1943 (Sup. Ct., Suffolk Co. April 25, 2013).; *Matter of Cornell Univ. v. Beer*, 16 App. Div. 890 (3d Dep’t 2005).
71. Eligibility for Historic Tax Credit, Int. Rev. Code § 47, 36 C.F.R § 67. Rehabilitation must comply with the Secretary of Interior’s Standards, https://www.nps.gov/tps/standards.htm. The Federal Low-Income Housing Tax Credit Program offers 4% or 9% tax credits, for constructing low-income housing. 26 U.S.C. § 42. New York Credit for Rehabilitation of Historic Properties, N.Y. Tax Law § 210-B (26).

Bergman on Mortgage Foreclosures

By Bruce J. Bergman

Danger: Lost Note Affidavit Fails

It is an unfortunate aspect of modern mortgage commerce that related to the conveyance of mortgages, notes can be lost. Most often this is not a problem because a lost note affidavit (with some detail as to how the note was lost) will suffice. But that situation was challenged vigorously in a recent case and the plaintiff lost—its judgment of foreclosure and sale was denied with the appeals court going back to the earlier summary judgment motion and denying that for want of the plaintiff's sufficient demonstration that the note was lost.[1]

Not only is this a warning, but it should be observed too that the case was somewhat confusing and just might create even more peril for mortgage holders.

The underlying issue was that the borrower challenged the plaintiff's standing in the foreclosure (hardly uncommon), which therefore required the plaintiff to demonstrate that it was the holder or assignee of the note at the time the action was commenced.

Upon summary judgment, the plaintiff conceded that the original note had been lost.[2] The court stated that a plaintiff seeking to recover upon a lost note must provide "due proof" of the plaintiff's ownership of the note, the facts which prevent production of the note and the note's terms.[3] (So far this is not unusual and would typically not create a problem.)

Here, however, the plaintiff failed to meet the tasks. While there was a lost note affidavit, it was signed by the purported predecessor in interest to the plaintiff stating that the note was deemed lost as of a certain date and that predecessor was "in possession of the original Note prior to its whereabouts becoming undeterminable."[4] But this evidence was held not to establish that the plaintiff itself was ever in physical possession of the subject note.[5] Well, if it had been lost by its predecessor, of course, it could not have been in physical possession of the note at the inception of the action.

Apparently, the problem might have been solved if the plaintiff was able to demonstrate ownership of the note by written assignment. That, of course, is an alternative to actual delivery of the note, but the party that signed the assignment here could not demonstrate its authority for having done so. Thus, the assignment branch was an insufficient substitute.

Still, further, the court emphasized that the plaintiff failed to demonstrate the facts preventing production of the lost note. The affidavit submitted by the plaintiff failed to identify who conducted the search for the lost note and failed to explain "when or how the note was lost" but instead described only approximately when the search for the note was conducted and when the loss was discovered which was "on or about" the date the affidavit was executed.[6]

So, what might be the ultimate lesson arising from this case? First, it asserts some of the detail necessary to create a satisfactory lost note affidavit. Second, it confirms that in the absence of such an affidavit, a valid assignment of the note and mortgage would appear to be an acceptable substitute. Both avenues are worthy of special consideration in case the lost note is ever challenged.[7]

Endnotes

1. *U.S. Bank Trust, N.A.* v. *Rose*, 176 A.D.3d 1012, 1014, 110 N.Y.S.3d 700 (2d Dep't 2019).
2. *Id.*
3. *Id.*
4. *Id.* at 1014-1015.
5. *Id.* at 1015.
6. *U.S. Bank Trust, N.A.*, 176 A.D.3d at 1015-1016.
7. For further discussion *see* 2 Bergman on New York Mortgage Foreclosures § 20.07[8][a], LexisNexis Matthew Bender (rev. 2021).

Condo Legal Fees: Payable Even if Lien Is Small

By Bruce J. Bergman

Foreclosure of a condominium common charge lien is pursued in the form of a mortgage foreclosure, so many principles that arise in that arena can be relevant to mortgage foreclosure. They are certainly critical to any board of managers enforcing the lien, and to the extent that a mortgage holder may be junior to the condo lien, how much is due on that senior position is relevant to that mortgage holder as well. And, of course, attorneys for defaulting unit owners will need to know what has to be paid.

One aspect of the common charge lien foreclosure (as it is in mortgage foreclosure) is the collection of legal fees incurred by the condominium board bringing the action. Because some facets of common charge lien foreclosures can be obscure (at least a bit different from the realm of mortgage foreclosures), it is worth noting immediately that legal fees *can* be a component of the award in the judgment—so long as the condominium bylaws so provide.[1] (There is ample authority for this proposition.[2]) If the bylaws did not have such a provision, it would be sufficient if found in the condo declaration.

Interestingly, a written retainer agreement is not a prerequisite for recovery of legal fees for the board's attorney's services and, as a recent case directs, the board's engagement or retainer letter with its counsel need not be produced where it is not relevant.[3] In the absence of the unit owner demonstrating that such disclosure is relevant evidence or would reasonably lead to the discovery of relevant evidence, it cannot be compelled.[4]

We now proceed to perhaps the most important message of the mentioned recent case and that is the relationship—if any—between the legal fee award and the amount sought as the common charges in arrears.

