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[RE]INTEGRATING COMMUNITY SPACE: THE LEGAL AND SOCIAL MEANINGS OF RECLAIMING ABANDONED SPACE IN NEW YORK'S LOWER EAST SIDE

*Andrea McArdle**

What understandings about property, the community concerns informing it, and the legal relationships that flow from it can we draw from a city's buildings and spaces? What contending values and expectations underpin laws that concomitantly protect property interests and seek to advance public safety, health, and economic well-being in urban neighborhoods? What explanatory narratives can advocates, analysts, and policymakers discern from such laws? If, as Jane Jacobs might attest, a city's "buildings and streetscapes encapsulate[] information" that engages its viewers and users,¹ these forms contribute to the meaning we derive from city spaces.

This Article argues that the meaning we can draw from these buildings and streetscapes as they have been constructed, abandoned, or refashioned over time is complex and multifaceted. Using New York City's Lower East Side landscape as exemplary text, the Article identifies various narratives of regulatory burden, scarcity, abandonment, transgression, and renewal that recur in the discourse of property law, and it considers ways in which local government institutions contribute to the shape of those narratives as regulators, service providers, and owners of property.

The Article begins with a brief account of conditions in the late 1960s and early 1970s that contributed to public and private disinvestment in the storied Lower East Side, a site of intense immigrant settlement at the turn of the

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¹ The quotation is part of a set of reflections on urbanist Jane Jacobs' penchant for drawing meaning from a city's buildings and infrastructure. See Robert Sirman, *Built Form and the Metaphor of Storytelling*, in *WHAT WE SEE: ADVANCING THE OBSERVATIONS OF JANE JACOBS* 159, 161 (2010).

twentieth century,² and, in the 1950s and 1960s, a space that attracted writers, artists, and political activists.³ Public disinvestment in local communities resulted from New York's fiscal crisis and its inability to maintain previous levels of municipal services.⁴ Private disinvestment entailed owners' exploitation and failure to maintain their properties, which was often followed by tax delinquencies and foreclosures, abandonment, or arson.⁵ The Article then addresses how these conditions also afforded an opportunity for reclaiming devalued land and distressed neighborhoods. Beginning in the mid-1970s, neighborhood-initiated cultivation of gardens in vacant, burnt-out lots⁶ and homesteading occupants' refurbishing of buildings that had fallen into disrepair⁷ created a new source of investment in city-owned property, holding out the promise of community stabilization.

This Article examines the legal implications of these autonomous, self-help responses to disinvestment. Initially, the City supported and legitimized community gardeners' and homesteaders' efforts at reclamation.⁸ However, when land values rose in the 1980s and 1990s, the City reversed course and invoked laws limiting access to property as the City sought to auction off community gardens that operated under revocable licenses⁹ and to evict homesteaders as trespassers.¹⁰ In response, local residents also invoked law's authority. Gardeners sought redress under legal theories alleging violations of environmental law and civil rights.¹¹ Squatters and homesteaders asserted rights as adverse possessors.¹² Although these legal claims proved unavailing, by 2002, agreements negotiated on behalf of these claimants permanently protected some community gardens from development¹³ and afforded occupants of eleven

² CHRISTOPHER MELE, *SELLING THE LOWER EAST SIDE: CULTURE, REAL ESTATE, AND RESISTANCE IN NEW YORK CITY* 45 (2000); Janet L. Abu-Lughod, *Introduction* to *FROM URBAN VILLAGE TO EAST VILLAGE: THE BATTLE FOR NEW YORK'S LOWER EAST SIDE* 1, 4 (Janet L. Abu-Lughod ed., 1994).

³ MELE, *supra* note 2, at 140-45, 158-66.

⁴ *Id.* at 190-91; *see also* WILLIAM K. TABB, *THE LONG DEFAULT: NEW YORK CITY AND THE URBAN FISCAL CRISIS* 30-35 (1982).

⁵ Neil Smith, Betsy Duncan & Laura Reid, *From Disinvestment to Reinvestment: Mapping the Urban 'Frontier' on the Lower East Side*, in *FROM URBAN VILLAGE TO EAST VILLAGE: THE BATTLE FOR NEW YORK'S LOWER EAST SIDE* 149, 149-52 (Janet L. Abu-Lughod ed., 1994); *see also* MELE, *supra* note 2, at 191-200.

⁶ MELE, *supra* note 2, at 208, 210; Robert Fox Elder, *Protecting New York City's Community Gardens*, 13 N.Y.U. ENVTL. L.J. 769, 773-76 (2005).

⁷ MELE, *supra* note 2, at 204-11.

⁸ *Id.* at 210-11.

⁹ Elder, *supra* note 6, at 776-77.

¹⁰ MELE, *supra* note 2, at 273-76, 299-301.

¹¹ Elder, *supra* note 6, at 777-83.

¹² Thomas J. Lueck, *Police Evict Squatters from Three City-Owned Tenements in the East Village*, N.Y. TIMES (Aug. 14, 1996), <http://www.nytimes.com/1996/08/14/nyregion/police-evict-squatters-from-three-city-owned-tenements-in-the-east-village.html>.

¹³ Elder, *supra* note 6, at 785-88.

squatted buildings a new legal status as shareholders of limited-equity cooperative housing.¹⁴

Drawing on these developments, this Article addresses how such community efforts to reengage with threatened urban landscapes generate legal meaning. It discusses how the recently opened Museum of Reclaimed Urban Space (MORUS), which is literally built into a formerly squatted building in New York's Lower East Side,¹⁵ both portrays and adds to that meaning-making. By illuminating the particular ways in which the owners and users of these contested spaces invoked both property law and community norms, MORUS documents how the squatter and community garden movements helped reintegrate distressed city buildings and lots as community spaces. The Article concludes with reflection on the continued work of MORUS to demonstrate how the impulse to reclaim space also inevitably transforms it.

