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## No Pact with the Devil: Defending & Strengthening New York City's Permanent Affordability Commitment Together (PACT) - P3

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**NO PACT WITH THE DEVIL: DEFENDING &  
STRENGTHENING NEW YORK CITY'S PERMANENT  
AFFORDABILITY COMMITMENT TOGETHER (PACT) -  
P3 TO PREVENT NYCHA'S OBSOLESCENCE**

*Madeline Martinez\**

*Faced with the dual threats of a federal receivership and a growing deficit of federal appropriations, in 2018, New York City Mayor Bill DeBlasio enrolled the New York City Housing Authority ("NYCHA") into the Permanent Affordability Commitment Together ("PACT"). PACT would allow NYCHA to convert its federal Section 9 funding streams into federal Section 8 vouchers and permit the local public housing authority to enter public-private partnerships with private developers. This move would infuse NYCHA with an additional \$12.8 billion in funding to counteract its roughly \$31.8 billion deficit. However, immediately after the mayor unveiled his plans to pursue PACT, tenant advocates and residents vocalized their concerns that the program would completely privatize NYCHA, dramatically reduce its affordability, and ultimately lead to resident displacement. This Note responds to popular anxiety over NYCHA's future and evaluates PACT's likelihood of meeting its stated objectives by using the six-prong "success factor" test derived from public management and engineering literature on public-private partnerships ("P3s"). This Note finds that PACT possesses most of the infrastructure industry's leading success factors for P3s and does more to shore up NYCHA's*

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*future viability than to jeopardize it. However, it identifies two vulnerabilities: (1) moderate Section 8 subsidy interruption risk; and (2) moderate tenant and local elected official opposition. This Note offers two recommendations to strengthen the program: (1) creation of municipal capital and operational reserve funds for each converted NYCHA development and (2) a scaling of the Chelsea Working Group model across all converted developments to ensure added resident and local representative engagement. Together, these recommendations will reduce resident displacement risk and increase the likelihood that NYCHA tenants will capture greater shares of the city and state budget to further stave off the authority's future obsolescence.*

#### INTRODUCTION

On January 31, 2019, the Office of Geoffrey S. Berman, the United States Attorney for the Southern District of New York, issued a press release announcing it had entered into a settlement agreement with the New York City Housing Authority ("NYCHA").<sup>1</sup> The settlement concluded a federal suit that the U.S. Attorney had brought forth just the year prior to hold NYCHA accountable for various violations of federal health and safety standards.<sup>2</sup> As part of this agreement, NYCHA promised to submit to the supervision of an independent monitor and to immediately remediate dangerous living conditions within its buildings, including: "toxic lead paint, asthma-inducing mold, lack of heat, frequent elevator outages, and vermin infestations."<sup>3</sup> For New

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<sup>1</sup> Press Release, U.S. Att'y Off. S.D.N.Y., Manhattan U.S. Attorney Announces New Agreement For Fundamental Reform At NYCHA (Jan. 31, 2019), <https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-new-agreement-fundamental-reform-nycha> [https://perma.cc/HH8H-P4BV].

<sup>2</sup> *Id.*

<sup>3</sup> U.S. v. N.Y.C. Hous. Auth., 347 F. Supp. 3d 182, 189 (S.D.N.Y. 2018) (order rejecting a proposed consent decree for a court-appointed monitor); Victor Bach et al., *NYCHA In Flux: Public Housing Residents Respond*, CMTY. SERV. SOC'Y. (July 2020), [https://smhttp-ssl-58547.nexcesscdn.net/nycss/images/uploads/pubs/2020\\_NYCHA\\_Report\\_V81.pdf](https://smhttp-ssl-58547.nexcesscdn.net/nycss/images/uploads/pubs/2020_NYCHA_Report_V81.pdf) [https://perma.cc/E7J2-ZCRW] (explaining that Judge Pauley rejected the consent decree believing it would create too much confusion, and instead suggested NYCHA be placed in federal

Yorkers with limited knowledge of NYCHA's inner workings, the entire event begged the question: how had NYCHA become the target of a lawsuit brought on by the federal government itself?

While bureaucratic mismanagement,<sup>4</sup> minimal political accountability, and politics may explain some of these circumstances, it would be naive to ignore the fact that, since the mid-twentieth century,<sup>5</sup> NYCHA—like all public housing authorities across the country—had been left with the responsibility of managing its aging housing stock with steadily decreasing federal dollars. In fact, researchers posit that such continued disinvestment will result in NYCHA's housing stock deteriorating beyond repair by 2027.<sup>6</sup>

Faced with the dual threats of federal receivership<sup>7</sup> and a growing deficit of federal appropriations, in 2018, New York City Mayor Bill DeBlasio enrolled NYCHA into the U.S. Housing and Urban Development's ("HUD") Rental Assistance Demonstration

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receivership); U.S. Att'y Off., *supra* note 1 (noting that the January 31, 2019 settlement staved off the federal receivership).

<sup>4</sup> ALEX F. SCHWARTZ, HOUSING POLICY IN THE UNITED STATES 111 (2004) ("Although many public housing authorities have professional, highly competent managers, others have long histories of ineptitude if not corruption. Poor management is evident in the oversight of entire public housing authorities . . . . It is reflected in . . . failure to respond to tenant complaints, failure to repair and maintain appliances and building systems, and failure to develop and implement long-term plans to replace building systems as they approach the end of their useful life.").

<sup>5</sup> See *infra* notes 40–46 and accompanying text; see also CITIZENS BUDGET COMM., STABILIZING THE FOUNDATION: TRANSFORMING NYCHA TO ADDRESS ITS CAPITAL NEEDS 13 (2018), [https://cbcny.org/sites/default/files/media/files/REPORT\\_NYCHAPNA\\_07022018\\_1.pdf](https://cbcny.org/sites/default/files/media/files/REPORT_NYCHAPNA_07022018_1.pdf) [<https://perma.cc/R625-QK7P>].

<sup>6</sup> CITIZENS BUDGET COMM. *supra* note 5, at 2 (The Citizens Budget Commission estimates "[w]ithout dramatic [funding and management] changes, by [2027], nearly 90 percent of NYCHA's housing . . . will be at risk of deteriorating past the point at which they are cost-effective to repair.").

<sup>7</sup> *Receivership*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining receivership as "the state of being placed under the control of a receiver" and defining receiver as "a disinterested person appointed by a court, or by a corporation or other person, for the protection or collection of property that is the subject of diverse claims (for example, because it belongs to a bankrupt or is otherwise being litigated)").

(“RAD”) program.<sup>8</sup> Signed into law by President Barack Obama in 2012,<sup>9</sup> RAD was devised by HUD—NYCHA’s parent agency—to allow local public housing agencies (“PHAs”) to replace their traditional federal Section 9 funding streams<sup>10</sup> with federal Section

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<sup>8</sup> Kyle Giller, *The Fight for NYCHA: RAD and the Erosion of Public Housing in New York*, 23 CUNY L. REV. 283, 307 (2020).

<sup>9</sup> *Id.* President Barack Obama was a proponent of P3s. *See* Dominique Custos & John Reitz, *Public-Private Partnerships*, 58 AM. J. COMP. L. 555, 563 (2010); *see also Partnerships*, WHITE HOUSE OFF. SOC. INNOV. & CIV. P’S HIPS, <https://obamawhitehouse.archives.gov/administration/eop/sicp/initiatives/partnerships> (last visited Oct. 24, 2021) [<https://perma.cc/C34Y-9M7L>]. He established the Office of Social Innovation and Civic Participations precisely as a means to facilitate his administration’s collaboration with non-government partners, viewing such cross-sectoral partnerships in cyber infrastructure, healthcare, education and other sectors as critical to the achievement of his presidential agenda. *Id.*

<sup>10</sup> Public housing authorities (“PHAs”) are partly funded by the federal government through the authority delegated to HUD under Section 9 of the U.S. Housing Act of 1937. *See A Blueprint for Change*, N.Y.C. HOUS. AUTH., [https://www1.nyc.gov/assets/nycha/downloads/pdf/Blueprint\\_for\\_Change\\_Brief\\_8.5x11\\_English.pdf](https://www1.nyc.gov/assets/nycha/downloads/pdf/Blueprint_for_Change_Brief_8.5x11_English.pdf) (last visited Feb. 13, 2022) [<https://perma.cc/2YH7-QDCV>].

8<sup>11</sup> vouchers.<sup>12</sup> This conversion of public housing's underlying funding mechanism would in turn lift a previously active statutory prohibition against the collateralization<sup>13</sup> of public housing property under Section 9 of the federal Housing Act of 1937.<sup>14</sup> With such newfound freedom, a RAD-converted PHA would be allowed to

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<sup>11</sup> The Section 8 program is primarily comprised of Housing Choice Mobility Vouchers and Project-based Vouchers. *Section 8 Voucher Types*, N.Y.C. HOUS. PRES. & DEV., <https://www1.nyc.gov/site/hpd/services-and-information/section-8-voucher-types.page> (last visited Feb. 13, 2022) [<https://perma.cc/N2T8-M5GM>]. The Section 8 Housing Choice Voucher program was created under the Homes and Community Development Act of 1974. DIRECTORY OF NYC HOUSING PROGRAMS, *Section 8 Housing Choice Voucher Program (HCV)*, COREDATA.NYC, <https://furmancenter.org/coredata/directory/entry/section-8-housing-choice-voucher-program> (last visited Feb. 13, 2022) [<https://perma.cc/A2PY-CJL8>] [hereinafter *Directory of NYC Housing*]. Essentially, it is a subsidy program in which participating tenants are allowed to rent market-rate housing while only directing 30% of their income toward rent. *Id.* HUD pays the difference between the tenant's share and the market rent. *Id.* However, there is a cap to the amount of rent the federal government will pay. *See id.* For example, in 2022, the maximum allowable rent a Section 8 Housing Choice Voucher may be applied toward is \$1,945 for a one-bedroom, or \$2,217 for a two bedroom in New York City. N.Y.C. Hous. Auth. *Voucher Payment Standards and Utility Standards*, N.Y.C. HOUS. AUTH., <https://www1.nyc.gov/site/nycha/section-8/voucher-payment-standards-vps-utility-allowance-schedule.page> (last visited Feb. 13, 2022) [<https://perma.cc/DH23-DQ38>]. The Section 8 Project-Based Voucher program was created in 1998 under the federal Quality Housing and Work Responsibility Act. *Directory of NYC Housing*, *supra* note 11. It functions as a component of the Housing Choice Voucher program. *Id.* Unlike Housing Choice Vouchers, however, Project-Based Vouchers are not portable. *Policy Basics: Project-Based Vouchers*, CTR. BUDGET & POL'Y PRIORITIES (Jan. 7, 2022), <https://www.cbpp.org/research/housing/project-based-vouchers> [<https://perma.cc/2T73-8DLN>]. A tenant cannot move and retain his voucher unless a new Housing Choice Mobility Voucher becomes available for his use. *See id.*

<sup>12</sup> *Final Report: Evaluation of HUD's Rental Assistance Demonstration (RAD)*, U.S. DEP'T HOUS. & URB. DEV., 1, 28 (June 2019), <https://www.huduser.gov/portal/sites/default/files/pdf/RAD-Evaluation-Final-Report.pdf> [<https://perma.cc/A4VH-NAR6>] [hereinafter *Final Report: Evaluation of HUD's Rental Assistance Demonstration*].

<sup>13</sup> *Collateralize*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining collateralize as "to serve as collateral for" and defining collateral as "property that is pledged as security against a debt").

<sup>14</sup> *See* Anne Marie Smetak, *Private Funding, Public Housing: The Devil in the Details*, 21 VA. J. SOC. POL'Y & L. 1, 14, n.50 (2014).

form partnerships with private developers that would allow them to access financing for repairs, renovations, and operations.<sup>15</sup>

If successful, the Permanent Affordability Commitment Together (“PACT”) program—as NYCHA’s RAD program would be called in New York City [hereinafter “PACT-P3”]—would infuse NYCHA with \$12.8 billion<sup>16</sup> in new private and public funding to counteract NYCHA’s running \$31.8 billion deficit.<sup>17</sup> However, immediately after Mayor DeBlasio announced that NYCHA would begin implementing PACT, and despite the sheer volume of new funding it could generate, Mayor DeBlasio’s plans drew sharp criticism.<sup>18</sup> In particular, NYCHA residents and advocates expressed concerns the PACT-P3 would completely privatize NYCHA, would dramatically reduce the affordability of

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<sup>15</sup> See *id.* at 14–17.

<sup>16</sup> SEAN CAMPION, CITIZENS BUDGET COMM’N, NYCHA 2.0: PROGRESS AT RISK, at 2 (2019), [https://cbcny.org/sites/default/files/media/files/CBCREPORT\\_NYCHA2.0\\_09172019\\_1.pdf](https://cbcny.org/sites/default/files/media/files/CBCREPORT_NYCHA2.0_09172019_1.pdf) [<https://perma.cc/X8HJ-PYZ5>].