As a practical matter, common charges tend not to be so large. (Obviously there are exceptions.) Especially if the board of managers is diligent (as is recommended) and pursues enforcement of the obligation before too much time passes, again, the amount of the past due and accruing common charges can be relatively minor. At the same time, however, the legal fees expended in the action will be the same regardless of the amount at issue. While a larger amount due might engender more litigation and greater fees, attributable to the unit owner's zeal to defend, the basic concept remains that there can be a divergence between the legal fees and the amount of the past due common charges.

This creates a conundrum for the board of managers when a wily unit owner may choose to submit past due common charge sums, but refrain from paying legal fees. The board fears—understandably—that if it accepts the common charges, it is then prosecuting the foreclosure *solely* for the legal fee component.[5] Psychologically, one might wonder whether the courts are so amenable to being generous with legal fee awards when the only item being pursued is those legal fees themselves.

The new case confirms, though, that the amount at issue, even if minor—and here it was $200—does not diminish an award of reasonable legal fees.[6] This is certainly correct, appropriate, and decidedly comforting to the board, which is charged with the obligation to secure common charges and expenses for the benefit of the other unit owners who bear the burden the defaulters.

Condo boards may still wonder, though, whether courts will be unstinting when only the legal fees are the object of the action. Another element of pursuing counsel fees alone is that there may be less incentive for the defaulting unit owner to rapidly pay those amounts. Nonetheless, when a defaulting unit owner remits the common charges alone, a board of managers may still consider rejecting that sum because it is not full payment, and then continue pursuit of the action for *everything* that is due. [7]

Endnotes

1. *See Bd. of Mgrs. of Dickerson Pond Condo. I v. Jagwani*, 276 A.D.2d 517, 713 N.Y.S.2d 761 (2d Dep't 2000), (citing *815 Park Ave. Owners v. Metzger*, 250 A.D.2d 471, 672 N.Y.S.2d 860 [1st Dep't 1998]).
2. *See* 4 Bergman on New York Mortgage Foreclosures § 36.11[1] (Bender & Co., Inc., LexisNexis 2021).
3. *Bd. of Mgrs. of Fishkill Woods Condo. v. Gottlieb*, 184 A.D.3d 792, 125 N.Y.S.3d 698 (2d Dep't 2020) (citing *Asphalt Maintenance Servs. Corp. v. Oneil*, 174 A.D.3d 562, 106 N.Y.S.3d 95 [2d Dep't 2019]; *Liberty Petroleum Realty, LLC v. Gulf Oil, L.P.*, 164 A.D.3d 401, 405, 84 N.Y.S.3d 82 [1st Dep't 2018]).
4. *Gottlieb*, 184 A.D.3d 792 (citing *Oneil*, 174 A.D.3d 562; *Gulf Oil, L.P.*, 164 A.D.3d 401, 405).
5. *Bd. of Mgrs. of One Strivers Row Condo. v. GIWA*, 134 A.D.3d 514, 22 N.Y.S.3d 176 (1st Dep't 2015) (citing *Hooper Assocs, Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 491, 549, N.Y.S.2d 365, 548 N.E.2d 903 [1989]).
6. *Gottlieb*, 184 A.D.3d 792; *see also*, *GIWA*, 134 A.D.3d 514 (citing *Hooper Assocs., Ltd.*, 74 N.Y.2d 487, 491).
7. *See Gottlieb*, 184 A.D.3d 792 (citing *Greenman-Pedersen, Inc. v. Berryman & Henigar, Inc.*, 130 A.D.3d 514, 517, 14 N.Y.S.3d 20 [1st Dep't 2015]; *Ross v. Sherman*, 95 A.D.3d 1100, 1101, 944 N.Y.S.2d 620 [2d Dep't 2012]).

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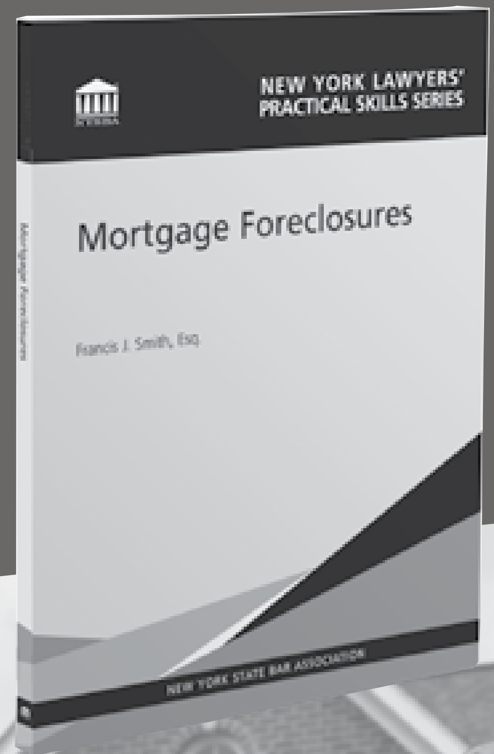

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Basics of Co-GP Transactions