I. The Narrative of Property at Risk: Public and Private Disinvestment

By the early 1970s, New York and most cities in the northeastern and midwestern United States had suffered a severe decline in their manufacturing sectors, which relocated mainly to nonunionized and less heavily regulated jurisdictions in the American South and offshore.¹⁶ The resulting reductions in New York City's tax base and employment levels placed pressure on City residents' ability to pay for housing and challenged the City's capacity to meet its day-to-day operating expenses. Property owners, particularly in lower-income neighborhoods, responded in part by disinvestment—a deliberate set of behaviors, including a failure to pay taxes or make debt payments, to make needed repairs, or to deliver basic services such as providing heat.¹⁷

The dynamics of ownership, investment, and disinvestment in residential property in New York City includes a longstanding system of rent regulation, which places limits on what landlords may charge for multifamily housing.¹⁸ Originating in housing shortages during World War II and the immediate post-war period, rent regulation initially consisted of rent control, which covered properties built before February 1947.¹⁹ The scope of this regulation was augmented by the enactment in 1969 of a rent stabilization law that principally

¹⁴ See, e.g., Paula Crossfield, *Sweat Equity Pays Off*, THE BROOKLYN RAIL (Nov. 2, 2006), <http://www.brooklynrail.org/2006/11/streets/sweat-equity-pays-off>; *Bullet Space is the First of the Former LES Squats to Take Over Ownership of Building from City*, EV GRIEVE (May 12, 2009, 7:00 AM), <http://www.evgrieve.com/2009/05/bullet-space-is-first-of-former-les.html>.

¹⁵ Colin Moynihan, *Sharing a Part of Activist History in the East Village*, N.Y. TIMES (Mar. 4, 2012, 3:14 PM), <http://www.nytimes.com/2012/03/05/nyregion/east-village-museum-shares-a-piece-of-activist-history.html?ref=nyregion>.

¹⁶ MELE, *supra* note 2, at 126-29; TABB, *supra* note 4, at 71-77; Abu-Lughod, *supra* note 2, at 1-2.

¹⁷ Smith et al., *supra* note 5, at 149-52.

¹⁸ Introduction, N.Y. ST. HOMES & CMTY. RENEWAL, <http://www.nyshcr.org/Rent/about.htm#intro> (last visited July 24, 2014).

¹⁹ *Id.*

applied to rental housing of six or more units completed after February 1, 1947, and before January 1, 1974.²⁰

The expanding landscape of rent regulation was, in turn, blamed for property owners' declining revenues and declining willingness to invest in rental properties,²¹ although it seems equally likely that these landlords' decisions to disinvest in rental properties may have been driven by the existence of other, higher-yielding investment options.²² In 1971, the perception of burdensome property regulation was inscribed in law when the New York State legislature enacted the Urstadt Law,²³ a measure that restricted the City's authority to strengthen existing rental regulations or to extend them to unregulated properties.²⁴ In the words of New York State's high court, this legislation was intended to "encourage owners to invest in the maintenance and improvement of existing housing units and thereby help to stem the tide of abandonment of sound buildings in the City."²⁵

The Urstadt Law accounted for the challenges of property ownership in terms of the impact of rent regulation on the revenues that an owner could realize from investing in property. By 1974, however, it was clear that the economics of property ownership in New York City was more complicated than a regulatory-burden explanation would suggest, as it was exacerbated by developments beyond the confines of New York City and even New York State.²⁶ At that time, the national economy was in a recession, triggered by adverse changes in the position of the U.S. dollar in international trade and precipitous increases in the price of oil imported from the Middle East.²⁷ These developments impacted New York City through an increase in unemployment levels tied to a plummeting of manufacturing jobs, which, in turn, increased the need for services and also created a downturn in the real estate sector that eventually resulted in tax arrears causing a loss of City revenues.²⁸

These developments led to further deterioration of neighborhoods, particularly those housing less-resourced residents, and reinforced patterns of disinvestment in residential buildings among landlords already disinclined to

²⁰ *Id.* In addition, tenants in New York City buildings completed before February 1, 1947, but who began residency after June 30, 1971, are covered under rent stabilization regulations, as are buildings with three or more residential units that were built or substantially renovated on or after January 1, 1974, with "special" designated tax benefits. *Id.* Buildings receiving these tax benefits usually remain under regulation while the benefits are in effect, or, in some instances, until the tenant terminates the tenancy. *Id.*

²¹ TABB, *supra* note 4, at 90-91.

²² *Id.* at 89 (noting rising interest rates and gentrification).

²³ N.Y. UNCONSOL. LAW § 8605 (McKinney 2014).

²⁴ *Id.* at 1.

²⁵ *In re KSLM-Columbus Apts., Inc. v. New York State Div. of Hous. & Cmty Renewal*, 835 N.E.2d 643, 648 (2005) (quoting *City of New York v. New York State Div. of Hous. & Cmty Renewal*, 765 N.E.2d 829,835 (2001)).

²⁶ Abu-Lughod, *supra* note 2, at 1.

²⁷ Abu-Lughod, *supra* note 2, at 1-2.

²⁸ *Id.* at 2.

maintain their properties.²⁹ The buildup of tax arrears eventually led to tax foreclosures that brought properties under City ownership.³⁰ Other buildings were abandoned by landlords who concluded that it was not profitable to invest resources in them.³¹ A number of these properties were destroyed or badly damaged as a result of arson—an outcome perhaps also connected to the perceived lack of profitability.³² By the mid-1970s, the City increasingly held the unsought status of property owner but lacked the wherewithal or the inclination to maintain the ravaged lots and the abandoned or tax-foreclosed properties that had fallen under its ownership.³³

As revenue losses exceeded the City's burgeoning expenses, the City incurred an increasing level of short-term debt to make up for these shortfalls. In late 1974, the City held 29% of total short-term notes issued in the United States, and by 1975, the City's short-term debt constituted 36.9% of its total debt.³⁴ Moreover, the City's ability to borrow had become tied in part to questionable budgetary practices based on overly generous, though unrealistic, revenue estimates and invasion of its capital reserves to pay ongoing operating expenses.³⁵ As the investment sector became uneasy with the City's approach to borrowing and spending, investment banks began decreasing their holdings of City bonds.³⁶ By the summer of 1975, it was widely believed that the City was "sliding toward bankruptcy."³⁷

These conditions triggered New York State and federal measures in the second half of 1975, which placed unprecedented strictures on the City's finances. The State measures comprised: the Municipal Assistance Corporation (MAC), a public entity that issued short-term bonds on behalf of the City;³⁸ the Emergency Financial Control Board, which assumed control of the City's budgeting, borrowing, and spending for a three-year period;³⁹ the short-lived Moratorium Act, which permitted the City to delay paying—and to lower the amount of interest due—on its short-term notes;⁴⁰ and a tax package that increased City and State taxes.⁴¹ This new stringency also entailed the City's laying off workers, reducing services, raising transit fares,⁴² charging increased

²⁹ *Id.*

³⁰ Smith et al., *supra* note 5, at 153-55.

