

IS THERE LIFE AFTER ABANDONMENT?  
THE KEY ROLE OF NEW YORK CITY'S *IN REM*  
HOUSING IN ESTABLISHING AN  
ENTITLEMENT TO DECENT,  
AFFORDABLE HOUSING

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INTRODUCTION

Heirs to a legacy produced by years of landlord neglect and abandonment, tenants in *in rem* housing<sup>1</sup> live in conditions that are among the worst in New York City. The same legacy has made the South Bronx a symbol of urban decay for the entire nation and has turned large portions of the urban landscape into barren wasteland. More than 150,000 *in rem* tenants, mostly low-income, are on the verge of homelessness. Only the plight of the homeless themselves more dramatically reflects the magnitude of the current housing crisis in New York City. While the private real estate sector at one time may have been able to house (however inadequately) low- and moderate-income New Yorkers, it is now clear that it will not and probably cannot continue to do so.

In recent history, major reforms have been achieved through effective political organizing and other forms of pressure which created the public perception that the housing situation was so intolerable as to offend basic notions of human decency. At the turn of the century, exposés of the horrible filth and squalor in slum housing resulted in such reforms as a building code that prohibited further construction of the airless, lightless, old law tenements. In the 1930s, in the midst of general economic crisis and the reforms of the New Deal, militant activism and other forms of political pressure resulted in the construction of the nation's first public housing units. Public housing represented a quantum leap forward in the role of government from one of enforcer of housing standards to that of provider of housing. Today, in the mid-eighties, we are again faced with an acute housing crisis that can and must be

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I would like to thank the following people for helpful comments on drafts of this article and assistance in finding information: Eleanor Bader, Lucy Billings, Hal Brodie, Jill Hamburg, Peter Marcuse, Mark Pennington, Susan Reynolds, David Robinson, Claudia Slovinsky and Morton Stark. I also gratefully acknowledge the fortitude and vision of the *in rem* tenants and organizers who provided the inspiration for this article.

1. The phrase "*in rem* housing," used throughout this paper, refers to housing to which the City of New York has taken title as a result of *in rem* tax foreclosure pursuant to New York, N.Y., Administrative Code, tit. D, §§ D17-4.0 et seq. (1984). Likewise, tenants who live in such housing will be referred to as "*in rem* tenants."

addressed by major reforms. The leap we must now take is towards a new role for government not only as the provider of housing, but also as the guarantor of an entitlement to decent affordable housing.<sup>2</sup>

The thesis of this article is that *in rem* housing can play a key role in establishing an entitlement to decent, affordable housing for everyone. *In rem* housing consists of buildings that come into public hands as a result of bankruptcy of the private real estate sector. A significant portion of New York City's low-income population lives in *in rem* housing. These *in rem* tenants have no option to move elsewhere. It is clear that the private sector will not, in the foreseeable future, regain control over the bulk of the occupied *in rem* housing stock, and that only a public sector solution will serve the needs of *in rem* tenants and the homeless. The dimension of the *in rem* situation is forcing the City to reevaluate its housing policy. Public recognition of the pressing nature of the problem is also giving *in rem* tenants and their allies a foothold in their effort to establish decent, affordable housing as an entitlement, with government as the guarantor of that entitlement.

This article will explore the roots of the *in rem* phenomenon, describe and critique New York City's *in rem* housing policy, and present a variety of advocacy goals and legal theories for the development of *in rem* buildings as a permanent resource for low-income housing.<sup>3</sup>

## I BACKGROUND

Over the past two decades, the phenomenon of landlord abandonment in New York City has accelerated sharply. In 1975, at its peak, abandonment resulted in the loss of 40,000 dwelling units a year, a rate of over 3,000 units a month.<sup>4</sup> One study reported that between 1970 and 1983, New York City lost over 310,000 units of low-income housing as a result of abandonment and demolition.<sup>5</sup> Because several households may be displaced when a single structure is abandoned, the number of households displaced exceeds the number of

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2. For an in-depth discussion of the notion of an entitlement to decent, affordable housing, and an elaboration of various arguments in favor of such an entitlement, see generally *America's Housing Crisis: What Is to Be Done?* (C. Hartman ed. 1983).

3. Although the focus of this article is New York City, abandonment is an urban problem that is hardly unique to New York. Nor is the extent of abandonment in New York proportionately as great as it is in some other cities. The unique aspect of New York's situation is the City's fledgling effort to manage occupied buildings that have been abandoned by landlords. The use of that stock as a solution to the problem of providing decent housing for low- and moderate-income people can create a model for use by advocates in any urban area plagued by abandonment.

4. H. DeRienzo & J. Allen, *The New York City In Rem Housing Program: A Report 1* (New York Urban Coalition Jan. 1985).

5. *Making Affordable Housing a Reality: Hearing before the Subcomm. on Hous. and Community Dev. of the House Comm. on Banking, Finance and Urban Affairs, 98th Cong., 2d Sess. 237* (1984) (testimony of Pratt Inst. Center for Community and Entl. Dev. and the Center for Metropolitan Action at Queens College, CUNY) [hereinafter *Hearing*].

units lost.<sup>6</sup>

Although its pace may have slowed somewhat in recent years, abandonment continues to be a problem. Analysts have attributed the phenomenon to causes ranging from rent control<sup>7</sup> to the quest for "super profits."<sup>8</sup> The severity of abandonment in New York City is at least partly due to the flight of capital to the Sunbelt, the loss of working class jobs in the metropolitan area,<sup>9</sup> and a failure of tenants' real income to keep pace with rent increases.<sup>10</sup> Whatever the cause, the significant fact for the purpose of this article is that huge numbers of private landlords have simply walked away from their properties and from their roles as providers of housing for low-income New Yorkers.

A significant and growing portion of the population simply cannot pay rents at the level necessary to yield profits for landlords. Many of New York City's low-income tenants already pay more than they can afford; over 80% of households with annual incomes below \$12,500 spend more than 25% of their income on rent.<sup>11</sup> The low-income tenant population is growing. The proportion of the City's renter households receiving public assistance increased from 11% to 14.3% of the City's population between 1970 and 1984.<sup>12</sup> Between 1977 and 1983, the percentage of households below the poverty level increased from 22.5% to 27.1%.<sup>13</sup> There is a very concrete limit on the ability of many New York low-income tenants to pay rent. The almost 1 million recipients of public assistance in New York City are restricted to their shelter grant allocations and whatever else they can squeeze out of their meager<sup>14</sup> remaining public assistance grant by depriving themselves and their children of other

6. See Marcuse, *To Control Gentrification: Anti-displacement Zoning and Planning for Stable Residential Districts*, 13 N.Y.U. Rev. L. & Soc. Change 931 (1985).

7. See, e.g., *Rent Control Forever* (editorial), N.Y. Times, May 27, 1985, at A18, col. 1. Klein, *Our Children Need Housing*, Real Estate Weekly, Sept. 3, 1984, at 11, col. 1; Morris, *No Justification for Rent Control* (letter to the editor), N.Y.L.J., Aug. 23, 1984, at 2, col. 6.

8. See, e.g., P. Hawley, *Housing in the Public Domain: The Only Solution 25-30* (Metropolitan Council on Housing 1978) and Homefront, *Housing Abandonment in New York City* 17-32 (1979).

9. Homefront, *supra* note 8, at 2, 43.

10. H. DeRienzo & J. Allen, *supra* note 4, at 1.

11. M. Stegman, *Housing in New York: Study of A City—1984*, at 146 (New York City Department of Housing Preservation and Development Feb. 1985).

12. *Id.* at 63.

13. *Id.* at 61.