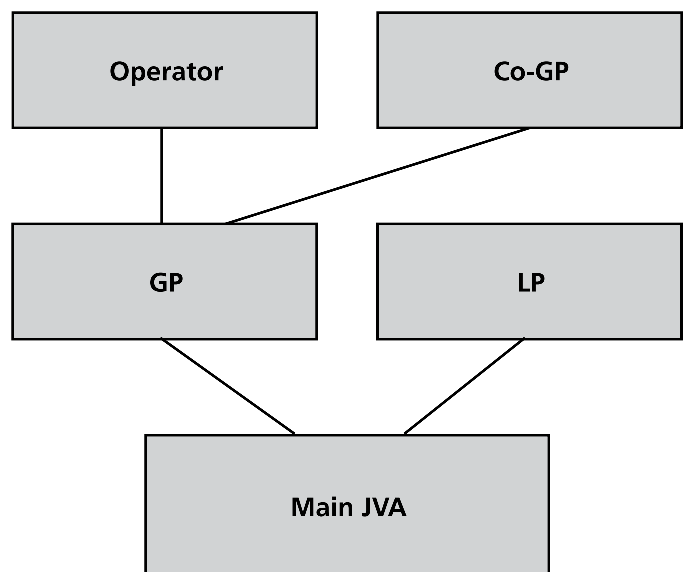
By Bradford B. Lavender

Introduction

A customary real estate joint venture consists of two parties: an operator or developer who typically originates the deal and does all the day-to-day work ("Operator"),[1] and an investor who typically provides the majority of the equity but does not have an active role in day-to-day matters (referred to in this article as the LP).[2] This structure has become extremely common, as (1) there are many institutional investors that want to invest in real estate but do not have the infrastructure or expertise to originate and operate or develop the real estate themselves, and (2) Operators can do more deals—and potentially earn a greater return on each deal (through fees and promotes, which are discussed in more detail below) —by bringing third party investors into each deal.[3]

But what happens if the Operator does not have sufficient capital for its share of a particular deal, wants to create even further leverage by bringing in outside capital to its side of a deal, or has other reasons for bringing an investor into its side of the deal? [4] In those cases, (1) the Operator may create an additional joint venture ("the GP") between the Operator and an additional investor (the "Co-GP"), and (2) there will be two layers of joint venture agreements: the main joint venture agreement between the GP and the LP (the "Main JVA") and a joint venture agreement (for the GP itself) between the Operator and the Co-GP (the "Co-GP JVA"). A basic chart for this type of structure is as follows:[5]

There are a number of unique and potentially difficult issues that arise in the context of negotiating a



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Co-GP JVA, including because many of the rights of the parties under the Co-GP JVA are subject to the terms of the Main JVA and may not be exercisable without the LP's consent.[6]

This article identifies and describes some of these issues, discusses common ways to address them, and offers some potential solutions.

Economics

The economic arrangement between the Operator and the Co-GP is obviously a key part of the deal to negotiate. Because—for the reasons discussed in this article—the Co-GP often takes on more risk in a deal than the LP, the Co-GP may require more favorable economics than the LP.

The economic components to be negotiated include the respective equity percentages and contributions between the Operator and Co-GP (including, in the case of a development deal, their respective shares of cost overruns);[7] to what extent, if any, the Co-GP shares in the fees (e.g., acquisition, development, asset management, and disposition fees) paid by the deal to the GP; to what extent, if any, the Co-GP shares in any promote paid by the LP; and whether the Go-GP pays any promote on its equity to the Operator.

There is no customary outcome to these negotiations, and, as seen in other transactions, the leverage of each party, the underlying nature of the deal, and the "hot buttons" of each party all come into play. Below are some customary considerations for each component:

1) *Respective equity/capital contribution percentages/cost overruns*: This is a case-by-case situation, but the LP may want the Operator (and sometimes its key principals) to have a minimum amount of equity in the deal, ensuring that it has sufficient "skin in the game." In a development deal where the GP bears a disproportionate share of cost overruns, the Operator and Co-GP must negotiate how those cost overruns will be divided between them. The outcome of that negotiation will often depend on how the Operator and Co-GP are sharing fees and promotes,[8] and the percentage split of cost overruns will sometimes mirror the percentage split of fees and promotes—on the theory that the parties should share downside risk in the same percentage as the potential upside.[9]

2) *Fee sharing*: This will depend somewhat on the nature of the fees, and to what extent they are intended to cover the Operator's overhead versus acting as an additional profit component. The Operator will typically want to retain 100% of the component of the fees that are for its overhead, but the rest are up for negotiation. Generally, the Co-GP's share of fees will be lower, on a percentage basis, than its share of the equity in the GP, as the Operator will expect a higher percentage on account of its sourcing the deal and "sweat equity."

3) *Promote Sharing*: This is also a case-by-case situation, but the outcome sometimes depends on the additional level of risk the Co-GP is taking compared to the LP. For example, if the Co-GP or its affiliate is a party to financing guaranties or to a backstop of the main guarantor,[10] then the Co-GP will usually argue that it should be compensated for this additional risk in the form of promote sharing. But, like the fee sharing, the Co-GP's share of the promote is typically lower, on a percentage basis, than its share of the equity in the GP for the reasons mentioned above.

