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NOTES

THEFT OF THE AMERICAN DREAM: NEW YORK CITY'S THIRD-PARTY TRANSFER PROGRAM

JOSEPH MOTTOLA[†]

INTRODUCTION

On September 5, 2018, Paul Saunders discovered a notice on the front door of his mother's home: it stated that the property, a Brooklyn brownstone owned by the family for over forty years, now belonged to a company called Bridge Street.¹ His mother, seventy-four-year-old retired nurse Marlene Saunders, had been notified several months earlier that her home, valued at two million dollars, was in danger of being foreclosed because she owed New York City (the "City") \$3,792 in unpaid water charges.² Her son had already paid the water bill, but when he contacted the water department, he discovered that the City had failed to record the payment.³ The water department assured Paul that there were "no problems."⁴

In spite of these assurances, the City transferred the property to a "qualified sponsor[]" under the Third Party

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¹ *Oversight—Taking Stock: A Look into the Third Party Transfer Program in Modern Day New York*, *Comm. on Hous. & Bldg., Comm. on Oversight & Investigations*, 15, 17–18 (N.Y.C. Council 2019) [hereinafter *Hearing Transcript*], <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3968975&GUID=17B27FCE-9E66-4803-%20AB35-7792BA254245&Options=&Search=> [https://perma.cc/S5VZ-3J3P] (statement of Paul Saunders).

² *Id.* at 8–9.

³ Kathleen Culliton, *City Returns Home It Snatched from Crown Heights Senior*, PATCH (Jan. 11, 2019), <https://patch.com/new-york/prospectheights/city-returns-home-it-snatched-crown-heights-senior> [https://perma.cc/6T25-HTCU].

⁴ *Hearing Transcript*, *supra* note 1, at 17.

Transfer Program (“TPT”).⁵ Marlene Saunders was fortunate: after she and her son launched an aggressive advocacy campaign comprising of a “whirlwind” of phone calls and visits with City Council members, the City reversed the transfer and returned her home.⁶ Unfortunately, many property owners have not been so lucky.⁷

TPT was enacted in 1996 and granted New York City the authority to utilize the *in rem* foreclosure process to transfer ownership of abandoned, distressed, and tax-delinquent properties to third-party developers—free of charge.⁸ Prior to enacting TPT, the City self-managed properties it acquired through foreclosure, but by the 1990s, the management of thousands of dilapidated buildings had become prohibitively expensive.⁹ TPT was conceived as a solution to this crisis—allowing the City to continue addressing abandonment and tax delinquency through *in rem* foreclosure while transferring the burdens of maintenance and management to private owners.¹⁰

However, the cure has proven worse than the disease. What started as an anti-abandonment and tax enforcement initiative has devolved into “something far more expansive, far more excessive and far more entangled with America’s treacherous history of race and homeownership.”¹¹ Under TPT, residential properties that owe *nothing* in tax arrears and have minimal municipal violations have been transferred to third-party developers for free—while homeowners receive no compensation

⁵ *Id.* at 18.

⁶ *Id.* at 19; Culliton, *supra* note 3.

⁷ See Jessy Edwards, *Lawsuit Alleging City Program Took 100s of Homes from Black and Brown Brooklynites Can Go Ahead, Judge Rules*, BKREADER (July 1, 2021), <https://bkreader.com/2021/07/01/lawsuit-alleging-city-program-took-100s-of-homes-from-black-and-brown-brooklynites-can-go-ahead-judge-rules/> [<https://perma.cc/4DEF-5ZNZ>]; Stephen Witt & Kelly Mena, *City Takes Property From Working Class Latinos*, POLITICSNY (Oct. 9, 2018), <https://politicsny.com/2018/10/09/city-takes-property-from-working-class-latinos/> [<https://perma.cc/UU9K-TCTY>].

⁸ Press Release, Rudolph W. Giuliani, Mayor, New York City, Mayor Giuliani Signs Council Bill No. 958, Enabling Abandoned Properties to be Held for Rehabilitation by Third Parties (Sept. 11, 1997), <https://www1.nyc.gov/html/om/html/97/sp532-97.html> [<https://perma.cc/4N8V-7H5W>]; *Dorce v. City of New York*, 2 F.4th 82, 87–88 (2d Cir. 2021).

⁹ Christopher J. Allred, *Breaking the Cycle of Abandonment: Using a Tax Enforcement Tool to Return Distressed Properties to Sound Private Ownership*, PIONEER INSTITUTE – BETTER GOVERNMENT COMPETITION 1, 2–3 (2000), https://www1.nyc.gov/assets/hpd/downloads/pdfs/services/bgc_winner.pdf [<https://perma.cc/5VH6-RG2C>].

¹⁰ See *Dorce*, 2 F.4th at 88.

¹¹ Hearing Transcript, *supra* note 1, at 10.

for the lost value of their homes.¹² This Note will argue that New York City has violated citizens' constitutional rights through TPT's administration.

Part I of this Note will discuss the motivating factors and purpose behind the enactment of TPT. Part II will discuss TPT's statutory framework, legal challenges to the program, and the City's response to such challenges. Part III will argue that property seizures under TPT are unconstitutional takings because the City fails to provide homeowners with an adequate means to recover the surplus value of their property. Part IV will propose that the City modify the statutory procedures to restrict the transfer of properties with minimal tax liens and compensate owners for surplus equity.

I. TPT'S ORIGINS AND STATUTORY FRAMEWORK

A. *The City's Property Abandonment Crisis*

In the 1970s, New York City was facing a severe housing crisis as tens of thousands of residential units were lost to abandonment.¹³ Between 1970 and 1978, the City lost nearly forty thousand housing units annually to abandonment.¹⁴ Further complicating the crisis, a significant portion of the City's multi-family properties failed to pay property taxes and municipal charges.¹⁵ In 1976, over twenty percent of the City's

¹² N.Y.C. COUNCIL, OVERSIGHT AND INVESTIGATIONS COMM. ON & INFRASTRUCTURE DIV., BRIEFING PAPER, OVERSIGHT—TAKING STOCK: A LOOK INTO THE THIRD PARTY TRANSFER PROGRAM IN MODERN DAY NEW YORK, at 11 (2019) [hereinafter Briefing Paper], <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3968975&GUID=17B27FCE-9E66-4803-%20AB35-7792BA254245&Options=&Search=> [https://perma.cc/4MAG-2VU2]; *Dorce*, 2 F.4th at 87.

¹³ Frank P. Braconi, *In Re in Rem: Innovation and Expediency in New York's Housing Policy*, in HOUSING AND COMMUNITY DEVELOPMENT IN NEW YORK CITY: FACING THE FUTURE 93, 94 (Michael H. Schill ed., 1999). In the residential housing context, "abandonment" has been defined as "the point at which the owner decides to give up any remaining interests" in a property. Roslyn C. Lieb et al., *Abandonment of Residential Property in an Urban Context*, 23 DEPAUL L. REV. 1186, 1187 (1974). While abandoned properties in many American cities tend to be "vacant and derelict," abandonment in New York City is complicated by the fact that many of the City's abandoned buildings are occupied. *Id.* at 1186; David Reiss, *Housing Abandonment and New York City's Response*, 22 N.Y.U. REV. L. & SOC. CHANGE 783, 787 (1996).

¹⁴ Braconi, *supra* note 13, at 94.

¹⁵ Reiss, *supra* note 13, at 787.

multi-family properties were in arrears, with fourteen percent of those at risk of foreclosure.¹⁶

B. Addressing the Crisis Through in Rem Foreclosure

Abandonment peaked in 1975, leading to the loss of 40,000 residential units—"a rate of over 3,000 units a month."¹⁷ The City was in the throes of a full-blown "abandonment crisis" and in desperate need of a solution.¹⁸ The City chose to address the problem through the conventional *in rem*¹⁹ foreclosure process, which enabled the city government to foreclose on and ultimately gain title to properties subject to delinquent tax liens.²⁰ Initially, properties had to be tax delinquent for at least three years to be subject to *in rem* foreclosure, but in 1976, the City reduced the delinquency period to one year—dramatically accelerating the rate of foreclosures.²¹

C. A Crisis Within a Crisis: Managing the In Rem Housing Stock

While the City successfully increased the rate of *in rem* foreclosures, it soon realized that the rapid acquisition of so many residential dwellings was not without problems.²² Managing thousands of derelict occupied buildings proved difficult and prohibitively expensive—the Department of Housing Preservation ("HPD"), which assumed management of the *in rem* stock in 1978, spent "over \$50 million" in 1979 alone.²³

Almost immediately, HPD began to search for methods to reduce the fiscal burden of maintaining a growing portfolio of foreclosed buildings through the creation of programs designed to transfer building management to tenants and community

¹⁶ *Id.*

¹⁷ Andrew Scherer, *Is There Life after Abandonment? The Key Role of New York City's in Rem Housing in Establishing an Entitlement to Decent, Affordable Housing*, 13 N.Y.U. REV. L. & SOC. CHANGE 953, 954 (1985).