14. For a family of four, the current shelter grant is \$270 per month. 18 N.Y.C.R.R. § 352.3 (1984). The shelter allowance for families of other sizes is:

Household Size:	1	2	3	4	5	6	7	8 or more
Shelter Grant:	\$193	\$227	\$244	\$270	\$281	\$308	\$366	\$383

(with heat)

The remaining grant covering other expenses for households on public assistance is:

Household Size	1	2	3	4	5	6	Each Additional Person
Monthly Grant:	\$94	\$150	\$200	\$258	\$318	\$368	+\$50

18 N.Y.C.R.R. § 352.2 (1984).

necessities. The New York City Housing Authority meets the needs of some of these tenants by providing housing for over 500,000 people in 172,202 apartments.<sup>15</sup> But with a wait list of 170,000 families<sup>16</sup> and a waiting period of many years, public housing is merely part of the answer. The remaining forms of federal subsidies also fail to meet the need.<sup>17</sup>

Landlords in low-income neighborhoods have generally found it difficult to make a profit if they charge affordable rents while paying the full cost of running a building.<sup>18</sup> These landlords generally make their profits by renegeing on their obligations to pay management costs such as operation and maintenance, debt service, or real property taxes, while charging rents that are unrelated to the tenant's ability to pay. In low-income private housing, any sensible relationship between rent charged and affordability is, for the most part, purely coincidental.<sup>19</sup> One study done in Boston in the early 1970s estimated that nonpayment of various management costs could allow a landlord to increase profits from 15.4% to 76%.<sup>20</sup>

This trend of abandonment by the private sector has been followed by massive public takeover of tax delinquent property. The notion of public landlordship is not new,<sup>21</sup> nor is the conclusion that the private sector, if left to its own resources, will not solve the problem of abandonment.<sup>22</sup> As of 1976, the City could not take over property until the landlord was three years in arrears. Implementation of the City's vesting law in fact took far longer than the minimum three years.<sup>23</sup> At that time, the City managed few occupied buildings. In 1976, however, the law was amended to allow the vesting of multiple dwell-

15. R. Metcalf, *Fifty Years of Public Housing: The Achievement and the Challenge* 1 (New York City Housing Authority Mar. 1984).

16. H. DeRienzo & J. Allen, *supra* note 4, at 40.

17. The largest of these programs, the Section 8 leased housing program (Section 8 of the revised Housing Act of 1937, 42 U.S.C. § 1437f), also administered by the New York City Housing Authority, provides benefits to approximately 100,000 people in 38,200 apartments in New York City. R. Metcalf, *supra* note 15, at 1.

18. See A. Downs, *Rental Housing in the 1980s*, at 3 (The Brookings Institution 1983).

19. Low-income tenants in "undesirable" neighborhoods, however, are able to impose limited market-style pressure on landlords. Rents in inner-city neighborhoods, while often higher than tenants can afford, may still not be as high as a landlord might theoretically be able to charge under New York City's Rent Control and Rent and Rent Stabilization Laws, New York, N.Y., Administrative Code, tit. Y, §§ Y51-1.0 et seq., and §§ YY51-1.0 et seq. (1984). This is due to the simple reason that there is a rent level beyond which slum landlords would not be able to keep tenants at all because poor people would find it impossible to pay the rents.

20. *People Before Property* 139-40 (The Community Research and Publications Group 1972). These figures do not refer to a particular building, but are "fairly typical" of the Boston market at that time. *Id.* at 139; see also P. Hawley, *supra* note 8, at 26.

21. See *New York City Hous. Auth. v. Muller*, 270 N.Y. 333, 1 N.E.2d 153 (1936); cf. F. Engels, *The Housing Question* (2d ed. 4th printing 1975) (Engels, writing in 1872, argued that the "housing question" could never be solved through private ownership).

22. *New York City Hous. Auth.*, *supra* note 21, at 341-42, 1 N.E.2d at 155; see also Note, *Low Income Co-ops: A Solution to Abandonment*, 17 N.Y.L.F. 149 (1971).

23. Reynolds, *Neighborhoods Pay the Price of Slower Tax Foreclosures*, *City Limits*, Jan. 1984, at 5.

ings after one year (or four tax quarters) of arrears.<sup>24</sup> This change was designed to preserve the low-income housing stock and to encourage payment of real property taxes.<sup>25</sup> Soon after the enactment of the new vesting law, the City's takeover of property for tax arrears rapidly accelerated. By September of 1979 the City's inventory of *in rem* housing consisted of 4,092 occupied residential buildings with 34,880 occupied units.<sup>26</sup> The inventory grew to 38,677 occupied units in fiscal year 1983,<sup>27</sup> and to 5,100 occupied buildings with 48,000 occupied apartments in February 1985.<sup>28</sup>

The passage of the new vesting law and the expansion of the City's *in rem* inventory prompted the realization that the management of *in rem* properties was a housing function rather than a tax function. Local Law 3 of 1978<sup>29</sup> transferred responsibility for the management of occupied *in rem* properties from the Department of General Services (then called the Department of Real Estate (DRE)) to the newly created Department of Housing Preservation and Development (HPD) (formerly the Housing Development Administration). HPD assumed responsibility for the management of these City-owned residential properties on September 1, 1978.<sup>30</sup> While the DRE's policy had been to sell *in rem* properties to the highest bidder, HPD undertook an "interim management" approach designed to preserve and upgrade *in rem* buildings.<sup>31</sup>

#### A. *The In Rem Housing Stock*

By the time residential buildings are transferred to City ownership through *in rem* tax foreclosures, they are among the most deteriorated housing stock in the City.<sup>32</sup> The 1981 housing and vacancy study shows that *in rem* housing is in much poorer condition than New York City's other rental housing. Compared to other rental housing in the City, *in rem* housing is

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24. New York, N.Y., Administrative Code tit. D, § D17-4.0 (1984), amended by Local Law 45 of 1976; see also *Sonmax, Inc. v. City of New York*, 43 N.Y.2d 253, 372 N.E.2d 9, 401 N.Y.S.2d 173 (1977) (landlord unsuccessfully challenged the shorter vesting period on constitutional grounds).

25. Dep't of Housing Preservation and Development of the City of New York, *The In Rem Housing Program*, Third Annual Report 32 (1981). Another factor in the City's decision to shorten the vesting period and accelerate foreclosures was the criticism of the City's accounting practices during the fiscal crisis. The debt ceiling for New York City's borrowing was based on anticipated revenue which included uncollected and in fact uncollectable real property taxes. The City exacerbated the crisis and increased its debt burden by borrowing against anticipated revenue that would never be realized. See Homefront, *supra* note 8, at 66-68.

26. Dep't of Housing Preservation and Development of the City of New York, *The In Rem Housing Program*, First Annual Report 13 (1979) [hereinafter *In Rem Housing Program*, First Annual Report].

27. Dep't of Housing Preservation and Development of the City of New York, *The In Rem Housing Program*, Fifth Annual Report 33, 34 (1983) [hereinafter *In Rem Housing Program*, Fifth Annual Report].

28. Failure of Plan for Homeless Reflects City Housing Crisis, *N.Y. Times*, Feb. 19, 1985, at B5, col. 1.

29. New York, N.Y., Charter § 1802.8 (1984).

30. *The In Rem Housing Program*, First Annual Report, *supra* note 26, at 2.

31. *Id.* at ii.

