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Roberts v. Tishman Speyer Properties: A Source of False Hope for Low-Income Victims of Predatory Equity

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ROBERTS V. TISHMAN SPEYER PROPERTIES: A SOURCE OF FALSE HOPE FOR LOW-INCOME VICTIMS OF PREDATORY EQUITY

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INTRODUCTION

On the evening of October 16, 2006, the broker charged with selling Stuyvesant Town and Peter Cooper Village ("Stuy Town") called Rob Speyer of Tishman Speyer Properties.[1] The broker instructed Speyer to gather BlackRock Inc., Tishman Speyer's partner in its bid to buy Stuy Town, as well as his team of bankers and lawyers, and rush over to her office, entering the building in groups of two in order to remain

* J.D. Candidate, Brooklyn Law School, 2011; B.A. Bates College, 2004. I would like to thank my family for their ongoing support and encouragement. Thanks to Kathleen Christatos, Jill Wexler, Sarah Castle and Jon Sabin, as well as the entire *Journal of Law and Policy* staff, for their edits and assistance throughout the writing process. Finally, I owe a debt of gratitude to Marty Needelman and Joanne Koslofsky for introducing me to the world of New York City housing law and to Professor David Reiss, who generously offered me his time and invaluable insights.

[1] The specifics of this deal were originally reported by Charles V. Bagli in the New York *Times*. Charles V. Bagli, *Megadeal: Inside a New York Real Estate Coup*, N.Y. TIMES, Dec. 31, 2006, at B1, *available at* http://www.nytimes.com/2006/12/31/business/yourmoney/31speyer.html [hereinafter *Megadeal*]. Rob Speyer is the son of, and heir apparent to, Jerry Speyer, the CEO of Tishman Speyer Properties, a preeminent property developer and owner, and was the Tishman Speyer representative in charge of the deal. *Id.*; Charles DuBow, *The World's Biggest Real Estate Deal*, BUSINESS WEEK, Oct. 18, 2006, *available at* http://www.businessweek.com/bwdaily/dnflash/content/oct2006/db20061017_682643.htm?chan=top+news_top+news+index_businessweek+exclusives.

inconspicuous.[2] The next morning, the Tishman Speyer Properties and BlackRock Inc. partnership ("the Owners") completed the biggest real estate deal of all time, making a $400 million deposit on a $5.4 billion dollar deal for 110 buildings and 11,232 apartments on 80 acres of prime Manhattan land.[3] The deal attracted significant publicity.[4] The sale, forged at the apex of the housing boom, offered bidders a rare opportunity in Manhattan's tight real estate market: to acquire a huge number of apartments where rents were only a third to a half of market rates, thus leaving room for the owner to significantly increase the rent.[5] Across the city, Stuy Town tenants and tenant advocates feared the apartments would be rapidly removed from rent regulation, legally and illegally, because doing so would be the only possible way to ultimately turn a profit on the deal.[6]

The transaction represented a new breed of real estate deals, dubbed "predatory equity" transactions because the deals are backed by private equity.[7] Predatory equity means investing

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[2] *Megadeal*, *supra* note 1.

[3] DuBow, *supra* note 1. The record price before this $5.4 billion purchase had been approximately $1.9 billion, when Tishman Speyer purchased Rockefeller Center. *Id.*; *Megadeal*, *supra* note 1. There were eight other bidders who competed for the Stuy Town deal. *Megadeal*, *supra* note 1. A tenant coalition was one of the bidders, offering $4.5 billion and promising to preserve 20 percent of the units as rent-regulated rentals while selling 20 percent to tenants at below-market prices. *Id.*

[4] *Megadeal*, *supra* note 1. Some bidders believed the deal to be too big to sustain itself and warned that the overleveraged terms of the deal could haunt the Tishman Speyer/BlackRock partnership in the future. *Id.* Tenant activists, for their part, worried that the $500,000 per apartment purchase price would require the new owners to aggressively move to deregulate apartments and raise rents. *Id.* Both the critics' and the tenants' prophesies ultimately came true. *See* Lingling Wei & Craig Karmin, *An Apartment Complex Teeters*, WALL ST. J., Oct. 15, 2009, at M12, *available at* http://online.wsj.com/article/SB125547827547583747.html?mod=rss_Today's_Most_Popular.

[5] *Megadeal*, *supra* note 1.

[6] David Jones, *Predatory Equity*, HUFFINGTON POST, Sept. 17, 2009, http://www.huffingtonpost.com/david-jones/predatory-equity_b_289172.html.

[7] TOM WATERS & VICTOR BACH, CMTY. SERV. SOC'Y OF N.Y., CLOSING THE DOOR 2008: SUBSIDIZED HOUSING LOSSES IN A WEAKENED MARKET 9

equity to buy rental apartments at inflated prices with the intention of replacing low- and middle-income tenants with new tenants who can afford much higher rents, thus enabling the investors to earn large profits.[8] New York City's housing advocates and elected officials believe this speculative practice[9] threatens the city's affordable housing stock[10] and they have worked to oppose the practice.[11]In New York, predatory equity has already put vast numbers of apartments at risk of being removed from rent regulation protections. Ninety thousand units[12] of affordable, rent regulated housing have already been purchased by predatory equity purchasers and removing these

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(2008), http://www.cssny.org/userimages/downloads/CSS_Report_Closing TheDoor_08.pdf. Private equity firms essentially engage in leveraged buy-outs, using borrowed money to buy what they deem to be undervalued assets, improve the assets and sell them for profit. *See, e.g.*, Julie Creswell, *Profits for Buyout Firms as Company Debt Soared*, N.Y. TIMES, Oct. 4, 2009, at A1, *available at* http://www.nytimes.com/2009/10/05/business/economy/05 simmons.html.

[8] TOM WATERS, CMTY. SERV. SOC'Y OF N.Y., GETTING STARTED ON PREDATORY EQUITY RESEARCH IN YOUR CITY (2009), http://www.cssny. org/userimages/downloads/Getting%20Started%20on%20Predatory%20Equity %20Research%20in%20Your%20City%20May%202009.pdf.

[9] These deals are "speculative" because the purchase prices and mortgages of the apartments are based on what the rent rolls ultimately *might* be able to support, not what they currently support. *See infra* Part I.A.

[10] New York, as one of the few American cities that has a large amount of rent regulated apartments, provides investors with a unique opportunity to profit from the predatory model. Gretchen Morgenson, *Questions of Rent Tactics by Private Equity*, N.Y. TIMES, May 9, 2008, *available at* http://www.nytimes.com/2008/05/09/business/09rent.html?pagewanted=all. Rent regulated apartments make up 57 percent of Bronx apartments, 42 percent of Brooklyn apartments, 59 percent of Manhattan apartments, 43 percent of Queens apartments and 15 percent of Staten Island apartments. *Id.*

[11] WATERS & BACH, *supra* note 7, at 12, 33. On December 2, 2009, New York City announced the formation of a "Predatory Equity Task Force" to monitor issues related to the burst of the housing bubble as they arise and mobilize to protect tenants when necessary. Press Release, N.Y. City Council, Council Announces New Predatory Equity Task Force Following Sale of Ocelot Portfolio (Dec. 2, 2009), *available at* http://council.nyc.gov/ html/releases/equity_tf_12_2_09.shtml.

[12] In this Comment "apartment" and "unit" will be used interchangeably.

units from the rent regulation scheme is at the heart of the predatory equity business model.[13]

In many ways, the Stuy Town deal exemplifies the predatory equity model and illustrates the high stakes involved for landlords and tenants.[14] By 2008, following the housing bubble burst and the concurrent global economic downturn, Stuy Town's investors' worst fears came true: the complex was in danger of imminent default.[15] On October 22, 2009, in *Roberts v. Tishman Speyer Properties*, the New York Court of Appeals added to the Owners' financial problems.[16] The court ruled that the Owners[17] had improperly removed thousands of units from rent regulation and charged market rates while simultaneously receiving tax abatements from New York City through the "J-51 program."[18] Reaction from interested parties has been swift: Pro-

[13] ASS'N FOR NEIGHBORHOOD & HOUS. DEV., THE NEXT SUB-PRIME LOAN CRISIS: HOW PREDATORY EQUITY INVESTMENT IS UNDERMINING NEW YORK'S AFFORDABLE MULTI-FAMILY RENTAL HOUSING 2, 4 (2008) http://www.anhd.org/resources/the%20next%20sub-prime%20loan%20crisis.pdf [hereinafter NEXT SUB-PRIME LOAN CRISIS]. One housing developer explains the scale of predatory equity: "During the past four years nearly one tenth of the entire rent regulated housing stock in New York City was bought by institutional investors, which is the equivalent of housing for one-third of the population of Washington, D.C. or Boston." Donald P. Cogsville, *Affordable Housing: Private Equity Solution to Predatory Equity*, 55 REAL EST. WKLY. (2008), *available at* http://www.entrepreneur.com/tradejournals/article/191645824.html.

[14] There are, however, critical differences between the Stuy Town deal and other predatory equity deals. *See infra* Part I.C.

[15] Wei & Karmin, *supra* note 4. The Owners have since defaulted—on Monday, January 25, 2010, they announced that they would return the property to their creditors. Charles V. Bagli, *New York Housing Complex is Turned Over to Creditors*, N.Y. TIMES, Jan. 25, 2010, at A12, *available at* http://www.nytimes.com/2010/01/25/nyregion/25stuy.html?dbk.

[16] *See generally* Roberts v. Tishman Speyer Props., L.P., 918 N.E.2d 900, 902 (N.Y. 2009).

[17] Defendants in the case included Stuy Town's former owners as well: Metropolitan Life and Annuity Company and Metropolitan Tower Life Insurance Company ("Former Owners"). *Id.*

[18] *Id.* The "J-51" program provides tax abatements to owners who renovate or rehabilitate their properties in certain ways. N.Y. CITY, N.Y. ADMIN. CODE § 11-242 (2008); *see infra* Part II.B.

tenant groups call the decision correct and highlight the injustice resulting from years of improper interpretation of the statutes at issue.[19] Pro-landlord voices, on the other hand, cite the decision's unfairness, given that landlords, housing agencies and tenants merely followed the rules—now deemed to be illegal—for many years.[20] One thing, however, is clear: this landmark

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[19] Nicholas Jahr, *A Matter of Interpretation: How Will Court View J-51?*, CITY LIMITS WKLY., June. 22, 2009, *available at* http://www.citylimits.org/content/articles/viewarticle.cfm?articlenumber=3764.