¹⁸ Reiss, *supra* note 13, at 787.

¹⁹ *Id.* *In rem* is a Latin term meaning "against a thing." *In rem*, BLACK'S LAW DICTIONARY (11th ed. 2019). Actions *in rem* "determine the title to property and the rights of the parties, not merely among themselves, but also against all persons at any time claiming an interest in that property." *Action in rem*, BLACK'S LAW DICTIONARY (11th ed. 2019).

²⁰ See Reiss, *supra* note 13, at 787; Braconi, *supra* note 13, at 93.

²¹ Braconi, *supra* note 13, at 97; Reiss, *supra* note 13, at 787; Scherer, *supra* note 17, at 956–57.

²² Scherer, *supra* note 17, at 957; Braconi *supra* note 13, at 98–99.

²³ Braconi *supra* note 13, at 98–99; Reiss, *supra* note 13, at 795.

organizations.²⁴ However, despite efforts to establish alternate methods of disposing of the *in rem* stock, the City's inventory of foreclosed homes continued to grow into the 1990s.²⁵ By 1994, the City owned 51,672 housing units in 5,458 buildings acquired through *in rem* foreclosures at a total estimated cost of \$10.6 billion.²⁶

D. The TPT as a Solution to the City's Management Crisis

As a result of the perceived failure of prior administrations to address the *in rem* management crisis, the privatization of these properties became a strong focus of candidate Rudolph Giuliani's successful 1994 mayoral campaign.²⁷ Two years after winning the election, Giuliani introduced Local Law 37 of 1996, which would serve as the basis for the TPT.²⁸ Local Law 37 was a sweeping amendment to the local Administrative Code, which permitted the City to transfer "distressed" properties directly to "qualified" third parties, completely bypassing the need for City ownership or maintenance.²⁹ Local Law 37 defined "[d]istressed" properties as those with significant tax liens or numerous municipal violations.³⁰ This law was soon supplemented by Local Law 69 of 1997, which allowed the City to transfer non-distressed properties located on the same block as distressed properties.³¹

The Giuliani administration predicted that transferring distressed properties to third parties would "drastically reduce" the financial burden of maintaining the decrepit *in rem* housing stock.³² However, one prescient contemporary observer noted another likely consequence: "A lot of people will lose their property."³³

²⁴ Reiss, *supra* note 13, at 792–93; Braconi, *supra* note 13, at 103–04.

²⁵ Allred, *supra* note 9, at 2.

²⁶ *Id.* at 3.

²⁷ Braconi, *supra* note 13, at 109; David Reiss, *Neighborhood Entrepreneurs Program in New York City*, 5 J. AFFORDABLE HOUS. & CMTY. DEV. L. 325, 325–26 (1996).

²⁸ Allred, *supra* note 9, at 3; N.Y.C. LOCAL LAW NO. 37 (1996) (codified in part as NEW YORK, N.Y., ADMIN. CODE § 11-401(4) (N.Y. Leg. Publ'g Co. 2010)).

²⁹ NEW YORK, N.Y., LOCAL LAW NO. 37 §§ 3, 13 (1996); MOLLY WASOW PARK, N.Y.C. INDEP. BUDGET OFF., SAVING HOMES: CITY SPENDING ON HOUSING PRESERVATION GROWS 6 (Feb. 2003); Giuliani, *supra* note 8.

³⁰ NEW YORK, N.Y., LOCAL LAW NO. 37 § 2 (1996).

³¹ NEW YORK, N.Y., LOCAL LAW NO. 69 (1997).

³² See Alan Oser, *New York City Shifts Tactics on Troubled Housing*, N.Y. TIMES (June 16, 1996), <https://www.nytimes.com/1996/06/16/realestate/perspectives-new-york-city-shifts-tactics-on-troubled-housing.html> [<https://perma.cc/9KHV-82DN>].

³³ *Id.*

II. ANALYSIS OF THE THIRD-PARTY TRANSFER PROGRAM'S STATUTORY FRAMEWORK AND LEGAL CHALLENGES TO THE PROGRAM

The City has stated that TPT's purpose is to rehabilitate buildings with delinquent municipal charges and "poor housing conditions" to ensure the availability of affordable homes.³⁴ While the City undoubtedly faced a crisis in managing thousands of derelict properties,³⁵ TPT has been heavily criticized—and the subject of numerous controversies, including lawsuits alleging constitutional violations³⁶ and accusations that the program targets the homes of elderly, Black New Yorkers.³⁷ Eric Adams, then Brooklyn Borough President and current New York City mayor, called for a "forensic audit" of the program and a federal investigation into the "possibly illegal actions being undertaken to defraud homeowners of their property."³⁸

In this section, I will first analyze the statutory framework of TPT. My analysis will focus on the City's authority for enacting the program, selection of properties for inclusion in TPT, notice provided to homeowners facing foreclosure, and homeowners' right to redeem their properties. Next, I will discuss challenges to TPT, including the pending class action *Dorce v. City of New York*. This section will also analyze the City's response to these challenges and the recommendations of the Third Party Transfer

³⁴ *Third Party Transfer (TPT) In Rem Program*, N.Y.C. DEPT OF FIN., <https://www1.nyc.gov/site/finance/taxes/property-in-rem-foreclosure.page> [<https://perma.cc/ZY4M-93Z8>] (last visited July 31, 2022).

³⁵ See Allred, *supra* note 9, at 1–3.

³⁶ See Complaint at 5, *Dorce v. City of New York*, 460 F. Supp. 3d 327 (S.D.N.Y. 2020) [hereinafter Complaint].

³⁷ See Stephen Witt, *Black Property Owners Say Abolish Third Party Transfer Program*, POLITICSNY (Nov. 11, 2021), <https://politicsny.com/2021/11/11/black-property-owners-say-abolish-third-party-transfer-program/> [<https://perma.cc/SSD2-MWLZ>]; Randi Richardson, *Black New Yorkers Strike Back at City Program That Seized Their Properties for Developers*, NBC NEWS (Aug. 5, 2021), <https://www.nbcnews.com/news/nbcblk/black-new-yorkers-strike-back-city-program-seizing-their-properties-n1276132> [<https://perma.cc/B6CG-LGRN>].

³⁸ *Oversight—Taking Stock: A Look into the Third Party Transfer Program in Modern Day New York, Comm. on Hous. & Bldg., Comm. on Oversight & Investigations* (N.Y.C. Council 2019) (statement of Eric Adams, Brooklyn Borough President); see Sam Raskin, *Borough President Adams Calls Third Party Transfer Program 'Racist'*, BKLYNER.COM (Aug. 1, 2019), <https://bklyner.com/borough-president-adams-calls-third-party-transfer-program-racist/> [<https://perma.cc/RQA4-D5K4>]; 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/7CX3-H3CG>].

Working Group, a task force charged with exploring potential changes to the program.³⁹

A. *TPT's Statutory Framework*

While the statutes underlying TPT lay out the general procedure under which properties might be selected and conveyed, there are glaring omissions and areas which require City administrative agencies to make highly consequential, subjective determinations.⁴⁰ For example, the City's Administrative Code does not define a minimum lien amount for *in rem* foreclosure⁴¹ or the precise criteria under which HPD chooses whether to include an otherwise eligible property in the program.⁴²

1. TPT's Statutory Authority

In 1939, New York State enacted the Uniform Delinquent Tax Enforcement Act, granting municipalities the power to initiate *in rem* foreclosure proceedings against tax-delinquent properties.⁴³ Local Law 37 effectively extended this power by allowing conveyances of *in rem* properties to third parties.⁴⁴ The City derives its authority to expand upon the traditional *in rem* foreclosure process from provisions of the state constitution and New York state statutes.⁴⁵

New York's Real Property Tax Law provides that the state's *in rem* foreclosure procedures apply to and supersede inconsistent municipal laws unless the City was authorized to enforce and had enacted *in rem* provisions prior to July 1, 1984.⁴⁶

³⁹ See NEW YORK, N.Y., ADMIN. CODE § 11-356(a) (N.Y. Leg. Publ'g Co. 2021) (establishing the task force).