³¹ MELE, *supra* note 2, at 191-200.

³² *Id.* at 192-93; TABB, *supra* note 4, at 94-96.

³³ MELE, *supra* note 2, at 200.

³⁴ SEYMOUR P. LACHMAN & ROBERT POLNER, *THE MAN WHO SAVED NEW YORK: HUGH CAREY AND THE GREAT FISCAL CRISIS OF 1975* 104 (2010).

³⁵ LACHMAN & POLNER, *supra* note 34, at 112; TABB, *supra* note 4, at 23-24.

³⁶ LACHMAN & POLNER, *supra* note 34, at 104-05.

³⁷ *Id.* at 113.

³⁸ *Id.* at 114-15.

³⁹ *Id.* at 129.

⁴⁰ *Id.* at 162.

⁴¹ *Id.* at 163.

⁴² TABB, *supra* note 4, at 34-35.

fees and eventually tuition at the formerly free City University of New York,⁴³ and the commitment of the City's five municipal unions to invest pension funds in MAC-issued debt.⁴⁴ After initial resistance and a prominent public scolding of the City's failure to rein in spending,⁴⁵ in December 1975, President Gerald Ford signed legislation that authorized seasonal federal loans. This measure enabled the City to avoid shortfalls resulting from time lags in revenue collections vis-à-vis when obligations became due.⁴⁶

This regime of restructuring responded to, and also reinforced, a dominant narrative of City profligacy, swollen government, excessive union leverage, and a failed capacity to make the difficult choices that would be required to bring spending in line with revenues.⁴⁷ Nonetheless, within City government and among municipal unions, a counter-narrative resonated: the investment banks had precipitated the fiscal crisis by selling off their holdings of City notes, which, in turn, contributed to a perception that the securities issued by or on behalf of the City were unsound and an unacceptable investment risk.⁴⁸ This narrative implied that the banks had pressed for a resolution that privileged investors' financial well-being over the needs of the City's more vulnerable populations.⁴⁹ Of these contending understandings of property—and of whose property most mattered—the banking sector's theme of fiscal discipline over City recalcitrance acquired more traction.⁵⁰

The City's retrenchment continued with the election of Mayor Edward Koch in 1977. A second round of discussions with federal officials led to the New York City Loan Guarantee Act of 1978,⁵¹ which was needed to contain the continuing risk of default.⁵² Municipal unions were again asked to invest a significant portion of pension funds into municipal bonds and notes.⁵³ Reductions in municipal services were extensive,⁵⁴ particularly in the City's less-resourced neighborhoods, where private disinvestment and abandonment were also ongoing.⁵⁵ Under these conditions, members of disenfranchised, disinvested communities in the City resorted to an alternative investment strategy: self-help.

⁴³ *Id.* at 49-53.

⁴⁴ LACHMAN & POLNER, *supra* note 34, at 132-33, 163-64.

⁴⁵ *Id.* at 109-10.

⁴⁶ *Id.* at 164-65.

⁴⁷ See TABB, *supra* note 4, at 31-33, 59-66; see also LACHMAN & POLNER, *supra* note 34, at 109-10, 128-32.

⁴⁸ TABB, *supra* note 4, at 24-25.

⁴⁹ *Id.* at 25.

⁵⁰ *Id.* at 35.

⁵¹ *Id.* at 32; see also New York City Loan Guarantee Act of 1978, Pub. L. No. 95-339, 92 Stat. 460.

⁵² TABB, *supra* note 4, at 31-32.

⁵³ *Id.* at 32.

⁵⁴ LACHMAN & POLNER, *supra* note 34, at 130.

⁵⁵ MELE, *supra* note 2, at 212.

II. New Investment: Reclaiming Property through Community Sweat Equity

Strait-jacketed by continuing revenue shortfalls and the austerity regime imposed by New York State, the federal government, and the investment sector, the City relied on its enterprising residents to reinvest in the deteriorating built environment, principally through their own labor. In the late 1970s, the City launched programs that permitted homesteading under the auspices of the Division of Alternative Management Program (DAMP), thus supporting a tenant's capacity to rehabilitate and assume a cooperative ownership interest in formerly City-owned buildings.⁵⁶ Non-profit organizations such as the Urban Homesteading Assistance Board (UHAB) and Adopt-a-Building helped these homesteaders acquire the skills needed to manage real estate.⁵⁷ Homesteaders' status typically was distinguished from that of squatters because squatters occupied buildings without the authorization of the City.⁵⁸ Before the real estate sector began to reinvest in the Lower East Side in the 1980s, however, squatters who occupied property and took some steps to improve it generally were allowed to remain.⁵⁹

Relatedly, the squalid conditions accompanying private and public disinvestment in the 1970s left vacant lots as eyesores and spurred community residents to initiate another form of sweat equity: cultivating and converting the lots into verdant, vegetation-filled oases. The gardens contributed needed green space, enhanced the appearance of neighborhoods, and furnished communities with gathering places for residents beleaguered by the combined effects of physical deterioration and crime.⁶⁰ Community-based organizations such as Green Guerrillas supported the launch of gardens,⁶¹ and, since 1978, the City has provided technical support and advice through the GreenThumb licensing program,⁶² a program that sanctions community efforts to occupy and use City-owned land until the City designates its intention to develop a site.⁶³

⁵⁶ *Id.* at 206-07.

⁵⁷ *Id.* An early example was 519 East Eleventh Street on the Lower East Side, a building that had been abandoned and damaged by arson, and located along a street dubbed Stripper's Row, where stripping cars was a nightly pastime. Shayla Love, *The Almost Forgotten Story of the 1970s East Village Windmill*, GOTHAMIST (Sept. 20, 2014, 10:55 AM), http://gothamist.com/2014/09/29/east_village_windmill_nyc.php#photo-1. Armed with a low-cost loan and funding under the Comprehensive Employment and Training Act to compensate (partly) and train residents in building construction skills, the newly formed UHAB offered the route to residents' eventual apartment ownership, which also entailed their investing hours of "sweat equity." *Id.*

⁵⁸ MELE, *supra* note 2, at 207.