[20] A Daily News editorial is reflective of opposition to the decision:

> Housing agencies wrote volumes of regulations based on the plain sense of the law. Thousands of landlords invested in residential buildings based on the regulatory decrees. Millions of tenants signed leases that were based on the same understanding. And the state Legislature reauthorized vacancy decontrol by adjusting its economic terms and leaving the word "become" intact.
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> . . . [T]he court has established that it is blithely willing to hammer business people and property owners who invested billions of dollars in residential properties and took out mortgages based on the rent rules as the regulations were officially interpreted.

Editorial, *A Court Out of Control: Jurists Impose Their Screwy Judgment on City's Rent Rules*, N.Y. DAILY NEWS, Nov. 2, 2009, *available at* http://www.nydailynews.com/opinions/2009/11/02/2009-11-02_a_court_out_of_control_jurists_impose_their_screwy_judgment_on_citys_rent_rules.html. The real estate industry, however, appeared to be selling two conflicting storylines in the immediate aftermath of the decision. On the one hand, they spoke of it as a doomsday scenario: Steven Spinola, president of the Real Estate Board of New York said, "It's a terrible decision" and explained that, "[t]his is another example of rent regulations basically throwing a little bit of havoc and a little bit of fear into property owners and financial institutions." Lingling Wei & Dawn Wotapka, *Court Shakes up New York Landlords*, WALL ST. J., Oct. 23, 2009, at A3, *available at* http://online.wsj.com/article/SB125622172790601315.html. On the other hand, the industry appeared to try and play down the repercussions of the decision, almost as if to contain the fall-out. One article, sardonically titled "Shock! Landlords Will Survive Stuy-Town Verdict" quoted the very same Mr. Spinola as saying, "It's certainly bad for [some], but it's not a decision that will affect tens of thousands of apartments." Theresa Agovino & Amanda Fung, *Landlords Will Survive Stuy-Town Verdict!*, CRAIN'S N.Y. BUS., Oct. 23, 2009, *available at* http://www.crainsnewyork.com/article/20091023/FREE/910239986 [hereinafter *Landlords Will Survive Stuy-Town Verdict*] (alteration in

decision will have far-reaching implications for a group of New York City tenants and landlords of buildings that have been removed from rent regulation while the landlords received J-51 tax breaks from the city. The critical question, then, is just how far-reaching this decision's implications will ultimately be.[21]

This Comment argues that, while the *Roberts* decision represents a significant victory for tenants whose landlords have simultaneously taken advantage of the deregulation benefits and J-51 tax abatements, it will ultimately have very little impact on ending predatory equity practices. Despite tenants' hopes to the contrary, the *Roberts* decision does not indicate a populist, anti-Wall Street trend on the part of the courts, but rather a ruling limited to a very narrow issue of statutory interpretation.[22] In fact, despite a number of events that would seem to deter predatory equity investment,[23] this model persists, albeit in a

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original).

[21] Theresa Agovino & Amanda Fung, *Court Hands Stuy Town Tenants Huge Victory*, CRAIN'S N.Y. BUS., Oct. 23, 2009, *available at* http://www.crainsnewyork.com/article/20091022/FREE/910229993/1072 [hereinafter *Court Hands Stuy Town Tenants Huge Victory*].

[22] Daniel Geiger, *In the End, J-51 Case Came Down to the Interpretation of Just a Few Words*, REAL EST. WKLY., Oct. 23, 2009, *available at* http://www.rew-online.com/news/story.aspx?id=776. Real estate experts believe that there may be a maximum of 80,000 units where the owners have taken advantage of J-51 benefits, while simultaneously deregulating their apartments. *Id*. Other industry experts put the number at 90,000. NEXT SUB-PRIME LOAN CRISIS, *supra* note 13, at 2. Moreover, only 27,708 of these 80,000 or 90,000 apartments are in buildings considered to be current victims of predatory equity deals. *See supra* note 19.

[23] These factors include the *Roberts* decision; an active tenant rights movement, Linda Collins, *Tenants of Brooklyn Apartments Protest Conditions, Harassment*, BROOKLYN DAILY EAGLE, Nov. 3, 2009, *available at* http://www.brooklyneagle.com/categories/category.php?id=31704; the passage of a tenant protection law in New York City, *see Prometheus Realty v. City of New York*, N.Y.L.J., Aug. 10, 2009, at 38, (col. 1); political pressure, Press Release, Senator Charles E. Schumer, Schumer Reveals: So-Called "Predatory Equity" Deals Just Like Subprime Loans but for Entire NYC Housing Complexes—Developers Cook the Books to Reap Millions and Leave Tenants in the Lurch (Dec. 2, 2008), *available at* http://schumer.senate.gov/new_website/record.cfm?id=305397; and fallout in the mortgage-backed securities market, Sam Chandan, *Investors and Stuy Town*, N.Y.

modified form.[24] This new form is characterized by deals that are still speculative but merely less so than the deals made at the height of the housing bubble.[25] Ultimately, ending this dangerous speculative model will require much stronger comprehensive regulation, at the state or national level, that prevents future deals from being made, or the removal of the incentives—like luxury decontrol—that allow developers to rapidly raise rents to market rate.[26]

In this Comment, Part I will introduce the recent phenomenon of predatory equity, a real estate trend necessary for understanding the *Roberts* decision, and its implications. Part II will provide an overview of relevant law concerning New York City's complex and overlapping rent regulation and tax abatement schemes. Part III will evaluate the opinion of the *Roberts* court, with a particular focus on whether the case was properly decided. Finally, Part IV will provide a detailed analysis of the *Roberts* decision's potential implications on predatory equity practices in New York City.

I. PREDATORY EQUITY: A NEW MODEL FOR MULTIFAMILY[27] APARTMENT TRANSACTIONS

A. Underlying Financial Model

In order to understand the *Roberts* decision in context, it is helpful to consider the structure of a predatory equity deal.

OBSERVER, Oct. 28, 2009, *available at* http://neptune.observer.com/2009/commercial-observer/investors-and-stuy-town#.

[24] ASS'N FOR NEIGHBORHOOD & HOUS. DEV., PREDATORY EQUITY: EVOLUTION OF A CRISIS 20–22 (2009), *available at* http://www.anhd.org/resources/Predatory_Equity-Evolution_of_a_Crisis_Report.pdf [hereinafter EVOLUTION OF A CRISIS]. "Vulture funds," which are investment funds that deal with distressed assets, appear poised to take advantage of investment opportunities in the New York City multifamily housing market as banks sell off predatory equity debt at discount prices. *Id; see infra*, Part III.B.

[25] EVOLUTION OF A CRISIS, *supra* note 24.

[26] WATERS & BACH, *supra* note 7, at 12–13.

[27] The term "multifamily" apartment refers to an apartment building that contains multiple apartment units.

Predatory equity deals involve buying rental apartments at prices not supported by the income produced from rent at the time of sale, in hopes of aggressively removing apartments from rent regulation, raising rents to market rates and increasing the building's profit-making potential.[28] Poor underwriting standards and the securitization of debt characterize these deals.[29] Tenant advocates criticize the underwriting terms for these mortgage-backed securities as being risky, not conforming to industry standards, and requiring the property owner to double or triple the rent in order to cover the debt service.[30] The problem with this model, explains a director of the bond-rating agency Realpoint, is that "[t]he apartments are just not generating revenues anywhere close to market rents. Yet, they were underwritten as if they were."[31] Property owners, then, must aggressively replace rent regulated tenants with those that can pay market rates.[32] Still, securitization fails to discourage lenders from making risky loans because it allows private equity

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[28] WATERS, *supra* note 8.

[29] Securitization refers to "the process by which a mortgage lender bundles together a large group of mortgages and sells certificates in that group of mortgages to investors." NEXT SUB-PRIME LOAN CRISIS, *supra* note 13, at 4–5.

[30] *Id.* at 6. The term "debt service" refers, in this case, to the owners' monthly mortgage payments. Investipedia.com, Debt Service, http://www.investopedia.com/terms/d/debtservice.asp (last visited Feb. 14, 2010).

[31] Charles V. Bagli, *Mortgage Crisis is Foreseen in Housing Owned by Private Equity Firms*, N.Y. TIMES, Oct. 6, 2008, at A24, *available at* http://www.nytimes.com/2008/10/06/nyregion/06default.html.

[32] NEXT SUB-PRIME LOAN CRISIS, *supra* note 13, at 5–8. The term sheets outline a "recapturing" strategy, where the property owner must convert regulated apartments into market rate units in order to pay the debt service. *Id.* at 6. In a prospectus filed with the Securities and Exchange Commission (SEC) for a group of buildings that one developer, Vantage Properties, owns in Washington Heights, the underwriting terms read, "[Vantage Properties] anticipates to recapture approximately 20–30% of the units [within the first year], and 10% a year thereafter" to afford the debt service on its loan. *Id.* at 5 (first alteration added). This is problematic because the annual rate of turnover for rent-regulated buildings is only 5.6% according to the Rent Guidelines Board and only 1% of the apartments in these buildings were vacant when the loan was made. *Id.*

companies to quickly recover the value of the loan and pass the risk of default to the security investors.[33]

B. Impact on Renters

Typically, New York's residential real estate in working-class neighborhoods is a fairly non-liquid asset that returns a 7–8% per year rate of profit, which makes it a relatively low-pressure, low-competition business.[34] When private equity funds invest in an asset, however, they must offer a competitive rate of return—14%–20% annually.[35] In the residential real estate rental context, this rate is impossible to return without forcing out tenants who pay below-market rents.[36] Accordingly, legal service providers and tenant advocates have reported drastic increases in tenant harassment in predatory equity buildings.[37] New York City responded to the crisis and passed Local Law 7, which provides tenants with a new, explicit cause of action in Housing Court for harassment.[38]

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[33] *Id.* at 4–5, 8. Of the 90,000 New York City units recently purchased by private equity-backed developers, principal mortgage loans have been securitized in about 40% of them. *Id.* at 5.