⁴⁰ See Hearing Transcript, *supra* note 1, at 46–48, 56–57; Municipal Defs.' Reply Memorandum of L. in Further Support of Mot. to Dismiss the Compl. at 8, *Dorce*, 460 F. Supp. 3d [hereinafter Defendants' Reply Memorandum].

⁴¹ *Id.*

⁴² See Briefing Paper, *supra* note 12, at 4.

⁴³ Matthew X. Wagner Sr., Note, *In Rem Tax Foreclosure in Erie County—Inviolable Title?*, 2 BUFF. L. REV. 133, 133 (1952). The relevant provision of the Uniform Delinquent Enforcement Act is now codified in New York's Real Property Tax Law. See N.Y. REAL PROP. TAX LAW § 1120 (McKinney 2021).

⁴⁴ NEW YORK, N.Y., LOCAL LAW NO. 37 (1996).

⁴⁵ Defendants' Reply Memorandum, *supra* note 40, at 8 (citing N.Y. REAL PROP. TAX LAW § 1104(2); N.Y. CONST. art. IX § 2(c)(8); N.Y. MUN. HOME RULE LAW § 10(1)(ii)(a)(9)).

⁴⁶ N.Y. REAL PROP. TAX LAW § 1104(1)–(2) (McKinney 2010).

The City first enacted its own *in rem* code in 1948.⁴⁷ The City also cites as a source of its authority the state constitution, which grants local governments the power to adopt laws pertaining to the collection and administration of local taxes as long as such laws are “not inconsistent” with the state’s constitution or other laws.⁴⁸

2. Qualification and Selection of Properties Subject to Third Party Transfer

In New York City, any failure to pay municipal property taxes, water, sewage, or Emergency Repair Program charges results in a lien against a property.⁴⁹ The City refers to these as “tax lien[s],” regardless of the debt’s origin.⁵⁰ Tax liens may be sold by the City at a lien sale, or subject to *in rem* proceedings if the lien is against a Class 1 or Class 2 property.⁵¹ Property Classes 1 and 2 include residential properties—Class 1 includes single-family homes, most multi-family homes of up to three units, and most condominiums less than three stories, while Class 2 includes “[a]ll other property that is not in Class 1 and is primarily residential.”⁵² *In rem* proceedings may be initiated against non-condominium and non-cooperative properties, such as single-family homes, after a lien is unpaid for at least one year, while liens against condominiums or cooperatives must be unpaid for at least three years.⁵³

Once a property is eligible for *in rem* foreclosure, the decision to dispose of it under TPT rests on a somewhat opaque and subjective analysis conducted by HPD, which selects properties that “exhibit the highest level of physical and financial distress” and meet the statutory “tax lien requirements.”⁵⁴ Strikingly, neither City nor state foreclosure statutes set a minimum lien amount for *in rem* foreclosures, though the City claims that it

⁴⁷ New York, N.Y., ADMIN. CODE § 11-401 (N.Y. Leg. Publ’g Co. 2010) (formerly § D17-1.0 added 1948).

⁴⁸ N.Y. CONST. art. IX, § 2(c)(8).

⁴⁹ § 11-301.

⁵⁰ *Id.*; see also JESSICA YAGER & ERIC STERN, SELLING THE DEBT: PROPERTIES AFFECTED BY THE SALE OF NEW YORK CITY TAX LIENS 2 (N.Y.U. Furman Ctr. 2016).

⁵¹ §§ 11-301, 11-401(3), 11-404.

⁵² *Definitions of Property Assessment Terms, Tax Class*, N.Y.C. DEPT OF FIN., <https://www1.nyc.gov/site/finance/taxes/definitions-of-property-assessment-terms.page> [<https://perma.cc/G7CK-6PZF>] (last visited Sept. 25, 2022).

⁵³ § 11-404(a)–(b).

⁵⁴ Briefing Paper, *supra* note 12, at 4.

only forecloses on properties with liens of at least \$1,000.⁵⁵ As an intended solution to the City's abandonment problem, TPT is ostensibly focused on conveying properties that are statutorily "distressed," and these properties are not included in the City's lien sales.⁵⁶

The City's definition of distressed properties is complex. Distressed properties are statutorily defined as any Class 1 or Class 2 parcel subject to tax liens with a lien-to-value ratio greater than or equal to fifteen percent that is either: (1) subject to "an average of five or more hazardous or immediately hazardous violations of record of the housing maintenance code per dwelling unit," or (2) subject to HPD liens of \$1,000 or more "for the repair or the elimination of any dangerous or unlawful conditions."⁵⁷ In May 2019, this definition was expanded to include Class 1 or Class 2 parcels subject to tax liens imposed by an Environmental Control Board judgment with a lien-to-value ratio greater than or equal to twenty-five percent.⁵⁸

However, despite the statute's clear focus on distressed properties, the City admits that it conveys non-distressed tax-delinquent properties under TPT.⁵⁹ Local Law 69 of 1997 amended the City's Administrative Code to convey non-distressed properties through TPT if those properties are located in close proximity to distressed properties.⁶⁰ The City refers to this as the "block pick-up" scheme⁶¹ and interprets it as allowing non-distressed, tax-delinquent properties to be seized under TPT because they happen to be on the same block as a distressed property.⁶² The City also engages housing policy when selecting

⁵⁵ Defendants' Reply Memorandum, *supra* note 40, at 8; *see also* Briefing Paper, *supra* note 12, at 5.

⁵⁶ *See* WASOW PARK, *supra* note 29, at 2; §§ 11-401.1(a), (c).

⁵⁷ § 11-401(4).

⁵⁸ *Id.* (effective May 1, 2019).

⁵⁹ *See* Defendants' Reply Memorandum, *supra* note 40, at 8; *In Rem* Tax Foreclosure Action No. 53 Borough of Brooklyn, No. 8700/15, 2019 WL 1431423, at *3 (Sup. Ct. Kings Cnty. Mar. 28, 2019).

⁶⁰ § 11-405(a).

⁶¹ *See* Press Release, N.Y.C. Dep't of Hous. Pres. & Dev., Working Grp. Proposes Reforms to Modernize the Third Party Transfer Program (Nov. 8, 2021), <https://www1.nyc.gov/site/hpd/news/064-21/working-group-proposes-reforms-modernize-third-party-transfer-program> [<https://perma.cc/Z24S-A4MG>]; THIRD PARTY TRANSFER WORKING GROUP, FINAL REPORT 1 (2021), <https://www1.nyc.gov/assets/hpd/downloads/pdfs/services/tpt-working-group-final-report.pdf> [<https://perma.cc/B5YT-9YQX>].

⁶² *See* THIRD PARTY TRANSFER WORKING GROUP, *supra* note 61, at 1; *see also* § 11-204(d) (defining a city block); Allred, *supra* note 9, at 3.

properties for TPT, with HPD considering whether a property is located “in an area that the City considers to be ‘blighted’ and has been targeted for improvements.”⁶³

3. Notice and Redemption Under the Third-Party Transfer Program

Although the City’s Administrative Code contains robust notice requirements, the City has been repeatedly accused of failing to adhere to these protocols by City Council members, New York City property owners, as well as both judges and litigants in actions challenging TPT.⁶⁴ The City claims to send “numerous notices” and quarterly tax bills to property owners prior to the commencement of an *in rem* foreclosure action.⁶⁵ The City also publishes lists of properties being foreclosed in newspapers and posts these lists in municipal buildings.⁶⁶

The Administrative Code requires the City to mail a foreclosure notice to the property owner’s registered address or the address listed on the *in rem* card.⁶⁷ Property owners have at least ten weeks after the first publication of notice to pay the delinquent charges, together with any interest and penalties, resulting in the issuance of a certificate of redemption and cancellation of the sale.⁶⁸ If the property owner does not respond to the notices, the property is included in a foreclosure action.⁶⁹ Property owners may still redeem their property once it has been included in a foreclosure action, albeit at a higher cost.⁷⁰ Specifically, the City levies a “penalty” charge of five percent of the total taxes, charges, and interest due on the property, not exceeding \$1,000 per parcel redeemed.⁷¹

TPT has been criticized for failing to allow divested property owners to recover the surplus equity in their homes, which is the value of the owner’s interest in the property in excess of the

⁶³ Briefing Paper, *supra* note 12, at 5.

⁶⁴ See Hearing Transcript, *supra* note 1, at 18, 96; *In Rem* Tax Foreclosure Action No. 53, No. 8700/15, 2019 WL 1431423 at *4–5, 18 (Sup. Ct. Kings Cnty. Mar. 28, 2019); Complaint, *supra* note 36, at 24.