4) *Promote Paid by Co-GP*: Frequently, a Co-GP will not directly pay the Operator a promote on the Co-GP's equity. But if the waterfall in the Main JVA provides that both the GP and LP pay promote, then, unless there is an appropriate adjustment in the Co-GP JVA, the Co-GP (as part of the GP) will indirectly pay a promote on its equity. This is something for Co-GP's to pay particular attention to, as this issue is sometimes overlooked.[11]

If the Main JVA contains the right to "claw back" any promote that is overpaid under the Main JVA (or requires disproportionate capital contributions from the GP on a "reverse waterfall" basis to achieve such repayment),[12] then the Co-GP JVA should require a corresponding claw back or reverse waterfall, based on the relative portions of the promote distributed to the Operator and Co-GP.[13] Additionally, if that claw back obligation is personally guaranteed under the Main JVA by the principals of the Operator, then the Operator may require a corresponding guaranty from the principals of the Co-GP for the Co-GP's share of the relevant clawed back promote.

Governance

To what extent the Co-GP participates in the management/governance of the GP (and thereby indirectly the Main JVA) is a key, and sometimes contentious, issue for all parties, including the LP.

The Co-GP will usually want at least the same level of decision making as the LP—and if the Co-GP or its affiliate has liability with respect to a loan or other guaranties—sometimes even more than the LP. But this can cause major concern for the LP (and, potentially, for lenders and other financing sources). When the

LP makes its deal with the Operator, it often does not contemplate that there will be a Co-GP who could have veto and other rights within the GP. Many LPs will not tolerate an additional party—particularly one that they did not contract with—having the ability to block (or, even worse from the LP's perspective, affirmatively make) decisions regarding the deal. LPs will argue that there should never be a situation where both the LP and Operator want to take an action but the Co-GP can block it. As a result, LPs will often want to 1) review and approve the Co-GP JVA at the time the Main JVA is executed to ensure they are comfortable with the Co-GP's level of management and veto rights, 2) prohibit amendments to the Co-GP JVA in the future, including any that give additional management/consent rights to the Co-GP, and 3) ensure that any future Co-GP JVAs are approved by the LP in its sole discretion. Sometimes, if the Main JVA is executed after the Co-GP JVA is already in place, the LP will require that the Co-GP give up some or all of its consent rights as a condition to the LP doing the deal. Given these sensitivities of the LP, it is important that their concerns are taken into consideration at the outset of the negotiations between the Operator and the Co-GP as well as between the Operator and the LP.

Apart from the important concerns of the LP, the negotiation of the management/governance rights in the Co-GP JVA will often be similar to the negotiation of those rights in the Main JVA. The Operator will typically want as much control as possible, and the Co-GP will want customary limitations on that control. This becomes even more important to the Co-GP if it, or its affiliates, have any guaranty liability or disproportionate liability for cost overruns in a development deal. Ultimately, the Co-GP may need to accept that it will have less control than it would like—particularly if it is brought into the deal after the agreement between the Operator and LP has been finalized or if it is not an experienced real estate operator itself.

In addition to management rights, the Co-GP JVA should address the respective management obligations of the parties—including actions (such as budget preparation and reporting) that are the GP's responsibility under the Main JVA. Typically, the Co-GP JVA will impose those obligations on the Operator, but that may not be the case in all deals. And, in that regard, the Co-GP may want the Co-GP JVA to provide that (1) before any budget or similar item is submitted to the LP for approval, the Co-GP must first approve the item (but that raises the issues described above about what level of control and approval the Co-GP will be permitted to have), and (2) the Operator, as manager of the Co-GP JVA, is required to perform all management obligations that are imposed on the GP under the Main JVA.

Removal of Manager for Cause/Loss of Promote

In a typical real estate joint venture agreement, the LP will have the right to remove the GP from any management role and take over management or appoint a third party to do so, if a "cause" event occurs on the GP's part (e.g., fraud, gross negligence, willful misconduct, material breach, or loss of services of a key person). If such a removal occurs, the GP will often lose its right to any future promotes and fees. This raises several issues to be addressed in the Co-GP JVA.

First, will the Co-GP have such a removal/take-over right under the Co-GP JVA? The Co-GP will, of course, want this right, but such a removal/takeover will not typically be permitted under the Main JVA unless the LP consents.[14] Thus, for the Co-GP to have any assurances that it will be able to exercise those rights, it will need to get the LP's prior approval to do so, ideally at the time the Co-GP JVA is executed. However, that may not be practicable, particularly if the LP is doing the deal based on the Operator's expertise.

Second, if the Co-GP does obtain the consents needed to allow it to take over management of the GP, the Co-GP will typically take the position that, because of such management take over, it should be entitled to all the promote and fees paid to the GP. Those negotiations often mirror the same negotiations that take place in a typical real estate joint venture agreement when an Operator is removed for "cause."

Third, if a "cause" event by the Operator gives the LP the right under the Main JVA to remove and replace the GP, the Co-GP may try to negotiate the right, in the Main JVA, to avoid such removal and replacement if it removes and replaces the Operator under the Co-GP JVA and thus takes over management of the GP. But, for the reasons discussed above, this is usually achievable only if the Co-GP is an experienced Operator itself and the LP has a high degree of confidence that it is the correct party to take control.