⁵⁹ *See id.*

⁶⁰ *Id.* at 208, 210.

⁶¹ Elder, *supra* note 6, at 775.

⁶² *Id.* at 776-77.

⁶³ *See, e.g.*, N.Y.C. Envtl. Justice Alliance v. Giuliani, 50 F. Supp. 2d 250, 252 (S.D.N.Y. 1999) (denying a motion to enjoin City from auctioning off parcels of land containing 600 community gardens) (discussed in Elder, *supra* note 6, at 781-85); *cf.* Memorandum of Agreement between the State of New

By these largely self-help efforts during the City's fiscal crisis, the homesteaders, squatters, and gardeners signaled their intention to invest in the devastated spaces of their neighborhoods and reintegrate them as community spaces. These affirmative acts should also be understood as a form of resistance, a way of returning disinvested properties to their communities.⁶⁴ In this sense, those engaging in sweat equity not only sought to realize personal goals to have a plot of land or a patch of earth to till, but also sought to reclaim for their communities the buildings and spaces lost as a consequence of disinvestment.⁶⁵

In the late 1970s, when the City was under the yoke of the Emergency Financial Control Board and the real estate sector had not yet reawakened interest in the Lower East Side, the fiscal logic of permitting and promoting homesteading, squatting, and community gardening seemed clear. The City both helped preserve these buildings and spaces from further deterioration and facilitated community-based initiatives without incurring substantial expenses itself. When the City's fiscal pressures eased and real estate interests sought to redevelop the Lower East Side, the City wavered in its support for these programs.⁶⁶ Community members who offered their labor to improve dilapidated City-owned spaces no longer could assume that they held a legitimate status.⁶⁷ Instead, the City sought to evict the occupants of squatted and homesteaded buildings and sell off the buildings as well as the garden lots.⁶⁸

The City's shift in position triggered a range of responses, from civil disobedience to litigation.⁶⁹ The City advanced affirmative claims during these legal skirmishes that centered on traditional understandings of a property owner's right to exclude,⁷⁰ and its corollary, that those to be excluded were either trespassers or otherwise subject to the withdrawal at will of any existing rights to possess or use City property. Those challenging the City developed

York and the City of New York regarding the GreenThumb Program, §§ 4-6 (Sept. 17, 2002), available at http://www.nyc.gov/html/om/pdf/community_gardens_agreement.pdf (compromise immunizing some New York City garden lots from development) (discussed in Elder, *supra* note 6, at 786-87).

⁶⁴ MELE, *supra* note 2, at 210; Alan W. Moore, *The Opening of the MORUS Museum Was an Unexpected Surprise*, in MUSEUM OF RECLAIMED URBAN SPACE OPENING — A MOMENT'S CATALOG DECEMBER 8, 2012, 6a-b (Benjamin Shepard ed., 2013).

⁶⁵ MELE, *supra* note 2, at 210.

⁶⁶ *Id.* at 210-11; see also William Sites, *Public Action: New York City Policy and the Gentrification of the Lower East Side*, in FROM URBAN VILLAGE TO EAST VILLAGE: THE BATTLE FOR NEW YORK'S LOWER EAST SIDE 189, 200-01 (Janet L. Abu-Lughod ed., 1994).

⁶⁷ See MELE, *supra* note 2, at 240-41.

⁶⁸ *Id.*

⁶⁹ *Id.* at 260-62.

⁷⁰ See, e.g., Moore v. Regents of Univ. of Cal., 793 P.2d 479, 509 (1990) (Mosk, J., dissenting) (“[T]he concept of property is often said to refer to a ‘bundle of rights’ . . . principally the rights to possess the property, to use the property, to exclude others from the property, and to dispose of the property by sale or by gift.”).

theories of individual rights rooted in community-based interests, which courts struggled with and typically rejected.

III. Legal Maneuvers and Legal Narratives: Theorizing Community Investment

When, by the 1990s, land values in the Lower East Side escalated to the point of fully engaging developers' interests, the mayoral administration of Rudolph Giuliani redoubled efforts to remove the occupants from the not-fully-livable structures that nonetheless functioned as home for some.⁷¹ And during these same years, the City first stopped issuing new GreenThumb licenses to City lot gardeners, then denied renewal requests for expired licenses,⁷² and began selling the lots at auction to developers, in many cases for the purpose of building affordable housing.⁷³ By the late 1990s, three lawsuits asserting a range of theories and narratives for understanding the community value of garden space helped shape the meaning that litigants, lawyers, and legal institutions could draw from the auctions.⁷⁴ These lawsuits illustrate the challenges when two vital urban aims are in tension: providing affordable housing and promoting preservation of green space in neighborhoods previously lacking such benefits.⁷⁵

A. Situating Community Gardens and Community Interests in a Legal Framework

A lawsuit challenging the withdrawal of garden lots from the Lower East Side and other City neighborhoods was brought by a local organization asserting interests that reflected the meaning derived from the use value of the abandoned lots to the gardeners. In *In re New York City Coalition for the Preservation of Gardens v. Giuliani*,⁷⁶ plaintiffs argued that the City was required to subject proposed construction of moderate- and middle-income cooperative and condominium housing units on the garden sites to environmental review under New York State and municipal laws before releasing the lots for sale to developers.⁷⁷ The court drew on conventional property-related concepts and concluded that the challengers lacked standing—either because they were gardening without a license or gardening with a GreenThumb license that was expressly revocable.⁷⁸

⁷¹ MELE, *supra* note 2, at 299.

⁷² Elder, *supra* note 6, at 776-77.

⁷³ *Id.* at 777; *see e.g.*, *In re N.Y.C. Coal. for the Pres. of Gardens v. Giuliani*, 670 N.Y.S.2d 654 (N.Y. Sup. Ct. 1997); *N.Y.C. Env'tl. Justice Alliance v. Giuliani*, 50 F. Supp. 2d 250, 251-52 (S.D.N.Y. 1999); *N.Y.C. Env'tl. Justice Alliance v. Giuliani*, 214 F.3d 65, 68-70 (2d Cir. 2000) (cited in Elder, *supra* note 6, at 777-85).