32. *Id.* at 1.

much more likely to be located in economically distressed neighborhoods.<sup>33</sup> More often than private rental housing, *in rem* buildings are dilapidated, rodent-infested, lacking in heat, and full of cracks and holes in the walls, ceilings, and floors.<sup>34</sup> The deterioration which inevitably accompanies abandonment and disinvestment is further exacerbated by the City's delay in vesting vacant buildings.<sup>35</sup>

### B. In Rem Tenants

On the whole, *in rem* tenants are people with the least resources and the fewest options. They are people who suffer the greatest discrimination in our society. They have a lower median family income than other tenants in New York City.<sup>36</sup> More of them receive public assistance relative to all renters.<sup>37</sup> Most *in rem* tenant families who do receive public assistance pay a higher portion of their income for rent than other renters.<sup>38</sup> Eighty-four percent of *in rem* tenants are minorities, while minorities comprise only 46.5% of the total

33. The In Rem Housing Program, Fifth Annual Report, *supra* note 27, at 5.

34. A chart comparing conditions in *in rem* housing with all rental housing in New York follows:

CONDITION OF IN REM AND ALL RENTER HOUSING UNITS,  
NEW YORK CITY, 1984

<u>Housing Condition:</u>	<u>All renter (%)</u>	<u>In rem (%)</u>
Dilapidated	3.4	16.5
Maintenance Deficiencies		
1 or more	57.5	78.0
3 or more	20.5	49.0
Additional heating needed	26.5	41.5
Heat breakdown 4 or more times	12.3	29.1
Cracks in walls/ceilings	23.9	45.2
Holes in floors	10.8	32.0
Broken plaster	16.6	25.7
Rodents	28.9	58.7

U.S. Bureau of the Census, New York City Housing and Vacancy Surveys (1984) (cited in M. Stegman, *supra* note 11, at 232).

35. In Rem Housing Program, First Annual Report, *supra* note 26, at 1.

36. "The 1983 median income of households who occupied *in rem* housing was \$8,215, two-thirds the median income for all renters." M. Stegman, *supra* note 11, at 233.

37. Thirty-seven percent of *in rem* tenants receive public assistance, compared to 14% of all renters. *Id.* at 63, 265.

38. *Id.* at 235.

renter population.<sup>39</sup> In contrast to private rental households, a higher percentage of *in rem* households are headed by females with dependent children.<sup>40</sup> *In rem* tenants receive less education than the average New Yorker. The estimated City-wide high school dropout rate is 42%, while the dropout rate for *in rem* tenants is 60%.<sup>41</sup>

*In rem* tenants are also distinguished by the fact that they have no place else to go. Because of their poverty, their minority status, and the low vacancy rate in New York City's rental housing, *in rem* tenants have virtually no alternatives for shelter. In 1984, New York City had an extremely low vacancy rate of 2.04%.<sup>42</sup> For low-income New Yorkers seeking decent housing, however, the vacancy rate is in reality less than zero. The need for decent, permanent shelter exceeds the supply.<sup>43</sup> *In rem* tenants, in practical terms, are trapped where they are.

### C. The City's In Rem Program

HPD's management scheme for *in rem* housing operates on two separate

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39. SELECTED CHARACTERISTICS OF HOUSEHOLDS IN IN REM RENTAL HOUSING AND ALL RENTAL UNITS, NEW YORK CITY, 1984

<u>Racial/Ethnic Origin of Household Head</u>	<u>In rem (%)</u>	<u>All renters (%)</u>
White	17.0	53.5
Black	50.6	24.4
Puerto Rican	25.6	13.0
Other	6.8	9.1
<u>Household characteristics</u>		
Female headed	59.5	N.A.
Single person	27.6	38.6
Household with at least 1 child	45.3	28.0

U.S. Bureau of the Census, New York Housing and Vacancy Survey (1984) (cited in M. Stegman, supra note 11, at 38, 233-35.)

40. M. Stegman, supra note 11, at 233. Presumably, Stegman's use of the term "female headed" means that there is no male in the household.

41. H. DeRienzo & J. Allen, supra note 4, at 48.

42. M. Stegman, supra note 11, at 3.

43. The crisis in housing availability for low income New Yorkers and its consequent effect on people's lives have been amply documented in a number of recent reports. See New York State Department of Social Services, 1 Homeless in New York: A Report to the Governor and the Legislature, at iii (Oct. 1984) [hereinafter Homeless in New York]. The total homeless population of New York State is between 40,000 and 50,000 people. The need for newly-built or substantially rehabilitated housing units throughout New York State is approximately 444,000. 2 Homeless in New York, supra, at 10; see also Office of the City Council President of New York, Children and the Housing Crisis: From No Home to Foster Home 5 (Oct. 1984) [hereinafter Children and the Housing Crisis] (Twenty percent of families with children in foster care are homeless); Citizens' Committee for Children of New York, 7,000 Homeless Children: The Crisis Continues 12 (Oct. 1984) ("[H]omelessness has its root in the low income population's inability to find affordable housing and the difficulty in holding onto and maintaining what little housing they do have."); Coalition for the Homeless, Cruel Brinkmanship: Planning for the Homeless - 1983, (Aug. 1982).

tracks. HPD's Office of Property Management (OPM), which oversees the entire *in rem* program, is divided into two main divisions: the Division of Property Management (known as "Central Management") and the Division of Alternative Management Programs (DAMP). Central Management is directly responsible for managing the bulk of the *in rem* properties (75%).<sup>44</sup>

Central Management, as its name implies, is a centralized bureaucracy that directly manages over 10,000 buildings from site offices in the Bronx, Brooklyn and Manhattan.<sup>45</sup>

DAMP, on the other hand, consists of several alternative programs through which HPD contracts with third parties or the tenants themselves for the management of *in rem* properties. DAMP was formed largely as a result of community pressure. Since its inception in 1978, DAMP has undergone several changes and reorganizations. New programs have been developed; other programs have been terminated. DAMP programs have involved contracts with people and entities in three separate categories: tenants, not-for-profit groups, and the private, for-profit real estate sector. The most innovative of the DAMP programs is the Tenant Interim Lease Program (TILP), under which HPD enters into leases with tenants' associations which then run their own buildings. Other not-for-profit DAMP programs include a Community Management Program (CMP), under which HPD contracts with neighborhood-based, not-for-profit groups to manage *in rem* buildings, and a 7-A Leasing Program, under which HPD contracts with court-appointed administrators<sup>46</sup> who had been overseeing the buildings at the time of foreclosure. In the category of for-profit management of *in rem* properties, DAMP has a Private Ownership and Management Program (POMP) under which HPD contracts with private real estate management firms to manage *in rem* buildings.

All DAMP programs are intended ultimately to result in a sale of the properties to private owners. In most programs the buildings are sold to the DAMP managers. DAMP expects that the buildings in TILP, and some of those in CMP, will be sold as tenant co-ops.<sup>47</sup>

As HPD's "sales track" program, DAMP has proportionately received the lion's share of the public funding directed towards the *in rem* program. A typical unit in DAMP receives an average of \$3,300 in public funding,<sup>48</sup> while a typical unit in Central Management only receives an average of \$511.43.<sup>49</sup>

44. H. DeRienzo & J. Allen, *supra* note 4, at 28.

45. *Id.* at 39.

46. These administrators are appointed under Article 7-A of the N.Y. Real Prop. Acts §§ 769-782 (McKinney 1979), a special proceeding which requires a court to appoint an administrator upon a finding that the landlord has not remedied conditions dangerous to the life, health or safety of the tenants. *Id.* at §§ 772-778. While the court appointment terminates upon the City's tax foreclosure on the property, arrangements are made under the 7-A leasing program for the administrator to continue to manage the building.

47. H. DeRienzo & J. Allen, *supra* note 4, at 28.

48. *Id.* at 43.