[34] EVOLUTION OF A CRISIS, *supra* note 24, at 7.

[35] *Id.*

[36] Morgenson, *supra* note 10. To give just one example, Vantage Properties, which recently paid over $1 billion to invest in 9,500 rent-regulated apartments in New York City, filed almost one thousand cases in housing court against tenants in a seventeen month period, as compared to previous landlords who had never filed more than 350 actions in a year. *Id.*

[37] NEXT SUB-PRIME LOAN CRISIS, *supra* note 13, at 2–4. Harassment strategies include: notifying tenants that their leases are being canceled, alleging that they sublet the apartments illegally, wrongfully suing tenants multiple times for unpaid rent, and erroneously claiming that tenants had never paid their security deposits despite having lived in the building for decades. *Id.* at 3–4. Compounding the impact of the high numbers of legal actions pursued by these owners, most tenants who are sued are not represented by counsel. *Id.* at 2. This has led many tenants to sign away their rights to remain in their apartment or dispute the charges against them. *Id.*

[38] Prometheus Realty v. City of New York, No. 111132/08, N.Y.L.J., Aug. 10, 2009, at 38 (col. 1). Local Law No. 7 amends Article 1 § 27-2004(a) to add a definition of harassment, § 27-2005 to make it an explicit

The overleveraged nature of predatory equity deals causes landlords to default and can lead to foreclosure.[39] A Deutsche Bank report predicts that the commercial real estate "'refinancing crisis' will reach an unprecedented level around 2013, as loans that were made during the boom in 2005, 2006 and 2007 mature and are unlikely to qualify for refinancing without substantial infusions of equity."[40] Rafael Cestero, the commissioner of the Department of Housing Preservation and Development ("HPD"), testified before a New York City Council Committee, that a "small but significant portion" of recently purchased multifamily buildings are likely overleveraged, meaning their rent does not generate enough income to repay the debt.[41] Moreover, when a building goes into foreclosure, entire neighborhoods are affected.[42] Therefore, the legal, financial and housing sectors have closely scrutinized Stuy Town's struggles; it could be a harbinger of the fate of other buildings with similar financial structures.[43]

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duty of owners not to harass their tenants and § 27-2115 to create a cause of action for harassment in housing court and to specify penalties for harassment. *Id.* at 2. The law was upheld when faced with a constitutional challenge by the landlord lobby, with New York State Supreme Court Judge Eileen Rakower calling the Act "a rational legislative response to what the City Council has determined is the potential for a growing problem of tenant harassment in New York City." *Id.* at 5.

[39] THE NEXT SUB-PRIME LOAN CRISIS, *supra* note 13, at 7.

[40] Daniel Massey, *Bronx is Burning Over Failed Deals*, CRAIN'S N.Y. BUS., Aug. 17, 2009, at 18.

[41] Manny Fernandez & Jennifer Lee, *Struggling Landlords Leaving Repairs Undone*, N.Y. TIMES, July 15, 2009, *available at* http://www.nytimes.com/2009/07/15/nyregion/15buildings.html. At the time this statement was made, 3,200 units in affordable housing complexes had already gone into foreclosure, 11,000 faced imminent foreclosure and potentially 55,000 more units were thought to be overleveraged and in danger of foreclosure. Massey, *supra* note 40, at 2.

[42] Massey, *supra* note 40, at 2.

[43] *See* Gretchen Morgenson, *All Those Little Stuyvesant Towns*, N.Y. TIMES, Jan. 31, 2010, at BU1, *available at* http://www.nytimes.com/2010/01/31/business/31gret.html.

C. Case Study: Stuyvesant Town and Peter Cooper Village

In many ways, the Stuy Town deal embodies the predatory equity phenomenon: It was sold to private equity-backed investors, the purchase price was exorbitant given the asset's cash-generating potential at the time of sale and the owners planned to proactively remove tenants they deemed to be illegal in order to deregulate the apartments and raise the rents to market rate.[44] However, the Stuy Town deal is also atypical in many ways. First, the apartment complex is famous, historic and located on prime Manhattan real estate.[45] Alternatively, many predatory equity properties are located in low-income neighborhoods in the outer boroughs, which means that they are not eligible to be removed from rent regulation because their rents have not reached the $2,000 mark.[46] Second, the complex residents are decidedly middle class, as opposed to the uniformly low-income population that inhabits most predatory equity buildings.[47] Stuy Town's socioeconomic composition has enabled it to retain counsel, pursue litigation and even make a reasonable, albeit losing, bid for the properties when it came up for sale.[48] Third, a New York City Councilman, Daniel

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[44] *Megadeal*, *supra* note 1.

> For all of the [Stuy Town] deal's accolades, it also illuminates the financial leaps of faith that real estate buyers are increasingly taking. Once, buyers priced properties based on existing cash flow. Real estate executives say that calculus would have generated a $3.5 billion price for the two Manhattan complexes that Tishman Speyer bought. But buyers are now looking to the future, building models of anticipated cash flow when determining how much to bid. The Stuyvesant Town deal, with its $5.4 billion price tag, reflects the new math . . . .

Id.

[45] *Id.*

[46] WATERS & BACH, *supra* note 7, at 11; *see infra* Part III.C.

[47] *Id.*

[48] Eliot Brown, *Stuy Town's Columbus: How a Lawyer Rediscovered an Arcane Rent Rule and Shook New York*, N.Y. OBSERVER, Oct. 27, 2009, *available at* http://www.observer.com/2009/real-estate/stuy-town's-columbus#.

Garodnick, lives in Stuy Town, providing it with a direct legislative advocate.[49] These differences are important to consider when analyzing the *Roberts* decision's potential reverberations.

II. *ROBERTS V. TISHMAN SPEYER PROPERTIES*: THE DECISION

The *Roberts* decision has placed all predatory equity buildings in New York under greater scrutiny and the Stuy Town purchase is reflective of the predatory equity model. Therefore, despite Stuy Town's atypical attributes, it is important to consider the effect the *Roberts* decision may have on the practice of predatory equity citywide.

A. Overview and Facts

On October 22, 2009, the New York Court of Appeals issued a 4-2 per curiam decision that, in affirming the Appellate Division decision, shook the real estate industry in New York City, delighted tenants and their advocates and appeared to have far-reaching implications on the New York rental market for years to come.[50] At its most basic level, the court found that the Stuy Town owners improperly removed thousands of units from rent regulation while simultaneously receiving J-51 tax benefits.[51]

Long before the Stuy Town sale, in 1992, the Former Owners began receiving J-51 benefits.[52] Then, after the Rent

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[49] Jim Dwyer, *What to Make of a Big Deal Gone Sour*, N.Y. TIMES, Nov. 4, 2009, at A25, *available at* http://www.nytimes.com/2009/11/04/nyregion/04about.html?scp=5&sq=garodnick&st=cse.

[50] Bendix Anderson, *The Complex That Just Became More So*, CITY LIMITS WKLY., Oct. 26, 2009, *available at* http://www.citylimits.org/content/articles/viewarticle.cfm?article_id=3827&content_type=1&media_type=3; Charles V. Bagli, *Impact of Ruling in Stuyvesant Town Case Could Take Years to Determine*, N.Y. TIMES, Oct. 24, 2009, at A17, *available at* http://www.nytimes.com/2009/10/24/nyregion/24stuytown.html [hereinafter *Impact of Ruling*]; Wei & Wotapka, *supra* note 20, at A3.

[51] Wei & Wotapka, *supra* note 20, at A3.

[52] *See* Roberts v. Tishman Speyer Props., L.P., 918 N.E.2d 900, 902 (N.Y. 2009).

Regulation Reform Act (RRRA) was enacted in 1993, the Former Owners attained approval from the New York City Division of Housing and Community Renewal (DHCR) and began charging market-rate rents for apartments that were eligible for luxury decontrol.[53] In October of 2007, the complexes were sold to the Owners in a "top-of-the-market" deal for $5.4 billion.[54]

Soon after the closing of the deal, nine plaintiff-tenants ("Tenants") sued the Owners and Former Owners, (hereinafter referred to collectively as "the Owners" in the context of *Roberts*).[55] The Tenants sued on behalf of a putative class of all current and former tenants who were charged, or would be charged, rents that exceeded the legal rent stabilization level at any time when the landlord was receiving J-51 real estate tax benefits.[56] The tenants claimed that the Owners did not have a right to enjoy the benefits of rent deregulation while simultaneously receiving nearly $25 million in J-51 tax benefits.[57] The Tenants asked the court for a declaration that the units remain rent stabilized until the J-51 tax benefits were scheduled to end, in 2017 or 2018. In addition, they sought a declaration that the Owners would follow the law when deregulating units and $215 million of relief in the form of rent overcharges and attorneys' fees.[58]

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[53] *See id*. Luxury decontrol refers to removing an apartment from the rent stabilization scheme and allowing an owner to charge market rates. *See infra* Part II.B.

[54] Wei & Wotapka, *supra* note 20, at A3.

[55] *Roberts*, 918 N.E.2d at 902.

[56] *Id*. The lawyers have since agreed to allow the case to proceed as a class action. Ilaina Jonas & Andre Grenon, *Stuyvesant Town Owners Agree to Class Action Suit*, REUTERS, Feb. 3, 2010, http://www.reuters.com/article/idUSN0319361720100204.

[57] *Roberts*, 918 N.E.2d at 902. Tenants claimed that 4,400 of the 11,227 apartments were illegally removed from rent stabilization and, thereafter, illegally subject to market rate rents. *Impact of Ruling*, *supra* note 50.

[58] *Roberts*, 918 N.E.2d at 904.

B. Relevant Rent Regulation and Housing Tax Abatement Law

The *Roberts* court called the New York State rent laws "an impenetrable thicket, confusing not only to laymen but to lawyers."[59] Below is a brief history of relevant rent regulation laws and their interplay with the New York City J-51 tax program, intended to provide the necessary background for understanding the *Roberts* decision.