⁷⁴ Elder, *supra* note 6, at 777-85 (addressing this tension and describing the cases).

⁷⁵ *Id.*

⁷⁶ 670 N.Y.S.2d 654 (N.Y. Sup.Ct. 1997) (cited in Elder, *supra* note 6, at 777-85).

⁷⁷ *In re N.Y.C. Coal. for the Pres. of Gardens*, 670 N.Y.S.2d at 657-58.

⁷⁸ *Id.* at 659.

Nonetheless, the court went on to address the merits of their challenge, interpreting the statutes at issue to permit exemption of the new construction from environmental review on the understanding that the new structures would replace a preexisting use.⁷⁹ It specifically rejected the contention that the intervening use of the lots as gardens disqualified the proposed construction as replacement housing and similarly disregarded the plaintiffs' point that the gardened lots were not in fact "vacant," as they had been classified by City housing officials.⁸⁰ In the court's view, these uses were, at best, "temporary," and, in some cases, unlicensed interruptions of a preexisting use.⁸¹ Turning to a separate claim under the General Municipal Law, the court noted the imperative of returning a "neighborhood as quickly and economically as possible to its original character."⁸² For the court, then, the use of the lots as gardens by predominantly low-income communities of color had no independent legal meaning.⁸³

A subsequent lawsuit brought by the New York City Environmental Justice Alliance challenged the sale of gardens that would make way for affordable and market-rate housing, senior care facilities, and some commercial space.⁸⁴ Here, plaintiffs developed a potentially more promising theory that eschewed property concepts in favor of a federal civil rights paradigm.⁸⁵ The complaint alleged that the auctioning of gardens violated community members' rights under federal regulations adopted to implement Title VI of the Civil Rights Act of 1964.⁸⁶ Specifically, these regulations barred use of methods in implementing a program that would have a discriminatory effect on the basis of race, color, national origin, or sex.⁸⁷

Ruling on a motion for a preliminary injunction, the District Court for the Southern District of New York concluded that plaintiffs were unlikely to succeed on the merits, in part because they lacked clear authority to bring a private right of action.⁸⁸ Affirming, the Second Circuit principally focused on the absence of sufficient evidence that the closing of gardens caused a disparate adverse effect on persons of color living nearby.⁸⁹ The court's emphasis on the failure of proof of racial discrimination invites consideration whether the court might have accepted an environmentally framed racial injustice narrative if supported with adequate evidence. Such a narrative might have achieved greater legal resonance than one based on property use and environmental regulation, since

⁷⁹ *Id.* at 660-61.

⁸⁰ *Id.* at 659-61.

⁸¹ *Id.* at 660-61.

⁸² *Id.* at 661 (cited in Elder, *supra* note 6, at 777-85).

⁸³ *Id.* at 665.

⁸⁴ *N.Y.C. Env'tl. Justice Alliance*, 50 F. Supp. 2d at 251-52 (cited in Elder, *supra* note 6, at 781-83).

⁸⁵ *Id.* at 252-53.

⁸⁶ 42 U.S.C. § 2000d (1988).

⁸⁷ *N.Y.C. Env'tl. Justice Alliance*, 50 F. Supp. 2d at 252-53.

⁸⁸ *Id.* at 252, 255.

⁸⁹ *N.Y.C. Env'tl. Justice Alliance*, 214 F.3d at 68-70.

understandings about property rights and their limitations have accrued and solidified over time, whereas civil rights jurisprudence continues to evolve.⁹⁰

The third suit, initiated in 1999 by then New York State Attorney General Eliot Spitzer, returned to a theory based on environmental protection claims to challenge the sale of the garden lots, which the State was authorized to vindicate.⁹¹ The complaint also sought to re-categorize older gardens as parkland under New York State law, which would insulate them from sale to developers.⁹² This use of property-preserving concepts to protect community assets pointed to the possibility of aligning the values underpinning property and community.⁹³ This lawsuit was settled in 2002, at the dawn of a new mayoral administration. The State and the City of New York agreed to protect some gardens permanently, and allowed others to remain available for development after sites undergo an environmental impact review and a garden review process to help gardeners locate alternate sites, if available.⁹⁴

B. Self-Help and the Law: The Shifting Legal Status of Homesteading and Squatting

As it had done in response to community gardens, the City in the mid-to-late-1970s supported homesteading programs that substituted tenants' sweat equity for the City's investments of its resources in the casualties of the fiscal crisis.⁹⁵ In those years before New York City land values had recovered, the burnt-out shells of residential buildings became laboratories for shared living, and self-help, and, on one occasion, the site of ingenious experiments in alternative energy, including a windmill that supplied electricity to a homesteaded building at 519 East Eleventh Street on the Lower East Side.⁹⁶

These experiments raised property issues, but perhaps the most impactful legal challenge faced by the early homesteaders did not emanate from the City.

⁹⁰ See EDUARDO MOISÉS PEÑALVER & SONIA K. KATYAL, *PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES, AND PROTESTERS IMPROVE THE LAW OF OWNERSHIP* 15-16 (2010).

⁹¹ *State of New York v. City of New York*, 713 N.Y.S.2d 360 (N.Y. App. Div. 2000); see also Elder, *supra* note 6, at 784; *Spitzer Sues to Block Auction of Garden Sites*, N.Y. TIMES (May 11, 1999), <http://www.nytimes.com/1999/05/11/nyregion/metro-news-briefs-new-york-spitzer-sues-to-block-auction-of-garden-sites.html>.

⁹² Elder, *supra* note 6, at 784.

⁹³ See PEÑALVER & KATYAL, *supra* note 90, at 15 (arguing for an understanding of property law that accounts for "evolving community values").

⁹⁴ Memorandum of Agreement between the State of New York and the City of New York regarding the GreenThumb Program §§ 4-6 (Sept. 17, 2002) (discussed in Elder, *supra* note 6, at 786-87). The Agreement expired in 2010, and the status of the gardens is now governed by regulations of the New York City Department of Parks & Recreation, 56 RCNY 6 (2010), and the New York City Department of Housing, Preservation, and Development, 28 RCNY 48 (2010). These two Departments largely continue the approach under the Agreement.