49. DeRienzo and Allen estimate a net public expenditure of \$17.9 million on the approxi-



Because they are targeted for sale and return to the tax rolls, the buildings that are selected for DAMP are in better condition than buildings in Central Management. Moreover, the tenants in the DAMP buildings are relatively better off than their counterparts in Central Management. Twenty-five percent of the tenants in DAMP rely on public assistance, as opposed to 50% of the tenants in Central Management.<sup>50</sup>

The projected total public expenditure for Central Management in 1985 is \$112.6 million.<sup>51</sup> Public funding for Central Management is split evenly between Community Development Block Grant money from the federal government and New York City tax dollars.<sup>52</sup> The fiscal year budget allocation for DAMP is \$33.39 million from a variety of sources.<sup>53</sup>

## II

### CITY POLICY TOWARD *IN REM* HOUSING — A CRITIQUE

City policy toward *in rem* housing has been at best ambivalent. Vacillating between the competing goals of increasing real property tax revenues and preserving low-income housing stock, City policy has tended to emphasize the former at the expense of the latter. The City's articulated policy has been to seek a return of *in rem* buildings to private ownership (and thereby to the tax rolls) as soon as possible.<sup>54</sup> *In rem* management is ostensibly an interim situation which exists pending the prompt resale of tax foreclosed property.<sup>55</sup> The articulated goal, preserving the low-income housing stock, has not resulted in adequate consideration of the long term needs of *in rem* tenants. Resources have generally been allocated according to formulas designed to accomplish the goal of building sales. The limited number of building sales and the worsening low-income housing situation, however, have had a sobering influence on City policy. In spite of its long resistance, the City has at least begun to consider both the cost of improvement of *in rem* housing conditions and long term management of occupied *in rem* properties.<sup>56</sup>

From the intake of *in rem* property to its management and disposition, City policy determinations generally work to frustrate the development of the

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mately 35,000 occupied units in Central Management. *Id.* at 39, 42. This amounts to \$511.43 per unit. Interestingly, TILP, the only DAMP program involving tenant self-management, gets less public money per unit than any of the other DAMP programs except the 7-A leasing program. *Id.* at 32.

50. *Id.* at 39.

51. *Id.* at 42.

52. *Id.*

53. *Id.* at 31. This figure represents the total of all the specific allocations set out by DeRienzo and Allen.

54. M. Stegman, *supra* note 11, at 227.

55. *In Rem Housing Program, First Annual Report, supra* note 26, at 1-2.

56. For example, the City recently estimated that it would cost \$150 million to make minimal rehabilitations in the *in rem* housing stock. A comprehensive rehabilitation program is under consideration. H. DeRienzo & J. Allen, *The New York City In Rem Housing Program, A Report 54* (Urban Coalition Sept. 1984) (draft). The City's hardship policy regarding rent increases provides another example. See text accompanying note 63 *infra*.

*in rem* stock as a permanent resource for low-income tenants. In spite of the statutory authorization allowing vesting after one year of tax arrears,<sup>57</sup> vestings still come about as slowly as they did before 1976, when the statutory vesting period was three years and actual vesting often did not take place for seven years.<sup>58</sup> The City's failure to take action to assure prompt vesting results in an extended period of abandonment during which buildings become far more deteriorated, underoccupied, and expensive to maintain.

Once it has achieved ownership of tax delinquent structures, the City has concentrated public funds in the sales track DAMP buildings, to the detriment of the Central Management buildings, where the majority of *in rem* tenants live. Moreover, to make *in rem* buildings more attractive to private owners, and to offset public expenses, the City has sought (although for the most part, has not obtained) large rent increases from *in rem* tenants who often were simply unable to afford them.<sup>59</sup> Other incentives the City has offered to purchasers of DAMP buildings have been assurances of tax exemptions in exchange for investments in the buildings, low interest loans and/or mortgages to purchasers and rent subsidies for low-income tenants.

In spite of a concentrated effort to gear the *in rem* program towards sale, the program has not effectuated the sale of many buildings. The City has sold only 271 buildings since sales began in 1980.<sup>60</sup> In fiscal year 1982, the City sold only 112 buildings.<sup>61</sup> In fiscal year 1983, it sold only 104 buildings out of a stock of 10,000.<sup>62</sup> The City's inability to sell occupied *in rem* buildings in any sizeable quantity is a reflection of their lack of marketability. It has also forced the City to face its role as a long-term manager of *in rem* properties and to reevaluate its approach to the *in rem* stock. One reflection of this reevaluation is the City's decision to develop a hardship policy to protect certain tenants from unaffordable rent increases.<sup>63</sup>

The City's "consolidation" program is another component of its policy regarding allocation of resources among *in rem* buildings. Essentially a triage<sup>64</sup> operation, the consolidation program closes down buildings that the City finds too burdensome to operate. Tenants are moved out of deteriorated and underoccupied *in rem* buildings into other, theoretically more viable ones. The vacated buildings are then permanently closed. As a rule, buildings va-

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57. New York, N.Y., Administrative Code, tit. D, §§ D17-4.0. et seq. (1984); cf. New York, N.Y., Charter and Administrative Code § 415(1) - 58(0), a July 1984 amendment that allows the City to vest buildings individually as well as by an entire borough at a time.

58. H. DeRienzo & J. Allen, *supra* note 4, at 4.

59. See text accompanying note 83 *infra*.

60. In Rem Housing Program, Fifth Annual Report, *supra* note 27, at 37.

61. *Id.*

62. *Id.* at 27.

63. See text accompanying note 56 *supra* and notes 83-86 *infra*.

64. The concept of triage has its origins in the sorting of battle casualties into categories that determined who would be saved and who would be allowed to die. Application of such a policy to *in rem* housing is a particularly unfortunate approach. It is one thing to make drastic sacrifices as a result of the exigencies of war and quite another thing to do so with regard to critically needed housing in one of the richest countries in the world.

cated in this manner are ultimately lost as available resources. Consolidation is usually followed by vandalism, and ultimately, by demolition.

By fiscal year 1983, the consolidation program had resulted in the closing of more than 1900 buildings and the displacement of more than 7200 households.<sup>65</sup> While on the surface the notion of consolidation may appear reasonable because it is an effort to streamline an unwieldy operation, in reality it merely accelerates a day of reckoning by diminishing the low-income housing stock. Ultimately, if people are to be decently housed, the existing supply of low- and moderate-rent housing must be expanded.<sup>66</sup> The cost of building replacement low-income housing, estimated at approximately \$70,000 per unit,<sup>67</sup> far exceeds the cost of rehabilitating the average unit in a consolidated building.<sup>68</sup> Moreover, the remaining life span of most of the *in rem* housing stock will far exceed that of most newly constructed buildings. The bulk of the *in rem* housing stock was constructed in the 1920s and 1930s.<sup>69</sup> If well maintained, these solidly built buildings will last for years. Additionally, building abandonment creates a "domino effect"; the existence of vacant buildings on a given block justifies the closing of additional buildings by the City and can lead to further abandonment of nearby buildings by private landlords. Thus, consolidation contributes to neighborhood destruction and frustrates attempts to resolve the housing crisis.

On the whole, the City's *in rem* housing policy has consisted of attempts to apply patchwork, short term solutions to immense, long term problems. The City has concentrated its resources in a relatively small portion of the *in rem* stock with the intention of returning it to private ownership. This priority has resulted in tenant displacement and a reduction of the remainder of the *in rem* stock. The City has neglected the needs of *in rem* tenants and the homeless. There are up to 53,000 vacant *in rem* housing units that could be used to provide additional low-income housing.<sup>70</sup> Yet the City's efforts to repair vacant units in *in rem* buildings to house the homeless have been minimal.<sup>71</sup>

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65. In Rem Housing Program, Fifth Annual Report, *supra* note 27, at 40.