There are two statutory structures that interact in the *Roberts* case: The New York City Rent Stabilization Law (RSL)[60] and the J-51 tax program.[61] The RSL was enacted in response to decreasing vacancy rates and rising rents[62] and is administered by DHCR,[63] which promulgates regulations called the Rent Stabilization Code (RSC).[64] The J-51 tax program[65] provides

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[59] *Id.* at 913.

[60] N.Y. COMP. CODES R. & REGS. tit. 9, § 2520.11 (2000).

[61] New York, N.Y., Code § 11-242 (2009).

[62] History of the Board and the Rent Regulation System, http://www.housingnyc.com/html/about/intro%20PDF/historyoftheboard.pdf, 29 (last visited Dec. 1, 2009) [hereinafter *History of the Board*]; Robin Reisig, *Rent Regulation*, GOTHAM GAZETTE, Mar. 9, 2003, *available at* http://www.gothamgazette.com/article/iotw/20030309/200/305.

[63] About Office of Rent Administration Operations and Services, Division of Housing and Community Renewal, http://www.dhcr.state.ny.us/Rent/about.htm (last visited Dec. 1, 2009).

[64] Guy McPherson, Note, *It's the End of the World As We Know It (And I Feel Fine): Rent Regulation in New York City and the Unanswered Questions of Market and Society*, 72 FORDHAM L. REV. 1125, 1148 (2004). Buildings with six or more units that were constructed between February 1, 1974 and January 1, 1974 are subject to rent stabilization. *Id.* at 1148. DHCR promulgated and adopted the RSC in 1987; it applies to housing accommodations subject to regulation under the RSL. N.Y. COMP. CODES R. & REGS. tit. 9, § 2520.11 (2000).

[65] The J-51 program is codified in § 11-242 of the NYC Administrative Code. Harold M. Shultz, *Court of Appeals Delivers Final Word on Stuy Town*, INSIDE EDGE, (Citizens Hous. & Planning Council, New York, N.Y.), Nov. 2009, at 1, *available at* http://www.chpcny.org/pubs/Court%20of%20Appeals%20Decides%20Stuy%20Town.pdf [hereinafter *Final Word on Stuy Town*].

incentives to landlords to make certain improvements on their properties by promising them tax breaks.[66] New York City's HPD administers the J-51 program.[67]

In 1993, the state legislature passed the RRRA, which amended the RSL.[68] The RRRA enacted "luxury decontrol," which refers to methods for "deregulating" a rent stabilized apartment and allows owners to charge market rates.[69] "High rent high income" decontrol allows an owner to remove an apartment from the rent stabilization scheme when the rent is more than $2,000 per month and the family earns more than $175,000 per year.[70] "High rent vacancy" decontrol allows an owner to remove an apartment when the rent is more than $2,000 per month and the unit is vacant.[71]

However, the RRRA contains an exception: the luxury decontrol provisions do not apply to housing "which became or become subject to [the RRRA] . . . by virtue of receiving [J-51 tax benefits]."[72] In 1996, due to confusion over this language, DHCR issued an advisory opinion to clarify the luxury decontrol law's interplay with the J-51 benefit, stating that the "J-51

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[66] New York, N.Y., Code § 11-243 (2008); Hannah Fons & Amy Blankstein, *Taxing Questions: A Look at J-51 and 421-a Abatements*, COOPERATOR: COOP & CONDO MONTHLY, *available at* http://www.cooperator.com/articles/1378/1/Taxing-Questions/Page1.html; McPherson, *supra* note 64, at 1148–49. J-51 was first created in 1955 as a means of encouraging landlords to provide heat and hot water but has since expanded to incentivize a much broader scope of renovation and rehabilitation. *See Fons & Blankstein*, *supra*; *see also* Jahr, *supra* note 19. It has been used in recent years as a means of quickly increasing rents towards the luxury decontrol threshold. *Id.*

[67] NYC Finance, J-51, http://www.nyc.gov/html/dof/html/property/property_tax_reduc_j_51.shtml (last visited Dec. 1, 2009).

[68] *History of the Board*, *supra* note 62.

[69] *Id.* In 1997, the legislature extended rent stabilization and made certain modifications in the RRRA, but it did not modify the language at issue in the *Roberts* case. *Id.* at 37–39; *see infra* text accompanying notes 73–79.

[70] *Final Word on Stuy Town*, *supra* note 65, at 1.

[71] *Id.*

[72] Roberts v. Tishman Speyer Props., L.P., 918 N.E.2d 900, 902 (N.Y. 2009) (quoting RSL § 26-504.1, 26-504.2[a]).

program only precluded luxury decontrol 'where the receipt of such benefits is the *sole reason* for the accommodation being subject to rent regulation.'"[73]

In 2000, DHRC amended RSC's section 2520.11 in an effort to again elucidate the manner in which the rent stabilization scheme and the J-51 tax program interacted.[74] The amended section stated that luxury decontrol would not apply to housing that "became or become subject to the RSL and this Code . . . *solely* by virtue of [getting J-51 tax benefits]."[75] Thus, the question before the court in *Roberts* was whether the RSC's exception to luxury decontrol, as understood and administered by DHCR, was the proper interpretation of the 1993 RRRA.[76] The court was to determine what the language "became or become subject to the RSL and this Code . . . by virtue of the receipt of tax benefits" actually meant.[77] The court considered

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[73] *Id*. at 903 (emphasis added by the court). The Appellate Division explained, "[I]t is our opinion that their apparent meaning is synonymous to 'by reason of' or 'because of,' and that an owner is precluded from seeking Luxury Decontrol of a housing accommodation receiving 'J-51' tax abatement benefits only where the receipt of such benefits is the sole reason for the accommodation being subject to rent regulation." Roberts v. Tishman Speyer Props., L.P., 874 N.Y.S.2d 97, 103–04 (N.Y. App. Div. 2009), *aff'd*, 918 N.E.2d 900 (N.Y. 2009).

[74] *See Roberts*, 918 N.E.2d at 903.

[75] *Id*. (emphasis added by the court). The section reads, "[luxury decontrol] shall not apply to housing accommodations which became or become subject to the RSL and this Code: (i) *solely* by virtue of the receipt of tax benefits pursuant to . . . section 11-243 (formerly J51-2.5) or section 11-244 (formerly J51-5) of the Administrative Code of the city of New York, as amended." N.Y. COMP. CODES R. & REGS. tit. 9, § 2520.11 (2000) (emphasis added).

[76] *Id*. at 904–05. One commentator summarized the question before the court as follows: "The question posed by *Roberts* was whether a building receiving J-51 benefits could also take advantage of the decontrol provisions. The 1993 law was ambiguous on this point, and the state's Division of Housing and Community Renewal interpreted the law to say that only buildings solely subject to rent regulation *because* of J-51 were prohibited from opting out—as opposed to buildings which took advantage of J-51 but were subject to rent regulation for other reasons." Jahr, *supra* note 19.

[77] Harold M. Shultz, *Stuy Town J-51 Decision Reversed*, INSIDE EDGE,

two conflicting interpretations: either a building owner could not benefit from luxury decontrol while receiving J-51 tax exemptions or abatements; or a building owner could not benefit from luxury decontrol while receiving J-51 benefits and where the *sole* reason that the building was rent stabilized was because the building had entered the J-51 program.[78] This distinction is important. Under the first view, any building receiving J-51 benefits could not simultaneously deregulate; under the second view however, only buildings that became rent stabilized in order to receive J-51 benefits would be prevented from deregulation.[79]

C. Majority Opinion

The majority, finding for the Tenants, ruled the former to be the correct legal interpretation—no owner, regardless of the reason for becoming rent stabilized, was entitled to simultaneously enjoy the benefits of New York City's J-51 program and deregulation.[80] The court first explained that it did not owe deference to DHCR's Rent Stabilization Law interpretation.[81] Then, the court outlined two essential bases for its holding. First, the Owners' luxury control exception interpretation was not the most natural reading of the statute's language.[82] The court wrote that "[c]ontrary to [the Owners'] argument, there is nothing impossible, or even strained, about reading the verb 'become' to refer to achieving, for a second

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(Citizens Hous. & Planning Council, New York, N.Y.), March 2009, *available at* http://www.chpcny.org/pubs/Stuy%20Town%20Decision%20Reversed.pdf (quoting RSL § 26-504.1, 26-504.2[a]).

[78] *See Roberts*, 918 N.E.2d at 905.

[79] Shultz, *supra* note 77.

[80] *Roberts*, 918 N.E.2d at 906.

[81] *Id*. at 904 ("[When] the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency and its interpretive regulations . . . ." (quoting Kurcsics v. Merchants Mut. Ins. Co., 49 N.Y.2d 451, 459 (1980))).

[82] *Id*. at 906.

time, a status already attained."[83]

Second, the court looked to the legislative intent.[84] Contrary to the Owners' contention, the court found that the legislature did not intend to create two categories of buildings that would benefit from the J-51 program.[85] The court cited the bill sponsor's language and found that the RRRA's legislative history more accurately supports the Tenants' reading.[86] The court reasoned that the legislative history, in light of the bill sponsor's statements, makes very clear that buildings receiving tax exemptions such as J-51 benefits would never be allowed to deregulate under the luxury decontrol provisions of the RRRA.[87] The court also explained that the legislature's failure to clarify DHCR's interpretation does not demonstrate acquiescence because a legislature may be inactive for any number of reasons.[88]

Just when it seemed the court had clarified that a landlord could not simultaneously benefit from J-51 benefits while

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[83] *Id.*

[84] *Id.*

[85] *Id.* The Owners argued that the apartments that were stabilized before getting J-51 benefits would be eligible for luxury decontrol and those that only became stabilized as a condition of getting J-51 benefits would not be eligible for luxury decontrol. *Id.*

[86] *Id.* at 906–07 ("[S]hould the exemptions contained in section 489 end, that—those J.51s and 489s end, then they would be subject so that at no point do you have the [luxury] decontrol provisions applying to the buildings which have received the tax exemptions that I just mentioned." (quoting N.Y. Senate Debate on Assembly Bill 8859, July 7, 1993, at 8213–16)).