⁶⁵ See N.Y.C. DEP’T OF FIN., *supra* note 34; Hearing Transcript, *supra* note 1, at 32–33.

⁶⁶ § 11-406(a); § 11-320(a)(1)(2).

⁶⁷ § 11-406(c).

⁶⁸ § 11-407(a).

⁶⁹ See N.Y.C. DEP’T OF FIN., *supra* note 34.

⁷⁰ § 11-407(c).

⁷¹ *Id.*

amount of the tax lien.⁷² The City has claimed that the TPT provides an avenue for retention of surplus equity, pointing to statutory provisions that allow property owners alleging “substantial equity” over the lien value to “demand additional time” to either pay their taxes or sell their property to satisfy the tax debt.⁷³ However, as alleged by the plaintiffs in *Dorce*, these procedures are largely illusory and provide “no real mechanism for a former owner to seek or regain their surplus equity after the property has been transferred under the TPT Program.”⁷⁴

B. *Dorce v. City of New York*

Dorce is the first putative class action allowed to proceed against the City and third-party organizations involved in the program for grievances resulting from TPT.⁷⁵ While *Dorce* is currently pending,⁷⁶ due to the magnitude of the allegations levied against the City and the media attention it has attracted, it could be determinative of TPT’s future.⁷⁷

1. Factual Background

Thomas-Murchison, Dorce, and Jones lost properties through *in rem* foreclosure proceedings under TPT.⁷⁸ Thomas-Murchison owned shares in a housing cooperative that was in tax arrears—the building was foreclosed on in 2011 and transferred to Neighborhood Restore, a third-party property developer and named defendant in the action.⁷⁹ Thomas-Murchison only learned that her cooperative was transferred to a third party in

⁷² See *In Rem Tax Foreclosure Action No. 53 Borough of Brooklyn, No. 8700/15*, 2019 WL 1431423, at *22–23 (Sup. Ct. Kings Cnty. Mar. 28, 2019) (“[U]nder the Third Party Transfer Program, [the foreclosed property owner] cannot recover any surplus monies above the taxes owed.”).

⁷³ § 11-409(d); Defendants’ Reply Memorandum, *supra* note 40, at 7, 10, n. 13.

⁷⁴ *Dorce v. City of New York*, No. 19-CV-2216, 2022 WL 2286381, at *2 (S.D.N.Y. June 24, 2022).

⁷⁵ Complaint, *supra* note 36, at 1, 2.

⁷⁶ *Dorce* is pending as of April 2023.

⁷⁷ See Stephen Witt & Kelly Mena, *Court Cases Could Determine Third Party Transfer Program’s Future*, POLITICSNY (Dec. 3, 2018), <https://politicsny.com/2018/12/03/court-cases-could-determine-third-party-transfer-programs-future/> [https://perma.cc/P8KW-ELPG]. But see Jessie Edwards, *City Looks to Restart Program Accused of ‘Snatching’ Black-Owned Homes Without Compensation*, BKREADER (Nov. 12, 2021), <https://bkreader.com/2021/11/12/city-looks-to-restart-program-accused-of-snatching-black-owned-homes-without-compensation/> [https://perma.cc/F297-8286].

⁷⁸ *Dorce v. City of New York*, 2 F.4th 82, 90–91 (2d Cir. 2021).

⁷⁹ *Id.*

2016, at which time she also discovered that she was being converted into a renter—whereas she previously paid maintenance to the cooperative, she now paid rent to Neighborhood Restore.⁸⁰ Thomas-Murchison claims she did not receive notice of the foreclosure proceedings and that the property was not statutorily distressed at the time of the action.⁸¹

Dorce, a retired machinist and Haitian immigrant, had owned 373 Rockaway Boulevard in Brooklyn since 1977.⁸² Dorce owned the property “free and clear,” having paid off his mortgage in 2012.⁸³ In 2012 he incurred water and sewer charges and entered into an installment plan with the City’s Department of Environmental Protection (“DEP”) to satisfy the debt.⁸⁴ Jones owned shares in a cooperative and lived in an apartment owned by the cooperative at 1197 Dean Street in Brooklyn.⁸⁵ In 2015, the City commenced foreclosure actions against both Dorce’s home and the Jones’ apartment building.⁸⁶ The City stated that both properties were in arrears, with Dorce’s property owing \$45,123.73 and Jones’ apartment building owing \$160,760.20.⁸⁷ In November 2017, both properties were transferred under TPT to Neighborhood Restore.⁸⁸

In September 2018, Dorce learned that his property had been transferred.⁸⁹ He stated that the City did not notify him of the transfer and that his property was not statutorily distressed.⁹⁰ Further, Dorce had continued making payments to the DEP after learning the property had been transferred because “he was not aware that he was no longer the owner.”⁹¹ Similarly, Jones later learned that the apartment building in which she lived had been transferred to a property developer and, like Thomas-Murchison, she was converted into a renter.⁹²

⁸⁰ *Id.* at 91.

⁸¹ *Id.*

⁸² *Id.*; Edwards, *supra* note 7.

⁸³ Complaint, *supra* note 36, at 26.

⁸⁴ Dorce, 2 F.4th at 91.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 91–92.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

2. Procedural History

In 2019, a putative class action was filed in the Southern District of New York on behalf of plaintiffs McConnell Dorce, Cecilia Jones, Sherlivia Thomas-Murchison, and twenty unidentified, similarly situated plaintiffs against the City of New York and several third-party transferees of property conveyed under TPT.⁹³ The case was not decided on its merits but was dismissed for lack of subject matter jurisdiction.⁹⁴ Subsequently, the Second Circuit partially reversed the district court, holding that the district court had jurisdiction over several significant claims.⁹⁵ Following the circuit court's partial reversal, the majority of the plaintiffs' claims survived a motion to dismiss for lack of subject matter jurisdiction and failure to state a claim.⁹⁶

3. Plaintiff's Claims

The plaintiffs alleged numerous violations of the United States Constitution and New York State law.⁹⁷ They alleged that the City exceeded its statutory grant of power under New York's Municipal Home Rule Law because the City laws establishing TPT were inconsistent with the New York State Constitution.⁹⁸ The plaintiffs also alleged that the City was unjustly enriched by the retention of the surplus equity of their homes and that City unlawfully converted their surplus equity.⁹⁹ The plaintiffs argued that the City violated their constitutional right to equal protection by disproportionately targeting homes located in communities of color for foreclosure under TPT.¹⁰⁰ They claimed that the City's notice provisions fell short of constitutional requirements and that the City failed to provide them with adequate notice of the *in rem* proceedings against the properties, in violation of their constitutional right to due process.¹⁰¹

⁹³ Complaint, *supra* note 36, at 21–22.

⁹⁴ The District Court specifically found that the *Rooker-Feldman* doctrine, Tax Injunction Act (“TIA”), and doctrine of comity barred it from hearing the claim. *Dorce*, 460 F. Supp. 3d at 345.

⁹⁵ *Dorce*, 2 F.4th at 88.

⁹⁶ *Dorce v. City of New York*, No. 19-CV-2216, 2022 WL 2286381 at *1 (S.D.N.Y. June 24, 2022).

⁹⁷ *Id.*

⁹⁸ *Id.* at *6–7.

⁹⁹ *Id.* at *8.

¹⁰⁰ *Id.* at *13.

¹⁰¹ *Id.* at *7, *14.

The plaintiffs further alleged that the City's retention of the surplus equity of their homes amounted to unconstitutional takings because the City failed to provide a process for the recovery of the surplus equity.¹⁰² Additionally, the plaintiffs claimed that the City's retention of surplus equity constituted an excessive fine in violation of both the federal and state constitutions.¹⁰³ The plaintiffs further claimed that the City violated New York's consumer protection laws by targeting minority homeowners in an attempt to manipulate the real estate market.¹⁰⁴ Finally, the plaintiffs alleged that the City and third-party transferees conspired to deprive communities of color of their homes and surplus equity in violation of federal and state law.¹⁰⁵

On June 24, 2022, the district court granted in part and denied in part a motion to dismiss for lack of subject matter jurisdiction and failure to state a claim.¹⁰⁶ The district court granted the motion to dismiss with respect to the plaintiffs' facial due process challenge to the City's notice statutes and their conspiracy claim under New York State law.¹⁰⁷ However, the majority of the plaintiffs' claims survived the motion to dismiss, setting the stage for a future determination of the constitutionality of the TPT.