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

<sup>18</sup> NYCHA’s official citywide tenant’s association—the Citywide Council of Presidents—initially vocalized opposition to PACT. Victor Bach, *Oversight Hearing on NYCHA Development: NYCHA 2.0 and PACT/RAD, Before the NYC Council Committee on Public Housing*, CMTY. SERV. SOC’Y. (Jan. 13, 2021), <https://www.cssny.org/news/entry/testimony-nycha-2.0-and-pact-rad> [<https://perma.cc/H7R3-WVSC>]. However, in recent years the Citywide Council of Presidents has softened its resistance and has helped to inform NYCHA’s current Guiding Principles. See N.Y.C. HOUS. AUTH., *Pact Information Session*, <https://www1.nyc.gov/assets/nycha/downloads/pdf/sept2021-acombined.pdf> [<https://perma.cc/PT3R-5YZJ>]. What opposition currently exists really comes from individual Resident Association presidents, such as that from John Adams Houses in the Bronx, or 344 E. 28<sup>th</sup> St. in Kips Bay, Manhattan. See Dean Moses, *Back to the Drawing Board: NYCHA Tenants Rally Against ‘A Blueprint for Change’*, AMNY (Mar. 23, 2021), <https://www.amny.com/news/getting-to-the-yoke-of-the-issue-nycha-tenants-rally-against-a-blueprint-for-change/> [<https://perma.cc/HD7S-FRET>]; Rachel Holliday Smith, *Feeling Left Out, Public Housing Tenants ‘Not on Board’ With Privatization Plan*, THECITY (July 2019), <https://www.thecity.nyc/housing/2020/7/19/21330309/public-housing-tenants-nycha-privatization-manhattan-housing> [<https://perma.cc/NA6X-4TK8>]; see also *infra* footnote 130 and accompanying text. These rather isolated tenant association leaders have joined various protests coordinated by the anti-PACT group, Fight for NYCHA.



renting in such housing, and ultimately result in the displacement of existing tenants.<sup>19</sup>

This Note responds to popular concern that PACT will serve as a death knell for New York City's public housing. To do so, this Note analyzes the project's strengths and weaknesses through the lens of public-private partnership ("P3s") theory. A six-point analytic framework derived from public management and construction literature is used to scrutinize PACT-P3's purported strength. The objective in applying this framework is to assess whether the PACT-P3 carries identifiable programmatic deficiencies that might lead to it failing and exposing public housing tenants to feared privatization, affordability, and displacement risks. Importantly, this Note identifies just two modest deficiencies in PACT-P3 and presents workable solutions to address them. On balance, the PACT program is poised to succeed in generating new, more reliable funding streams to meet NYCHA's severe federal funding gaps. Consequently, the PACT-P3 stands to prevent, rather than foment, NYCHA's future obsolescence.

Part I of this Note outlines a brief history of federal public housing spending. Part II describes the local impact of NYCHA housing and the scale of NYCHA's funding crisis. Part III details key features of Mayor DeBlasio's PACT-P3. And, after summarizing leading empirical research on factors found to correlate with successful P3s in the public infrastructure space, Part IV applies a composite framework to assess whether New York City's PACT-P3 contains any facially evident programmatic vulnerabilities. Part V proposes two modest modifications to the PACT program that would reduce public anxiety over the long-term affordability of local public housing.

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<sup>19</sup> The Community Service Society conducted a randomized survey of a citywide sample of NYCHA residents inquiring on their reception of PACT program. Bach, *supra* note 18. In their survey they found that 44% of residents opposed PACT conversions. *Id.* at 14. When probed further, residents explained public housing should not be privatized, they feared PACT would lead to gentrification that could push out residents, and they did not trust NYCHA more generally. *Id.*



I. THE GRADUAL FEDERAL DIVESTMENT IN AMERICAN PUBLIC HOUSING AND THE NEED FOR PUBLIC-PRIVATE FUNDING

To understand the root causes of NYCHA's current funding crisis, one must revisit the history of federal public housing spending in the United States more broadly. Historians generally divide the history of American public housing into three eras: the expansionary federal funding period from the 1930s through to the early 1970s; the subsequent contractionary period running from the early 1970s to the early 1990s; and the current period of public-private funding hybridization to prevent continued loss in units, running from the 1990s onward.<sup>20</sup> History shows that throughout the twentieth century the U.S. Congress moved to make public housing increasingly affordable for tenants, while failing to approve added public outlays to meet increased operating and capital costs.<sup>21</sup> Accordingly, with fewer resources to go around, local public housing authorities—such as NYCHA—had the unenviable responsibility of managing housing assets which grew too expensive to maintain.

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<sup>20</sup> See Giller, *supra* note 8, at 293–94. In a recent paper, UCLA Professor Jon D. Michael also splits the American administrative state between the twentieth to the twenty-first century into four broad periods. See also Jon D. Michaels, *We the Shareholders: Government Market Participation in the Postliberal U.S. Political Economy*, 120 COLUM. L. REV. 465, 467–70 (2020). In his analysis, these eras are understood as pendulum shifts in the competition between the state and private sector regarding “the ratio of public regulation to private ordering.” *Id.* Professor Michael demarcates the twentieth century to the present as follows: the mid-1930s is an era of a “state welfarist regime.” *Id.* The late 1960s are marked by the rise of libertarianism, which carries forward into the period of widespread deregulation and privatization of the state apparatus during 1990s. *Id.* He characterizes the present moment as a period in which the state has reclaimed some ground from the private sector as seen by the increased regulation of the financial markets and experimentation with segmentation of public services based on the public's willingness to pay (i.e., this tier system can be seen in the introduction of premium fees for access to expedited civil trials and VIP-style public jails). *Id.* According to Professor Michael, the current period is a pivot away from twentieth century's liberalism toward a yet inchoate state of “public capitalism”—featuring the government's positioning of itself as a savvy market participant, i.e., one that reaches for commercial, rather than typically sovereign, levers to achieve its public aims. *Id.*

<sup>21</sup> CITIZENS BUDGET COMM., *supra* note 5, at 13.

*A. Public Housing's Expansionary Period: The Mid-1930s to the Early 1970s*

The expansionary period of the American public housing program begins with the passage of the Wagner-Steagall Housing Act of 1937 (“the Wagner-Steagall Act”).<sup>22</sup> As part of one of the last significant pieces of legislation passed during the New Deal,<sup>23</sup> the Wagner-Steagall Act tasked HUD’s predecessor—the United States Housing Authority<sup>24</sup>—and state governments with the responsibility of jointly running local PHAs.<sup>25</sup> PHAs were permitted to issue bonds to finance the development costs of public housing, while the federal government would make the interest payments to investors.<sup>26</sup> Additionally, the program’s realty would be owned by state-chartered PHAs. One of the most important features of this early configuration, however, was the fact that tenant rents were set sufficiently high to help cover the operating costs of maintaining such large public housing buildings.<sup>27</sup>

During the earlier part of the twentieth century, there was public support for public housing’s construction.<sup>28</sup> However, fearing direct competition from public housing, the American real estate lobby convinced Congress to make public housing less desirable than

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<sup>22</sup> Maggy McCarty, INTRODUCTION TO PUBLIC HOUSING, CONG. RSCH. SERV., at 2 (2014), <https://sgp.fas.org/crs/misc/R41654.pdf> [<https://perma.cc/Z94Y-6NTF>]; NAT’L ARCHIVES, *FDR and Housing and Legislation*, FDR LIBR., <https://www.fdrlibrary.org/housing> (last visited Mar. 27, 2022) [<https://perma.cc/N3DD-7AVE>].

<sup>23</sup> SCHWARTZ, *supra* note 4, at 101.

<sup>24</sup> The United States Housing Authority is a predecessor to today’s federal HUD. NAT’L ARCHIVES, *supra* note 22. HUD was first constituted as a cabinet agency with the passage of the Housing and Urban Development Act of 1965. U.S. HOUS. & URB. DEV., *Questions and Answers About HUD*, ABOUT HUD, <https://www.hud.gov/about/qaintro> (last visited Mar. 27, 2022) [<https://perma.cc/MV9R-JG97>].

<sup>25</sup> *See id.* at 9.

<sup>26</sup> Capital funds are used to renovate or replace large-scale building systems. SCHWARTZ, *supra* note 4, at 113–14.

<sup>27</sup> SCHWARTZ, *supra* note 4, at 102.

<sup>28</sup> *See Smetak, supra* note 14, at 5.

private housing.<sup>29</sup> In response to industry pressure, HUD opted to use second-rate construction materials for public housing developments and to set low-income caps for tenants.<sup>30</sup> Later, with the passage of the United States Housing Act of 1949, Congress decreased public housing rents to 20% below fair market values.<sup>31</sup> Unfortunately, the long-term consequences of these choices were

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<sup>29</sup> The public housing program was initially met with opposition from the private real estate lobby. *See generally* SCHWARTZ, *supra* note 4, at 105. Thus, to overcome this opposition, Congress agreed to design a program that would not directly compete with market rate housing. *Id.* In order to prevent competition with private real estate, the original public housing legislation also influenced the architectural aesthetic of public housing: “architects were forbidden the liveliness of shopping [amenities] . . . [were] allowed bare minimum in common facilities . . . and given approval for low coverage usually with high densities and unplanned open space. So instead of attractive neighborhood additions, they were large monotonous, pared-down institutions alienating support among the general public . . .” *Id.* at 110 (quoting MARY NENNO, *ENDING THE STALEMATE: MOVING HOUSING AND URBAN DEVELOPMENT INTO THE MAINSTREAM OF AMERICA’S FUTURE* 104–105 (1996)); Brooklyn Law School, *A Conversation with Keeanga-Yamahatta Taylor: Author of Race for Profit*, YOUTUBE, at min. 47 (Nov. 11, 2021), <https://www.youtube.com/watch?v=TNOFgNCektA> [<https://perma.cc/95LN-9DQE>] (explaining that due to the private real estate lobby’s influence at the outset of the creation of the public housing program, this type of housing was to be branded “housing of last resort” and only made available to those who could not afford market-rate housing); McCarty, *supra* note 22, at 2.

<sup>30</sup> SCHWARTZ, *supra* note 4, at 109–10 (“The poor design and physical condition of public housing is partly, but not completely, due to the severe financial limitations imposed by the program on the amount of money that [could] be spent on construction. The 1937 legislation set a maximum development cost of \$5,000 per unit . . . Comparing [this] cost standard[ ] with the more generous one[ ] set by the Housing Division of Public Works Administration . . . the ‘permanent [public housing] legislation mandated markedly diminished physical standards for what Americans would come to know as public housing’ . . . . In order to comply with the program’s extremely low construction budgets, public housing was all too often built on the cheap. Building materials were second rate, construction often shoddy.”).

<sup>31</sup> McCarty, *supra* note 22, at 3 (“Out of concern about crowding out private market housing, the act . . . added the requirement that public housing rents be at least 20% below prevailing market rents . . .”).

early and expensive renovation costs<sup>32</sup> and the concentration of poverty.<sup>33</sup>

At the end of this expansionary period, Congress passed the Housing and Urban Development Act of 1969,<sup>34</sup> which included a “Brooke Amendment.” This key amendment was responsible for decreasing public housing rents yet again,<sup>35</sup> uncoupled from market values and set to 25% of a tenant’s income.<sup>36</sup>

Simultaneously, changes to the screening process—including the removal of public housing managers’ discretion to select tenants—led to an inflow of lower-income tenants.<sup>37</sup> Thus, with a rent formula set on tenant income and the decrease in total tenant income, local public housing authorities were further stymied in their efforts to meet operational costs on existing rent payments.<sup>38</sup> In part to compensate for PHAs’ projected revenue shortfalls, Congress charged HUD with the responsibility of supplementing public housing’s operational needs<sup>39</sup> in addition to the pre-existing responsibility to support PHAs’ capital funding.

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<sup>32</sup> SCHWARTZ, *supra* note 4, at 110 (“The drive to save money in constructing public housing proved to be extremely short sighted. Shoddy construction more often than not resulted in abnormally high maintenance and repair costs.”).

<sup>33</sup> See McCarty, *supra* note 22, at 2.

<sup>34</sup> *Id.* at 5.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* This rent formula would later increase to today’s 30% target. *Id.* at 6.

<sup>37</sup> Until the Civil Rights Era’s prohibition of racial segregation in housing, public housing managers often used race as a proxy for a desirable tenant. Meryem Dede, Comment, *Radical Options for Small Town Public Housing*, 23 VA. J. SOC. POL’Y & L. 129, 132–34 (2016). Civil rights pressures gradually abolished those screening tactics and others, lifting the prohibition against single-parent households and families whose principal source of income was welfare. LAWRENCE J. VALE, PURGING THE POOREST: PUBLIC HOUSING AND THE DESIGN POLITICS OF TWICE-CLEARED COMMUNITIES 16–18 (2013). Simultaneously, federal housing financing policies excluding potential black homeowners from access to federally subsidized mortgages fueled white flight from public housing, and trapped upwardly mobile African American families in urban centers. See Dede, *supra* note 37, at 132–34. Thus, gradually, public housing agencies had to operate housing with a population of residents that were increasingly more impoverished and racially concentrated. See SCHWARTZ, *supra* note 4, at 105.

<sup>38</sup> See McCarty, *supra* note 22, at 5.