66. Hearing, *supra* note 5, at 7-8.

67. Interview with Roy Metcalf, Deputy Director of Public Information, New York City Housing Authority (June 28, 1985); cf. Dep't of Housing and Urban Development, Prototype Cost Determinations Issued Under the United States Housing Act of 1937, 4A Fed. Reg. 47,776 (1984), which limits the cost of a three bedroom public housing apartment in an elevator operated structure to \$67,350.

68. Children and the Housing Crisis, *supra* note 43, at 16.

69. M. Stegman, *The Dynamics of Rental Housing in New York City* 22 (1982).

70. M. Stegman, *supra* note 11, at 227.

71. Children and the Housing Crisis, *supra* note 43, at 16. Ironically, in response to the homelessness crisis, the City established an unwritten policy in 1983 to rent vacant units in *in rem* buildings exclusively to the homeless. Yet, according to City Council President Bellamy, while hundreds of millions of dollars have been spent on temporary shelter for the homeless, relatively little has been spent to rehabilitate vacant *in rem* units. *Id.*

## III

ADVOCACY STRATEGIES FOR *IN REM* HOUSING

A confluence of factors makes the time ripe for advocates to press the public sector to assume accountability for *in rem* tenants. The daily newspapers are constantly filled with the issue of homelessness. A sense of urgency pervades the media. Increasingly, the public is coming to realize that solutions to the housing crisis must be found, and that these solutions must involve permanent housing, not merely temporary shelter. There is a growing consensus that the solutions must come from the public sector, and that the housing crisis is a social problem in which government has an essential role.<sup>72</sup> Moreover, in increasing numbers, *in rem* tenants are organizing, taking a stand and demanding that the City become accountable.<sup>73</sup> These tenants realize that they have no place to go. The very existence of an enormous stock of *in rem* housing of which the City has no foreseeable means to divest itself demands that the problem be addressed immediately.

A concentrated advocacy effort on the political, legislative, and legal fronts can help shape City policy and assist in the establishment of *in rem* housing as a permanent, affordable resource for low-income people. Advocates have at their disposal a wide variety of tactics ranging from direct action on the grass roots level to litigation designed to address issues in both an affirmative and a defensive manner. Advocates can also pursue legislative efforts on the municipal, state, and federal levels. Pressure brought to bear on the City at each stage of the *in rem* process—from the vesting of *in rem* buildings to their management by the City to their ultimate disposition—can profoundly affect the availability of housing in New York City.

A. *At the Intake Stage*

At the very start of the process, the City must hasten the vesting of *in rem* buildings in order to protect the low-income housing stock from the ravages of abandonment. The City must vest buildings as soon as it has the authority to do so—after one year of arrears, not after three to seven years.<sup>74</sup> Moreover,

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72. See, e.g., Klein, *supra* note 4, at 11, col.1. (Klein, President of the N-7 Realty Owners Association, argues for “funds through bonding which can be used to do massive rehabilitation and renovation work . . . .”); see also United States Conference of Mayors, *Housing Needs and Conditions in America's Cities: A Survey of the Nation's Principal Cities 2* (June 1984) (eighty-nine percent of the municipalities surveyed responded that the private sector could not meet local housing needs absent housing subsidies).

73. One organization, the Union of City Tenants (UCT), is a grass roots union of tenants who live in *in rem* housing. UCT is a growing union devoted to advocating the rights of *in rem* tenants. Metropolitan Council on Housing, the largest and oldest New York City-wide tenant organization, has also made the issue of *in rem* housing an important focus of its work, as has the Association for Neighborhood and Housing Development (ANHD), an umbrella organization for community development groups that has taken leadership in policy analysis and advocacy regarding *in rem* issues.

74. Of additional use in the fight to halt abandonment is the City's recently acquired authority to vest individual buildings. See note 57 and accompanying text *supra*.

the City must make housing code enforcement a priority, and undertake a serious, comprehensive effort to compel landlords to maintain habitable properties.<sup>75</sup> Such an effort, it may be argued, is ill-advised because it will drive marginal landlords out of business by forcing them to choose between paying taxes or making repairs. This is, in fact, the rationale for a selective approach to code enforcement on the part of HPD.<sup>76</sup> Yet, if the City is ever to make a serious commitment to guaranteeing decent housing, its policies will inevitably have the effect of driving some marginal landlords out of business. Ideally, this would happen in time to salvage deteriorating properties and preserve them as resources for low-income tenants.

### B. During City Management

Once these properties come under City ownership, advocacy efforts are needed to achieve improvements in at least six different areas: quality, affordability, stability, tenant control, institutionalization, and budget.

#### I. Quality

The City has a legal obligation, which all too often goes unheeded, to keep its *in rem* properties in good repair.<sup>77</sup> To its credit, the City has made progress in improving its abysmal performance in providing services and repairs.<sup>78</sup> In 1980, for example, the median time required for HPD to restore heat to a building was 14 days. By 1983 it was 2.4 days.<sup>79</sup> Yet *in rem* tenants, and advocates working with them, must continue to insist that their housing be made truly liveable.<sup>80</sup>

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75. One way to aid in effective code enforcement would be to bar landlords from instituting eviction proceedings if they have *any* outstanding code violations.

76. HPD's Division of Code Enforcement is charged with the responsibility of enforcing the housing maintenance code. New York, N.Y., Charter § 1802.1 (Supp. 1984-1985).

77. See N.Y. Real Prop. Law § 235-b (McKinney 1984); see also *City of New York v. Rodriguez*, 117 Misc. 2d 986, 461 N.Y.S.2d 149 (1983). The city's obligation under RPL § 235-b to warrant the habitability of *in rem* housing was recently reaffirmed in *Dep't of Hous. Preservation and Dev. of New York v. Sartor*, N.Y.L.J., March 25, 1985, at 6, col. 3 (N.Y. App. Div. 1985), in which the Court held: "It is clear from the unequivocal language of the statute, and the broad application of its protective mantle by the cases which have applied it, that 235-b excludes no residential tenant and includes all persons and entities as 'landlords.'" *Id.* The *Sartor* court rejected the argument articulated in a recent commentary on *Rodriguez* that the warranty of habitability does not apply to *in rem* housing. See, Comment, *The Warranty of Habitability as Applied to New York City In Rem Housing: A Premature Promise*, 50 Brooklyn L. Rev. 1103 (1984). As the *Sartor* court pointed out, "[w]hile superficially appealing, this position discriminates basically against lower-income tenants. It would, in effect, force these tenants not only to subsidize the cost of their housing (which appears fair) but also to pay for housing which they are not receiving." N.Y.L.J., March 25, 1985, at 6, col 2.

The *Sartor* court's rejection of this argument is a significant condemnation of the callous disregard for the needs of *in rem* tenants that has all too frequently prevailed among those with decision-making power.

78. *In Rem Housing Program: Fifth Annual Report*, *supra* note 27, at 23-24

79. *Id.* at 24.

80. For a discussion of the condition of *in rem* housing as compared to other rental housing, see text accompanying note 34 *supra*.