Finally, if the LP does remove the GP because of a "cause" event by the Operator, then the GP will often lose its rights to any future promote and fees and lose all material voting rights. The Main JVA may also require the GP (and/or its principals[15]) to indemnify the LP for losses resulting from such "cause." Thus, the Co-GP is in a position where it can lose meaningful economics, be relegated to an investor in passive entity, and indirectly be required to indemnify the LP, all because of actions beyond the Co-GP's control. This is one reason a Co-GP investment can be a riskier proposition, and require more favorable economics, than a typical LP investment. The Co-GP may sometimes require an indemnity from the Operator or its principals for any losses suffered because of such removal, promote loss, etc., but that is ultimately a lawsuit for damages that could be difficult to prove—and the principals of the Operator will

typically resist any attempt to impose liability on them beyond their investment in the deal.

Capital Call Obligations and Rights

As in any joint venture agreement, the Co-GP JVA needs to address the parties' respective rights to call for required capital contributions[16] under the Co-GP JVA, the parties' respective obligations to make such capital contributions, and the remedies for failing to do so.[17] However, there are additional considerations to address in the Co-GP context.

First, in any instance where a party has a right to make a capital call under the Co-GP JVA, that party should also have the right, on behalf of the GP, to make a capital call under the Main JVA (to the extent the Main JVA allows for it)— so that all parties are required to fund their respective shares of the needed capital.

The Operator and Co-GP should consider providing in the Co-GP JVA that 1) in any instance where the GP is obligated to fund amounts under the Main JVA (or will otherwise suffer adverse consequences if it fails to do so), either party to the Co-GP JVA may make a capital call for that amount, and 2) if the LP sends the GP a capital call under the Main JVA, then each party to the Co-GP JVA should automatically be obligated to fund its share of the amount required to be funded by the GP under that capital call.

Also, in any instance where a capital call under the Co-GP JVA is to fund amounts that the GP is required to fund under Main JVA, the period in which each party to the Co-GP JVA needs to fund such capital call should be at least a few business days shorter than the period for the GP to fund the corresponding capital call under the Main JVA. This provides the opportunity to cure a failed capital contribution under the Co-GP JVA before that failure becomes a default under the Main JVA.

The remedies for failing to fund a required capital contribution under the Co-GP JVA often mirror those under the Main JVA (e.g., a member loan at the same default interest rate or a squeeze down at the same punitive dilution rate). The parties to the Co-GP JVA may also want to provide that the non-funding party under the Co-GP JVA will bear 100% of any adverse consequences to the GP if 1) one party fails to fund its share of a required capital call under the Co-GP JVA and, 2) as a result, the GP fails to fund its full share of the corresponding capital call under the Main JVA.

Finally, the parties to the Co-GP JVA should also consider addressing what happens if the LP fails to fund its share of a capital call under the Main JVA. The parties to the Co-GP JVA will not typically be obligated to fund their share of any shortfall that results from such a failure by the LP. But they will often provide that if one party to the Co-GP JVA wants to cure that failure and the other party does not, then the party that wants to cure the failure will have the right to do so—in which case that party will be entitled to 100% of the economic remedies that inure to the benefit of the GP as a result of such cure (e.g., 100% of the benefits of any member loan to the LP or squeeze down of the LP).

Loan and Other Guaranties

Another key issue in Co-GP transactions —and one that will drive many other areas of the negotiations (including the economic arrangement and management rights) —is whether a creditworthy affiliate of the Co-GP (a "Co-GP Guarantor") will be a party to the required loan and other deal guaranties (or backstop the Operator for a share of the liability under such guaranties).[18] This becomes particularly important when those guaranties include not just customary "bad boy" guaranties but also include financial guaranties, such as completion guaranties, debt service and carry cost guaranties, and principal repayment guaranties.

If a Co-GP Guarantor is taking on any liability under those guaranties (whether directly or through a backstop arrangement), then that of course substantially increases the risk to the Co-GP in the deal, potentially exposing the Co-GP principals to liability far beyond their invested equity in the deal. And, in that case, the Co-GP will typically expect to be compensated for that increased risk—usually in the form of a share of the promote and potentially a share of the deal fees. Also, because of the increased risk, the Co-GP may require a greater level of governance and control (which, as described above, may or may not be achievable, depending on the LP's position on this issue).

The Co-GP Guarantor's specific share of any such guaranty liability may drive the other economics, or vice versa. For example, a Co-GP may take the position that its guaranty risk-sharing percentage should mirror the percentage of the promote to which it is entitled—so that if, for example, a Co-GP invests 90% of the GP equity but gets only 50% of the promote, the Co-GP may argue that its guaranty risk-sharing percentage should be only 50%. In this example, the Co-GP's disproportionate upside percentage in the form of promote matches its disproportionate downside percentage in the form of guaranty liability. An Operator may take the opposite position, arguing that the Co-GP's guaranty risk-sharing percentage should equal the Co-GP's percentage share of equity in the GP.

On the flip side, if a Co-GP Guarantor will not take on any such guaranty liability (whether directly or through a backstop arrangement), then that will naturally decrease the possibility that an Operator will be willing to share a meaningful portion of the promote with the Co-GP. But as mentioned above, every deal

has its unique factors that drive the outcome of such negotiations.