<sup>39</sup> *Id.*

*B. Public Housing's Contractionary Period: Early 1970s - Early 1990s*

With the rise of Congressional libertarianism in the 1970s, and the country's stark retreat from the New Deal's state welfarist regime,<sup>40</sup> the contractionary period of public housing spending commenced.<sup>41</sup>

In particular, by 1973, the political will to fund public housing production dissipated. Shortly after taking office, President Richard Nixon abruptly declared a moratorium on the construction of new public housing.<sup>42</sup> One year later, Congress passed the Housing and Community Development Act of 1974, which created a direct competitor for national housing funds: the Section 8 voucher program.<sup>43</sup>

Consequently, public housing authorities were left to compete for fewer annual congressional appropriations to fulfill their annual operations and capital spending obligations,<sup>44</sup> pressuring these entities to rely on unsound deferred maintenance practices.<sup>45</sup> Importantly, many of the ballooning maintenance costs that PHAs struggle with today can be traced back to necessary deferred maintenance practices they were forced to institute in the 1970s.<sup>46</sup>

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<sup>40</sup> See Michaels, *supra* note 20, at 468–70.

<sup>41</sup> See Giller, *supra* note 8, at 296.

<sup>42</sup> Dede, *supra* note 37, at 132.

<sup>43</sup> CITIZENS BUDGET COMM., *supra* note 5. Unlike Section 9, which funded the quasi-governmental PHAs, Section 8 channeled housing subsidies directly to private landlords who would agree to house low-income tenants. VALE, *supra* note 37, at 20.

<sup>44</sup> See Peter Mercuse, *Interpreting "Public Housing" History*, 12 J. ARCHITECTURAL & PLAN. RSCH., 240, 251–52 (1995).

<sup>45</sup> Deferred maintenance is when a public housing agency forgoes investing in major building system capital improvements and defers up to 20% of its federal capital fund allocation to cover funding gaps for operational expenses. See SCHWARTZ, *supra* note 4, at 113–14.

<sup>46</sup> See *id.* at 114; see also Gates et al., REG'L PLAN ASS'N, NYCHA'S CRISIS: A MATTER FOR ALL NEW YORKERS 6, 8 (2018), [https://s3.us-east-1.amazonaws.com/rpa-org/pdfs/RPA-NYCHAs\\_Crisis\\_2018\\_12\\_18.pdf](https://s3.us-east-1.amazonaws.com/rpa-org/pdfs/RPA-NYCHAs_Crisis_2018_12_18.pdf) [<https://perma.cc/283L-ZY89>] ("Thirty-five percent of the added maintenance and repair needs in NYCHA buildings was due to . . . added depreciation [resulting from deferred maintenance].").

*C. Public Housing Unit Losses & the Need for Hybridized Funding: The 1990s - Present*

Faced with increased difficulty securing congressional appropriations to fund public housing and net losses in public housing units,<sup>47</sup> HUD began experimenting with hybrid funding schemes in the 1990s.<sup>48</sup> In particular, there was considerable experimentation with P3s to fund housing along with other public infrastructure.<sup>49</sup> In fact, between 1990 and 2000, HUD instituted five such demonstration programs.<sup>50</sup>

These five programs included: Family Self Sufficiency, Moving to Opportunity, Moving to Work, Jobs Plus, and HOPE VI.<sup>51</sup> Of these, HOPE VI, was the largest and was directly designed to address public housing's funding deficit and aging infrastructure

<sup>47</sup> From 1997 to 2004 there was a net reduction in public housing units of 173,368 apartments across the United States. SCHWARTZ, *supra* note 4, at 102.

<sup>48</sup> See Giller, *supra* note 8, at 300–01.

<sup>49</sup> The use of public-private partnerships by HUD during the early 1990s actually fits into a broader international trend in the government sector's use of P3s for infrastructure procurement. That is, following the United Kingdom's Private Finance Initiative's successful encouragement of commercial investment in public projects in 1992, P3s rose in global prominence. Michael J. Garvin & Doran Bosso, *Assessing the Effectiveness of Infrastructure P3 Programs and Projects*, 12(2) PUB. WORKS MGMT. & POL'Y 162, 162 (2008). In the United States, a cumulative \$48.8 billion of P3 contracts have closed between 2005 to 2014. Andrew Deye, *U.S. Infrastructure Public-Private Partnerships: Ready for Takeoff?*, 15 HARV. KENNEDY SCH. REV. 6, 6 (2014).

<sup>50</sup> These five programs include: Family Self Sufficiency, Moving to Opportunity, Moving to Work, Jobs Plus, and HOPE VI. Peter W. Salsich, *Does America Need Public Housing?*, 21 GEO. MASON L. REV. 690, 702–05 (2012). Of these, HOPE VI is the largest and is the one most directly designed to address public housing's deficit and aging infrastructure problems. Dede, *supra* note 37, at 134. Importantly, key programmatic flaws of the HOPE VI program—the requirement that demolition grants be used in order to access revitalization funding—resulted in its controversial net reduction of 400,000 public housing units and increase in public tenant displacement. See *When Hope Falls Short: HOPE VI, Accountability, and the Privatization of Public Housing*, 116 HAR. L. REV. 1477, 1483 (2003) [hereinafter *When Hope Falls Short*]. The recent experience with HOPE VI's net loss of public housing units likely explains why current NYCHA residents and their advocates are so fearful of experimental programs like PACT.

<sup>51</sup> Salsich, *supra* note 50, at 702–03.

challenges.<sup>52</sup> Importantly, however, key programmatic flaws of the HOPE VI program, in particular the requirement that demolition grants be used in order to access revitalization funding, resulted in its controversial net reduction of 400,000 public housing units and increase in public tenant displacement.<sup>53</sup>

The PACT-P3 comes at the heels of this third period's experimentation with alternative sources for public housing funding. Moreover, HOPE VI's net loss of public housing units likely explains, at least partly, why current NYCHA residents and their advocates are so fearful of new hybrid partnerships.

## II. WHAT'S AT STAKE? NYCHA'S SOCIAL UTILITY & THE MAGNITUDE OF ITS FINANCIAL CRISIS

New York City's state-chartered PHA—the New York City Housing Authority, or NYCHA—is simply unrivaled in the volume and affordability of housing it offers low-income renters: it is the nation's largest landlord<sup>54</sup> and it offers housing that is one-third of the price of market-rate housing on average.<sup>55</sup> Consequently, its ongoing dilapidation presents a threat to extremely low-income New Yorkers and to other key vulnerable populations it houses. In particular, given the scarcity of similarly affordable rental housing in New York City, NYCHA residents are at substantial risk of entering the city's shelter system if unexpectedly displaced due to the loss of public housing units.<sup>56</sup>

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<sup>52</sup> *Id.*; Dedde, *supra* note 37, at 134.

<sup>53</sup> See *When Hope Falls Short*, *supra* note 50, at 1483.

<sup>54</sup> See Gates et al., *supra* note 46, at 4.

<sup>55</sup> See *infra* footnotes 62–63 and accompanying text.

<sup>56</sup> See Gates et al., *supra* note 46, at 20.



A. *NYCHA's Social Utility: Providing Housing Where the Private Market Cannot*

NYCHA oversees 302 separate developments, comprised of 2,252 buildings<sup>57</sup> or 177,000 apartments.<sup>58</sup> Providing homes for 400,000 tenants, NYCHA is larger than the next ten PHAs combined.<sup>59</sup> Moreover, at \$548 per month,<sup>60</sup> the average rent in a NYCHA development is less than one-third of the price to rent market-rate apartments.<sup>61</sup>

If NYCHA's low-income renters were not living in public housing, they would likely be severely rent-burdened.<sup>62</sup> For example, in 2017, 61% of all NYCHA apartments were rented to households with "extremely low income."<sup>63</sup> Outside of NYCHA,

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<sup>57</sup> N.Y.C. HOUS. AUTH., NYCHA 2020 FACT SHEET 1 (2020), [https://www1.nyc.gov/assets/nycha/downloads/pdf/NYCHA-Fact-Sheet\\_2020\\_Final.pdf](https://www1.nyc.gov/assets/nycha/downloads/pdf/NYCHA-Fact-Sheet_2020_Final.pdf) [<https://perma.cc/CX3W-5JFJ>] [hereinafter *NYCHA 2020 FACT SHEET*].

<sup>58</sup> N.Y.C. HOUS. AUTH., *About NYCHA*, N.Y.C. HOUS. AUTH., <https://www1.nyc.gov/site/nycha/about/about-nycha.page> (last visited Mar. 26, 2021) [<https://perma.cc/PK4H-VJ3W>].

<sup>59</sup> Gates et al., *supra* note 46, at 4.

<sup>60</sup> *NYCHA 2020 FACT SHEET*, *supra* note 57, at 2.

<sup>61</sup> For 2017, unregulated housing rents for apartments of any size were on average \$2,061/month. See NYU FURMAN CTR, NYCHA'S OUTSIZED ROLE IN HOUSING NEW YORK'S POOREST HOUSEHOLDS 1 (2018), [https://furmancenter.org/files/NYCHA\\_Brief\\_12-17-18\\_Final.pdf](https://furmancenter.org/files/NYCHA_Brief_12-17-18_Final.pdf) [<https://perma.cc/VPM3-RNKN>] [hereinafter *NYCHA'S OUTSIZED ROLE IN HOUSING NEW YORK'S POOREST HOUSEHOLDS*].

<sup>62</sup> To be severely rent-burdened means to be expending over half of one's monthly gross income on rent. Jeff Larrimore et al., *Assessing the Severity of Rent Burden on Low Income Families*, FED. RSRV. (Dec. 22, 2017), <https://www.federalreserve.gov/econres/notes/feds-notes/assessing-the-severity-of-rent-burden-on-low-income-families-20171222.htm> [<https://perma.cc/9J8N-GWS5>].

<sup>63</sup> Extremely low-income is synonymous with living below 30% of the area median income. For 2019, that threshold was earning approximately \$31,299 annually for a family of four. N.Y.C. HOUS. PRES. & DEV. AFFORDABLE HOUS., *Area Median Income*, N.Y.C. HOUS. PRES. & DEV., <https://www1.nyc.gov/site/hpd/services-and-information/area-median-income.page> (last visited Nov. 26, 2021) [<https://perma.cc/6PG3-PX96>].

however, nearly all extremely low-income New York City renters were “severely rent-burdened.”<sup>64</sup>

Finally, a loss of NYCHA housing would create a disproportionate impact on a wide array of New York City’s vulnerable populations, as racial minorities, the elderly, the disabled, and the youth are overrepresented within the NYCHA tenant population. In particular, 90% of NYCHA residents are Black or Latino,<sup>65</sup> compared with 29% Black residents and 24.1% Latino residents citywide.<sup>66</sup> Twenty percent of the NYCHA residents are senior citizens,<sup>67</sup> compared to 14.5% of New York City’s total population.<sup>68</sup> Twenty percent of NYCHA residents are disabled,<sup>69</sup> while the disabled population in New York City is only 11%.<sup>70</sup> And 33% percent of NYCHA residents are under the age of eighteen,<sup>71</sup> contrasted with 20.8% across the municipality.<sup>72</sup>

### B. NYCHA’s Funding Crisis

Although it provides great benefits to the local community, NYCHA continues to obtain more of its public funding from the

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<sup>64</sup> Ninety-one percent of extremely low-income New Yorkers renting in the private housing market were also severely rent-burdened. *NYCHA’S OUTSIZED ROLE IN HOUSING NEW YORK’S POOREST HOUSEHOLDS*, *supra* note 61, at 4.

<sup>65</sup> NYU FURMAN CTR., *HOW NYCHA PRESERVES DIVERSITY IN NEW YORK’S CHANGING NEIGHBORHOODS* 3 (2019), [https://furmancenter.org/files/NYCHA\\_Diversity\\_Brief\\_Final-04-30-2019.pdf](https://furmancenter.org/files/NYCHA_Diversity_Brief_Final-04-30-2019.pdf) [https://perma.cc/BB5S-8APL] [hereinafter *How NYCHA Preserves Diversity*].

<sup>66</sup> According to population estimates for 2019. *Quick Facts, New York City, New York*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/newyorkcitynewyork> (last visited Nov. 26, 2021) [https://perma.cc/67P2-KG4J].

<sup>67</sup> *How NYCHA Preserves Diversity*, *supra* note 65, at 2.

<sup>68</sup> According to population estimates for 2019. U.S. CENSUS BUREAU, *supra* note 66.

<sup>69</sup> *How NYCHA Preserves Diversity*, *supra* note 65, at 2.

<sup>70</sup> According to Census data for 2017. OFF. OF THE N.Y. COMPTROLLER, *EMPLOYMENT TRENDS FOR PEOPLE WITH DISABILITIES IN NEW YORK CITY*, 1 (2019), <https://www.osc.state.ny.us/files/reports/osdc/pdf/report-7-2020.pdf> [https://perma.cc/VZJ3-Y99P].

<sup>71</sup> *How NYCHA Preserves Diversity*, *supra* note 65, at 2.

<sup>72</sup> According to population estimates for 2019. U.S. CENSUS BUREAU, *supra* note 66.

federal government than any other government source.<sup>73</sup> To illustrate: in 2021, 58% of NYCHA's total revenues came primarily from the federal government—in either Section 9 or Section 8 funding allocations,<sup>74</sup> whereas New York City's government allocated just 6%.<sup>75</sup> New York State government's allocation was folded into all other sources, but did not exceed 11% of the 2021 budget.<sup>76</sup>

Within its operational budget—the funds of which go toward covering the gap between rent revenue received and a formula-driven “allowable expense level”<sup>77</sup>—NYCHA received \$932 million in federal dollars in 2018.<sup>78</sup> The New York State government allocated no money that year,<sup>79</sup> while the New York City government allocated only \$144 million—or half of the amount New York City's government allocated to its Department of Cultural Affairs.<sup>80</sup> Capital funding allocations to NYCHA—for the renovation or replacement of large-scale building systems<sup>81</sup>—have

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<sup>73</sup> See Gastelum et al., THE COUNCIL OF THE CITY OF NEW YORK, REPORT TO THE FINANCE DIVISION ON THE FISCAL 2022 PRELIMINARY PLAN, 4 (2021), <https://council.nyc.gov/budget/wp-content/uploads/sites/54/2021/03/NYCHA.pdf> [<https://perma.cc/D6RL-H7VM>].