[87] *Roberts*, 918 N.E.2d at 906–07. While *Roberts* was focused on the J-51 program, it is unclear whether other tax benefit programs may fall within the *Roberts* ruling given the court's language: "The RRRA's sponsor stated that luxury decontrol was unavailable to building owners who 'enjoy[ed] another system of general public assistance" *such as* J-51 benefits . . . ." *Id.* at 906.

[88] *Id.* at 907. The court wrote that because the "practical construction" here can't be said to be well known, the legislature cannot be "charged with knowledge of [a well-known] construction" such that the legislature's inaction could be deemed acquiescence. *Id.* The court noted as well that there is no indication that the issue here was even considered the last time the legislature considered the statute. *Id.*

removing an apartment from rent regulation, the majority's concluding sentence reflects the legal ambiguity that remains: "[The dire financial consequences the dissent predicts] may not come true; they depend, among other things, on issues yet to be decided, including retroactivity, class certification, the statute of limitations, and other defenses that may be applicable to particular tenants."[89] The majority then called on the legislature to provide relief if the statute does ultimately impose such "unacceptable burdens" on landlords in New York.[90]

D. The Dissent

The *Roberts* dissent aggressively challenged the majority's methods of statutory interpretation and warned of "significant, if not severe dislocations in the New York City residential real estate industry as a result of [the] decision."[91] First, the dissent took issue with the majority's statutory interpretation.[92] Referring to the words "became or become subject to this law (a) by virtue of receiving J-51 benefits," the dissent argued that if the legislature "had intended for all buildings *receiving* J-51 tax benefits to be exempt from luxury deregulation, it could have easily said just that" and the court should assume that the words used in a statute were inserted by the legislature for a reason.[93]

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[89] *Id.*

[90] *Id.*

[91] *Id.* at 912 (Read, J., dissenting).

[92] *Id.* at 907–09.

[93] *Id.* at 908 (Read, J., dissenting) (citing Sanders v. Winship, 57 N.Y. 2d 391 (1982)) ("Under well-established principles of interpretation, effect and meaning should be given to the entire statute and every part and word thereof."). Under the dissent's comprehension of the statute's plain meaning, the court reasons that

> the buildings that 'became or become subject to [the RSL] by virtue of' receiving J-51 tax benefits passed from their former state (unregulated) into a new state (rent-stabilized) because of their owners' receipt of these benefits. That did not happen here since the apartment buildings comprising Peter Cooper Village and Stuyvesant Town have been rent-regulated since at least 1974, 18 years before any building in either complex is alleged to have received J-51

Moreover, in the dissent's view, even a generous reading of the verb "become" to mean "achieving, for a second time, a status already attained" makes the statutory terms ambiguous, certainly not clearly wrong as the majority implied.[94]

Next, the dissent rebuts the majority's interpretation of the statute's legislative intent.[95] It charges the majority with "pluck[ing] a snippet" from a Senate floor debate on the bill that eventually became the RRRA, and cautions against making conclusions based on such history.[96] The dissent also points to what it calls the "most important gauge of statutory meaning," which it faults the majority for failing to address at all: the RRRA's sunset clause, which mandates the legislature to evaluate the statute's terms.[97] Given that the legislature reviewed the statute twice since the DHCR released its advisory opinion in 1996,[98] it was indeed aware of the advisory decision and the deregulation that followed from it.[99] The dissent argued that

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> benefits. They did not 'become' rent-stabilized by virtue of receiving J-51 benefits; they already *were* rent-stabilized.

Id. (citing *In re* KSLM-Columbus Apts., Inc. v. N.Y. State Div. of Hous. & Cmty. Renewal, 5 N.Y.3d 303 (2005) ("[O]nce a building became rent-stabilized, later, redundant statutory routes 'would not have [been] needed' to make the building subject to the RSL.")).

[94] *Id.* at 904 (Read, J., dissenting).

[95] *Id.* at 910–12 (Read, J., dissenting).

[96] *Id.* at 910 (Read, J. dissenting). The dissent asserts that Senator Hannon's response, which the majority uses to support their interpretation, does not support the court's holding. *Id.* at 910–11. Instead, taken in context with Senator Mendez's question, which referred only to buildings entering the rent stabilization program for the first time as a condition of receiving J-51 benefits—Senator Hannon's response did not even address buildings that began receiving J-51 benefits after having already been subject to rent stabilization, as Stuyvesant Town and Peter Cooper Village were. *Id.*

[97] *Id.* at 911 (Read, J., dissenting).

[98] *Id.* (Read, J., dissenting). The statute's terms were reconsidered in 1997 and 2003 and are to be considered for renewal in 2011. *Id.*

[99] *Id.* Pointing to DHCR's adoption of a revised RSC, the dissent argues that

> the code made the DHCR's interpretation of [the rent stabilization law] unmistakably clear: the exception from luxury decontrol for buildings receiving J-51 tax benefits covered only those buildings

failing to amend a statute when the practical construction is clear signals acquiescence on the legislature's part.[100]

Lastly, the dissent bristles at the lack of deference shown to DHCR's interpretation, given its mandate to "promulgate regulations in furtherance of the rent control and rent stabilization laws."[101] The dissent writes:

> While we may not owe deference to the administrative agency, it should count for something that DHCR adopted its interpretation as a formal regulation after a notice-and-comment rulemaking enjoying wide participation by both landlord and tenant advocacy groups and interests. If DHCR's interpretation were as wide off the mark as the majority claims, it is odd that this infirmity was not discovered then.[102]

In its conclusion, the dissent adopts a tone protective of the real estate industry and accuses the majority of minimizing potentially far-reaching consequences for both the defendants and New York City real estate industry.[103] The dissent argues that accepted industry practice and continuity matter in the real estate industry and blames the majority for upsetting foundations upon which many business transactions have been made.[104] In conclusion, the dissent warns that the impact of the decision will be even more significant given the fragility of the real estate market due to the housing bubble burst.[105]

> rent-stabilized solely on this basis. Yet, the Legislature in 2003 did not amend the RRRA to adopt the interpretation favored by plaintiffs, although it otherwise modified the statute.

Id.

[100] *Id.* at 911–12 (citing Matter of Ansonia Residents Assn. v. New York State Div. of Hous. & Community Renewal, 75 N.Y.2d 206 (N.Y. 1989); Brooklyn Union Gas Co. v. New York State Human Rights Appeal Bd., 41 N.Y.2d 84, 90 (1976)).

[101] *Id.* at 912.

[102] *Id.*

[103] *Id.* at 912–13.

[104] *Id.*

[105] *Id.* at 913.

E. Evaluation of the Decision

The *Roberts* majority decided the case correctly, properly interpreting the statute at issue through a linguistic and legislative history analysis. It correctly decided not to address issues that should be outside the scope of a judicial determination, such as financial ramifications for the New York real estate industry.[106]

First, the majority correctly decided that DHCR's interpretation should not be given deference, given that the issue before the court was one of strict statutory interpretation.[107] Case law supports this decisively: "if the regulation runs counter to the clear wording of a statutory provision it should not be accorded any weight."[108] Here, DHCR inserted the word "solely" where the legislature did not and therefore the regulation conflicts with the statute. Mere dependency on erroneous administrative interpretation is not a sound legal basis to continue relying on that erroneous interpretation.[109]

Second, the language of the statute, while lacking clarity, simply does not state that an apartment must become stabilized *solely* by virtue of receiving tax benefits under the J-51 program, as DHCR later amends its interpretation to read.[110] Thus, DHCR acted beyond the scope of its authority in essentially amending the statute.[111] The Owners and the dissent attempt to create a post hoc distinction where there is none. There are no separate categories reflected in the remainder of

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[106] *Id.* at 912–13.

[107] *Id.* at 905–06.

[108] *Id.* (citing Kurcsics v. Merchant Mut. Ins. Co., 403 N.E.2d 159, 163 (N.Y. 1980)).

[109] Jahr, *supra* note 19. According to an attorney for Legal Aid, who submitted an amicus brief for the Tenants, "[i]f you read the statute, the statute's pretty clear. The fact that DHCR, at the urging of landlords, years ago came out with a different position doesn't mean the law as the legislature enacted it changed its meaning." *Id.*

[110] *See Roberts*, 918 N.E.2d at 905.

[111] *See id.* In fact, the Owners concede that the word "solely" should not have been inserted by basing their case on the "became or become" language. *Id.*

the statute dictating disparate treatment for apartments that became stabilized because they received J-51 benefits and for apartments that had already been subject to stabilization.[112] The dissent is selective in choosing when it follows a strict interpretation of statutory language.[113] In one instance, it argues that each word has an exact meaning, explaining that the legislature would have specified that all housing receiving J-51 benefits would be excluded from taking advantage of luxury decontrol, not just those that receive benefits *because* they received J-51 benefits.[114] In another context, however, it excuses language redundancy, arguing that DHCR's inclusion of the word "solely" was merely a redundancy in its regulations, not a change to the statute's meaning.[115]

The majority, however, appeared to stretch its logic to accommodate its result. The court reasons, "there is nothing impossible, or even strained, about reading the verb 'become' to refer to achieving, for a second time, a status already attained"[116] and in doing so ignores both the commonsense and definitional meanings of "become." This flawed logic is not necessary for the court's holding and should have been excluded. The "by virtue of" and "solely by virtue of" distinction and the legislative history of the statute provide a sufficiently strong foundation for the court's holding that this reasoning, which has been criticized,[117] was superfluous.

Third, the majority writes persuasively in its analysis of the 1993 RRRA legislative history. In citing the sponsor's unambiguous language during a Senate floor exchange, the majority relies on the legislative source most likely to reflect the

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[112] *See id.* at 906.

[113] *See id.* at 908–09.

[114] *See id.* at 908.

[115] *See id.* at 909.

[116] *Id.* at 906.