## 2. *Affordability*

*In rem* buildings must be kept affordable, and where necessary, made affordable for *in rem* tenants.<sup>81</sup> The City concedes that *in rem* housing is in fact the last resort for much of its low-income tenant population.<sup>82</sup> To charge *in rem* tenants unaffordable rents is to relegate them to the streets, an option the City cannot be allowed to take. Vigorous advocacy has produced progress in this area as well—most notably the “hardship” policy for tenants in Central Management that allows them to pay no more than 30% of their income for rent.<sup>83</sup> This restriction applies across the board for Central Management tenants because the City does not attempt to sell Central Management buildings. There is also a hardship provision for certain tenants in DAMP buildings.<sup>84</sup> The protected categories are: 1) tenants who are eligible for rent subsidies under the federal government Section 8 program,<sup>85</sup> and 2) tenants who are senior citizens who would be eligible for a rent increase exemption under the City’s Senior Citizen Rent Increase Exemption (SCRIE) program if they did not live in a City-owned building.<sup>86</sup> DAMP tenants are not given across-the-board protection from unaffordable rents because rents are set in order to assure that these buildings, which are slated to become privately owned, produce an income flow large enough to make them economically self-sufficient.<sup>87</sup> The condition of the buildings is thus given priority over the tenants’ needs for affordable rents and their ability to remain in their homes regardless of their income.

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81. City owned buildings are exempt from New York City’s Rent Control and Rent Stabilization Laws. New York, N.Y., Administrative Code, tit. Y, §§ Y51 - 3.0 (e)(2)(f), and YY51-3.0(a)(1)(9) (1984).

82. In Rem Housing Program, First Annual Report, *supra* note 26, at 1.

83. At present, the only place this policy can be found in writing is in affidavits submitted by HPD during litigation. See *Laureano v. Koch*, 116 Misc. 2d 287, 254 N.Y.S.2d 956 (Sup. Ct. 1982), modified, 100 A.D.2d 192, 473 N.Y.S.2d 445 (1st Dep’t 1984), rev’d, N.Y.L.J., Apr. 1, 1985, at 4, col. 1, amended, N.Y.L.J., June 6, 1985, at 5, col 3 (N.Y. 1985). Paragraph 12 of the affidavit of William Terry Krueger provides that:

If the rent established at title vesting creates a financial hardship and is beyond what the tenant can demonstrate that he can pay, then central management [sic] will rollback the rent to an affordable level upon the submission of proper income verification. Welfare recipients will not be required to pay over the maximum rental level established by the Department of Social Services and tenants on fixed incomes are eligible for rent reduction so that their rents do not exceed 25-33% of their income. Further, central management [sic] will honor any existing subsidy or exemption, e.g., senior citizen rent increase exemption. The burden is on the tenant, however, to produce the proper documentation indicating eligibility for a rent reduction.

84. HPD Rules and Regulations for Rent Setting and Rent Increases to tenants in occupancy in Division of Alternative Management Program Building, § 7 of which sets forth a hardship policy for tenants in DAMP buildings.

85. See note 17 *supra*.

86. New York, N.Y., Administrative Code, tit. Y, §§ Y51-5.0, YY51-4.1.1, and YYY51-1.0-14.0 (1984).

87. Upon return to private ownership, dwelling units that had been rent controlled or rent stabilized prior to *in rem* foreclosure become “subject to [the] rent stabilization law . . . at the last rent charged by the city on behalf of the city.” New York City Administrative Code, tit. Y, § YY51-3.3a (1984).

### 3. *Stability*

The City must guarantee stability in the *in rem* program. Forced displacement, as a result of neglect, mismanagement, unaffordable rent increases, consolidation, or any other cause cannot be part of the City's approach to *in rem* housing. The scarred and ravaged communities in which *in rem* housing is concentrated must be given the opportunity and the resources to rebuild.

### 4. *Tenant Control*

Tenants in *in rem* housing must be given the opportunity to have some meaningful control over the decisions which affect their shelter and their lives. Tenants must be involved in decision making about every facet of *in rem* management, including who manages the building, what rent levels are set, how fellow tenants are screened, and whether buildings are sold. Only with meaningful control will tenants remain committed to the preservation of their buildings and their neighborhoods.

### 5. *Institutionalization*

A less concrete but equally important advocacy goal for *in rem* management is the institutionalization of the notion of *in rem* housing as a permanent resource for low-income tenants. Advocates must insist that the *in rem* program be the vehicle by which the municipal government fulfills its obligation to assure that low-income people have decent, affordable shelter. They must establish that the *in rem* program is a viable, long term solution, not merely a temporary interval before the return of housing stock to a private sector unable to provide low-income people with decent housing.

Here, as well, the City has made progress. It has promulgated regulations formalizing the procedures for increasing rent in DAMP housing.<sup>88</sup> These regulations give tenants a means to prevent the City from taking wholly arbitrary action and lend consistency to the program.<sup>89</sup> Moreover, the City is contemplating a major investment in the upgrading of the *in rem* stock.<sup>90</sup> Such improvements would alleviate *in rem* tenants' frustration and the overall sense of imminent decay. They would also involve the City in a more meaningful, long term commitment to *in rem* housing.

### 6. *Budget*

Underlying all of the above concerns is the need for more money to make the *in rem* program succeed. Unless the City makes a financial commitment to upgrade the occupied *in rem* housing stock, repair and rent vacant apart-

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88. See HPD regulations, *supra* note 84.

89. The regulations require advance notice of proposed increases, including a detailed budget. This enables tenants to evaluate whether the costs alleged are accurately calculated and necessary. Hardship provisions protect some tenants from unaffordable rent increases.

90. See note 17 *supra*.

ments, and keep rents affordable to low-income tenants, *in rem* tenants are destined to join the legions of the homeless. Advocates must, therefore, seek and support measures to increase allocations for the *in rem* program.

### C. *At Disposition*

At disposition, the last stage of the City's involvement in *in rem* housing, there are two important tasks for advocates—fighting the closing of buildings, and fighting the sale of *in rem* buildings to the for-profit sector. Under the “consolidation” program, the City closes buildings in an arbitrary, standardless manner with no community input. Only when building conditions pose a real danger to the lives, health, or safety of the tenants should tenants be required to move. Even under such circumstances, repairs should be made immediately and displaced tenants should be given a right to return. Only under the most exceptional circumstances—where basic structural defects are so extensive that the cost of repairs approaches the cost of replacement—should a building be permanently closed. Displaced tenants must then be guaranteed permanent, decent, affordable shelter within the same community.

The disposition of *in rem* buildings through sale to the private, for-profit sector must also be resisted. It is a given that public funds (in the form of public assistance shelter grants and/or other public subsidies such as those under the Section 8 program<sup>91</sup>) are necessary to support a building that houses low-income tenants. Because a private owner must pay debt service, property taxes, operation and maintenance costs, and still show a profit, the cost of supporting a private owner far exceeds the cost of operating a building under public ownership.<sup>92</sup> Such private subsidies could save only a limited number of *in rem* buildings, and represent a misallocation of limited resources.

In sum, advocacy efforts must address a wide range of problems in each phase of the City's *in rem* program if the program is to become a viable resource for low-income housing. Able organizers, housing theoreticians, and *in rem* tenants themselves are spending a considerable amount of time and energy developing political and legislative strategies to address the issues set forth above. Lawyers and legal workers can play an important role in developing legal theories to be used offensively and defensively to establish and protect the rights of *in rem* tenants, and to make *in rem* housing a permanent, affordable, and viable resource. A description of several possible theories follows.

## IV

### LEGAL THEORIES IN SUPPORT OF *IN REM* TENANTS

At present, there is a very limited body of case law addressing the rights of *in rem* tenants.<sup>93</sup> Yet a number of legal arguments in a variety of contexts

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91. H. DeRienzo & J. Allen, *supra* note 4, at 43.

92. See *America's Housing Crisis: What is to be Done?*, *supra* note 2, at 4.

93. See notes 94-115 and accompanying text *infra*.



are available to support the substantive and procedural rights of *in rem* tenants.