<sup>74</sup> See *id.*

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

<sup>76</sup> See *id.*

<sup>77</sup> SCHWARTZ, *supra* note 4, at 113. “The allowable expense level ‘is supposed to represent what a well-run housing authority would spend on operations, based on the experience of a small sample of agencies in the early 1970s and updated annually inflation.’ This formula used to determine the allowable expense level incorporates such factors as the age, size, and location of the public housing stock along with characteristics of the residents that influence the cost of a well-managed public housing department.” *Id.* (citations omitted). However, this expense level is subjected to the Congressional appropriation process. *Id.*

<sup>78</sup> Gastelum et al., *supra* note 73, at 14.

<sup>79</sup> In the entire financial report—in particular, the section discussing funding from the state and federal governments—made available to NYCHA for 2022, there is no mention of operational funds allocated from New York State government. See *id.*

<sup>80</sup> \$144 million also represented just one third of what it spent on its Parks Department; and one tenth of what it spent on its Department of Homeless Services. Gates et al., *supra* note 46, at 4.

<sup>81</sup> SCHWARTZ, *supra* note 4, at 114.

been comparatively more evenly distributed across the federal, state, and municipal governments. In 2018, the federal government allocated \$528 million to the capital budget,<sup>82</sup> while the state government allocated \$450 million,<sup>83</sup> and New York City allocated about \$450 million.<sup>84</sup>

Nevertheless, there has been a historical trend toward a steep decline in both federal operational and federal capital funding to NYCHA. For example, from 2001 to 2018, NYCHA accumulated an estimated \$1.5 billion in operational budget losses.<sup>85</sup> Moreover, between 2002 and 2017, NYCHA's capital budget decreased by \$100 million, despite capital costs increasing nearly five-fold.<sup>86</sup>

Unfortunately, the sheer enormity and age of the NYCHA infrastructure necessitates substantially more spending by all parties. According to NYCHA's latest physical needs assessment, the agency will need approximately \$31.8 billion over the course of five years to bring all of its buildings and grounds to a "state of good repair."<sup>87</sup> This is largely because nearly all of NYCHA's housing stock is over fifty years old;<sup>88</sup> the physical buildings have required increasingly more maintenance expenditures to offset natural

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<sup>82</sup> Gastelum et al., *supra* note 73, at 14.

<sup>83</sup> *See id.* at 15.

<sup>84</sup> Per NYCHA's *Adopted Budget for FY 2018 and the Four Year Financial Plan FY 2019-2022*, the City of New York's capital contributions represented 20.9% of the Authority's \$2.201 billion capital plan for 2018. N.Y.C. HOUS. AUTH., NEW YORK CITY HOUSING AUTHORITY, ADOPTED BUDGET FOR FY 2018 AND THE FOUR YEAR FINANCIAL PLAN FY 2019-2022 17 (2018), <https://www1.nyc.gov/assets/nycha/downloads/pdf/nycha-fy2018-budget-book.pdf> [<https://perma.cc/B7JP-D9UX>] [hereinafter *NYCHA Adopted Budget for FY 2018*].

<sup>85</sup> *Id.* at 19 (refer to Chart 4: Historical Operating Subsidy and Cumulative Loss); *see* CITIZENS BUDGET COMM., *supra* note 5, at 13.

<sup>86</sup> Had federal spending kept up with inflation and building costs, NYCHA's federal allocation would have been \$1.5 billion additional. CITIZENS BUDGET COMM., *supra* note 5.

<sup>87</sup> Gastelum et al., *supra* note 73, at 16. For comparative purposes it is worth noting that the cost of bringing NYCHA housing to good repair now exceeds even that which is needed to fix New York City's subway system. Gates et al., *supra* note 46, at 6.

<sup>88</sup> *See* CITIZENS BUDGET COMM., *supra* note 5, at 12.

depreciation,<sup>89</sup> and the deferred maintenance practices initiated during public housings' contractionary period have now come home to roost.<sup>90</sup>

If these physical infrastructure needs are not met, NYCHA could easily see a loss of units due to demolition. There is important precedent for such losses.<sup>91</sup> In 1990, the Brewster-Douglas Houses in Detroit—providing 661 units<sup>92</sup>—were torn down.<sup>93</sup> In the 1970s the high-rise Pruitt Igoe Houses containing 2,870 units<sup>94</sup> were also razed—having gone from state-of-the-art to dilapidated in just twenty years.<sup>95</sup> Today, demolition remains a threat to public housing as HOPE VI continues to remain actively funded by Congress.<sup>96</sup> So long as the HOPE VI program remains actively funded, public housing authorities remain incentivized to tear down public housing in order to access revitalization funds for the construction of new, mixed-use housing.

Finally, given the demographic makeup of NYCHA tenants, demolition of units would create tremendous pressure on New York City's expensive shelter system.<sup>97</sup> Accordingly, it is good social and

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<sup>89</sup> The largest tranche of this estimate, \$12.8 billion, would be necessary to make many of the long-overdue, intra-unit repairs, which came under scrutiny in the *United States v. New York City Housing Authority* federal suit, 347 F. Supp. 3d at 189, including: unresolved defects in piping, walls, ceilings, bathrooms, and kitchens, in particular. Gastelum et al., *supra* note 73, at 16. Roughly \$11 billion is needed to repair the exterior of NYCHA buildings, including roofs, facades, front doors, and brickwork. *Id.*

<sup>90</sup> CITIZENS BUDGET COMM., *supra* note 5, at 6, 8, 10, 17.

<sup>91</sup> Gates et al., *supra* note 46, at 7.

<sup>92</sup> Corey Williams, *Housing Project Where Supremes Lived Coming Down*, WASH. EXAM'R (Nov. 15, 2012), <https://www.washingtonexaminer.com/housing-project-where-supremes-lived-coming-down> [<https://perma.cc/J5NA-NJE7>].

<sup>93</sup> Gates et al., *supra* note 46, at 7.

<sup>94</sup> *Pruitt-Igoe: The Troubled High-Rise That Came to Define Urban America – a History of Cities in 50 Buildings, Day 21*, GUARDIAN, (Apr. 22, 2015), <https://www.theguardian.com/cities/2015/apr/22/pruitt-igoe-high-rise-urban-america-history-cities> [<https://perma.cc/P45R-EZVQ>].

<sup>95</sup> Gates et al., *supra* note 46, at 7.

<sup>96</sup> *See id.*

<sup>97</sup> New York only pays about \$143 million dollars to leverage \$885 million dollars in federal operational assistance and in total it expends about \$70 per month to operate each NYCHA unit compared to the \$3,272 it expends to house a household in the city's shelter per month. Gates et al., *supra* note 46, at 19–20.

fiscal policy for the City of New York to take advantage of innovative programs like PACT to cover some of NYCHA's federal funding gaps.

### III. KEY FEATURES OF NYCHA'S PACT-P3 GUARDING AGAINST PRIVATIZATION, THE UNAFFORDABILITY OF UNITS, AND TENANT DISPLACEMENT

To meet NYCHA's growing financial crisis, the City of New York unveiled NYCHA 2.0 on December 12, 2018.<sup>98</sup> Then Mayor Bill de Blasio<sup>99</sup> intended NYCHA 2.0 to serve as a strategic plan to preserve NYCHA's housing stock and directly address its \$31.8 billion five-year capital need.<sup>100</sup> The plan included two broad components: (1) "Invest to Preserve" and (2) "Fix to Preserve."<sup>101</sup> PACT-P3 is a subset of the "Invest to Preserve"<sup>102</sup> prong of the plan.

Although seemingly controversial on its face, beneath the surface PACT is designed to prevent the realization of many tenant fears. Firstly, the ownership structure undergirding a PACT partnership is a joint venture in which NYCHA retains a significant interest in entities on both sides of the venture.<sup>103</sup> Secondly, as part of their participation in the program, private parties sign a Housing Assistance Payment ("HAP") contract, which sets rent affordability analogous to that currently in effect under Section 9 law.<sup>104</sup> And thirdly, NYCHA preserves key tenant protections to ensure that a PACT tenancy closely resembles the traditional Section 9

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<sup>98</sup> *Fixing NYCHA: Mayor de Blasio Announces Comprehensive Plan to Renovate NYCHA Apartments and Preserve Public Housing*, OFF. OF THE MAYOR OF N.Y.C. (Dec. 12, 2018), <https://www1.nyc.gov/office-of-the-mayor/news/591-18/fixing-nycha-mayor-de-blasio-comprehensive-plan-renovate-nycha-apartments-and#/0> [<https://perma.cc/JF6G-RQQN>].

<sup>99</sup> *Id.*

<sup>100</sup> *See* CAMPION, *supra* note 16, at 1–2.

<sup>101</sup> *Id.* at 2.

<sup>102</sup> *Id.* at 3.

<sup>103</sup> *See P.A.C.T. Development Handbook: Tools and Best Practices for PACT Conversions in NYC*, ENTER. CMTY. PARTNERS & HESTER ST. 7 (2019), <https://www.enterprisecommunity.org/sites/default/files/2021-06/PACT-development-handbook.pdf> [<https://perma.cc/9M9B-LCAY>] [hereinafter *P.A.C.T. Development Handbook*].

<sup>104</sup> *See* discussion *infra* Part III, Section C.



tenancy.<sup>105</sup> Therefore, in a best-case scenario the PACT conversion program guards against many of its tenants' worst fears.

*A. A Joint Venture Where NYCHA Retains Majority Stake  
on Both Sides of the Deal*

Overall, NYCHA has designed the PACT-P3 to preserve its control and property interest in the city's public housing stock.<sup>106</sup> It employs a parent-subsidary corporate structure<sup>107</sup> which allows NYCHA to indirectly influence the operations of the public entity contracting with private parties over future housing management, while ostensibly protecting the remainder of NYCHA's public assets behind a corporate shield.<sup>108</sup> NYCHA also forms a limited liability company<sup>109</sup> with the private development team, and retains

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<sup>105</sup> *Id.*

<sup>106</sup> See generally *P.A.C.T. Development Handbook*, *supra* note 103.

<sup>107</sup> In corporate law, a corporation is considered the “parent” of a subsidiary corporation when the former owns either the majority, or the totality, of the shares of the latter. See *What is a Parent Company Subsidiary Relationship?*, UPCOUNSEL, (Oct. 12, 2020), <https://www.upcounsel.com/parent-company-subsubsidiary-relationship> [<https://perma.cc/49TE-JMLW>]; see also Frank J. Antione, *Corporations-Parent Subsidiary-Corporate Entity*, 17 MARQ. L. REV. 280, 280 (1933); *P.A.C.T. Development Handbook*, *supra* note 103.

<sup>108</sup> The typical parent-subsidary corporate relationship is designed to protect the parent corporation's assets from the liabilities incurred by the subsidiary. William J. Rands, *Domination of a Subsidiary by a Parent*, 32 INDIANA L. REV. 421, 423 (1999). Courts will, however, allow a “piercing of the corporate veil” if the parent company is shown to “[exert] complete control of [subsidiary] corporation; use . . . such control to commit [a] wrong; and [if the parent company's wrongful act] proximately caused [an injury to a third-party] . . . .” *Guptill Holding Corp. v. State*, 33 A.D.2d 362, 365 (1970), *aff'd* 31 N.Y.2d 897 (1972) (citations omitted).

<sup>109</sup> Part of the distinctive characteristics of a limited liability company is that it affords its members the limited liability of a corporation without imposing the internal governance requirements of state corporation law. ROBERT J. HAFT, ET AL., *VENTURE CAPITAL AND SMALL BUSINESS FINANCINGS* § 3:1 (2021). Thus, NYCHA's 50% stake in the LLC and status as manager allows it to exert significant control over the activities of the developer operating the ground lease of the converted NYCA campus. See *P.A.C.T. Development Handbook*, *supra* note 103, at 6; see also ROBERT J. HAFT, ET AL., *VENTURE CAPITAL AND SMALL BUSINESS FINANCINGS* § 3:46 (2021).



the status of co-managing member.<sup>110</sup> As co-manager, along with private developers, NYCHA can continue to direct the activities of the NYCHA campus after its conversion.<sup>111</sup> And finally, NYCHA at no time sells its buildings.<sup>112</sup> The subsidiary created by NYCHA merely leases out its realty to the quasi-private development team.<sup>113</sup> Thus, this highly sophisticated ownership structure allows it to leverage private party expertise and financial risk management, while retaining the public's interest in the infrastructure asset.

Specifically, NYCHA, as the public benefit corporation "parent," creates a "subsidiary" housing development fund corporation ("NYCHA-HDFC<sub>x</sub>") for each development that will undergo conversion.<sup>114</sup> The HDFC is primarily used to hold fee title to the land and the buildings for a given NYCHA campus undergoing conversion.<sup>115</sup> Since NYCHA-HDFC<sub>x</sub> is a subsidiary of the NYCHA parent, NYCHA can retain indirect control over the activities of NYCHA-HDFC<sub>x</sub>, while preserving the remainder of its housing stock behind a corporate shield.<sup>116</sup>

NYCHA-HDFC<sub>x</sub> is then used as the vehicle to enter into a joint venture with a Limited Liability Company ("PACT-LLC").<sup>117</sup>

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<sup>110</sup> See *P.A.C.T. Development Handbook*, *supra* note 103, at 6.