⁹⁵ Crossfield, *supra* note 14.

⁹⁶ Love, *supra* note 57.

Rather, the building's generation of electricity prompted a lawsuit by the local investor-owned utility, Consolidated Edison, for in effect occupying its power grid⁹⁷—infringing on a core property concept of exclusive control.⁹⁸ Ultimately, this unique application of wind power was approved by New York State's Public Service Commission and vindicated by the federal government as a precedent for the principle of cogeneration in the Public Utility Regulatory Policies Act of 1978,⁹⁹ which required utilities to purchase electric power from entities capable of producing power at a lower cost than that of the utility.¹⁰⁰

During this era, the Urban Homesteading Assistance Board began working on the City's then-devastated housing stock, in initiatives that it currently carries out under the auspices of the Tenant Interim Leasing program: these programs entail training residents in City-owned properties in building management and self-governance, and converting the buildings into limited-equity cooperatives for a modest investment by the residents.¹⁰¹ Other occupants of City-owned buildings who were not participating in the early homesteading programs, although similarly animated by the values of self-help and community control of abandoned spaces,¹⁰² remained essentially squatters; they faced a more precarious legal status, especially after the City withdrew its involvement in homesteading programs.

Increasingly, occupants of squatted buildings offered a highly critical perspective about urban housing policy. Beginning in the latter half of the 1980s, some squatters saw themselves as part of a broader movement advocating for access to low-income housing beyond their own individual needs.¹⁰³ They also

⁹⁷ *Id.*

⁹⁸ See PEÑALVER & KATYAL, *supra* note 90, at 10.

⁹⁹ Love, *supra* note 57. The text of the statute is located at Pub. L. 95-617, 92 Stat. 3117 (1978).

¹⁰⁰ Public Utility Regulatory Policy Act (PURPA), UNION OF CONCERNED SCIENTISTS, http://www.ucsusa.org/clean_energy/smart-energy-solutions/strengthen-policy/public-utility-regulatory.html#.VE1HH74Q7zI (last visited July 24, 2014).

¹⁰¹ History, URBAN HOMESTEADING ASSISTANCE BD., <http://uhab.org/history> (last visited July 24, 2014); Philosophy, URBAN HOMESTEADING ASSISTANCE BD., <http://uhab.org/about> (last visited July 24, 2014).

¹⁰² TOM ANGOTTI, *NEW YORK FOR SALE: COMMUNITY PLANNING CONFRONTS GLOBAL REAL ESTATE* 98 (2008).

¹⁰³ Andrew Van Kleunen, *The Squatters: A Chorus of Voices . . . But Is Anyone Listening?*, in *FROM URBAN VILLAGE TO EAST VILLAGE: THE BATTLE FOR NEW YORK'S LOWER EAST SIDE* 285, 289-302 (Janet L. Abu-Lughod ed., 1994) (discussing squatters' objections to a City-backed cross subsidy plan in 1987, in which the City would sell unoccupied lots to developers for market-rate housing and local housing advocates would rehabilitate existing City-owned structures as affordable housing; the plan was criticized as inevitably promoting gentrification over the entire area of development). *Cf.* TOM ANGOTTI, *supra* note 102, at 101 (describing squatters from the 1990s as an "eclectic mix," which included anti-gentrification activists but also comprised others who were interested in avoiding rent payments or opposed to plans to develop affordable-housing units on the sites they occupied).

faced more sustained removal efforts as the City in the late 1980s and 1990s began regularly to pursue evictions and demolitions of purportedly unsafe and “vacant” buildings to facilitate the sale of the lots to developers.¹⁰⁴ In response, some squatters became identified with obstructionist protest tactics, ranging from pitching rocks and eggs to launching M-80 explosives,¹⁰⁵ while others opted for absurdist behavior calculated to generate media attention.¹⁰⁶ In one celebrated incident, a number of squatter activists opened bags that contained thousands of crickets during an auction for garden lots and a parcel housing Charas, a cherished community center also slated for development.¹⁰⁷

A heavily publicized example of the City’s enforcement efforts occurred in the mid-1990s, as tenants in five buildings on the Lower East Side’s East Thirteenth Street asserted a right to remain on the property under an adverse possession theory—long-term, open, continuous occupancy of property owned of record by another.¹⁰⁸ After the City won the right to evict tenants from two of the buildings in 1995, it famously enforced the order, amid resistance and efforts at obstructionism, with a heavy police presence and an armored personnel carrier.¹⁰⁹ That vehicle has become an iconic reminder of the intensity of a dispute involving contending theories of the basis of the right to occupy and use land.¹¹⁰ In 1996, the occupants of the three other buildings were also evicted; they were unable to meet the requirements of adverse possession¹¹¹ under an arguably more tenant-favorable interpretation of the law prevailing at that time,¹¹² a version that the New York State Legislature has since amended to

¹⁰⁴ MELE, *supra* note 2, at 273.

¹⁰⁵ *Id.* at 270-75.

¹⁰⁶ Ben Shepard, *From the Tenement Museum to Bluestockings, the Museum of Reclaimed Urban Space and the Lower East Side’s Radical History*, MUSEUM OF RECLAIMED URBAN SPACE OPENING — A MOMENT’S CATALOG DECEMBER 8, 2012 38 (Dec. 8, 2013) [hereinafter *From the Tenement Museum*]. The participants in the protest were arrested. *Id.* at 44.

¹⁰⁷ *Id.*

¹⁰⁸ Thomas J. Lueck, *Police Evict Squatters from Three City-Owned Tenements in the East Village*, N. Y. TIMES (Aug. 14, 1996), <http://www.nytimes.com/1996/08/14/nyregion/police-evict-squatters-from-three-city-owned-tenements-in-the-east-village.html?smid=pl-share>.

¹⁰⁹ MELE, *supra* note 2, 299-300. A photograph of the vehicle and New York Police Department officers seeking to remove squatters from the buildings is on display at the Museum of Reclaimed Urban Space, 155 Avenue C, on New York’s Lower East Side.

¹¹⁰ Lueck, *supra* note 108.