C. *In Rem Tax Foreclosure Action No. 53*

When viewed in light of *Dorce*, the Kings County Supreme Court's opinion *In Rem Tax Foreclosure Action No. 53* highlights a pattern of repeated, problematic takings under TPT.¹⁰⁸ In this case, Judge Mark Partnow vacated foreclosure judgments on six different properties administered under TPT.¹⁰⁹ In each case, the property owners asserted that they did not receive notice of the foreclosure actions commenced against their properties.¹¹⁰ The court's "sweeping decision" was celebrated for returning "millions

¹⁰² *Id.* at *12.

¹⁰³ *Id.* at *15.

¹⁰⁴ *Id.* at *18.

¹⁰⁵ *Id.* at *19.

¹⁰⁶ *Id.* at *1.

¹⁰⁷ *Id.* at *15, *19.

¹⁰⁸ *In Rem Tax Foreclosure Action No. 53 Borough of Brooklyn, No. 8700/15, 2019 WL 1431423, at *1 (Sup. Ct. Kings Cnty. Mar. 28, 2019).*

¹⁰⁹ *Id.* at *1, *8, *13, *16, *20, *24, *30.

¹¹⁰ *Id.* at *1.

of dollars of intergenerational wealth” to Black and Latinx property owners.¹¹¹

The opinion is notable for Judge Partnow’s strongly worded condemnations of TPT. Partnow wrote that improper takings under TPT are not “isolated occurrence[s]” and that the program “particularly target[s] . . . minorities” and “inequitably strip[s] owners] of their valuable property rights.”¹¹² Notably, the court found that the inclusion of non-distressed properties in TPT was “completely arbitrary” and unrelated to the City’s tax collection goals under TPT.¹¹³ Judge Partnow noted that the foreclosure of non-distressed properties raises equal protection concerns because it results in the disparate treatment of property owners based on where they happen to live, rather than whether their property is statutorily distressed.¹¹⁴

D. *The City’s Response to the Mounting Criticism of TPT*

After the latest round of TPT ended in 2018, the City could scarcely escape confronting the mounting public controversy—TPT had issues, and the public demanded answers and action.¹¹⁵ As *Dorce*, along with Judge Partnow’s startling reversal of six TPT foreclosures, threatened the program’s legal foundation,¹¹⁶ the City’s response was defensive.¹¹⁷ An HPD representative contended that the City’s “extensive outreach” to property owners during the latest round of foreclosures led to “more than 76

¹¹¹ Stephen Witt & Kelly Mena, *Court Rules Against City, Millions of Dollars of Wealth Restored*, POLITICSNY (Mar. 29, 2019), <https://politicsny.com/2019/03/29/courts-rules-against-city-millions-of-dollars-of-wealth-restored/> [<https://perma.cc/5FL5-V28Q>].

¹¹² *In Rem* No. 53, 2019 WL 1431423, at *6.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ The seizure of properties belonging to Marlene Saunders and the plaintiffs in *Dorce* in late 2018 was highly publicized and led to protests calling for the program’s end. See, e.g., Witt & Mena, *supra* note 111; Culliton, *supra* note 3; Andrea Leonhardt, *‘It’s Highway Robbery!’ Brooklyn Senior Residents Protest Against City Seizing Homes*, BKREADER (Sept. 28, 2018), <https://bkreader.com/2018/09/28/its-highway-robbery-brooklyn-senior-residents-protest-as-city-seizes-their-homes/> [<https://perma.cc/7MNQ-ZNCQ>].

¹¹⁶ See Complaint, *supra* note 36, at 2. See generally *In Rem* No. 53, 2019 WL 1431423 (discussing the improper application of TPT, resulting in arbitrary and disparate treatment of property owners, unjustified taking of private property, and divestiture of property equity).

¹¹⁷ Stephon Johnson, *City Defends Program That Seizes Property of Homeowners*, AMSTERDAM NEWS (Sept. 27, 2018), <https://amsterdamnews.com/news/2018/09/27/city-defends-program-seizes-property-homeowners/> [<https://perma.cc/V5WK-LDGU>].

percent” of properties being redeemed by homeowners, while maintaining that TPT was the “best path forward” for properties that were ultimately transferred under the program.¹¹⁸ In January 2019, former Mayor Bill de Blasio even sought to *expand* the program to allow the City to seize “the worst buildings that have failed to correct violations and pay the debt they owe the City within a reasonable timeframe.”¹¹⁹ City Council Member Robert Cornegy refused to support the expansion, instead calling for a “comprehensive review” of the program.¹²⁰ Cornegy’s call for a review was successful, and in July 2019, the City Council held a hearing examining the program’s procedures.¹²¹

1. The 2019 City Council Oversight Committee

The Oversight Committee’s findings painted a stark contrast between the reality of TPT and its intended purpose of disposing of distressed and abandoned housing.¹²² Examining Round X, the most recent round of TPT, the Committee found that half of the properties selected for inclusion in the program were not statutorily distressed.¹²³ During Round X, the City ultimately conveyed sixty-five properties to Neighborhood Restore—four of which were not distressed.¹²⁴

The City asserts that it is permitted to foreclose upon non-distressed properties through the block pick-up scheme,¹²⁵ but thirty-three properties included in Round X were neither statutorily distressed nor located on the same block as a distressed property.¹²⁶ One property selected for inclusion was valued at approximately \$6 million, owed *nothing* in arrears, and had just 0.16 violations per unit.¹²⁷ Another property was valued

¹¹⁸ *Id.*

¹¹⁹ Will Parker & Kathryn Brenzel, *Here’s How de Blasio Will ‘Take’ Buildings from Bad Landlords*, REAL DEAL (Jan. 10, 2019), <https://therealdeal.com/2019/01/10/de-blasio-creates-new-tenant-protection-office-says-city-will-seize-buildings-from-the-worst-landlords/> [<https://perma.cc/Q25J-LBWN>].

¹²⁰ *City Council Housing Chair Expresses Concern over Mayor’s Plan to Expand Seizure of Private Residential Properties*, N.Y.C. COUNCIL (Jan. 10, 2019), <https://web.archive.org/web/20201125024337/https://council.nyc.gov/robert-cornegy/2019/01/10/housing-chair-concerned-by-expansion-of-property-seizures/> [<https://perma.cc/P3MV-T3QR>].

¹²¹ See Briefing Paper, *supra* note 12, at 2.

¹²² *Id.*

¹²³ *Id.* at 9.

¹²⁴ *Id.*

¹²⁵ See *id.*; NEW YORK, N.Y., ADMIN. CODE § 11-405 (N.Y. Leg. Publ’g Co. 2010).

¹²⁶ Briefing Paper, *supra* note 12, at 10.

¹²⁷ *Id.* at 11.

at \$2.2 million, had no violations, and owed just \$2,200 in arrears—yet it was still selected for inclusion in Round X.¹²⁸ When asked to explain the legal basis for including properties owing nothing in arrears on the list of properties eligible for foreclosure under TPT, HPD Commissioner Louise Carroll struggled to provide an answer.¹²⁹

The hearing testimony illustrates a troubling lack of clarity in the City’s purpose and goals under TPT and a startling lack of awareness of the gravity of injustices inflicted. Given the Committee’s stark findings, it is surprising that the City waited nearly two years to convene a “temporary task force” to evaluate TPT with the goal of ensuring that the City’s lien collection process is “fair, efficient and effective.”¹³⁰

2. The TPT Working Group’s Final Report

The task force, officially titled the Third Party Transfer Working Group (the “Group”), was statutorily required to submit a list of “recommendations for administrative or legislative changes that may improve the fairness, efficiency and effectiveness” to improve TPT by November 1, 2021.¹³¹ The report was released over a week later.¹³² Dated November 8, 2021, it recommended a host of enhancements for the City to implement or “explore,”—including expanded community outreach programs, the creation of financial assistance programs, and the creation of a “[h]elp [d]esk” to provide New Yorkers with legal counseling.¹³³ The report also stated that the City would “endeavor to make additional proactive outreach to each applicable owner . . . before initiating a TPT round”—a hopeful “endeavor” that falls short of a commitment to enhanced notice procedures.¹³⁴

The Group, which included elected officials, legal services providers, tenant advocates, property managers, and community-based organizations, made several recommendations that, if enacted, would alleviate some issues associated with TPT.¹³⁵ The Group supported dispensing with the City’s \$1,000 foreclosure

¹²⁸ *Id.*

¹²⁹ See Hearing Transcript, *supra* note 1, at 45–46.

¹³⁰ § 11-356(a) (creating the task force).

¹³¹ *Id.*

¹³² See Third Party Transfer Working Group, *supra* note 61, at 1, 13–18.

¹³³ *Id.*

¹³⁴ *Id.* at 15.