[117] *See* Posting of Lucas A. Ferrara to New York Real Estate Lawyers' Blog, http://www.nyrealestatelawblog.com/2009/10/what_do_you_think_about_the_st.html (Oct. 23, 2009, 17:15 EST) [hereinafter *NY Real Estate Lawyers' Blog Post*] (criticizing the Court's reasoning in the Stuy Town Decision).

statute's intent.[118] The dissent wrongly focuses on the legislature's inaction in the face of DHCR's interpretation. Contrary case law undermines this theory. "Legislative inactivity is inherently ambiguous and 'affords the most dubious foundation for drawing positive inference'"[119] Moreover, there is no proof that this issue ever came to the legislature's attention.[120] Also, the dissent's assumption that the issue in the *Roberts* case would be considered in 1997 and 2003 simply because "battles over rent stabilization are among the fiercest in Albany" is unfounded.[121] Finally, even the precedent the dissent cites concedes the weakness of its acquisition argument: the case to which the dissent cites merely calls legislative inactivity "*some additional evidence* of [the legislature's] intention."[122]

Ultimately, the Owners and the dissent appear to put more weight in the stability of the real estate industry than in the letter of the law, and in doing so, argue that the *Roberts* decision is inequitable because of landlords' reliance on DHCR's interpretation of the statute.[123] This argument is unpersuasive because in making this argument, the Owners subjectively judge the value of their potential loss to be greater than the loss suffered by the tenants who paid rents based on a faulty statutory interpretation.[124] Ultimately, the majority's focus on the law—as opposed to financial consequences for the real estate industry—provides the basis for an analysis and ruling that are more legally sound.

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[118] *See Roberts*, 918 N.E.2d at 906–07. The dissent's efforts to expand the context in order to clarify this exchange are not insignificant, but are far from conclusive. *Id.*

[119] *Id.* at 907 (citing United States v. Price, 361 U.S. 304, 310–11 (1960)).

[120] *See id.*

[121] *See id.* at 911.

[122] Engle v. Talarico, 306 N.E.2d 796, 799 (N.Y. 1973) (emphasis added).

[123] *See Roberts*, 913 N.E.2d at 912–13.

[124] *See* Gurnee v. Aetna Life & Casualty Co., 55 N.Y.2d 184, 193 (N.Y. 1982) (finding that the unfairness to the victims of an erroneously interpreted statute outweighed the financial burden imposed on the party who had taken advantage of that improper interpretation).

III. THE *ROBERTS* DECISION'S IMPACT ON PREDATORY EQUITY

While the tenants claim victory, debate continues as to what was actually won and whether or not tenants—at Stuy Town and in rent regulated housing across the city—will actually be better off after the *Roberts* decision. Clearly, the *Roberts* decision will apply to all tenants in apartments that have been deregulated and for which landlords are also receiving J-51 tax abatements.[125] Experts believe that this holding will affect up to 90,000 apartments for which landlords simultaneously took advantage of J-51 benefits and luxury decontrol.[126] It is believed that 27,708 units that meet these criteria are in buildings that can be classified as "predatory equity" buildings. In these buildings, *Roberts* will certainly aid tenants facing aggressive—and now illegal—deregulation.[127]

Yet, the true *Roberts* significance hinges on the possibility that the decision will reverberate across an entire industry and will ultimately lead to greater protections by the court or the legislature for an even greater number of low and middle-income tenants. In other words, the decision will allow some lucky tenants to receive an unexpected windfall—back rent for the difference between the regulated rent and the market rate charged[128]—or, at the very least, protect them from having to pay market rate rents prospectively.[129] The more important question, however, is whether the decision will help protect future tenants from predatory equity's harmful effects.[130] Additionally, it is unclear whether the decision signifies a growing anti-owner/Wall Street investor trend among the courts.[131] Significantly, the Court of Appeals left much to be

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[125] *Final Word on Stuy Town*, *supra* note 65, at 1.

[126] NEXT SUB-PRIME LOAN CRISIS, *supra* note 13, at 2. This is out of 354,084 units in 8,142 buildings that receive J-51 benefits. *Final Word on Stuy Town*, *supra* note 65, at 3.

[127] Jahr, *supra* note 19.

[128] *Final Word on Stuy Town*, *supra* note 65, at 3.

[129] *Id.* at 1.

[130] Anderson, *supra* note 50.

[131] *NY Real Estate Lawyers' Blog Post*, *supra* note 117.

determined on remand, leaving the decision's implications for the Stuy Town tenants still unknown.[132]

A. The Roberts *Decision's Conflicting Views*

1. Broad Interpretation: The Decision will "Chill" the Predatory Equity Market

Some believe the *Roberts* decision to be a landmark case[133] with significant implications for the New York City market in regulated rental housing. First, they believe that a broad interpretation of the *Roberts* decision could lead to a "chilling" effect on speculative purchases of multifamily housing because the scope and application of this decision are so uncertain that the practice of predatory equity is now too risky for private equity-backed developers.[134] Predatory equity success relies on

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[132] *See* David S. Hershey-Webb & William J. Gribben, *In the Wake of the 'Roberts' Decision, What's Next?*, N.Y.L.J., Dec. 1, 2009, at 4, col. 1. A law firm bulletin described the potential implications of the decision: "In addition, there may be disputes between present and prior landlords over liability, mortgage defaults at affected buildings and diminished services. It may take further litigation, regulatory action, or legislation to resolve such issues." *See* Special Bulletin: New York State Court of Appeals Issues Decision in Stuyvesant Town/ Peter Cooper Village Case, Stroock & Stroock & Lavan LLP 2 (Oct. 29, 2009), *available at* http://www.stroock.com/SiteFiles/Pub848.pdf [hereinafter *Special Bulletin*].

[133] Press Release, City Council Member Dan Garodnick, Re: *Roberts v. Tishman Speyer* Decision (Mar. 6, 2009), *available at* http://stuytownluxliving.com/2009/03/statement-from-council-member-garodnick-re-roberts-v-tishman-speyer-decision.html.

[134] Ilaina Jonas, *Court Ruling May Cost NYC Apartment Owners Billions*, REUTERS, Nov. 30, 2009, *available at* http://www.reuters.com/article/bankruptcyNews/idUSN3036333920091201; Anderson, *supra* note 50. The General Counsel to the Rent Stabilization Association has said that the decision exposes so many possible liabilities in the residential rental real estate market that there will be an immediate freeze in market activity. *Impact of Ruling*, *supra* note 50. Some believe that a "chilled" market and lack of competition will allow preservation purchasers—nonprofit organizations committed to keeping the housing affordable, city agencies or the tenants themselves—to acquire buildings and maintain their affordability,

the use of deregulation mechanisms, such as luxury decontrol, in order to remove apartments from the rent stabilization scheme and charge market rate rents.[135] If apartments that currently allow owners to receive tax abatements are unable to be deregulated, investors—ever cautious about investing in housing that is, or may become, regulated—may be even less inclined to invest in rent regulated housing.[136]

In other words, for tenants, the positive result of the *Roberts* decision may be that real estate speculation on rent regulated housing will decrease; a high court decision bolstering rent regulation could discourage subsequent rounds of speculative, overleveraged transactions in the residential rental housing market.[137] A prominent New York real estate brokerage firm founder explains that "[w]hen an investor purchases a rent controlled property, they usually do so with the expectation that they'll be able to convert a portion of the units to market rents . . . . Now those expectations have been challenged. For a lot of landlords, *this case just eliminated their upside*."[138] The loss of this "upside" could have enormous implications for developers who have used private equity to speculate on rental housing; it means that those involved in the already risky practice of predatory equity, who have purchased apartments that benefit from J-51 benefits, may not deregulate those apartments and charge market rents. Perhaps more importantly is the possibility that this loss of "upside" will discourage predatory equity transactions going forward.

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although financing these purchases requires significant capital to which many nonprofits, municipal agencies and low-income tenants may not have access. Anderson, *supra* note 50.

[135] ASS'N FOR NEIGHBORHOOD & HOUS. DEV., THE $20,000 STOVE: HOW FRAUDULENT RENT INCREASES UNDERMINE NEW YORK'S AFFORDABLE HOUSING 8 (2009), *available at* http://www.anhd.org/resources/the%20$20,000%20stove%20report%20on1-40th%20rent%20increase%20fraud.pdf.

[136] Daniel Geiger, *Owners Scratch Their Heads As Tenants Beat the System*, REAL EST. WKLY., Oct. 28, 2009, at 3, 27, *available at* http://www.masseyknakal.com/news/pdf/633924219561898750.pdf [hereinafter *Tenants Beat System*] (emphasis added).

[137] *Id*.

[138] *Id*. (emphasis added).

There is also the possibility that the scope of *Roberts* is not necessarily limited to the 90,000 units that are eligible for J-51 benefits and have been deregulated, or even the 350,000 J-51 units that receive J-51 benefits.[139] Even the *Roberts* court, despite its focus on J-51 benefits and its related statutes, acknowledged that the finding could apply to other types of tax benefits.[140] Courts may find that landlords received other tax abatements improperly while taking advantage of deregulation.[141] The case could have enormous implications on the number of claims brought and therefore, the decision's overall impact.[142] Lenders and investors may also balk at the prospect of offering funds for improvements with uncertainty around the owners' ability to successfully recoup their investment.[143] In fact, some investors appear to have already been affected[144] and the banking industry has indicated that *Roberts* could affect as much as $5.8 billion in loans and deter investors from pursuing rent stabilized

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[139] *See* Anderson, *supra* note 50.

[140] Roberts v. Tishman Speyer Props., L.P., 918 N.E.2d 900, 906 (N.Y. 2009). The court writes, "[t]he RRRA's sponsor stated that luxury decontrol was unavailable to building owners who 'enjoy[ed] another system of general public assistance' such as J-51 benefits." *Id*.

[141] *See Special Bulletin*, *supra* note 132, at 2. As Leonard Boxer, one of the leading real estate lawyers in the city explained in this client bulletin:

> The implications of this decision are likely to be far reaching, not only for other landlords and tenants in a similar predicament, but also for lenders, investors and for the residential real estate market in general. While this decision deals only with J-51, *entering into any tax exemption program* could significantly limit the use of your property in ways that may not be predictable.

Id. (emphasis added).