### A. Due Process

Perhaps as a reflection of the societal disadvantages of *in rem* tenants, perhaps as a result of confusion within HPD, policies and standards regarding *in rem* housing have been developed and changed on an ad hoc basis. *In rem* policies are formulated with no public input. Tenants are evicted, buildings are closed, and rent increases are effected in the total absence of written guidelines, ascertainable standards, or standardized procedures. These actions have the force of law. Yet case law exists for the proposition that when the government acts as landlord, it may not act arbitrarily. In *Fuller v. Urstadt*,<sup>94</sup> the New York Court of Appeals held that tenants who had the state as their landlord were "entitled to the same treatment as other individuals who [were] the direct subjects of state action, namely, the assurance . . . that the state had not acted arbitrarily or capriciously."<sup>95</sup>

Federal level court decisions also support the notion that due process requirements circumscribe the actions of a governmental body acting in the capacity of landlord. Justice Douglas, concurring in *Thorpe v. Housing Authority of the City of Durham*,<sup>96</sup> summarized the case law as follows:

Over and over again we have stressed that "the nature and the theory of our institutions or government, the principles upon which they are supposed to rest . . . do not mean to leave room for the play and action of purely personal and arbitrary power" and that the essence of due process is the "protection of the individual against arbitrary action." Any suggestion to the contrary "resembles the philosophy of feudal tenure." It is not dispositive to maintain that a private landlord might terminate a lease at his pleasure. For this is government we are dealing with, and the actions of government are circumscribed by the Bill of Rights and the Fourteenth Amendment.<sup>97</sup>

Even the supposedly transitory nature of the City's ownership does not relieve the City of its due process obligations to *in rem* tenants.<sup>98</sup> When the

94. 28 N.Y.2d 315, 321 N.Y.S.2d 601 (1971).

95. *Id.* at 318, 321 N.Y.S.2d at 603; see also *Vinson v. Greenburgh Hous. Auth.*, 29 A.D.2d 338, 341, 288 N.Y.S.2d 159, 163 (2d Dep't 1968), *aff'd* 27 N.Y.2d 675, 314 N.Y.S.2d 1 (1970) ("Once a State embarks into the area of housing as a function of government, necessarily that function, like other governmental functions, is subject to the constitutional commands . . . . The government as landlord is still the Government. It must not act arbitrarily, for, unlike private landlords, it is subject to the requirements of due process of law.")

96. 386 U.S. 670 (1967).

97. *Id.* at 678 (citations omitted).

98. *Johnson v. White Plains Urban Renewal Agency*, 65 Misc. 2d 293, 294, 317 N.Y.S.2d 899, 900-01 (Sup. Ct. 1971).

City acts in its governmental capacity in the housing area, it is subject to constitutional requirements.

To avoid acting arbitrarily, the City as landlord must comply with two basic requirements. First, ascertainable standards must govern the relationship between the City and its tenants.<sup>99</sup> Second, procedures must be established for determining whether the standards are being appropriately applied.<sup>100</sup> The City has consistently violated both of these requirements by failing to develop and implement ascertainable standards in virtually all aspects of its *in rem* operation. The only exceptions are the procedures governing rent increases for tenants in DAMP buildings that resulted from litigation and advocacy on the part of *in rem* tenants.<sup>101</sup> Pressure on the City to provide *in rem* tenants with adequate due process in appropriate contexts has not only the practical value of establishing a more rational and reasonable program, but also the added value of forcing the City to treat *in rem* tenants with a modicum of respect in spite of their generally disadvantaged status.

### B. New York City Charter

Another potentially useful legal tool in compelling the City to establish ascertainable standards is section 1105 of the New York City Charter. Section 1105-b requires all rules and regulations of City agencies to be promulgated in accordance with its notice and comment provisions.<sup>102</sup> The City cannot defend its program by claiming that it has standards unless it meets these requirements.

Although the New York City Charter contains no definition of the word "rule," cases and statutes at both the state and federal level have interpreted this term. In a landmark case, the New York State Court of Appeals defined "rule" as "any kind of legislative or quasi-legislative norm or procedure which

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99. See *Holmes v. New York City Hous. Auth.*, 398 F.2d 262, 265 (2d Cir. 1968), *Williams v. White Plains Hous. Auth.*, 62 Misc. 2d 613, 617, 309 N.Y.S.2d 454, 459 (Sup. Ct. 1970).

100. See *Escalera v. New York City Hous. Auth.*, 425 F.2d 853, 861 (2d Cir.), cert. denied, 400 U.S. 853 (1970); *Fuller*, 28 N.Y.2d at 318, 321 N.Y.S.2d at 603; *Johnson*, 65 Misc. 2d at 295, 317 N.Y.S.2d at 901-02; *Williams*, 65 Misc. 2d at 617, 309 N.Y.S.2d at 459.

101. See *Laureano*, 116 Misc. 2d 287, 254 N.Y.S.2d 956 (Sup. Ct. 1982), modified, 100 A.D.2d 192, 473 N.Y.S.2d 445 (1st Dep't 1984), rev'd, N.Y.L.J., Apr. 1, 1985, at 4, col. 1, amended, N.Y.L.J., June 6, 1985, at 5, col. 3 (N.Y. 1985).

102. New York, N.Y., Charter § 1105-b (Supp. 1984-1985) provides that:

No rule or regulation of an officer of the city or of a city agency, including but not limited to those with respect to the fixing of charges or penalties, nor an amendment or addition thereto, shall be adopted or repealed pursuant to any provision of this charter, unless, prior thereto, there shall be afforded by such officer or agency an opportunity for interested persons to comment in writing thereon by a date certain to be specified in a notice published at least twice in the City Record, the first publication being not more than ten or less than five days preceeding the date so specified. The notice shall set forth the text and an explanation of the rule, regulation, amendment or addition and the authority pursuant to which it is proposed to be adopted or repealed. Such publication in the City Record shall constitute complete legal notice.

establishes a pattern or course of conduct for the future.”<sup>103</sup> Many City actions involving the management of *in rem* properties fall under this definition, including decisions as to assignment of particular programs, rent setting, and standards for eviction and consolidation.<sup>104</sup>

In the rent context, the City's obligation to publish the standards by which it sets rents has been acknowledged. The Court of Appeals recently reversed a decision of the New York State Supreme Court, Appellate Division, First Department, which held without explanation that rent setting procedures need not be published according to section 1105.<sup>105</sup> In its reversal, the Court of Appeals held that the publication issue was moot because the City had published regulations.<sup>106</sup> Although the Court of Appeals has not addressed the merits of the section 1105 argument, section 1105-b can be a useful tool for advocates in eviction and consolidation, as well as rent increase contexts.

The City Charter's mandate that rules or regulations be promulgated does not guarantee that the substance of those rules sufficiently protects *in rem* tenants. However, by giving *in rem* tenants and advocates working on their behalf an opportunity to have input into the substance of the rules, the promulgation process at least provides a vehicle to influence City policy. Moreover, the existence of established, written rules in itself can have a stabilizing effect on the administration of the *in rem* program.

### C. Uniform Land Use and Review Procedures

Ideally, decisions as to disposition of City-owned property should be subjected to the provisions of the City's Uniform Land Use and Review Procedure (ULURP).<sup>107</sup> This process requires review by the local community planning board in the community where the building is located, and an application to the City Planning Commission. Disposition by sale is currently subjected to this procedure. Disposition by "consolidation," or closing up of an *in rem* building is not. Failure to observe this procedure at the consolidation stage is arguably a violation of ULURP. More than a mere technical obstacle to place in the City's path, ULURP provides the only mechanism for involving communities in basic decisions affecting their future. Because of its de-

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103. *People v. Cull*, 10 N.Y.2d 123, 126, 176 N.E.2d 495, 497, 218 N.Y.S.2d 38, 40 (1961); cf. Administrative Procedure Act (APA), 5 U.S.C. § 551(4) (1982); N.Y.A.P.A. § 102.2 (McKinney 1984).