¹¹¹ *Id.*

¹¹² Before the New York State Legislature clarified the definition of “claim of right” in 2008, New York’s high court had stated the rule for adverse possession more favorably to squatters. Discussing New York precedent, the court indicated that adverse possession would defeat deed title even if the possessor had knowledge of the deed: “Conduct will prevail over knowledge, particularly when the true owners have acquiesced in the exercise of ownership rights by the adverse possessors (citation omitted).” *Walling v. Przybylo*, 851 N.E.2d 1167, 1170 (N.Y. 2006).

require a showing of a “reasonable basis” for a belief that property belongs to the adverse possessor.¹¹³

In their study of “property outlaws,” Eduardo Moises Peñalver and Sonya Katyal argue that deliberate law breaking, such as squatting, often is the response of those with limited resources, and can serve both an “acquisitive” goal—acquiring something that the lawbreaker lacks—or an “expressive” purpose—focusing attention on a failing or unfairness in the law.¹¹⁴ Therefore, deliberate law breaking can exert pressure on rules, including their manner of interpretation and enforcement, and in this sense, contribute to property law’s capacity to evolve.¹¹⁵ Considered in relation to this framework, squatting on the Lower East Side demonstrated both aspects of intentional law breaking: squatters occupy and appropriate real property owned by another, generally the City, and squatting became increasingly associated with a radical critique of the lack of affordable housing in the City, as well as with unorthodox oppositionist tactics.¹¹⁶ Squatters’ motivations in the late 1980s and 1990s for actively resisting the City’s efforts to remove them seemed to encompass both a response to their

¹¹³ In 2008, the New York Legislature amended the statute defining the elements of adverse possession to include a showing of a “claim of right”:

Adverse possession; defined: For the purposes of this article: 1. Adverse possessor. A person or entity is an “adverse possessor” of real property when the person or entity occupies real property of another person or entity with or without knowledge of the other’s superior ownership rights, in a manner that would give the owner a cause of action for ejectment. 2. Acquisition of title. An adverse possessor gains title to the occupied real property upon the expiration of the statute of limitations for an action to recover real property pursuant to subdivision (a) of section two hundred twelve of the civil practice law and rules, provided that the occupancy, as described in sections five hundred twelve and five hundred twenty-two of this article, has been adverse, under claim of right, open and notorious, continuous, exclusive, and actual. 3. Claim of right. A claim of right means a reasonable basis for the belief that the property belongs to the adverse possessor or property owner, as the case may be. Notwithstanding any other provision of this article, claim of right shall not be required if the owner or owners of the real property throughout the statutory period cannot be ascertained in the records of the county clerk, or the register of the county, of the county where such real property is situated, and located by reasonable means.

N.Y. REAL PROP. ACTS. LAW § 501 (McKinney 2014). The showing of a reasonable basis now required by statute would appear to bar a claim of adverse possession of the kind advanced by the Thirteenth Street squatters: “An awareness that others own the property within the statutory 10-year period will defeat any claim of right.” *D’Argenio v. Ashland Bldg., LLC*, 910 N.Y.S.2d 550 (N.Y. App. Div. 2010) (citation omitted). The shift in New York law is consistent with a developing trend in the U.S. to eliminate a remedy for the intentional or “bad faith” adverse possessor who knows that the property at issue is owned by another. PEÑALVER & KATYAL, *supra* note 90, at 151.

¹¹⁴ PEÑALVER & KATYAL, *supra* note 90, at 16-17.

¹¹⁵ *Id.* at 15-16.

¹¹⁶ See Shepard, *From the Tenement Museum*, *supra* note 106.

individual plight and a more general critique of City policies and practices, although these motivations were perhaps difficult to disentangle.¹¹⁷

If the legal status of Lower East Side's squatters shifted from homesteaders in the 1970s to outlaws, transgressors against property, as well as perhaps social propriety in the 1990s,¹¹⁸ the status of many Lower East Side squatters changed again in 2002. The new administration of Mayor Michael Bloomberg carried forward a surprise reversal in policy by outgoing Mayor Rudolph Giuliani¹¹⁹ by entering into an agreement with the Urban Homesteading Assistance Board (UHAB).¹²⁰ By the agreement's terms, UHAB purchased eleven squatted buildings from the City for one dollar each, arranged for financing to bring the buildings into code compliance, and helped residents of each building form a cooperative association (a housing development fund company)¹²¹ as a vehicle for self-governance and limited-equity apartment ownership for a modest purchase amount—\$250—¹²² with the support of a property tax exemption, and with limits on the resale price.¹²³

For the former squatters, the legal meaning of the agreement seems clear: by the stroke of a pen, the accord transformed them from trespassers—property outlaws—to co-op shareholders and, in effect, apartment owners. At the same time, the legal import of these arrangements has produced some ambivalence; although the agreement with the City secured affordable housing for individuals whose situation had long been legally vulnerable, the financial terms of the construction loan repayment for which they are legally responsible might prove onerous. Specifically, these arrangements have led to charges of mismanagement and delay against UHAB, some refinancing of these loans, and even an effort to assert adverse possession on a building-wide basis.¹²⁴ The restrictions on resale

¹¹⁷ MELE, *supra* note 2, at 272-76.

¹¹⁸ *Id.*; see also Ben Shepard, *Notes on Floods, Reclaiming Urban Space Through Community Gardens, Crickets and Even a Radical History Museum*, in MUSEUM OF RECLAIMED URBAN SPACE OPENING—A MOMENT'S CATALOG DECEMBER 8, 2012, 8, 16, 24 (Benjamin Shepard ed., 2013) [hereinafter *Notes on Floods*].

¹¹⁹ Paula Crossfield, *Sweat Equity Pays Off*, BROOKLYN RAIL (Nov. 2006), <http://www.brooklynrail.org/2006/11/streets/sweat-equity-pays-off>

¹²⁰ *Id.*

¹²¹ N.Y. PRIV. HOUS. FIN. LAW § 573 (McKinney 2014). The statutory scheme governing the formation and operation of these companies is set out in N.Y. PRIV. HOUS. FIN. LAW §§ 570-582 (McKinney 2014).

¹²² Lincoln Anderson, *Former Squats are Worth Lots, But Residents Can't Cash In*, THE VILLAGER (Dec. 31, 2008), http://thevillager.com/villager_296/formersquats.html.