¹³⁵ *Id.* at 1, 15–19.

threshold in favor of individualized thresholds based on a property's annual tax liability.¹³⁶ The Group endorsed replacing the "block pick-up" scheme with "a more refined selection methodology," although they failed to identify an alternative.¹³⁷ In selecting properties for inclusion under TPT, the majority of the Group supported the equal consideration of a building's "physical and financial crisis conditions," while fifty four percent preferred basing inclusion "entirely on building financial data."¹³⁸ Notably, the Group supported excluding one to three family properties in Tax Class 1 that are subject to certain tax benefits or exemptions—such as the City's Senior Citizen Homeowner's Exemption.¹³⁹

The Group's recommendations are a step in the right direction, and the creation of the Group amounts to a tepid concession that there are significant issues with TPT. The program was created to address a very real problem: abandonment and dereliction can have far-reaching impacts on a city's economy and its residents' quality of life, while the failure to enforce tax payment leads to devastating outcomes for neighborhoods, local governments, and property owners alike.¹⁴⁰ TPT may have been created out of the perceived necessity to forestall these calamities and relieve the fiscal burden of managing the *in rem* housing stock¹⁴¹—but necessity does not absolve the City of its constitutional mandate to respect its citizens' property rights.¹⁴²

III. THE CITY MUST CEASE TAKINGS UNDER THE TPT—OR PAY PROPERTY OWNERS THE SURPLUS VALUE

It is difficult to identify the crux of injustice at the heart of TPT because the City's application of the program is broadly problematic. The City's block pick-up scheme implicates issues of

¹³⁶ *Id.* at 19.

¹³⁷ *Id.* at 17; see NEW YORK, N.Y., Local Law No. 69 (1997) (establishing the "block pick-up" scheme).

¹³⁸ Third Party Transfer Working Group, *supra* note 61, at 17.

¹³⁹ *Id.* at 19.

¹⁴⁰ See Reiss, *supra* note 13, at 785–87 ("[A]bandonment has a 'contagious' aspect in which good housing stock is infected by the nearby abandonment of poor housing stock so that an entire low-income community, such as the South Bronx, is devastated."); Braconi, *supra* note 13, at 93 ("[A]bandonment . . . had left some communities resembling the bombed-out cities of World War II.").

¹⁴¹ See WASOW PARK, *supra* note 29, at 2.

¹⁴² See N.Y. CONST. art. I, §§ 1, 7; U.S. CONST. amend. V.

equal protection because, while it may be conceived as a “seemingly neutral geographic distinction[],” its grossly disproportionate impact on communities of color implies its use as an “insidious prox[y] for suspect *racial* classifications.”¹⁴³ The City’s contention that TPT “satisfies ‘the minimum requirements of due process’ ” is contradicted by numerous allegations that the City failed to provide homeowners with foreclosure notices before conveying their properties to third parties under the program.¹⁴⁴

However, the program’s most patent failure may be that it does not provide owners with the opportunity to recover surplus equity.¹⁴⁵ The City has a strong interest in tax collection, curing municipal violations, and putting abandoned property to good use—but these interests are subordinate to citizens’ “paramount” and fundamental right to property ownership.¹⁴⁶ The City’s failure to provide a mechanism for owners to recover surplus equity in properties seized under TPT raises serious constitutional concerns into question the program’s justification as a tax collection tool.

A. *The City’s Seizure of Property Under TPT Without Just Compensation is Unconstitutional*

Government takings of private property for public use without compensation is unequivocally prohibited by both the United States and New York constitutions.¹⁴⁷ In *Knick v. Township of Scott*, the Supreme Court found that “[a] property owner has an actionable Fifth Amendment takings claim when the government takes his property without paying for it.”¹⁴⁸ The

¹⁴³ U.S. CONST. amend. XIV, § 1; *Pyke v. Cuomo*, 258 F.3d 107, 108–10 (2d Cir. 2001); *Pyke v. Cuomo*, 567 F.3d 74, 78 (2d Cir. 2009). City Council members have repeatedly accused TPT of targeting communities of color. See Leonhardt, *supra* note 111. Public Advocate Jumaane Williams labeled the program a “gentrification scheme that . . . takes equity away from the very people the program is intended to help” by disproportionately targeting “black and brown homeowners in lower-income neighborhoods.” See Hearing Transcript, *supra* note 1, at 13.

¹⁴⁴ See U.S. CONST. amend. XIV, § 1; *In Rem Tax Foreclosure Action No. 53 Borough of Brooklyn*, No. 8700/15, 2019 WL 1431423, at *10–11 (Sup. Ct. Kings Cnty. Mar. 28, 2019); *Dorce v. City of New York*, 2 F.4th 82, 94 (2d Cir. 2021); Hearing Transcript, *supra* note 1, at 18.

¹⁴⁵ See *In Rem No. 53*, 2019 WL 1431423, at *22–23; U.S. CONST. amend. V; N.Y. CONST. art. I § 7.

¹⁴⁶ *In Rem No. 53*, 2019 WL 1431423, at *11.

¹⁴⁷ U.S. CONST. amend. V; N.Y. CONST. art. I § 7.

¹⁴⁸ 139 S. Ct. 2162, 2167 (2019).

Court was explicit in its interpretation of the takings clause: “[I]f a local government takes private property without paying for it,” the Fifth Amendment has been violated “no matter what sort of procedures the government puts in place to remedy a taking.”¹⁴⁹

While there is “no magic formula” used to determine whether a government action is a taking,¹⁵⁰ a claimant must first establish the existence of a cognizable property interest.¹⁵¹ A cognizable property interest exists when a person has “a legitimate claim of entitlement” to property greater than an “abstract need or desire for it.”¹⁵² In ordinary mortgage foreclosures, an owner has an interest in any surplus proceeds that remain after debt satisfaction.¹⁵³ New York courts recognize that “[s]urplus money . . . stands in the place of the land for all purposes of distribution among persons having vested interests or liens upon the land.”¹⁵⁴ A property owner cannot claim surplus proceeds from a foreclosure sale as a “general asset,” but as the owner of the equity of redemption, they have a common law claim to these funds.¹⁵⁵ While it seems logical that owners of property taken via *in rem* foreclosure would be entitled to this surplus, in New York, they have generally not been afforded this entitlement—but the applicable tax foreclosure statute must meet several requirements.¹⁵⁶

In *Nelson v. City of New York*, the United States Supreme Court held that a state’s retention of surplus proceeds is not an unconstitutional taking if the foreclosed property owner failed to file an action to redeem the surplus in accordance with the applicable tax foreclosure statute after receiving adequate notice of both the taxes due and the foreclosure proceedings.¹⁵⁷ Many courts, including those in New York, have tended to treat this as

¹⁴⁹ *Id.* at 2170.

¹⁵⁰ *Ark. Game & Fish Com’n v. United States*, 568 U.S. 23, 31 (2012).

¹⁵¹ *Puckett v. Lexington-Fayette Urban Cnty. Gov’t*, 833 F.3d 590, 609 (6th Cir. 2016).

¹⁵² *See Deepwells Ests. Inc. v. Head of Harbor*, 973 F. Supp. 338, 349 (E.D.N.Y. 1997) (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)).

¹⁵³ *See, e.g., Emigrant Mortg. Co., Inc. v. Biggio*, 110 A.D.3d 673, 675 (N.Y. 2d Dep’t 2013).

¹⁵⁴ *Shankman v. Horoshko*, 291 A.D.2d 441, 442 (N.Y. 2d Dep’t 2002) (quoting *Roosevelt Sav. Bank v. Goldberg*, 118 Misc.2d 220, 221 (Sup. Ct. Nassau Cnty. 1983)).

¹⁵⁵ *See NYCTL 1997-1 Trust v. Stell*, 184 A.D.3d 9 (2d Dep’t 2020) (citing *First Fed. Sav. & Loan Assn. of Rochester v. Brown*, 78 A.D.2d 119, 434 N.Y.S.2d 306, 310 (4th Dep’t 1980)).

¹⁵⁶ *See Nelson v. City of New York*, 352 U.S. 103, 110 (1956).

¹⁵⁷ *Id.*

a settled issue, finding that property owners given “reasonably calculated” notice of foreclosure proceedings and a right to redeem have no claim to surplus equity.¹⁵⁸ However, the City’s administration of TPT fails to live up to *Nelson*’s requirements.