Also, if the Co-GP Guarantor is a direct party to any guaranties on a joint and several basis (or on any other basis that does not reflect the guaranty liability sharing deal between the Co-GP and Operator),[19] then the Co-GP Guarantor and Operator guarantors should execute a separate agreement[20] in which 1) they agree to share the relevant guaranty liability in the proportion they agreed to as described above (and make appropriate payments from one to the other to achieve such sharing), 2) agree as to what portion of any required net worth and liquidity under the relevant guaranty each much provide (if the guaranty only has combined net worth and liquidity tests), and 3) depending on the nature of the guaranty, indemnify the other party for any guaranty liability the other party occurs as a result of "bad acts" of the indemnifying party.

Liquidity Rights

The right of a party to create liquidity for its equity investment is an important component for any joint venture arrangement. This can be accomplished in various ways, including by allowing that party to force a sale of the relevant joint venture assets (sometimes subject to a right of first offer in favor of the other party); allowing for a transfer of that party's interests in the joint venture to a third party (sometimes with the other party having a tag-along right);[21] allowing that party to implement a buy-sell provision (described below); or affording that party a put option (i.e., the right of that party to sell its interest in the joint venture to the other party) if the other party does not want to sell.

For numerous reasons, this can be particularly tricky in a Co-GP JVA. First, any right of the GP to sell the relevant property, or otherwise monetize the GP position, will depend on the terms of the Main JVA. Typically, the LP will have a right to consent to such a sale (at least for a certain period) and, if the GP can sell the property without the LP's consent, the LP will often have a right of first offer to buy out the GP to avoid such a sale. A party to the Co-GP JVA may try to negotiate for the right to exercise, on behalf of the GP, any sale right the GP has under the Main JVA to sell the relevant assets (which right would include, if applicable, the right to give an "offer notice" on behalf of the GP in connection with any right of first offer in favor of the LP under the Main JVA). This, of course, will require negotiations between the Operator and Co-GP as to when, and under what circumstances, that can happen. In that connection, the parties to the Co-GP JVA may negotiate a right of first offer within the GP itself before a party to the Co-GP JVA can exercise rights under the Main JVA to start the property sale process. This would enable the Co-GP JVA party that does not want to sell to buy out the other party at a price determined through that process. But this might not work if the Operator wants to sell but the Co-GP does not, as the Main JVA will likely prevent the Co-GP from taking control of the GP without the LP's consent. And if the Co-GP wants to sell but the Operator does not, the Operator may have capital issues if it wants to exercise such a right of first offer (as a need for capital may have been why the Co-GP was brought into the deal in the first place).

The sale by the Operator or Co-GP of its interest in the GP can also be challenging. Again, it is unlikely that the LP (or, for that matter, the Co-GP)[22] will allow the Operator to sell a controlling interest to a third party, given that would mean a new entity would be taking control over the entire venture. And there are also challenges to allowing a Co-GP to sell its interests in the GP. First, depending on the Co-GP rights negotiated, the Operator and LP may not want those rights to be exercised by a third party that is not approved by the Operator and the LP. Also, the more limited those rights, the less liquid and marketable the Co-GP interest is likely to be.

A buy-sell provision is sometimes a mechanism used in joint venture agreements to allow for liquidity, particularly if there is a disagreement about whether to sell the underlying assets. A buy-sell provision is a mechanism where the party that implements it (the initiator) sets a value for the joint venture's assets, and the other party must elect to either sell its entire interest in the joint venture to the initiator, or buy the entire interest of the initiator in the joint venture, for a price that is based on the value of the joint venture's assets that is so set by the initiator. This is designed to keep the parties honest, as the party initiating and setting the value does not know if it is going to have to sell or buy at a price based on that value.[23] But, for the reasons set forth above, this is difficult to make work in a Co-GP JVA because (per the terms of the Main JVA, loan documents, etc.) the Co-GP may not be permitted to be the buyer and the Operator may not have adequate capital to be the buyer. Mutual put rights have the same concerns.

Because of the complexity of these issues, each party to a Co-GP JVA will need to be comfortable with its ability (or lack thereof) to monetize its investment in the future.

Buy-Sells/ROFOs/Tag-Along and Similar Provisions in Main JVA

The Main JVA may contain various exit/liquidity provisions like those described in the prior section, and in that case the parties to the Co-GP JVA will need to address how the exercise of those rights (and response to the LP if the LP exercises those rights) will be determined.

For example, the Main JVA may have a buy-sell provision like the one described above, and the Co-GP JVA will need to address how the parties decide whether the

GP will buy or sell in response to the LP triggering that provision. If the Operator and Co-GP agree on the decision, then it is easy. But what happens if one party to the Co-GP JVA wants the GP to sell its entire interest to the LP and the other wants the GP to buy the LP's entire interest? One way to resolve this is to allow the party that wants the GP to buy the LP's interest to do so, but only if that party, simultaneously with the purchase of the LP's interest, also buys out the other party's interest in the Co-GP JVA based on the same valuation. However, this can be difficult to implement from a timing and logistical perspective (not to mention what happens if the party that is supposed to buy defaults in that obligation). Also, if the Co-GP is to be the buyer, that might not be permitted under relevant loan or other transaction documents. Another potential solution is to allow the party that wants to buy to make that election on behalf of the GP and have the GP designate that party as the buyer (assuming the Main JVA allows for that). But the same potential timing and default issues apply. Also, the parties may not be comfortable having the buying party step into the shoes of, and have the same rights as, the LP. Because of the above complexities, the Co-GP JVA may provide that if the Operator and Co-GP cannot agree on whether the GP should be the buyer or seller in response to a buy/sell provision triggered by the LP, the default position is for the GP to be the seller. But this can result in potential gaming by the LP, particularly if it knows about such a provision. For the above reasons, the GP may push to have any buy-sell provisions eliminated from the Main JVA when it is being negotiated.