104. Cf. *Dubendorf v. New York State Educ. Dep't*, 97 Misc. 2d 382, 394-95, 412 N.Y.S.2d 260, 269 (Sup. Ct. 1978), modified on other grounds, 71 A.D.2d 837, 418 N.Y.S.2d 834 (App. Div. 1979) (procedures for setting tuition in the State University system held to be rules); *Yaretsky v. Blum*, 456 F. Supp. 653, 656 (S.D.N.Y. 1979) (memoranda designed to assist health facilities in determining patient placement held to be rules).

105. *Laureano v. Koch*, supra note 83.

106. *Id.*

107. New York, N.Y., Charter § 197-c (Supp. 1984-1985) and regulations promulgated thereunder.

structive effect on a neighborhood, consolidation should only occur after adequate notice to and consultation with the community.

#### D. Article 17 of the New York State Constitution

Article 17 of the New York State Constitution<sup>108</sup> provides another tool for advocates striving to establish substantive rights to decent shelter and guarantees against the displacement of *in rem* tenants. The State and its instrumentalities have an obligation under article 1, section 1 to provide for the needy. Although courts cannot necessarily dictate the particular level of benefits to be provided,<sup>109</sup> article 17 requires that, at a minimum, assistance for the needy not be withdrawn or denied arbitrarily. In fact, the New York State Court of Appeals has held that "Article XVII imposes upon the State an affirmative obligation to aid the needy."<sup>110</sup> In the context of *in rem* housing, article 17 provides a useful foundation from which to argue against displacement. This is especially true in light of the City's acknowledgment that the "*in rem* stock is the sole housing option for many poor families in New York."<sup>111</sup>

Advocacy must take place on still other fronts in order to establish and protect the rights of *in rem* tenants. These include: holding the City to its obligations under the Community Development Grant program<sup>112</sup> to spend its grant principally to benefit low-income persons; holding the City to its obligations under the State Environmental Quality Review Act<sup>113</sup> to ascertain the impact of *in rem* policies on the environment; asserting the constitutional right of low-income, predominantly minority *in rem* tenants to equal protection of the law; and holding the City to its obligation to warrant the habitability of *in rem* buildings.<sup>114</sup>

The more successfully lawyers and legal workers can develop and articulate legal theories that support *in rem* tenants in their broader struggle for survival, the sooner a real commitment to *in rem* housing as a viable long term resource will be won.

#### CONCLUSION

Instead of the final stage in the demise of low-income housing, *in rem* housing has the potential to be the foundation for a meaningful commitment

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108. N.Y. Const. art. XVII.

109. See *Bernstein v. Toia*, 43 N.Y.2d 437, 373 N.E.2d 238, 402 N.Y.S.2d 342 (1977); *RAM v. Blum*, 77 A.D.2d 278, 279, 432 N.Y.S.2d 892, 893 (App. Div. 1980).

110. *Tucker v. Toia*, 43 N.Y.2d 1, 4, 371 N.E.2d 449, 452, 400 N.Y.2d 728, 731 (1977); see also *Lee v. Smith*, 43 N.Y.2d 453, 460, 373 N.E.2d 247, 250, 402 N.Y.2d 351, 355 (1977).

111. *City of New York, Housing Assistance Plan: Federal Fiscal Year 1983*, at 2 (May 1983).

112. *Housing and Community Development Act*, U.S.C. §§ 5301 et seq. (1976) and regulations at 24 C.F.R. §§ 570, 301 et seq. (1985).

113. N.Y. Envtl. Conserv. Law §§ 8-0101 et. seq. (McKinney 1984).

114. N.Y. Real Prop. Law § 235-b (McKinney 1984).

on the part of government to guarantee decent, affordable housing to all, regardless of income.

The private sector has walked away from the provision of low-income housing. The numbers of poorly housed and homeless people are growing. Yet, if we are to be a decent society, everyone in the society must be able to have decent, affordable shelter. The intrinsic value of this principle is apparent.

The *in rem* phenomenon in New York City represents an important stage in the evolution of the government's role in assuring that everyone has decent shelter. Government's historic role as enforcer of housing standards and, later, as sometime provider of housing, is no longer adequate to the task. Government can and must make the quantum leap forward to accepting its role as the guarantor of decent, affordable housing. Unquestionably, there are major obstacles to overcome. The first is theoretical: a significant portion of the public and/or policymakers must accept the notion of meaningful public responsibility.<sup>115</sup> The second is practical: an entitlement to decent housing regardless of income will cost money. Resources must be reallocated to meet the housing need.<sup>116</sup>

These obstacles are not insurmountable; they do, however, require a reordering of governmental priorities. But governments are continually called upon to reorder priorities in the face of compelling human need. Here, the need is apparent and compelling, and the solution is an obvious extension of government's historic role with regard to housing. In 1936, when the first public housing project ever to be built in this country was challenged on constitutional grounds, the New York State Court of Appeals stated:

Whenever there arises, in the state, a condition of affairs holding a substantial menace to the public health, safety, or general welfare, it becomes the duty of the government to apply whatever power is necessary and appropriate to check it . . . .

The menace of slums in New York City has been long recognized as serious enough to warrant public action. The Session Laws

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115. This is certainly not unprecedented. For example, private unsubsidized rental housing has virtually faded away in Great Britain and subsidized housing is expanding. A. Downs, *supra* note 18, at 1.

116. For an analysis of available resources that could be applied to the development of *in rem* buildings as a permanent resource for low- and moderate-income housing, see Hearing, *supra* note 5, at 260-62.

In addition, real property tax delinquency has dropped significantly since the inception of the *in rem* management program under HPD in 1978. As a result of a lower delinquency rate, tax revenues collected in fiscal year 1981-82 were an estimated \$137 million over those collected in 1975-76. See H. DeRienzo & J. Allen, *supra* note 4, at 23. This is money that can and should be used for the *in rem* housing stock. DeRienzo and Allen estimate that an investment of \$70 million per year of the City's capital budget over a period of five years could restore the existing *in rem* stock to viability. *Id.* at 60-61. They add, "to put this amount [\$350 million] in perspective, the city has budgeted \$744 million for improvements to the City's parks over the same period." *Id.* at 61.

for nearly seventy years past are sprinkled with acts applying the taxing power and the police power in attempts to cure or check it. The slums still stand. The menace still exists . . . .

. . . Legislation merely restrictive in its nature has failed because the evil inheres not so much in this or that individual structure as in the character of a whole neighborhood of dilapidated and un-sanitary structures. To eliminate the inherent evil and to provide housing facilities at low cost—the two things necessarily go together—require large scale operations which can be carried out only where there is power to deal in invitum with the occasional greedy owner seeking excessive profit by holding out. *The cure is to be wrought, not through the regulated ownership of the individual, but through the ownership and operation by or under the direct control of the public itself.* Nor is there anything novel in that. The modern city functions in the public interest as proprietor and operator of many activities formerly and in some instances still carried on by private enterprise.<sup>117</sup>

Perhaps the quantum leap that must be taken is merely unfinished business.

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117. *New York City Hous. Auth. v. Muller*, supra note 21, at 339-40, 1 N.E.2d at 155 (1936) (emphasis added).