[142] Press Release, Harry Hecking & Paul Watkins, Flash: New York State's Court of Appeals Holds Tax Breaks Preclude Rent Decontrol (Oct. 28, 2009), *available at* http://www.dwpv.com/en/17620_24362.aspx.

[143] *Impact of Ruling*, *supra* note 50.

[144] Sam Chandan, *Investors and Stuy Town*, N.Y. OBSERVER, Oct. 28, 2009, *available at* http://neptune.observer.com/2009/commercial-observer/investors-and-stuy-town#. The predatory equity model depends in large part on securitization of the debt taken to finance the purchase. EVOLUTION OF A CRISIS, *supra* note 24, at 12–13.

properties in the future.[145]

In addition, the *Roberts* decision could suggest two judicial trends as courts adjudicate disputes over transactions that were executed at the height of the housing bubble. First, the *Roberts* decision could signal a shift away from pro-landlord rent regulation and deregulation rulings.[146] The possibility that this ruling was based, at least in part, on ideology—a disapproval of private equity's involvement in the New York rent regulated housing market, for example—is certain to give private equity-backed developers pause before making similar ventures into the regulated housing market.[147] Second, the decision could demonstrate the court's willingness to disregard longtime industry practices if a court believes that doing so is necessary to reach the proper legal result, as it did here in invalidating DHCR's application of J-51 law.[148] The court ignored the long-held and widespread view that DHCR's interpretation was legally correct[149] and invalidated that interpretation with the stroke of a pen.[150] Consequently, developers and their counsel could approach similarly structured real estate deals with much greater caution than they did before the *Roberts* case was decided.[151] This fear adds to the shadow of uncertainty that *Roberts* casts over the industry and market.[152]

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[145] *The Next Stuyvesant Town? Deutsche Bank Report Examines Fallout*, WALL ST. J. (Developments Blog), Dec. 1, 2009, http://blogs.wsj.com/developments/2009/12/01/the-next-stuyvesant-town-deutsche-bank-report-examines-fallout/ [hereinafter *The Next Stuyvesant Town*].

[146] *NY Real Estate Lawyers' Blog Post*, *supra* note 117.

[147] *The Next Stuyvesant Town*, *supra* note 145.

[148] Roberts v. Tishman Speyer Props., L.P., 918 N.E.2d 900, 907 (N.Y. 2009). The court simply dismisses the claim that a longtime practice should be upheld on the grounds that it is a longtime practice and that a change in that practice will require parties to expend significant effort, expense and that future litigation is certain. *Id.*

[149] *Tenants Beat System*, *supra* note 136, at 3.

[150] Jahr, *supra* note 19.

[151] *See Special Bulletin*, *supra* note 132.

[152] *Id.*

2. Narrow Interpretation: The Roberts *Decision Will Have a Limited Effect on Predatory Equity*

The *Roberts* decision also evokes the alternate view that the court's strict holding is likely to have only a negligible effect on New York City's predatory equity.[153] In other words, the decision appears to expressly impact *only* those property owners who simultaneously took advantage of J-51 tax abatements and deregulation.[154] The ruling, therefore, is most likely limited to a maximum of 90,000 apartments in New York City, less than 30,000 of which are in buildings considered to be predatory equity purchases.[155] While significant, such low numbers on their own are not substantial enough to ward off future predatory equity purchases, especially in light of the fact that now owners can simply forego J-51 benefits and reap the great rewards of deregulation.[156]

In addition, under this narrow view it is very unlikely that the *Roberts* decision foreshadows a broad, liberal, anti-owner/investor trend on the part of courts. To the contrary, the case is based strictly on an issue of statutory interpretation.[157]

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[153] *Landlords will Survive Stuy-town Verdict*, *supra* note 20.

[154] *Id.; see also* Wei & Wotapka, *supra* note 20, at A3.

[155] NEXT SUB-PRIME LOAN CRISIS, *supra* note 13 at 2; Jahr, *supra* note 19.

[156] Assuming that the Stuy Town Tenants collect the $215 million they wish to recover for back rent, Wei & Wotapka, *supra* note 20, at A3, the Owners could have saved $181 million by simply foregoing the $24 million they received as tax abatements through the J-51 program. *See* Charles V. Bagli, *Court Deals Blow to Owners of Apartment Complex*, N.Y. TIMES, Oct. 22, 2009, *available at* http://www.nytimes.com/2009/10/23/nyregion/23stuy town.html?_r=1. This math will likely deter like-minded property owners from entering the J-51 program in the future.

[157] *See* Roberts v. Tishman Speyer Props., L.P., 918 N.E.2d 900, 906 (N.Y. 2009). The decision reads:

> Here, we conclude that defendants' interpretation of the exception to luxury control for units that "became or become" subject to rent stabilization . . . conflicts with the most natural reading of the statute's language . . . . Contrary to PCV/ST's and MetLife's argument, there is nothing impossible, or even strained, about

Given the ruling's narrow language, courts will only be bound by the decision when exclusively addressing the interplay of J-51 tax abatements and simultaneous deregulation.

This decision could simply be a product of its times; it did, after all, come in the midst of a severe recession that followed the greed and audacity of a boom time. If the justices were, in fact, tinged by ideology, their holding is not likely to be applied by future courts in such a manner that it becomes a truly influential decision. Future courts will be vigilant to ensure that their decisions are based on the law, not ideology.

B. Roberts*' Impact on Predatory Equity will be Negligible*

Ultimately, the *Roberts* court's narrow holding indicates that this case, while significant, will not be instrumental in bringing about the demise of predatory equity. As such, the case is a source of false hope for those who believed that it would represent a seismic shift in New York residential real estate law. While the tenants in this case have prevailed against Stuy Town, there are a number of reasons why the tenant movement should not claim victory just yet.

First, despite speculation that this decision could chill the predatory equity market temporarily,[158] it does not appear to be doing so.[159] The narrow holding regarding just the J-51 program does not appear to be deterring vulture investors seeking distressed properties,[160] and is not likely to prevent private equity

> reading the verb "become" to refer to achieving, for a second time, a status already attained. Even assuming that the reading given to 'became or become' by PCV/ST and MetLife is a possible one, the RRRA's legislative history better supports our interpretation of the statute.

Id.

[158] *See supra* Part III.A.1.

[159] EVOLUTION OF A CRISIS, *supra* note 24, at 21. Instead, the banks selling the debt seem to be waiting to determine the market value of the buildings and loans so that they do not sell the assets for less than they could soon be worth if the market ends up recovering. *Id.*

[160] *Id.* Although they preceded the *Roberts* decision, there have been recent sales of predatory equity properties to owners with histories of

investors from getting involved again once the housing market rebounds.[161] Second, the ruling—which focuses almost exclusively on statutory language and legislative intent—debunks the notion that this decision reflects a new populist trend whereby ideologically motivated judges will punish investors and developers.[162]

Third, there are important socioeconomic differences between Stuy Town residents and other predatory equity building residents. The *Roberts* decision will not affect many buildings that are predatory equity victims because the buildings are located in neighborhoods where the rents are much less than the $2,000 mark that allows owners to deregulate the unit.[163] Thus, many predatory equity victims live in apartments that have become more expensive, but have not been deregulated and may not be for quite some time.[164] Moreover, most of the

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speculation and tenant harassment. *Id.* at 21. One example that worries tenant advocates is a speculative purchase made by the Orbach Group of debt held by Deutsche Bank in March, 2009 on overleveraged buildings owned by The Pinnacle Group. *Id.; see also* Massey Knakal, Commercial Mortgage Alert, Mar., 27, 2009, *available at* http://www.masseyknakal.com/news/pdf/633737690628258682.pdf. The Association for Neighborhood and Housing Development explains:

> [I]t is our assessment that a 40 percent discount would leave the building far less overleveraged, although still somewhat in excess of the building's actual income-based value. This suggests that the lender, Deutsche Bank, now has a more realistic model of how rent-regulated buildings in New York City should be underwritten. However, there are grave concerns about the Orbach Group as purchaser of the mortgage, as evidence suggests that it has a history of managing buildings with the same speculative approach and harassing tactics as the worst of the predatory equity developers.

EVOLUTION OF A CRISIS, *supra* note 24, at 21.

[161] EVOLUTION OF A CRISIS, *supra* note 24, at 20.

[162] Roberts v. Tishman Speyer Props., L.P., 918 N.E.2d 900, 906–07 (N.Y. 2009).

[163] WATERS & BACH, *supra* note 7, at 11.

[164] *Id.* While the rent can be raised rapidly due to a 20% vacancy bonus and the owner's ability to charge one dollar more per month for every forty dollars spent on improvements, in many cases, the rent will remain under $2,000. *Id.*

predatory equity victims are low-income tenants, unlike Stuy Town's middle-class tenants, and lack the political clout that comes from living in such a famous, historic and symbolic housing complex situated in the heart of Manhattan. Low-income tenants may be more easily coerced into giving up their legal rights and abandoning their homes due to financial concerns, lack of knowledge of their rights or because of their status as undocumented immigrants.[165] Such tenants are less likely to initiate expensive litigation like the Owners faced in *Roberts*.

Fourth, there is a chance that the backlash from this well-publicized case could prompt the New York State Legislature to accept the *Roberts* court's express invitation to amend the RSL and essentially undo the *Roberts* decision.[166] The decision invites those it knew would be angered by its ruling to do so: "If the statute imposes unacceptable burdens, defendants' remedy is to seek legislative relief."[167]

Fifth, it is likely that property owners will simply forego the benefits received through the J-51 program. Although these benefits are not insubstantial, they pale in comparison to the

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[165] PRATT CTR. FOR CMTY. DEV. & N.Y. IMMIGRANT HOUS. COLLABORATIVE, CONFRONTING THE HOUSING SQUEEZE: CHALLENGES FACING IMMIGRANT TENANTS, AND WHAT NEW YORK CAN DO 16 (2008), *available at* http://prattcenter.net/sites/default/files/publications/Confronting%20the%20Housing%20Squeeze.pdf.