1. The City’s Questionable Reliance on *Nelson* as Grounds for the Retention of Surplus Equity

The City relies on precedent set in *Nelson* in retaining the surplus value of TPT foreclosures—but under careful examination, clear distinctions arise between what the Court permitted in *Nelson* and the City’s actions under TPT.¹⁵⁹ In *Nelson*, the retention of surplus equity was permitted, in part, because the statute did not “absolutely preclude[.]” an owner from recovering the surplus proceeds from a judicial sale.¹⁶⁰ *Nelson* does not permit a divested property owner to assert a takings claim if the foreclosure statute in question allows recovery of surplus value and the owner failed to utilize this method of recovery.¹⁶¹ Prior to *Nelson*, in *U.S. v. Lawton*, the Supreme Court addressed the statutory right to surplus proceeds in a foreclosure sale.¹⁶² In *Lawton*, the Court found that a takings claim will arise if a former property owner has a statutorily established interest in surplus equity, which the government fails to remit.¹⁶³

Together, *Lawton* and *Nelson* recognize that a former owner may assert a takings claim “when a tax-sale statute provides the divested property owner an interest in the surplus proceeds and the government does not honor that statutory interest.”¹⁶⁴ But what if a statute both fails to recognize a property owner’s interest in surplus equity and fails to provide a means to recover it? This “would produce an identical result to *Lawton*: ‘Property to which an individual is legally entitled has been taken without recourse.’ ”¹⁶⁵

¹⁵⁸ *Miner v. Clinton Cnty.*, 541 F.3d 464, 467 (2d Cir. 2008); *see also* *Sheehan v. Cnty. of Suffolk*, 67 N.Y.2d 52, 60 (1986); *Zachary v. Clinton Cnty.*, No. 1:01CV1281(FJS/DRS), 2003 WL 24197685, at *3, *6 (N.D.N.Y. 2003).

¹⁵⁹ *See* Defendants’ Reply Memorandum, *supra* note 40, at 7 (citing *Nelson*, 352 U.S. at 110).

¹⁶⁰ *See Nelson*, 352 U.S. at 110.

¹⁶¹ *Id.*; *see also* *Rafaeli, LLC v. Oakland Cnty.*, 505 Mich. 429, 452–53 (2020).

¹⁶² *U.S. v. Lawton*, 110 U.S. 146, 147 (1884).

¹⁶³ *See Rafaeli*, 505 Mich. at 461 (citing *Lawton*, 110 U.S. at 150).

¹⁶⁴ *Id.* at 461 (citing *Lawton*, 110 U.S. at 150; *Nelson*, 352 U.S. at 110).

¹⁶⁵ *See id.* at 461–62.

2. TPT Fails to Recognize Owners' Claim to Surplus Equity and Provides No Opportunity for Recovery

The City's contention that TPT allows property owners to recover surplus equity fails under close examination.¹⁶⁶ Under Administrative Code § 11-409(d), prior to foreclosure, an owner of a distressed property can make a claim of substantial equity over a tax lien and demand a six-month delay in foreclosure to pay off the lien or sell the property.¹⁶⁷ In contrast, tax liens against non-distressed properties are sold to a trust, foreclosed, and sold at auction—allowing divested owners to receive any surplus proceeds from the foreclosure sale.¹⁶⁸ The City offers little logical defense of the seemingly arbitrary and differential foreclosure procedures for distressed and non-distressed properties, citing precedent including *Nelson* as granting it the right to retain surplus value and “broad discretion” in choosing how to dispose of foreclosed properties.¹⁶⁹ New York courts have generally upheld *Nelson*'s application to TPT, finding that the Constitution does not require the City to sell foreclosed property to allow the owner to “recoup the surplus,” but “merely mandates that [property owners] not be deprived of the surplus without an opportunity to recoup it.”¹⁷⁰ Conversely, at least one court has reversed TPT foreclosures as unconstitutional because the City failed to provide property owner's with “an opportunity to recover the excess value” or adequate notice of foreclosure.¹⁷¹

The statute upheld in *Nelson* provided a clear mechanism by which a property owner could reliably recoup surplus value through judicial sale.¹⁷² Unlike *Nelson*'s permissible procedure, which directed the sale of property and assured distribution of surplus proceeds to divested owners, under TPT, a property owner must sell their property independently to recover any

¹⁶⁶ See Defendants' Reply Memorandum, *supra* note 40, at 7; NEW YORK, N.Y., ADMIN. CODE § 11-409(d) (N.Y. Leg. Publ'g Co. Supp. 2022).

¹⁶⁷ § 11-409(d).

¹⁶⁸ See § 11-401.1 (outlining procedures for distressed properties); § 11-319 (outlining procedures for non-distressed properties); Defendants' Reply Memorandum, *supra* note 40, at 4.

¹⁶⁹ Mun. Defs. Memorandum of L. at 11–12, *Dorce*, 460 F. Supp. 3d 327 (citing *Nelson*, 352 U.S. at 110).

¹⁷⁰ In Rem Tax Foreclosure Action No. 37, Borough of Queens, 118 Misc. 2d 1081, 1082–83, (Sup. Ct. Queens Cnty. 1983).

¹⁷¹ In Rem Tax Foreclosure Action No. 53, 2019 WL 1431423 at *11–12 (Sup. Ct. Queens Cnty. Mar. 28, 2019).

¹⁷² *Nelson*, 352 U.S. at 110.

surplus.¹⁷³ Owners wishing to retain the value of their property over the tax lien, and escape total loss of equity, must hope to find a ready, willing, and able buyer on relatively short notice¹⁷⁴—a tough sell, considering the property may be physically distressed and subject to tax liens or municipal violations.¹⁷⁵ The City’s alleged failure to provide property owners with notice of foreclosure, as required under *Nelson*,¹⁷⁶ is especially problematic because owners must be aware of an impending foreclosure if they wish to sell their property in advance of it.¹⁷⁷ If a property owner cannot find a buyer within the permitted timeframe, the statute provides no other way for an owner to retain their surplus equity.¹⁷⁸

Property owners can, of course, petition to pay off their tax debt and release their property for up to four months after it has been taken—but these releases are entirely discretionary, and would be of little use to a property owner who does not have the funds to pay off the outstanding tax lien.¹⁷⁹ If a property owner wishes to dispute the City’s denial of a release, the statutory

¹⁷³ See *id.*; § 11-409(d).

¹⁷⁴ § 11-409(d) (permitting a six-month extension period for the sale of property). While the average New York City home sold in ninety-six days in March 2020 and sixty-eight days in April 2021—these timeframes are heavily dependent on market conditions. Nancy Wu, *The Best Day of the Week to List a Home in NYC May Surprise You*, STREETEASY READS (June 16, 2021), <https://streeteasy.com/blog/how-to-sell-your-home-best-days-to-list/> [<https://perma.cc/TE4G-FAE6>].

¹⁷⁵ Property liens must generally be cleared prior to sale and may lengthen timeline of home sales, rendering the property less appealing to buyers. Julie Ryan Evans, *Do Property Liens Mean a Home Sale Can’t Happen? Here’s Hope*, REALTOR.COM (July 31, 2018), <https://www.realtor.com/advice/sell/property-liens-handled-during-home-sale/> [<https://perma.cc/4XDB-9LQK>]. About half of the properties included in the latest TPT round were statutorily distressed, meaning they are subject to liens and municipal violations. Briefing Paper, *supra* note 12, at 9. Even if a property is not statutorily distressed, properties may be unappealing to buyers if they are subject to liens or in poor physical condition, issues which may repel buyers due to the difficulty of finding a lender willing to finance the purchase of such a property. Jamie Johnson, *Distressed Properties: Everything You Need to Know*, ROCKET MORTG. (Jan. 7, 2022), <https://www.rocketmortgage.com/learn/distressed-property> [<https://perma.cc/BN7L-74ZC>].

¹⁷⁶ See *Nelson*, 352 U.S. at 110.

¹⁷⁷ See Hearing Transcript, *supra* note 1, at 18, 96; In Rem Tax Foreclosure Action No. 53 Borough of Brooklyn, 2019 WL 1431423 at *7 (Sup. Ct. Kings Cnty. Mar. 28, 2019); Complaint, *supra* note 36, at 24.

¹⁷⁸ See Defendants’ Reply Memorandum, *supra* note 40, at 11–12. The City states that TPT provides a means to recover surplus equity by allowing owners to “demand additional time to sell property,” pay off the tax liens, and retain any surplus. *Id.* (citing § 11-409(d)).