<sup>111</sup> *Id.* at 6.

<sup>112</sup> *Id.* at 7.

<sup>113</sup> *Id.*

<sup>114</sup> This Housing Development Fund Corporation is a creature of New York State law and is the vehicle used to allow the NYCHA subsidiary to retain a property tax exemption. See *Directory of NYC Housing Programs: Article XI Tax Incentives*, COREDATA.NYC, <https://furmancenter.org/coredata/directory/entry/article-xi-tax-incentive> (last visited Nov. 26, 2021) [<https://perma.cc/K33N-K6Q2>]; see also *P.A.C.T. Development Handbook*, *supra* note 103, at 6 (depicting NYCHA as a "parent" entity over NYCHA-HDFC in the flowchart illustrating the PACT deal structure).

<sup>115</sup> See *P.A.C.T. Development Handbook*, *supra* note 103, at 7.

<sup>116</sup> Brad Castel, *Forming a Subsidiary of a Non-Profit, Charitable Tax-Exempt Corporation*, CTR. FOR CMTY. ECON. DEV., 1, 3–5 (2002), <http://ww1.insightcced.org/uploads/publications/legal/720.pdf> (last visited Nov. 30, 2021) [<https://perma.cc/H7P4-3KEA>]; *Taking Care of Business: Use of a For-Profit Subsidiary by a Nonprofit Organization*, AM. BAR ASS'N., [https://www.americanbar.org/groups/business\\_law/publications/blt/2014/06/03\\_levitt/](https://www.americanbar.org/groups/business_law/publications/blt/2014/06/03_levitt/) (last visited Nov. 30, 2021) [<https://perma.cc/Y7V3-K7L9>].

<sup>117</sup> See *P.A.C.T. Development Handbook*, *supra* note 103, at 7.

NYCHA also holds a 50% stake in the limited liability company.<sup>118</sup> The remaining 50% stake in the PACT-LLC is owned by the Project Team consisting of a private housing developer, a property management company, and a social service provider.<sup>119</sup> The transaction linking both parties to the joint venture is a ninety-nine-year ground lease between NYCHA-HDFC<sub>x</sub>, the lessor, and PACT-LLC, the lessee.<sup>120</sup> NYCHA-HDFC<sub>x</sub> maintains ownership of the land under the ground lease, while NYCHA, a controlling member of the PACT-LLC, retains a significant stake in control over the operations of the leased buildings.<sup>121</sup> In addition, PACT-LLC pays NYCHA a fee for maintaining the lease,<sup>122</sup> while NYCHA administers the Section 8 payments PACT-LLC will receive as the new landlord to the converted buildings.<sup>123</sup>

*B. NYCHA-HDFC<sub>x</sub> As Administrator of Ground Lease  
Setting Affordability Metrics for Private Partner*

As the Section 8 voucher administrator,<sup>124</sup> NYCHA can dictate the rents set in the units converted under PACT.<sup>125</sup> The HAP contract is the principal document that allows NYCHA to exert control over PACT rents.<sup>126</sup> The HAP contract is a standard Section

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<sup>118</sup> *See id.*

<sup>119</sup> *See id.* at 6.

<sup>120</sup> *See id.* at 7.

<sup>121</sup> *Id.*

<sup>122</sup> *See* N.Y.C. HOUS. AUTH., NYCHA PACT ROUND 11 RFEI, at 54 (2021), <https://www1.nyc.gov/assets/nycha/downloads/pdf/round11-oct8.pdf> [<https://perma.cc/8URQ-39WD>] (noting that under the “Financial Proposal” criteria the “return to NYCHA” will in part be determined by lease payments and fees made by the PACT Project Team) [hereinafter NYCHA PACT ROUND 11 RFEI].

<sup>123</sup> N.Y.C. HOUS. AUTH., NYCHA 2.0 PART 1 INVEST TO PRESERVE: ASSURING QUALITY AFFORDABLE HOUSING FOR ALL NYCHA RESIDENTS 12, 24, <https://www1.nyc.gov/assets/nycha/downloads/pdf/NYCHA-2.0-Part1.pdf> [<https://perma.cc/KM85-GDAJ>] [hereinafter *NYCHA 2.0 PART 1 INVEST TO PRESERVE*].

<sup>124</sup> *Id.* at 24.

<sup>125</sup> *See id.* at 14, 24.

<sup>126</sup> PACT Project Teams enter into HAP contracts in order to receive Section 8 rent subsidies from HUD. *See* U.S. GOV’T ACCT. OFF., GAO-18-123, RENTAL

8 contract that sets rent affordability nearly analogous to that set under Section 9 law: 30% of annual tenant income.<sup>127</sup> Section 8 contracts are set for either fifteen or twenty years and are statutorily required to be renewed for the ninety-nine years on the ground lease;<sup>128</sup> therefore, NYCHA anticipates no issues in controlling the rent levels that PACT-LLC will set.<sup>129</sup>

*C. Tenant Protections Allowing PACT Tenancies to Closely Resemble Section 9 Tenancies*

The PACT program incorporates many fundamental tenant rights and protections against displacement. For example, if a resident has to move due to a PACT rehabilitation project, that resident is guaranteed a “right to return” to their original unit.<sup>130</sup> In addition, tenants are not “rescreened” by the PACT Project Team for income or other eligibility upon their return to the development.<sup>131</sup> Owners or operators of the new Section 8 public housing units must also create analogs to the robust notice requirements that Section 9 imposed on NYCHA before initiating eviction proceedings.<sup>132</sup> Moreover, residents living in Section 8-funded public housing units retain the right to continue to operate Resident Organizations<sup>133</sup> funded by the operator or owner’s

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ASSISTANCE DEMONSTRATION: HUD NEEDS TO TAKE ACTION TO IMPROVE METRICS AND ONGOING OVERSIGHT 33 (2018), <https://www.gao.gov/assets/gao-18-123.pdf> [<https://perma.cc/45ZR-G3H6>]. NYCHA also happens to be one of the agencies that administers the Section 8 program in New York City, which is why it is relatively easy for it to administer newly signed HAP contracts with PACT LLCs. See N.Y.C. HOUS. PRES. & DEV., *Section 8, About Section 8*, N.Y.C. HOUS. PRES. & DEV., <https://www1.nyc.gov/site/hpd/services-and-information/about-section-8.page> (last visited Nov. 26, 2021) [<https://perma.cc/Z7RD-8TTS>].

<sup>127</sup> U.S. GOV’T ACCT. OFF., *supra* note 126, at 33, n.49.

<sup>128</sup> Smetak, *supra* note 14, at 52–53.

<sup>129</sup> See NYCHA 2.0 PART 1 INVEST TO PRESERVE, *supra* note 123, at 12, 14.

<sup>130</sup> U.S. GOV’T ACCT. OFF., *supra* note 126, at 25.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> Resident organization is another name for tenant association. N.Y.C. HOUS. AUTH., *Resident Councils*, RESIDENTS, <https://www1.nyc.gov/site/nycha/residents/resident-councils.page> (last visited Feb. 16, 2022). NYCHA residents

expense.<sup>134</sup> Finally, residents living in converted units retain the option to access “Choice Mobility Vouchers,” or other tenant-based public rental assistance, to transfer to live in private-market apartments.<sup>135</sup>

#### IV. PACT AS A PUBLIC-PRIVATE PARTNERSHIP (P3) & *NOT* AS DIVESTITURE

Critics of the PACT-P3 mischaracterize the program as effectively being a complete privatization<sup>136</sup> of public housing or divestiture.<sup>137</sup> However, in the absence of a complete transfer of the

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are entitled to organize into resident organizations under federal law. N.Y.C. HOUS. AUTH., *Tenant Participation Activity*, RESIDENTS, <https://www1.nyc.gov/site/nycha/residents/nycha-tpa.page> (last visited Feb. 16, 2022) [<https://perma.cc/WV5A-8BGF>]. They also receive funding to operate form NYCHA itself. *Id.*

<sup>134</sup> U.S. GOV’T ACCT. OFF., *supra* note 126, at 25.

<sup>135</sup> A Choice Mobility Voucher is a voucher that allows a resident of a PACT-converted property to move to a non-PACT NYCHA building after one or two years depending on the type of Section 8 funding that the PACT unit receives. U.S. GOV’T ACCT. OFF., *supra* note 126, at 28; Smetak, *supra* note 14, at 1, 7.

<sup>136</sup> For example, in March of 2021, a NYCHA tenant of the Isaacs Houses and founder of the Issacs Coalition was quoted as stating in a protest against PACT, “Keep public housing *public* . . . . It is shameful in a pandemic that NYCHA is pushing their Blueprint plan. We are sick and tired of their privatization schemes . . . .” Moses, *supra* note 18 (emphasis added) (Note: the Issacs Coalition is an independent group formed to protest proposed infill development in the Issacs Houses of the Upper East Side.). Nick Gerber, *UES NYCHA Tenants Say Fixes Haven’t Arrived, 1 Year Into Lawsuit*, PATCH (Mar. 3, 2021), <https://patch.com/new-york/upper-east-side-nyc/ues-nycha-tenants-say-fixes-havent-arrived-1-year-lawsuit> [<https://perma.cc/CST7-9YNU>]; *see also* Michael Gartland, *NYC Public Housing Residents Fear Privatization of Buildings*, DAILYNEWS (Jan. 26, 2020), <https://www.nydailynews.com/new-york/ny-rad-nycha-de-blasio-privitization-20200126-iszwy43cejf5no7odlr62vd7ry-story.html>; *see also* Smith, *supra* note 18.

<sup>137</sup> Privatization falls into a spectrum. *See* Marshall Hargrave, *Privatization*, INVESTOPEDIA (Feb. 27, 2021), <https://www.investopedia.com/terms/p/privatization.asp> [<https://perma.cc/M5PX-CNKL>]. Thus, it is only where there is a complete or substantial transfer of a government’s ownership stake in a public utility or service, can it be properly said the government has divested from the public asset. WORLD BANK, *Full Divestiture / Privatization*, <https://ppp.worldbank.org/public-private-partnership/agreements/full-divestiture-privatization> (last visited Feb. 19, 2022) [<https://perma.cc/4P9R-G524>]. It is the

government's ownership rights there is no complete privatization.<sup>138</sup> In reality, the PACT-P3 is a form of public-private *partnership* in which the underlying asset—in this case, a public housing building or its land—remains government property while receiving public financing and private operational support.<sup>139</sup> While, admittedly, public-private infrastructure partnerships are not always successful,<sup>140</sup> it is crucial to evaluate the PACT-P3 on its actual attributes and recent performance. By these measures, it becomes easier for one to appreciate its careful design and be less certain that it will be ruinous for the public housing program.

*A. The Distinctive Attributes of Public-Private Partnerships*

P3s are “long-term contract[s] between a private party and a government entity, for providing a public asset or service, in which the private party bears significant risk and management responsibility, and remuneration is linked to performance.”<sup>141</sup> Among the theorized benefits of P3s are their ability to allow governments “to holistically address multiple stages of [an asset’s] lifecycle without developing the technical, financial, and physical resources needed to deliver and maintain these [assets]

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author’s opinion that it is analytically advantageous to consider an asset “public” unless a government has engaged in a substantial divestiture.

<sup>138</sup> Anika Guevera, *Public-Private Partnerships: An Innovative Solution for Declining Infrastructure*, 47(2) URB. L. 309, 314 (2015) (“Privatization refers to the transfer of ownership, specifically ownership in government owned or operated infrastructure, from a public entity to a private entity.”) (citations omitted).

<sup>139</sup> CAMPION, *supra* note 16, at 3.

<sup>140</sup> See Pamela Bloomfield, *The Challenging Business of Long-Term Public-Private Partnerships: Reflections on Local Experience*, 66 PUB. ADMIN. REV. 400, 400–06 (2018) (describing examples of many poorly conceived American public-private partnerships in infrastructure).

<sup>141</sup> PRIVATE INFRASTRUCTURE ADVISORY FACILITY, *Methodology for PPP Projects and Investment*, PPP KNOWLEDGE LAB, [https://pppknowledgelab.org/ppi\\_methodology](https://pppknowledgelab.org/ppi_methodology) (last visited Nov. 26, 2021) [<https://perma.cc/RV8S-CB86>].

themselves.”<sup>142</sup> In addition, P3s allow governments to finance infrastructure off the balance sheet, allowing a government body to use its existing credit lines on other initiatives.<sup>143</sup> Finally, P3s are thought to encourage governments to further innovate in infrastructure procurement.<sup>144</sup>

Among their empirical drawbacks, however, are their high transaction costs and potential to create new budgetary problems for governments.<sup>145</sup> In many cases, these unintended consequences result from the fact that the public and private entities have “differing interests and [pursue] legitimate efforts to protect their interests [which] can lead to . . . disputes . . . .”<sup>146</sup> Faced with these conflicting forces, contracting governments that lack the expertise or structure to effectively administer long-term agreements leave their public-private partnerships vulnerable to failure.