[166] Richard A. Epstein, *The Scourge of Rent Stabilization*, FORBES.COM, Nov. 3, 2009, http://www.forbes.com/2009/11/02/rent-stabilization-tishman-speyer-peter-cooper-stuyvesant-opinions-columnists-richard-a-epstein.html. "[I]t is not as though the tenants have won anything tangible . . . for their Pyrrhic victory guarantees only further litigation on such technical subjects as class certification, measure of damages and statutes of limitation—unless of course the state legislature accepts the Court's invitation by undoing the *Roberts* decision." *Id*. Given the New York State Democrats' current control of the legislative and executive branches, such legislation is not, however, likely to be imminent. *See, e.g.*, Azi Paybarah, *Espada Promises the Repeal of Vacancy Decontrol and More*, N.Y. OBSERVER, Oct. 26, 2009, *available at* http://www.observer.com/2009/politics/espada-promise-repeal-vacancy-decontrol.

[167] *Roberts*, 918 N.E.2d at 907.

money an owner stands to make from a deregulated apartment.[168]

Sixth, the decision could actually harm tenants at Stuy Town and across the city more than it helps them.[169] Many "predatory equity" properties, including Stuy Town, are already debt-laden and on the path toward foreclosure. This decision, and any damages owners would be forced to pay, could actually make conditions worse for tenants.[170] "In the end, while the decision may provide monetary benefits to tenants in the short run, it may also prove to have a profoundly negative effect on the buildings and neighborhoods in which the affected units are located."[171] For example, there is a possibility that landlords will

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[168] Epstein, *supra* note 166.

[169] *Id.*

[170] *Court Hands Stuy Town Tenants Huge Victory*, *supra* note 21 ("'This decision is going to push building owners to the wall,' said Patrick Siconolfi, executive director of Community Housing Improvement Program, a group that represents landlords. 'And that's not good for anybody, because we need buildings to flourish for New York to flourish.'"). The impact of foreclosure on renters is beyond the scope of this Comment, but has been addressed in detail elsewhere. *See, e.g.*, Vicki Been & Allegra Glashausser, *Tenants: Innocent Victims of the Nation's Foreclosure Crisis*, 2 ALB. GOV'T L. REV. 1 (2009).

[171] *Special Bulletin*, *supra* note 132. While this may be true, there is an almost universal sentiment that predatory equity has caused many hardships for—if not the complete displacement of—many tenants in these neighborhoods, so it is difficult to evaluate which scenario is "worse." According to Joe Strasburg, president of the city's Rent Stabilization Association, which represents 25,000 owners of rent stabilized apartments:

> This ruling leaves more questions unanswered than the questions it addressed and, quite frankly, it raises new and alarming questions for both owners and tenants . . . . This court decision has the potential to force buildings into bankruptcy or foreclosure if owners are required to roll back rents. This would not only create chaos in the affordable housing industry, it would have a cascading detrimental effect on the New York City budget because property tax rolls would have to be adjusted lower—which would cripple an already financially struggling City during this economic crisis.

Tenants Beat System, *supra* note 136, at 3, 27. Others have noted that the ruling could decrease the city's tax revenues given that landlords' rent rolls determine the amount they must pay in taxes. *Court Hands Stuy Town Tenants Huge Victory*, *supra* note 21.

decide to simply avoid necessary renovations now that a significant incentive—the J-51 abatement—would preclude the significant benefits of deregulation.[172]

IV. CONCLUSION

There are a number of deterrents for future predatory equity investments in New York City: newly enacted tenant protection legislation, an active, organized and vocal tenant-rights movement with increasing success fighting harassment, elected officials who are willing to expend political capital fighting this battle for their constituents, the burst of the housing bubble, the pending crisis in the commercial mortgage-backed securities markets and now the *Roberts* decision and its impact in hastening the downfall of the most prominent and expensive real estate deals in history.[173] In fact, the *Roberts* decision impacts about one-third of all units in predatory equity buildings.[174] Yet, despite all of these deterrents, activity in the market for predatory equity properties continues, albeit in a slightly more moderate form.[175] In other words, the deterrents, including *Roberts*, are insufficient; the persistence of predatory equity demonstrates the belief, on the part of investors and developers,

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[172] *Court Hands Stuy Town Tenants Huge Victory*, *supra* note 21. "'It renders J-51 tax benefits useless,' said David Kuperberg, chief executive of Cooper Square Realty, the city's largest residential property manager, a firm that also has an ownership stake in about a dozen buildings with rent stabilized-units in the city. 'It is a disincentive for landlords to upgrade properties.'" *Id*.

[173] *See* WATERS, *supra* note 8.

[174] Jahr, *supra* note 19. According to Jahr's article, 27,708 of the 90,000 apartments that have been purchased through a predatory equity model have been deregulated while the owner has simultaneously received J-51 benefits. *Id*. Even this high percentage of impacted units does not appear to be deterring future investors from making purchases in this sector. *See id*.

[175] *See* EVOLUTION OF A CRISIS, *supra* note 24, at 21. Note that this activity preceded the *Roberts* Court of Appeals decision but followed the Appellate Division decision. Therefore, the potential for such a holding has been clear to the developers continuing to pursue predatory equity deals.

that such deals are not only rational, but profitable.[176]

The second, more "moderate" phase of predatory equity is characterized by more moderate overleveraging, but overleveraging nonetheless. While the implications of the economic slump and the *Roberts* ruling have yet to fully emerge, it seems clear that investors are still willing to buy distressed properties at a discount in the hopes of using predatory equity strategies to turn a profit. The *Roberts* decision's narrow holding appears to have done very little to thwart such efforts.

Ultimately, legislation, political pressure and market forces may actually pose a much greater threat to predatory equity investment than any court decision. There are numerous bills pending in state legislatures that could prevent predatory equity investment more effectively than the *Roberts* decision by strengthening rent regulation and, thus, removing the benefit of investing in regulated housing with the intention of someday charging market rents.[177] Federal legislation has also been introduced to curb new predatory equity purchases and to soften existing deals' harmful impacts on tenants and banks.[178] New York City recently announced a "Predatory Equity Task Force" to "respond to foreclosures around the city, and find creative new policies to prevent problems before they escalate."[179]

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[176] *See id.* at 20–22.

[177] *See, e.g.*, A02005, Assem. (N.Y. 2009), *available at* http://assembly.state.ny.us/leg/?bn=A02005 (proposing to repeal provisions of luxury decontrol); A02002, Assem. (N.Y. 2009), *available at* http://assembly.state.ny.us/leg/?bn=A02002 (proposing to increase civil penalties for types tenant harassment); A01688 Assem. (N.Y. 2009), *available at* http://assembly.state.ny.us/leg/?bn=A01688 (proposing to repeal the Urstadt Law); A00860, Assem., (N.Y. 2009) (proposing to increase the threshold levels for luxury decontrol to account for inflation), *available at* http://assembly.state.ny.us/leg/?bn=A00860.

[178] TARP for Main Street Act of 2009, H.R. 3068, 111th Cong. (2009), *available at* http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.3068:.

[179] Press Release, Dep't of Hous. Pres. & Dev., Mayor Bloomberg, Senator Schumer, Congressman Serrano, Speaker Quinn and Fannie Mae Announce Housing Developer Led by Mo Vaughn Will Purchase Troubled South Bronx Housing Portfolio (Dec. 2, 2009), *available at* http://www.nyc.gov/html/hpd/html/pr2009/pr-12-02-09.shtml. It seems unlikely, however,

Finally, the financial meltdown exposed systemic problems in the commercial mortgage backed securities market that could hinder deals of this magnitude from being made.[180] These forces could confront predatory equity much more effectively than the judiciary ever could.

The *Roberts* decision is significant because it demonstrates the ability of tenants to make current owners account for rent overcharges and to deter investors from using an already-risky investment strategy. Other tenants and their lawyers have already used the *Roberts* decision as a basis for claims, and more claims will certainly follow.[181] Unfortunately for tenants

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that this task force will have the mandate to implement any significant prophylactic measures; takings clause and contract challenges are legal hurdles for policy makers and tenant advocates whose ideal solution would be to guarantee that purchasers of multifamily rental housing be committed to maintaining affordability. *See* Maria Cristiano Anderson, *Solutions to the Crisis in Affordable Housing: A Proposed Model for New York City*, 3 RUTGERS J.L. & URB. POL'Y 84 (2005); Nat'l Hous. Law Project, *A Brief Review of State and Local Preservation Purchase Laws*, 36 HOUSING L. BULL. 217, 223 (2006), *available at* http://www.nhlp.org/files/Pres%20Purchase%20Rts%20(Nov%20Dec%2006).pdf.

[180] Sam Chandan, *Investors and Stuy Town*, N.Y. OBSERVER, Oct. 28, 2009, *available at* http://neptune.observer.com/2009/commercial-observer/investors-and-stuy-town#.

Given the struggling commercial mortgage backed securities (CMBS) market, it is unclear whether predatory equity deals of the magnitude made during the housing bubble could even be executed. Chandan explains:

> Apart from the specifics of last week's decision, a default of the magnitude and visibility of the Stuyvesant Town loans bears implications for a broader class of investors' perceptions of risk in holding CMBS exposure.
>
> . . .
>
> Confounding efforts to rebuild confidence in securitization, many investors will view a prospective default at Stuyvesant Town as a result of systemic issues in the CMBS market that have yet to be properly addressed, and not just as an asset-specific issue.

Id.

[181] Theresa Agovino, *Big Development Hit with Stuy-Town Ruling Fallout*, CRAIN'S N.Y. BUS., Nov. 16, 2009, *available at* http://www.crainsnewyork.com/article/20091116/FREE/911169987 (noting that 11 tenants at a building complex called London Terrace Gardens recently sued

and their advocates, investors continue to seek investment opportunities in the regulated residential real estate market, albeit with a modified and slightly more realistic model. The *Roberts* decision will certainly add to New York State's "impenetrable thicket" of rent laws, but it does not impose significant enough burdens on landlords and developers to precipitate the demise of predatory equity.

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their landlord on the same grounds the plaintiffs used in *Roberts*; the lawyer for the tenants has said that he is working on filing suits on these grounds in other buildings as well).