Many of the same issues arise when an LP gives the GP a right of first offer to buy the LP's interest (in connection with a proposed sale by the LP of the joint venture assets or the LP's interests) or a tag-along right in connection with a sale of the LP's interest to a third party.

In addition to the above, the Co-GP JVA should address whether, and under what circumstances, a party to the Co-GP JVA may implement, on behalf of the GP, any buy-sell or similar provisions under the Main JVA. The simplest solution is to provide that such a decision requires both the consent of the Operator and Co-GP (and that is often how that is addressed). But, as noted in the previous section, this can potentially limit the exit/liquidity rights of the parties, and exceptions may need to be negotiated.

Conclusion

Although this article is not intended to address every possible issue that will need to be negotiated in a Co-GP JVA, it is a summary of the issues that the author most frequently encounters in these arrangements—including many that are easily overlooked by those who do not regularly practice in this area. For the reasons discussed above, these issues require a lot of thought and attention to make them work for all the parties. Failure to do so could result in adverse, and unexpected, outcomes to the Operator and Co-GP.

Endnotes

1. Many Co-GP arrangements are in the context of development deals, but for simplicity we are referring to this party as the Operator (even in situations where they might more commonly be referred to as the developer).
2. Most real estate joint ventures use a limited liability company as the joint venture vehicle. However, some may use a limited partnership or other structure (usually for tax reasons). Notwithstanding that most real estate joint ventures are limited liability companies, it is common parlance to refer to the operator/developer as the GP and the majority investor as the "LP." But because in this article there are two relevant entities on the "GP" side, we refer to the operator/developer as the "Operator," its co-GP investor (described below) as the "Co-GP," and the joint venture between them as the "GP."
3. In a typical real estate joint venture, 1) the Operator will be entitled to a disproportionate share of profits from the deal after the LP achieves certain minimum returns—and that disproportionate share of profits is commonly referred to as a "promote" and the flow of funds to the parties in that regard is commonly referred to as the "waterfall"; and 2) the Operator will often be paid various fees from the deal, and these can be in the form of acquisition fees, development management fees, asset management fees, property management fees, leasing fees, and disposition fees (but most deals include only some, rather than all, of these).
4. Other reasons may include 1) having an additional party to share guaranty liability (particularly if the LP is not bearing its share of that liability)—whether because the principals of Operator want to limit their guaranty exposure or because they do not have sufficient financial wherewithal to satisfy the relevant counterparty; 2) giving a party with which the Operator has a strategic relationship the opportunity to invest in a deal where that party cannot otherwise be the LP; and 3) bringing in a party with a needed area of experience or infrastructure.
5. These entities will typically be single-purpose entities formed just for the relevant joint venture.