*B. A Comprehensive Framework for Identifying the Strengths and Weakness of NYCHA’s PACT-P3*

Due to the almost infinite permutations of a P3 contract,<sup>147</sup> tracking the factors leading to success across diverse projects is

<sup>142</sup> Carter B. Casady et al., *Examining the State of P3 (P3) Institutionalization in the United States*, 8 ENG’G PROJ. ORG. J. 3 (2017), <https://epojournal.net/v8-casady> [https://perma.cc/8A9H-GCYS].

<sup>143</sup> Graeme A. Hodge & Carsten Greve, *On Public-Private Partnership Performance: A Contemporary Review*, 22(1) PUB. WORKS MGMT. & POL’Y 56, 59 (2017) (“[T]he use of private finance had the ‘crucial [political] advantage that borrowing undertaken through it . . .’ was . . . [e]ssentially invisible to public sector borrowing and investment measurements.”); Bloomfield, *supra* note 140, at 403 (“Unlike general-obligation bond sales, [long-term public-private partnerships] enable local governments to finance public infrastructure projects without legally incurring debt.”).

<sup>144</sup> *Id.* at 61.

<sup>145</sup> Casady et al., *supra* note 142, at 1, 2; Hodge & Greve, *supra* note 143, at 56, 65.

<sup>146</sup> Bloomfield, *supra* note 140, at 400, 407.

<sup>147</sup> There exist a multitude of contractual structures that are used in public-private infrastructure procurement. Some of the most common include: management and operating contracts, leases, concessions, Build-Operate-and-Transfer (“BOT”), and Design-Build-Operate (“DBO”) contracts, as well as Joint Venture agreements. *See* THE WORLD BANK, *PPP Arrangements/ Types of PPP Agreements*, PUB.-PRIV. P’SHP LEGAL RSCH. CTR., <https://ppp.worldbank.org>



exceedingly difficult. Notwithstanding this complexity, recent literature has begun to identify “critical success factors” that signal the relative soundness of any given P3.<sup>148</sup> Arguably, the most functional of the recent frameworks can be sourced from a peer-reviewed, meta-analysis of all reported research on public-private infrastructure partnerships published between 1990 and 2013. A 2015 paper, “*Review of Studies on the Critical Success Factors for Public-Private Partnership (PPP) Projects from 1990 to 2013*,” identified twenty-seven “critical success factors,” which if present in a given public-private partnership deal would indicate the deal’s likelihood to succeed.<sup>149</sup> The top five P3 success factors were: (a) the proper allocation of a project’s risk; (b) the relative strength of the P3’s private consortium; (c) the degree of a P3’s political support; (d) the degree of public or community support for the same; and (e) the degree of transparency in the government’s selection of a P3 partner.<sup>150</sup> Moreover, to produce a more robust framework, these critical success factors can be combined with (f) the role

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/public-private-partnership/agreements (last visited Nov. 26, 2021) [<https://perma.cc/WM32-D9UR>].

<sup>148</sup> Hodge & Greve, *supra* note 143, at 55–56 (“The purpose of this article is to explore what constitutes high performance, and thus ‘success,’ for infrastructure P3s.”); Michael J. Garvin & Doran Bosso, *Assessing the Effectiveness of Infrastructure Public-Private Partnership Programs and Projects*, 13 PUB. WORKS MGMT. & POL’Y, 162, 163 (2008) (“P3 initiatives worldwide have generated substantial institutional, archival, and popular literature . . . . Archival manuscripts have tended to focus on . . . key success factors . . . .”); Xueqing Zhang, *Critical Success Factors for Public-Private Partnerships in Infrastructure Development*, 131 (1) CONSTR. ENG’G MGMT. 3, 6 (2005) [hereinafter *Critical Success Factors for Public-Private Partnerships in Infrastructure Development*].

<sup>149</sup> Robert Osei-Kyei & Albert P.C. Chan, *Review of Studies on the Critical Success Factors for Public-Private Partnership (PPP) Projects from 1990 to 2013*, 33 INT’L J. PROJECT MGMT. 1335, 1339 (2015).

<sup>150</sup> In their meta-study Osei-Kyei and Chan reviewed twenty-seven different journal articles from leading peer-reviewed engineering and public management journals. *Id.* at 1339. In total their research identified thirty-seven factors that appeared at least twice across the study’s sample. *Id.* at 134. However, for the purposes of efficiency only the five most frequently cited factors were discussed at length in the paper. *Id.* Thus, for the purposes of this Note, only those top five factors were included in the aforementioned success framework.



government expertise in contract management.<sup>151</sup> When applying this six-point composite framework to New York City's PACT-P3, four out of the six success factors identify PACT-P3 strengths, whereas only two highlight weaknesses.

### *C. Four Success Factors Present in NYCHA's PACT- P3*

#### *1. A Strong Private Consortium*

The success of any infrastructure P3 project depends on how well the private partner manages its own risk.<sup>152</sup> Thus, a desirable private consortium will possess "strong technical and financial strength"<sup>153</sup> as well as excellent "operational and managerial capacity to undertake [P3] projects."<sup>154</sup> The best way to select a valuable private partner is to "determine the appropriate criteria and their relative significance against which proposals . . . will be evaluated equitably."<sup>155</sup>

Evaluating New York City's PACT-P3 against this first factor, the project's robust screening criteria indicates it is highly likely to select a strong private consortium. Firstly, PACT-P3 Project Teams, consisting of the developer, property manager, and general contractor must be assembled from a "Pre-Qualified Partners" list.<sup>156</sup> Following an assembly of a Project Team off that list, the team must submit an application that meets a set of "Threshold Requirements."<sup>157</sup> As part of this threshold review, NYCHA vets a Project Team's "assets, and bank or other lender references"<sup>158</sup> to gauge its "ability to finance" [a project] and "absorb any cost

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<sup>151</sup> Bloomfield, *supra* note 140, at 400, 402, 406.

<sup>152</sup> Xueqing Zhang, *Criteria for Selecting the Private-Sector Partner in Public-Private Partnerships in Infrastructure Development*, 131 (6) CONSTR. ENG'G MGMT. 631, 631 (2005).

<sup>153</sup> *Id.* at 7–8.

<sup>154</sup> Osei-Kyei & Chan, *supra* note 149, at 1342.

<sup>155</sup> Zhang, *supra* note 152, at 643.

<sup>156</sup> See *infra* footnotes 174–75 and accompanying text for an explanation on how the Pre-Qualified Partners list is assembled and the function the list serves throughout a conversion process.

<sup>157</sup> NYCHA PACT ROUND 11 RFEI, *supra* note 122, at 52–53.

<sup>158</sup> *Id.* at 53.

overruns, and commence and complete [the] rehabilitation . . . in a timely manner.”<sup>159</sup>

Next, NYCHA rates and ranks applications according to a “Competitive Selection Criteria.”<sup>160</sup> This selection criterion is multifaceted, as it covers a wide array of subfactors, including the teams’ (i) “development experience and capacity,”<sup>161</sup> (ii) “property management experience and plan,”<sup>162</sup> and (iii) financial proposals, which NYCHA vets for reasonableness of projected rehabilitation and operation costs.<sup>163</sup>

Accordingly, PACT-P3’s three rounds of partner vetting guards the housing authority against having its subsidiary enter into a ninety-nine-year ground lease with a Project Team that would mishandle its finances and fail to execute the long-term contract. While this design strength alone will not guarantee a project’s success, it can serve as a strong indicator of the P3’s future efficacy if combined with other success factors.

## 2. Valuable Political Support

Because infrastructure P3s are initiated by governments and, in some ways, subsidized by governments, it is almost axiomatic that political support for a given P3 plays a role in its success.<sup>164</sup> Without government support, a P3 project will struggle to secure necessary approvals and supplementary grant funding.<sup>165</sup> In the case of NYCHA’s PACT-3, however, there seems to be minimal political opposition by the city councilmembers and other elected officials who have significant discretion over the program.

That is, apart from being spearheaded by the Mayor’s Office, local political leaders with great interest and influence over public housing have also publicly supported the PACT-P3. For example, Congressman Ritchie Torres of the South Bronx, and former New

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<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 53–54.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 54.

<sup>163</sup> *Id.*

<sup>164</sup> Osei-Kyei & Chan, *supra* note 149, at 1342.

<sup>165</sup> *Id.*

York City Council Chairman of the Public Housing Committee, is on record supporting the PACT program.<sup>166</sup> In addition, during the 2021 New York City mayoral debates, two out of the three leading candidates—then Brooklyn Borough President Eric Adams and former Interim NYCHA Chairwoman Katherine Garcia—both also expressed their support.<sup>167</sup>

Nevertheless, this moderate political approval is not necessarily stable. Small-scale political opposition does exist, albeit concentrated for now in somewhat isolated grassroots groups like “Fight for NYCHA.”<sup>168</sup> Accordingly, it remains vital that NYCHA preemptively shores up vulnerabilities in its program design to preserve the political capital it enjoys today.

### 3. A Transparent Procurement Process

Transparency can be measured by the extent to which there is “constant communication among parties and external stakeholders” and openness in consultation between bidding parties and the public contracting agency.<sup>169</sup> “Transparency rests on the shoulders of cordial and constant communication among parties and external

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<sup>166</sup> Joe Anuta, *New York Has a Plan to Fix its Broken Public Housing—It Just Needs to Convince Congress*, POLITICO (Aug. 4, 2020), <https://www.politico.com/news/2020/08/14/new-york-fix-public-housing-395026> [<https://perma.cc/8Q6R-7KXU>] (quoting Congressman Ritchie Torres describing NYCHA 2.0 as “the boldest vision for preservation that NYCHA has ever presented to the public”).

<sup>167</sup> Ethan Geringer-Sameth, *Can the Next Mayor Save NYCHA? Democratic Candidates Offer Varied Plans for City’s Crumbling Public Housing*, GOTHAM GAZETTE (June 8, 2021), <https://www.gothamgazette.com/city/10536-democratic-mayoral-candidates-plans-rescue-nycha-public-housing> [<https://perma.cc/ZH8D-XCXA>].

<sup>168</sup> See *About*, FIGHT FOR NYCHA, <https://fightfornycha.org/about/> (last visited Nov. 26, 2021). Fight For NYCHA’s relative isolation is indicated by the fact that it is critical of other visible and highly active NYCHA advocates, such as Community Voices Heard. See Louis Flores, *RAD is a Raw Deal for Public Housing: Well-Intentioned Program Actually Hikes Rents, Empowers Landlords, Fuels Evictions*, DAILY NEWS (Feb. 15, 2020, 5:00 AM), <https://www.nydailynews.com/opinion/ny-oped-rad-is-a-raw-deal-we-must-refuse-20200215-b6jll3tfuzdpnjxy6jjjmxweju-story.html>.

<sup>169</sup> Osei-Kyei & Chan, *supra* note 149, at 1343.

stakeholders.”<sup>170</sup> Due to the fact that NYCHA solicits bids through an open and accessible request for proposal process, it puts itself in a good position to identify the best-suited PACT partner.<sup>171</sup>

First, NYCHA opted for a unique system that allows diverse Project Teams to assemble procurement bids for the PACT-P3. That is, NYCHA places a public Request for Qualifications (“RFQs”), a solicitation for small and large developers, property managers, general contractors, and social service providers interested in being included in a publicly available “Pre-Qualified Partners List.”<sup>172</sup> It is from within the names of companies on the Pre-Qualified Partners List that members of PACT’s Project Teams are assembled.<sup>173</sup> NYCHA’s use of a Pre-Qualified Partners List minimizes information asymmetries endemic to real estate development and facilitates the formation of new and diverse teams.

Secondly, Project Teams are given several opportunities to speak with NYCHA representatives to refine their proposals. At the outset of an approximately five-month process allotted for the preparation of a bid in response to the Request for Expression of Interest (“RFEI”), NYCHA hosts a pre-submission conference to answer all questions.<sup>174</sup> NYCHA subsequently allows bidders two opportunities to submit questions on the RFEI that the authority will reply to and send back before the proposal’s deadline.<sup>175</sup>

Thirdly, NYCHA operates a comprehensive PACT procurement website.<sup>176</sup> This website includes all open Requests for Proposals, RFEI, and other information relevant to prospective bidders.<sup>177</sup> As

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<sup>170</sup> *Id.*

<sup>171</sup> *See* Zhang, *supra* note 152, at 631.

<sup>172</sup> *Permanent Affordability Commitment Together: PACT Procurement Information*, N.Y.C. HOUS. AUTH., <https://www1.nyc.gov/site/nycha/about/pact/procurement.page> (last visited Nov. 26, 2021) [hereinafter *PACT Procurement Information*].

<sup>173</sup> NYCHA PACT ROUND 11 RFEI, *supra* note 122, at 48.

<sup>174</sup> *See id.* at 1.

<sup>175</sup> *See id.*

<sup>176</sup> *PACT Procurement Information*, *supra* note 172.

<sup>177</sup> *See Procurement Opportunities*, N.Y.C. HOUS. AUTH., <https://www1.nyc.gov/site/nycha/business/procurement-opportunities.page> (last visited Feb. 26, 2022) [<https://perma.cc/YY6P-UNRF>].

a repository, it ensures that the information pertinent to prepare a quality bid is made easily accessible to all interested parties.<sup>178</sup>

Taken as a whole, the PACT procurement process is relatively open, transparent, and designed to reduce information asymmetries. This feature allows NYCHA to attract a new and diverse array of future partners to contribute to the PACT's success.