¹⁷⁹ § 11-424(g); see *Hecht v. City of New York*, 19 Misc. 3d 1102(A), 2008 WL 682515, at *7 (Sup. Ct. Queens Cnty. Mar. 4, 2008).

presumption of regularity strongly favors the city—and “[a]bsent a showing of fraud or illegality,” the City’s discretion to deny a release is “absolute.”¹⁸⁰

While the City contends that it is not obligated to take specific steps when selling tax-delinquent properties, it has a constitutional mandate to provide divested owners with adequate notice and an opportunity to recoup the value of their seized property.¹⁸¹ With respect to these duties, the City fails, providing no meaningful path for property owners to retain equity and questionable notice of foreclosure.¹⁸²

3. The City’s Taxing Power Does Not Justify Retention of Surplus Value

In the latest round of TPT, half of the properties selected for transfer had an average lien-to-value ratio of just *three percent*—under the auspices of tax collection, the City is providing windfalls to third-party developers and acting as a municipal “property tax privateer[.]”¹⁸³ The City derives its *in rem* authority from broad tax enforcement powers granted to municipalities by New York State and claims protection under the state constitution, which empowers municipalities to adopt

¹⁸⁰ King Holding Corp. v. City of N.Y. Dept. of Hous. Preserv. & Dev., 24 A.D.3d 395, 396 (1st Dep’t 2006); § 11-411; § 11-412.1(g)–(h); § 11-424(g).

¹⁸¹ See U.S. CONST. amend. V; N.Y. CONST. art. I, § 7(a); *Nelson*, 352 U.S. at 109–10.

¹⁸² See *In Rem No. 53*, 2019 WL 1431423 at *15 (“[TPT] was not intended to permit the City to strip a property owner of all of the surplus monies above its lien.”). The City’s statutory procedures for notice in tax foreclosures have generally been upheld as satisfying the “minimum requirements of due process.” *Hatorah v. City of New York*, 175 A.D.2d 795, 796 (2d Dep’t 1991); see also *In re ISCA Enters. v. City of New York*, 77 N.Y.2d 688, 689 (1991). While property owners have challenged the City’s failure to provide actual notice, courts have upheld the City’s procedure—citing the “onerous” burden of searching title records to determine correct homeowner addresses, the City’s robust notice by publication practices, and property owner’s failure to provide the City with their current address. *Id.* However, multiple property owners whose homes were conveyed under TPT have alleged that they received no notice of foreclosure, even after entering into debt payment plans with the City or satisfying their debt entirely, leading to vacated foreclosures in *In Rem Tax Foreclosure No. 53*, the return of Marlene Saunders’ home, and McConnell Dorce’s pending class action lawsuit against the City. See *In Rem No. 53*, 2019 WL 1431423, at *8, *13, *16; Hearing Transcript, *supra* note 1, at 15, 19; *Dorce v. City of New York*, 2 F.4th 82, 92 (2d Cir. 2021).

¹⁸³ See Cameron M. Baskett & Christopher G. Bradley, *Property Tax Privateers*, 41 VA. TAX REV. 89, 92 (2021). Baskett and Bradley coined the term “property tax privateers” to describe third parties that purchase low-value tax liens at lien sales with the intention of foreclosing on the properties to which they are attached, leading to “windfall” profits. *Id.* at 91–92.

laws effecting the collection and administration of local taxes.¹⁸⁴ However, the City's repeated takings of properties with minimal or no tax debt indicates that transfers of property are motivated by a purpose independent of tax collection—and belies HPD Commissioner Louise Carroll's assertion that TPT is merely a "tax collection tool."¹⁸⁵

In the context of tax lien sales, New York State has defended the practice of retaining surplus proceeds, arguing that municipalities are entitled to this money because nonpayment of tax inhibits their ability to fund public services and benefits.¹⁸⁶ In *Rafaeli, LLC v. Oakland County*, the Supreme Court of Michigan rebuked this assertion, holding that although cities are authorized to collect taxes for the public benefit, "[t]he purpose of taxation is to assess and collect taxes *owed*, not appropriate property *in excess of what is owed*."¹⁸⁷ *Rafaeli* involved a situation similar to the City's actions under TPT—Oakland County was foreclosing on tax-delinquent properties, selling them to satisfy tax debts, and retaining any surplus proceeds from the sales.¹⁸⁸ Perhaps the strongest condemnation of this faulty logic came from the Second Circuit in *Dorce*: in finding that comity did not block plaintiffs from seeking surplus value, the court stated that any amount collected in excess of a tax lien "cannot, by definition, be a tax."¹⁸⁹ The retention of surplus equity amounts to a taking in violation of both the state and federal constitutions and is not justified by the City's tax collection authority.¹⁹⁰ In spite of this, the City can continue seizing properties through TPT—but it must make significant

¹⁸⁴ See Wagner, *supra* note 43, at 133; N.Y. REAL PROP. TAX LAW § 1120 (McKinney 2021); N.Y. CONST. art. IX, § 2(c)(8).

¹⁸⁵ Hearing Transcript, *supra* note 1, at 43. City Council Member Ritchie Torres criticized the HPD Commissioner's assertion as "profoundly misleading" because HPD has consistently stated that "the purpose of [TPT] is to target distressed properties." *Id.* at 43–44.

¹⁸⁶ STATE BD. OF EQUALIZATION AND ASSESSMENT, REAL PROPERTY TAX ENFORCEMENT IN NEW YORK STATE: A SYSTEM IN NEED OF REFORM 39 (1989), Dec. of Andrea B. Feller, Exhibit J, *Dorce v. City of New York*, 460 F. Supp. 3d 327 (Nov. 15, 2021).

¹⁸⁷ *Rafaeli, LLC v. Oakland Cnty.*, 952 N.W.2d 434, 464 (Mich. 2020).

¹⁸⁸ See *id.* at 442–46.

¹⁸⁹ *Dorce v. City of New York*, 2 F.4th 82, 99 (2d Cir. 2021) (quoting Brief and Special Appendix for Plaintiff-Appellants at 20, *Dorce v. City of New York*, 2 F.4th 82 (No. 20-1809)).

¹⁹⁰ *In Rem Tax Foreclosure Action No. 53 Borough of Brooklyn*, No. 8700/15, 2019 WL 1431423 at *29 (Sup. Ct. Kings Cnty. 2019).

changes to the program, including paying surplus value and ceasing foreclosure on certain properties.

B. The City's Must Pay Property Owners Surplus Value and Cease Foreclosing on Properties with Minimal Lien-to-Value Ratios

Municipalities have significant and well-recognized interest in tax collection and avoiding the blight of housing abandonment,¹⁹¹ but serving these interests cannot come at the expense of their citizens' constitutional rights. The City has a clear path forward that will allow it to continue to collect taxes and seize dangerous, unsafe abandoned properties—but it will have to pay property owners for that benefit. The Constitution requires that “just compensation” be paid to property owners whose property is seized for public use.¹⁹² When property is seized to satisfy a debt, just compensation is self-evident: it is the fair market value of the property, less taxes, interest, penalties, and any foreclosure-related fees.¹⁹³ If the City chooses to foreclose on a property due to housing code violations, it could potentially utilize eminent domain—with just compensation measured by fair market value less the cost of remedying the violations.¹⁹⁴

The City must also revise its selection criteria to prohibit takings of properties with minimal lien-to-value ratios. The City should abide by the HPD's stated methodology, foreclosing only on properties that “exhibit the highest level of physical and financial distress.”¹⁹⁵ In this regard, the City's revised selection criteria from the Third Party Transfer Working Group is on the right track—it has recommended the City discontinue its use of the block pick-up scheme, and the Group favored revised selection criteria that equally considers a building's financial distress and physical distress.¹⁹⁶ Let's hope that Eric Adams and the City Council are listening.

The TPT program has led to significant losses—New Yorkers have been removed from their homes, their home equity vanishing into thin air in service of the City's housing agenda. *In*

¹⁹¹ See Allred, *supra* note 9, at 1–2; Reiss, *supra* note 13, at 785–86.

¹⁹² U.S. CONST. amend. V; N.Y. CONST. art. I, § 7.

¹⁹³ *Rafaeli*, 952 N.W.2d at 466.

¹⁹⁴ See David T. Kraut, Note, *Hanging Out the No Vacancy Sign: Eliminating the Blight of Vacant Buildings from Urban Areas*, 74 N.Y.U. L. REV. 1139, 1140 (1999).

¹⁹⁵ See Briefing Paper, *supra* note 12, at 4.

¹⁹⁶ Third Party Transfer Working Group, *supra* note 61, at 16–17.

rem seizures of property can be an effective weapon in the City's fight to enforce tax collection, provide affordable housing, and avoid abandonment—but the City must use its foreclosure powers responsibly and with the utmost regard for its citizens' fundamental rights.