6. This is similar to negotiating a sublease (with the Co-GP JVA being analogous to a sublease and the Main JVA being analogous to the main lease).
7. In many development deals, the GP is solely responsible for certain types of cost overruns.
8. Described below.
9. The same issues can arise in other areas where the Main JVA requires the GP to bear a disproportionate share of costs, such as purchase agreement deposits and dead deal costs.
10. Described in greater detail below.
11. For example, if the waterfall in the Main JVA has a tier as follows, then the GP is effectively paying a share of the promote to itself (and thus the Co-GP is paying its share of such promote): "Second, (1) 20% to the GP as a promote, and (2) 80% to the members in proportion to their respective percentage interests." Under such a tier of the waterfall, assuming the respective percentage interests of the LP and GP are 90% and 10% and $100 were being distributed under such tier, the GP would receive $20 as a promote and $8 on account of its equity investment (10% of the $80 balance remaining after the promote is paid). If, instead, such $100 were merely distributed to the GP and the LP in accordance with their respective percentage interests, then the GP would receive $10 on account of its equity investment. Thus, in this example, the GP is, under the Main JVA, effectively paying itself $2 as a promote (i.e., 10% of the total promote payment in this tier). If, in a Co-GP JVA where the Operator's and Co-GP's respective capital contribution percentages are 20% and 80%, but all promote is split 50/50, the Operator and Co-GP would each get $1 of such $2 of promote—instead of the Co-GP getting $1.60 (80%) and the Operator getting $0.40 (20%) of such $2 paid by the GP (thus resulting in the Co-GP paying $0.60 of such promote to the Operator). If that is not the intent of the parties to the Co-GP JVA, then the Co-GP JVA will need to address promote sharing in a way that makes it clear that such sharing is limited to the portion of the promote that is paid by the LP (with the balance to be shared by the Operator and Co-GP based on their proportionate shares of non-promote cash flow).
12. In some cases, a GP may be paid promote before the main joint venture entity is liquidated. If that happens, there can be situations occurring after that promote payment that would result in the GP being entitled to less promote than it was actually paid (e.g., in a portfolio transaction, one property is sold for a large gain, but the next one is sold for a loss; or significant capital contributions are required after a promote payment). In those cases, 1) a joint venture agreement will often require a "claw back" where the GP must return the excess promote it was paid; and 2) a joint venture agreement might also require a "reverse waterfall" where the GP funds a disproportionate share of future capital contributions so that the excess promote is returned in that manner.
13. If relevant, this same concept applies to tax distributions. The GP will sometimes receive a disproportionate share of distributions to cover the tax liability of the ultimate GP principals, treated as an advance against future distributions. But if those future distributions are not sufficient to cover that advance, then the GP (and sometimes its principals) will often be required to return the amount of that insufficiency.
14. Such a takeover will usually also be prohibited under loan documents, franchise agreements (if applicable), and similar agreements, unless the Co-GP is preapproved by the applicable counterparties.
15. If the principals of the Co-GP are also a party to any such indemnification obligation (such that they can be responsible for acts of the Operator and its affiliates), then there should be a contribution and indemnity between the principals of the Operator, on the one hand, and the principals of the Co-GP, on the other hand, so that the party that causes the issue is 100% responsible for any liability to the LP.
16. A request for required capital contributions is commonly referred to as a "capital call."
17. These rights and obligations are negotiated on a case-by-case basis, but usually include 1) the right for each party to require capital contributions for budgeted and certain non-discretionary expenses, and 2) remedies in favor a funding party against the non-funding party for the failure of the non-funding party to make a required capital contribution. Examples of remedies include (a) the right of the funding party to fund the non-funding party's share as a loan to the non-funding party at a punitive interest rate (to be repaid out of any distributions that would otherwise be made to the non-funding party), (b) the right of the funding party to fund the non-funding party's share as a capital contribution by the funding party, with a disproportionate dilution of the non-funding party's interest in the joint venture (commonly referred to as a "squeeze down"), and/or (c) the right of the funding party to loan both its and the non-funding party's share to the joint venture as a priority loan to the joint venture (to get repaid before any other distributions to the parties).
18. These guaranties may include, among others, 1) for loan transactions, non-recourse carveout or "bad boy" guaranties; environmental indemnities; completion guaranties (for development or value add deals); interest and carry guaranties (also for development or value add deals); and partial or full principal guaranties; 2) for hospitality transactions, franchise guaranties; and 3) for development-oriented ground lease deals, completion guaranties (and potentially full lease guaranties until completion is accomplished).
19. If the Co-GP Guarantor will not be a direct party to any guaranties but will backstop the Operator guarantors for the Co-GP Guarantor's share of liability under the relevant guaranties, then the parties will need to execute a separate agreement that reflects that arrangement.
20. These are customarily referred to as "contribution and indemnity agreements" or "cross-indemnity agreements."
21. A "tag-along" right is a right that gives a party to a joint venture agreement the right to sell its interests on the same terms, and in the same proportion, as another member is then selling (or proposing to sell) its joint venture interests to a third party.
22. Lenders, franchisors, and similar parties will also have the same concern.
23. A buy-sell provision is like the process I used with my young kids when they would share a cookie: one would split the cookie, and the other would pick which half each would get. This resulted in amazing precision to try to cut the cookie right down the middle.

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Lasting Model Real Estate Forms

A Letter From Karl Holtzschue

Working on an update for my book, *Holtzschue on Real Estate Contracts and Closings* (PLI), I realized that many of the model real estate form projects I worked on with many of my Real Property Law Section colleagues have had a long life. Here's what I am adding after the Introduction:

Lasting Model Real Estate Forms

The following bar association model real estate form projects that I participated in have had lasting effects:

- In 1982, I chaired the subcommittee that drafted the ABCNY *Contract of Sale for Office, Commercial and Multi-Family Residential Premises*. See § 2:1.2[C] and Appendix K. It was revised in 2000 to add some sections.
- In 1998, I participated in drafting the NYSBAR-PLS/ABCNY *1998 Mortgage Loan Opinion Report*. See § 3:2.5.
- In 2000, I chaired the Joint Committee of bar associations that drafted a revision of the *New York Multibar Residential Contract of Sale*. See § 2:1.2 [A] and Appendix C1.
- In 2001, I participated in drafting a revision of the *NY Cooperative Contract of Sale*. See § 2:1.2[A].
- In 2015, I participated in drafting a revision of the *NY Condominium Contract of Sale*. See §2:1.2[A] and Appendix D1.

Each of the forms was drafted and approved by members of the NYSBA Real Property Section (other than the Commercial Contract, which was drafted and approved by the ABCNY). The Mortgage Loan Opinion and the Residential Contract were also drafted and approved by other bar associations. Each was a group effort.

Karl Holtzschue

All these forms and the Mortgage Loan Opinion Report are still in use today.

Karl Holtzschue was Chair of the Section (2007-2008), co-chair of the Title and Transfer Committee (1998-2004), co-chair of the Legislation Committee (2008-2014) and recipient of the Section's Professionalism Award in 2012. He is author of *Holtzschue on Real Estate Contracts and Closings* (PLI).

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Articles should be submitted in electronic document format (pdfs are NOT acceptable), along with biographical information.

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