#### 4. Sufficient Government Capacity for P3 Contract Enforcement

Yet another critical success factor for a public-private partnership is a procuring government's ability to manage its long-term contracts. This is an important factor because in many cases, these contractual arrangements are only as good as a government's enforcement capacity.<sup>179</sup> Government entities that lack the funding or the internal ability to keep long-term contractual promises can jeopardize the value for the money<sup>180</sup> governments expect to generate from the use of a P3 deal structure.<sup>181</sup> However, with respect to this factor, PACT-P3 is well-conceived.

Had PACT's contract management been left to the NYCHA exclusively, it would be wise to question whether the agency possessed the internal checks and expertise to manage such agreements.<sup>182</sup> However, PACT is structured so that New York

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<sup>178</sup> See *id.*

<sup>179</sup> See Bloomfield, *supra* note 140, at 400–08.

<sup>180</sup> “Value for the money” is a concept used to capture the extent to which the costs weighed against the benefits of a given P3 transaction are more favorable than those that would be achieved by a government's traditional infrastructure procurement methods. *Value-for-Money Analysis- Practices and Challenges: How Governments Choose When to Use PPP to Deliver Public Infrastructure and Services*, WORLD BANK INST. (May 28, 2013), <https://openknowledge.worldbank.org/bitstream/handle/10986/17622/840800WP0Box380ey0Analysis00PUBLIC0.pdf?sequence=1&isAllowed=y> [<https://perma.cc/S4S2-9BQD>].

<sup>181</sup> See Bloomfield, *supra* note 140, at 406 (“Performance contracts that commit the private partner to specific results are held to be the key to successful risk allocation in public-private partnership contracts . . . . However, implementing and enforcing effective performance guarantees can be problematic.”).

<sup>182</sup> It is prudent to be skeptical of NYCHA's ability to independently manage PACT contracts absent any countervailing factors, particularly because

City's Housing Development Corporation ("NYC-HDC") assists NYCHA with a significant amount of PACT's contract asset management functions.<sup>183</sup> NYC-HDC is the ideal partner for this work because it is a well-regarded housing finance agency that routinely supports affordable housing development in New York City by entering into agreements with government entities.<sup>184</sup> In addition, NYCHA was reorganized to create a new Department of Real Estate to liaise with NYC-HDC on matters concerning the PACT program.<sup>185</sup> Finally, in 2019, NYCHA welcomed a new chair, Gregg Russ, with prior experience successfully implementing RAD conversions in two other PHAs.<sup>186</sup> Together, these three facts signal that NYCHA possesses the necessary internal expertise and

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NYCHA's management competencies were called into question during the 2018 federal probe for failure to remediate egregious violations and for lying to the federal government regarding remediation efforts, *see supra* INTRODUCTION, as well as during the New York City Department of Investigation's probe for "false certification of compliance with federal toxic lead paint requirements," in 2017. Bach et al., *supra* note 3, at 3.

<sup>183</sup> *NYCHA 2.0 PART 1 INVEST TO PRESERVE*, *supra* note 123, at 23–24.

<sup>184</sup> NYC-HDC has not been riddled with anywhere near the same level of scandal as NYCHA. In fact, NYC-HDC has been ranked as one of the top performers in the municipal bond issuance field by Thomson Reuters. *Meet HDC*, N.Y.C. HOUS. DEV. CORP., <https://www.nychdc.com/meet-hdc> (last visited Nov. 26, 2021). This recognition is taken by the author to signal sound internal agency competence and management.

<sup>185</sup> In order to meet the increased demands of managing the PACT program, NYCHA restructured and built-out its Department of Real Estate into a new division that will center on: (1) planning; and (2) development. Among its responsibilities, this unit will analyze the NYCHA portfolio and along with NYC-Housing Development Corporation (NYC-HDC) will determine which units to transition onto the PACT pipeline. In addition, NYCHA will remain responsible for conducting federal Housing Quality Standard Inspections, approving income-eligible tenants and conducting recertifications, and administering Housing Assistance Payment contracts. *See NYCHA 2.0 PART 1 INVEST TO PRESERVE*, *supra* note 123, at 23–24.

<sup>186</sup> Current NYCHA Chairman Greg Russ has served in the PHAs in Cambridge, Philadelphia, Chicago, and Minneapolis. He has also implemented RAD programs in Minneapolis and Chicago. Luis Ferré-Sarduni, *He's In Charge of Housing for 11,000 Minnesotans. Can He Handle 400,000 New Yorkers?*, N.Y. TIMES (June 24, 2019), <https://www.nytimes.com/2019/06/24/nyregion/nycha-chairman-gregory-russ.html> [<https://perma.cc/DBD7-BEQ9>].

external support to manage PACT's highly consequential P3 contracts.

In sum, of the six of the composite success factors for evaluating infrastructure P3s, only two—risk allocation and degree of public/community support—point negatively. From the strength of these four P3 success factors, one could conclude that NYCHA's PACT-P3 initiative is poised to succeed. However, two of the success factors—risk allocation and degree of public/community support—are not present in the current initiative. Due to the fact that public perception can significantly jeopardize the long-term efficacy of the program, this Note discusses the problems that incomplete affordability risk absorption and lack of meaningful tenant engagement present to the PACT project and provides tangible solutions.

## V. TWO PACT-P3 PROGRAM DESIGN WEAKNESSES AND REMEDIES

### *A. PACT Problem #1: Improper Mitigation of Subsidy Risk in PACT Contracts*

In a best-case scenario, PACT's contractual structure preserves NYCHA's ownership in public housing land and buildings.<sup>187</sup> However, NYCHA has written a lax affordability metric into its RAD Use Agreement—a contractual agreement subordinate to the HAP contract.<sup>188</sup> If the HAP contract is breached—due to the HUD's inability to make good on its promise to pay the Section 8 subsidies, for example—the affordability of the terms of the RAD Use Agreement alone remain in force. But those affordability targets would severely compromise the reliance interests NYCHA residents have formed on Section 9's rent-setting formula. Thus, in order to prevent this risk to residents, PACT's contractual structure must incorporate more effective contingency planning—like a NYCHA reserve fund contingency.

A RAD Use Agreement is signed by NYCHA-HDFC and the PACT-LLC and intended to survive—that is remain enforceable—

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<sup>187</sup> See *supra* Part III (“Key Features of NYCHA's PACT-P3 Guarding Against Privatization, The Unaffordability of Units, and Tenant Displacement”).

<sup>188</sup> See Smetak, *supra* note 14, at 16.



even in the event of breach in the separately signed, supra-ordinated HAP contract.<sup>189</sup> The problem with the RAD Use Agreement, however, is that it allows PACT-LLCs to set rents for converted public housing units according to the *Area Median Income*—a formula far less individualized than the Section 9’s 30% of annual tenant income formula.<sup>190</sup> That is, the RAD Use Agreement would allow rent to go as high as “30 percent of 80 percent of the Area Median Income (“AMI”).”<sup>191</sup> To put this into context: in New York City, 30% of 80% of AMI would result in a single-member household paying \$1,672 in rent per month; or a family of four paying \$2,386 in rent per month.<sup>192</sup> With the average NYCHA rent being \$548 across *all* family sizes,<sup>193</sup> the RAD Use Agreement would stand to *triple* rent for a single-person household and more than *quadruple* the average rent for a family of four. Effectively, thus, if activated, the RAD Use Agreement’s terms would trigger a financial calamity for the average NYCHA resident.

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<sup>189</sup> See Smetak, *supra* note 14, at 52. All loans taken out against a converted property will be subject to the RAD Use Agreement which is recorded in the first position. *Id.* That is, the first position recordation will allow the agreement to have priority over any subsequent liens and even in the event of a lender’s foreclosure on a PACT building. *Id.* This also means if the HAP agreement is breached that the RAD Use Agreement’s affordability terms are the only ones that remain in force. *See id.* at 52–53.

<sup>190</sup> See U.S. GOV’T ACCOUNT. OFF., *supra* note 126, at 33–34.

<sup>191</sup> *Id.* at 33.

<sup>192</sup> Per New York City’s latest data, 30% of 80% of AMI for a one-person household would amount to \$20,064 annually, which divided into twelve-month increments is \$1,672 in rent. Similarly, 30% of 80% of AMI for a four-person household would be \$28,632. In twelve month increments, that would translate to a \$2,386 monthly rent. *See* N.Y.C. HOUS. PRES., & Dev., *Affordable Housing, Area Median Income*, N.Y.C. HOUS. PRES. & Dev., <https://www1.nyc.gov/site/hpd/services-and-information/area-median-income.page> (last visited Nov. 26, 2021).

<sup>193</sup> *See supra* notes 60–61 and accompanying text.

1. Solution #1: Use a Reserve Fund to Prevent NYCHA's Outright Breach of the HAP Contract in the Event of Interrupted Section 8 Payments

The obvious solution to this potential problem would be for NYCHA to change the standard affordability language in the RAD Use Agreement. Ideally, NYCHA would graft the rent setting formula—30% of tenant income—from its HAP agreement onto its Use Agreement to ensure it remains in force even after a HAP contractual breach. However, as most NYCHA buildings are in an abysmal physical state today,<sup>194</sup> without the Section 8 subsidies, a PACT LLC might not be able to operate NYCHA buildings without linking rents to AMI. It is therefore necessary for New York City to create another contingency—such as a PACT reserve fund—to ensure that in the event of a prolonged interruption of federal Section 8 payments, the PACT LLC could operate its converted NYCHA buildings without increasing rents.

Reserve funds are budgetary “mechanisms for accumulating cash for future capital outlays and other allowable purposes.”<sup>195</sup> They are considered prudent fiscal policy because in the event of a sudden capital or repair need, governments can turn to their reserves, thereby avoiding the alternatives of taking on debt or raising taxes, which would come with costly interest spending and political resistance.<sup>196</sup> In fact, reserve funds were initially required for the public housing program under the U.S. Housing Act of 1937.<sup>197</sup> Importantly, the utility of a reserve requirement becomes more

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<sup>194</sup> See CITIZENS BUDGET COMM., *supra* note 5, at 2 (The Citizens Budget Commission estimates “[w]ithout dramatic [funding and management] changes, by [2027], nearly 90 percent of NYCHA’s housing . . . will be at risk of deteriorating past the point at which they are cost-effective to repair.”).

<sup>195</sup> Thomas P. DiNapoli, OFF. N.Y. STATE COMPTROLLER, LOCAL GOVERNMENT MANAGEMENT GUIDE, RESERVE FUNDS 2 (2010), <https://www.osc.state.ny.us/files/local-government/publications/pdf/reservefunds.pdf> [<https://perma.cc/6CY4-NQY5>] [hereinafter *RESERVE FUNDS*].

<sup>196</sup> *Id.*

<sup>197</sup> SCHWARTZ, *supra* note 4, at 114 (“Although the original public housing legislation of 1937 required housing authorities to set up capital reserve funds, Congress decided in the 1950s that PHAs should use them instead to offset federal debt service contributions on bonds issued to finance the construction of public housing . . .”).

relevant today, due to the foreseeability of future budget shortfalls caused by the federal government's lack of political will to fully fund low-income housing in inner cities<sup>198</sup> Thus, public housing authorities' undue reliance on an inconsistent federal funding subjects most of its residents to systematic housing insecurity.

The PACT program is one of the ways that the City of New York is interrupting their problematic dependency scheme. However, the City could further strengthen its efforts by employing its powers under New York State's General Municipal Law ("GML") to establish a PACT-specific capital reserve and repair funds. Sections 6-c and 6-g of the GML allow city governments to establish a capital reserve fund to "finance the cost of construction, reconstruction, or acquisition of . . . specific capital improvement . . . or equipment."<sup>199</sup> Capital improvements would look like investments into the physical infrastructure of PACT-operated buildings or other investment that would add value to the property or substantially prolong its useful life—such as a boiler replacement or roof renovation.<sup>200</sup> By contrast, section 6-d of the GML would allow the City of New York to establish a PACT-repair reserve fund<sup>201</sup> that would serve as a funding stream to make necessary repairs to previously made capital improvements.<sup>202</sup>

PACT capital and repair reserve funds would help ensure that NYCHA avoids a breach of the HAP contract if partisan gridlock in Congress interrupts the Section 8 subsidy payments to PACT partners.<sup>203</sup> In addition, because the money in reserve funds is

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<sup>198</sup> See discussion *supra* Part II, Section B.

<sup>199</sup> *RESERVE FUNDS*, *supra* note 195, at 6.

<sup>200</sup> The tax definition for capital improvement in New York State includes three elements: (1) substantially adding value to a property; or substantially prolonging its useful life; (2) becoming permanently affixed to the realty; or (3) an intention for the improvement to become a permanent part of the property. See *Capital Improvements*, DEP'T OF TAX. & FIN. (July 27, 2012), [https://www.tax.ny.gov/pubs\\_and\\_bulls/tg\\_bulletins/st/capital\\_improvements.htm](https://www.tax.ny.gov/pubs_and_bulls/tg_bulletins/st/capital_improvements.htm) [<https://perma.cc/H86X-BXPP>].

<sup>201</sup> *RESERVE FUNDS*, *supra* note 195, at 11.