¹²³ *Bullet Space Is the First of the Former LES Squats to Take Over Ownership of Building from City*, EV GRIEVE, (May 12, 2009) [hereinafter *Bullet Space*], <http://www.evgrieve.com/2009/05/bullet-space-is-first-of-former-les.html>; Crossfield, *supra* note 119.

¹²⁴ Anderson, *supra* note 122 (quoted in *Bullet Space*, *supra* note 123). The attorney who handled the suit noted that the claim arose before New York tightened the adverse possession law. See *Bullet Space*, *supra* note 123. The claims appear to have been settled and the firm that, at the time of the lawsuit,

price have also generated complaints resulting in some upward adjustments, as objecting residents pointed to the market value added to the buildings over the years through their own labor.¹²⁵ The social meaning of the squatters' new status may be similarly nuanced; the unconventional and more radicalized dimensions of life that a number of the Lower East Side squatters had famously pursued might seem compromised, or perhaps too domesticated by the new arrangements.

Although differences over the extent and exchange value of individual sweat equity investments have divided a number of the buildings' residents, the agreement with UHAB has significance beyond the meaning it holds for the individuals it covers.¹²⁶ By offering a framework rooted in cooperative governance, the agreement memorializes community-based ideas of shared effort that former squatters lived out informally since the 1970s, while they occupied and rehabilitated what were, at times, dangerously substandard structures. The community-enhancing norms of collective ownership and democratic governance incorporated into housing development fund companies contribute to both the legal and social meaning of the agreement by illuminating the relationship between rules governing property and community-driven initiative and investment.

IV. A Museum for a Movement: Reclaiming Meaning for Abandoned Urban Space

Housed in the cramped main floor and basement of a refurbished Lower East Side tenement building, the Museum of Reclaimed Urban Space (MORUS) opened in December 2012, just weeks after Superstorm Sandy had surged over large swaths of the floodplain where the Lower East Side sits. The Museum was itself a victim of water damage that delayed its opening.¹²⁷ Billed as an "archive of the unthinkable,"¹²⁸ MORUS is dedicated to preserving the history of the

had highlighted its expertise in the intricacies of adverse possession claims. Anderson currently describes its practice in this area in the following terms:

Adam Leitman Bailey, P.C. has taken dozens of buildings from being squats to homesteader status and eventually owners all over New York City. We have obtained grants for many millions of dollars for some buildings to do necessary repairs and renovations and negotiated loans for others. Our firm has gone to battle when necessary to ensure that the money, repairs and renovations as well as other promises have been completed by contractors, governmental agents or other entities.

Mitchell-Lama Representation/ Housing Development Fund Corporation (HDFC) and Third Party Transfer Building Representation, ADAM LEITMAN BAILEY, P.C., <http://www.alblawfirm.com/index.cfm?pageid=6&itemID=1556> (last visited July 24, 2014).

¹²⁵ Anderson, *supra* note 122.

¹²⁶ *Id.*

¹²⁷ Shepard, *Notes on Floods*, *supra* note 118 at 8, 16, 24.

¹²⁸ Stephen Duncombe, *It Happened and Somebody Noticed*, in MUSEUM OF RECLAIMED URBAN SPACE OPENING — A MOMENT'S CATALOG DECEMBER 8, 2012, 5, 6 (Benjamin Shepard ed., 2013).

community gardens, squatting, and bicycle advocacy environmentalism movements.¹²⁹

The Museum's host building, located on Avenue C, and popularly known as "See Sqwat," is one of the eleven buildings covered under the City's 2002 agreement with UHAB.¹³⁰ Long identified as a "punk squat," See Sqwat housed a mosh pit and space in one portion of the basement for band performances.¹³¹ Longtime residents recall a time when the building lacked stairs, leading residents to use netting to hoist themselves up to their apartments, a procedure likened to "scaling the rigging of an old sailing ship."¹³² See Sqwat residents are among the cohort of volunteers who have built the Museum.¹³³

Leading walking tours and workshops, and using photographs, community newspapers, and other material artifacts of place-based activism, MORUS offers perspectives on how the community gardens, squatting, and bicycle advocacy environmentalism movements helped reclaim Lower East Side properties from abandonment and disinvestment in the 1970s and from the City's later efforts to sell off the properties for redevelopment.¹³⁴ The Museum's programming seeks to connect the neighborhood's history of activism with the principle of sustainability, particularly as local community groups have found new uses for the neighborhood's abandoned lots,¹³⁵ uses that transformed Avenue C (and environs) from the "lunar landscape" it had come to resemble in 1980.¹³⁶

As one commentator has noted, MORUS documents "defiant direct action designed to rebuild a city out of the rubble of a fiscal crisis and planned shrinkage."¹³⁷ In preserving a record of art interventions and arrests, lawsuits and garden occupations, MORUS also offers interpretation, drawing meaning from the acts of landlords, City officials, and the community initiatives that reclaimed ravaged and abandoned spaces and reintegrated them as community spaces. The narrative that MORUS tells makes clear that these initiatives sometimes entailed property outlawry, but it also offers a critical view of property rules and government policies, inviting consideration of inequity that may inhere in those rules and policies.

In the first anniversary edition of the MORUS opening catalogue, a contributor recalled how the activists that MORUS memorialized "transformed a material and political landscape with our ideals of how things could be."¹³⁸

¹²⁹ Shepard, *Notes on Floods*, *supra* note 118, at 24-25; Colin Moynihan, *Sharing a Part of Activist History in the East Village*, N.Y. TIMES (Mar. 4, 2012), <http://www.nytimes.com/2012/03/05/nyregion/east-village-museum-shares-a-piece-of-activist-history.html?ref=nyregion>.

¹³⁰ Anderson, *supra* note 122.

¹³¹ *Id.*

¹³² *Id.*

¹³³ Shepard, *Notes on Floods*, *supra* note 118, at 24-25.

¹³⁴ *Id.*

¹³⁵ *Id.* at 25.

¹³⁶ LUC SANTE, *Afterword to LOW LIFE 370* (1st paperback ed. 2003) (1991).

¹³⁷ Shepard, *From the Tenement Museum*, *supra* note 107, at 37.

¹³⁸ Duncombe, *supra* note 128, at 6.

That insight—that the act of reclaiming is also transformative—is part of the essential meaning that the users, owners, and regulators of reintegrated spaces will draw from this history.