<sup>202</sup> *Id.*

<sup>203</sup> A failure to deliver Section 8 payments are grounds for a breach of the HAP contract. Due to the fact the Section 8 payments are made under term subsidy contracts, NYCHA projects the likelihood of a breach of the HAP contract as not being substantially high. See Smetak, *supra* note 14, at 52. However, the risk of a

invested in the stock market, the principal allocations could be set to less than the overall cost of sustaining rents with the expectation that gains made from investment of the principal will ultimately equal the total cost of operating the property without Section 8 subsidies.<sup>204</sup> Again, to address the structural problem presented by a funding scheme in which the plurality of operational and capital funds to run NYCHA come from the U.S. Congress—a governing body less accountable to NYCHA residents than local government—it would make sense for the City of New York to devise mechanisms—like PACT capital and reserve funds—to diversify away from federal funding sources.

*B. PACT Problem #2: Tenant Perception of Insufficient Resident Engagement*

Research has found that “acceptance and understanding by the public community be it the media, trade unions, civil societ[y] and other non-governmental organizations is very important in ensuring the progress of [P3] projects.”<sup>205</sup> The broader the public support for a P3 project, the better the operational environment,<sup>206</sup> the lower likelihood of delay and disruption of the project<sup>207</sup> and ultimately the greater the likelihood that services valued by the community will be delivered.<sup>208</sup> However, robust public or community support for a public-private partnership is another critical success factor that the PACT initiative currently lacks.

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Section 8 subsidy interruption is certainly not zero: as recent as 2007, HUD had partially defaulted on its obligations to pay existing Section 8 contracts. *Growing Reports of a Project-Based Section 8 Funding Crisis as FY 2007 Closes*, 37 HOUS. L. BULL. 149, 150 (2007), [https://nhlp.org/files/PB%20Section%208%20Funding%20NHLP%20Bull%20\(Sept%2007\).pdf](https://nhlp.org/files/PB%20Section%208%20Funding%20NHLP%20Bull%20(Sept%2007).pdf) [<https://perma.cc/G4GD-EY2L>].

<sup>204</sup> *RESERVE FUNDS*, *supra* note 195, at 4.

<sup>205</sup> Osei-Kyei & Chan, *supra* note 149, at 1342.

<sup>206</sup> WORLD BANK GRP. ET AL., *A GUIDE FOR COMMUNITY ENGAGEMENT PARTNERSHIPS FOR PUBLIC PRIVATE PARTNERSHIPS 3* (2019), [https://consultations.worldbank.org/sites/default/files/materials/consultation-template/global-guide-community-engagement-pppsopenconsultationtemplate/materials/ppp\\_community\\_engagement\\_guide\\_fin\\_for\\_7-19a.pdf](https://consultations.worldbank.org/sites/default/files/materials/consultation-template/global-guide-community-engagement-pppsopenconsultationtemplate/materials/ppp_community_engagement_guide_fin_for_7-19a.pdf) [<https://perma.cc/M99C-3QPX>] [hereinafter *A GUIDE FOR COMMUNITY ENGAGEMENT*].

<sup>207</sup> *Id.* at 4; see Osei-Kyei & Chan, *supra* note 149, at 1342.

<sup>208</sup> *A GUIDE FOR COMMUNITY ENGAGEMENT*, *supra* note 206, at 3–4.

Even though NYCHA has complied with the minimally required consultation requirements,<sup>209</sup> there remains public critique that NYCHA's implementation of the PACT program is too insular.<sup>210</sup> For example, in 2020, Politico quoted the president of the resident organization of the Fredrick Douglass Houses in the Upper West Side stating, "[t]here is no inclusivity, yet we are supposed to be at the table."<sup>211</sup> In addition, the Community Service Society, a local not-for-profit providing social services and advocacy on behalf of NYCHA and other low-income tenants in New York, just last year testified at a New York City Council hearing on the PACT that, "[t]he RAD assessment is conducted by a qualified third party approved by HUD and NYCHA . . . . But, prior to the release of the RFP, affected NYCHA residents are not consulted for their views on what repairs need to be done and do not have an opportunity to review and comment on the RAD needs assessment."<sup>212</sup>

Likely in response to the critique that affected public housing tenants are not given an option to decide whether, or how, the PACT conversion moves forward, NYCHA created the PACT Residential Planning Fund, endowed with \$6 million, to assist Project Teams in

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<sup>209</sup> As NYCHA is considering a conversion for one of its campuses, it must first hold two meetings with tenants in the developments that will be affected by the conversion. Resident meetings should explain the NYCHA's objectives with the PACT conversion, disclose any unit or location changes, projected PACT partners, and explain the scope of work for any construction or rehabilitation. NYCHA must also send a PACT information notice to all residents explaining all of their relevant rights. The questions asked at planning meetings and the NYCHA's responses to them must be included with the subsequent PACT applications submitted to HUD by NYCHA. *Id.* In addition, PACT details must be included in NYCHA's annual report. Once its application is approved by HUD, NYCHA must also hold one more meeting with tenants to explain with greater specificity the nature of the various partnership(s) the NYCHA will form through the conversion. *Final Report: Evaluation of HUD's Rental Assistance Demonstration*, *supra* note 12, at 33–34.

<sup>210</sup> See *Testimony: NYCHA Pact Plan*, CMTY. SERV. SOC'Y (Feb. 13, 2021), <https://www.cssny.org/news/entry/testimony-nycha-pact-plan> [<https://perma.cc/H5ZY-V5SD>] [hereinafter *Testimony: NYCHA Pact Plan*].

<sup>211</sup> Anuta, *supra* note 166.

<sup>212</sup> *Id.*

carrying out “visioning” exercises with PACT tenants.<sup>213</sup> However, while the Residential Planning Fund incentivizes resident consultations over the deployment of social services, it does not actively include residents into the PACT conversion planning process<sup>214</sup> or support a vital cross-sectional dialogue between NYCHA tenants and their elected officials. However, such dialogues had been facilitated in the context of a PACT conversion and were a distinctive feature of NYCHA’s previously successful resident engagement effort: the Chelsea Working Group.<sup>215</sup>

### 1. Solution #2: Facilitate Resident & Elected Representative NYCHA Funding Dialogues

In 2019, NYCHA established the Chelsea Working Group in response to resident backlash to NYCHA’s proposal to enroll the Fulton, Chelsea, Elliot, and Chelsea Addition Houses into the PACT program.<sup>216</sup> The Chelsea Working Group brought together residents of the affected NYCHA campuses, leaders of neighborhood nonprofits, elected officials and housing advocates to address multi-stakeholder concerns over the manner in which the conversion might take place.<sup>217</sup> An important feature of the Chelsea Working

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<sup>213</sup> In June 2021, NYCHA announced that it had selected Public Works Partners, Local Initiatives Support Coalition, Public Policy Lab, and the Pratt Center for Community Development as the cohort that would design and administer the Resident Planning Fund. *New York City Housing Authority Names Public Works Partners Program Administrator for the PACT Residential Planning Fund*, PUB. WORKS PARTNERS (June 30, 2021), <https://www.publicworkspartners.com/2021/06/30/pact-resident-planning-fund-press-release/> [<https://perma.cc/FS87-CVFW>].

<sup>214</sup> *See id.*

<sup>215</sup> *See infra* text accompanying notes 216–26.

<sup>216</sup> *See* N.Y.C. HOUS. AUTH., CHELSEA NYCHA WORKING GROUP 3 (2021), <https://www1.nyc.gov/assets/nycha/downloads/pdf/Chelsea-NYCHA-WG-Report-Final.pdf> [<https://perma.cc/E6AY-BV7D>] (“Following community objection to the draft proposal from NYCHA that considered partial demolition to repair and renovate the Chelsea NYCHA developments, local elected officials, NYCHA residents of Chelsea, and members of the wider Chelsea community called for more, and transparent, community input on any plan to address much-needed capital repairs.”).

<sup>217</sup> *See id.* at 1.

Group was its use of a Capital Finance Committee.<sup>218</sup> This committee gathered NYCHA tenants, elected representatives, local nonprofits, and NYCHA officials to discuss public financing options and alternatives to meet their housing campus's specific needs.<sup>219</sup> Importantly, these dialogues allowed NYCHA residents to leverage political clout to ensure political commitments to fund specific parts of the Physical Needs Assessment<sup>220</sup> for their particular NYCHA campus.<sup>221</sup>

Although the current PACT Residential Planning Fund initiative is well-conceived, it would be much more impactful if it facilitated NYCHA resident-elected representative dialogues and trained tenants for meaningful participation in such dialogues. Before the announcement of the PACT Resident Planning Fund in the summer of 2021, NYCHA had rarely engaged with NYCHA residents beyond the minimum federal requirements.<sup>222</sup> As noted in Part II, New York State and New York City governments have substantial room to make more meaningful investments into NYCHA.<sup>223</sup> Creating an avenue for NYCHA residents to lobby City Councilmembers and members of the state legislature would allow NYCHA residents to capture increasing shares of available public money towards addressing this need.

New York City Councilmembers have annual discretionary fund allocations upon which they can draw to assist in capital

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<sup>218</sup> See *id.* at 19.

<sup>219</sup> See *id.* at 19–27.

<sup>220</sup> See *id.* at 9 (“The [Physical Needs Assessment] is an inventory of the major repair costs prepared every five years by contracted engineering firms for NYCHA, as required by HUD.”).

<sup>221</sup> See *id.* at 20 (evincing that the work of the Capital Finance Committee resulted in the inclusion of an upgrade of the building heating systems that had been breaking down, but which had been left out of the scope of work for that campus's PACT conversion).

<sup>222</sup> See *Testimony: NYCHA Pact Plan*, *supra* note 210.

<sup>223</sup> See *supra* Part II, Section B.



renovations.<sup>224</sup> Furthermore, City Councilmembers,<sup>225</sup> State Assembly members, and State Senators<sup>226</sup> have direct say over annual budget allocations to public housing. Thus, the inclusion of a resident-elected official funding dialogue as part of the PACT Residential Planning Fund could begin to address an imbalanced funding schema that is partly to blame for the financial crisis NYCHA is facing today.

## CONCLUSION

This Note applied six of the leading success factors collected from public management literature to identify design strengths and weakness in New York City's PACT-P3. While this analysis resulted in the finding that PACT-P3 is well-designed on balance, there remain two facially evident areas of concern. First, PACT's contractual structure does not sufficiently guard against the risk of public housing rents becoming unaffordable in the event of NYCHA breaching its HAP contract due to an interruption of Section 8 housing funding. Second, current tenant engagement plans do not make the most meaningful use of public housing tenants' time and local political clout.

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<sup>224</sup> Because NYCHA is technically a state-chartered, quasi-independent entity, it qualifies to receive New York City Council capital funding allocations from a councilmember's individual pool of capital funds. See *FY 2022 Capital Funding for Non-City Organizations*, N.Y.C. COUNCIL (Jan. 4, 2021), <https://council.nyc.gov/budget/fy2022-capital-funding-for-non-city-organizations/> [<https://perma.cc/C7US-LL6G>]; see also *Capital Funding*, N.Y.C. COUNCIL, [http://www.nyc.gov/html/citycouncil/html/budget/capital\\_funding.shtml](http://www.nyc.gov/html/citycouncil/html/budget/capital_funding.shtml) (last visited Nov. 26, 2021) [<https://perma.cc/W64U-MKSZ>] (there is a hyperlink on the right side of the page that downloads a Microsoft excel chart of all the capital funding projects individual councilmembers have sponsored for the FY 2022 fiscal year. Among those on that list are many capital improvements for security cameras, interior walkway renovations, playground upgrades, and other work for NYCHA).

<sup>225</sup> See *The City Budget*, N.Y.C. COUNCIL, <https://council.nyc.gov/budget/> (last visited Nov. 26, 2021) [<https://perma.cc/YS6A-MPC9>].

<sup>226</sup> See DIV. OF BUDGET, N.Y. STATE, *The Budget Process*, <https://www.budget.ny.gov/citizen/process/process.html> (last visited Nov. 26, 2021) [<https://perma.cc/2HC9-3G8J>].

In response to the first deficiency, NYCHA should work with New York City and/or New York State government to develop a reserve fund that would forestall a breach of the HAP covenants in the event of Section 8 payment interruption. Secondly, the PACT Resident Planning Fund should include facilitated funding dialogues between NYCHA residents and city and state elected officials to assist NYCHA in capturing capital and operational funding from city and state legislators with a far greater faith in public housing's social utility than the U.S. Congress.

The preceding analysis is valuable for a number of reasons. First, as of this writing, the PACT-P3 has yet to be fully implemented, and it is possible that any critical deficiencies in its beta version can yet be corrected in future scaling.<sup>227</sup> Further, New York City has recently changed its mayoral administration<sup>228</sup> and this nascent project will be implemented under a highly fluid political environment—one in which poor execution might set off a resurgent groundswell of popular opposition. Finally, given the scarcity of alternatives to the deeply affordable housing offered by NYCHA,<sup>229</sup> a failure in the PACT intervention due to inherent flaws or the proliferation of misinformation carries incalculable human costs for current residents. Accordingly, depoliticized analyses of the PACT program are essential in order to foster productive reflection and informed policy debate on this critical social policy.

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<sup>227</sup> PACT conversions happen in clusters, usually with the bundling of different NYCHA campuses. To date, roughly 65% of the 62,000 units slated for conversion have not begun conversion. *See* Gastelum et al., *supra* note 73, at 18–19.

<sup>228</sup> Katie Glueck, *Eric Adams is Elected Mayor of New York City*, N.Y. TIMES (Nov. 2, 2021), <https://www.nytimes.com/2021/11/02/nyregion/eric-adams-mayor.html> [<https://perma.cc/MFU4-TNYU>].

<sup>229</sup> *See supra* Part II, Section A.