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New York City Low-Income Cooperatives: A Guide for Practitioners

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I. Introduction and Overview

Home ownership has long been considered a boon to stability and economic security for American families. For low-income families, though, these benefits may be elusive. However, various government programs have facilitated single-family home ownership as well as condominium and cooperative ownership for low-income families keyed to various income limits. The focus here is a particular type of cooperative in New York City designed for low-income families: housing development fund corporations, also known as HDFCs. There are over a thousand of these buildings with 33,000 units, making them "a significant part of the fabric of New York City's affordable housing"[1] whose preservation is quite crucial as New York struggles to preserve affordable housing opportunities.

The legal issues these HDFCs present are complicated and resources for attorneys seeking to help them are meager.[2] The purpose of this guide is to compile and explain applicable statutes and programmatic details as well as to convey practice tips, particularly as they relate to HDFCs struggling with financial and operational problems.

II. Housing Cooperative Structure in New York

A look at the structure of income-restricted housing cooperatives, and HDFCs in particular, should begin with an understanding of housing cooperative formation in New York State. "The cooperative apartment regime involves, 1) transfer of the entire fee simple interest to a corporation, 2) sale of shares of such corporation to unit owners, and 3) creation and transfer of a leasehold interest in particular units by the corporation to the unit owners."[3] The corporation must be a business corporation in order to issue shares. Thus, in New York State, the corporations are formed pursuant to the New York State Business Corporation Law (BCL)[4] sometimes in conjunction with the New York State Cooperative Corporations Law.[5] The corporation's purpose and authority is set out in the certificate of incorporation.

A. By-laws, Certificates of Incorporation and Proprietary Lease

The corporation's by-laws generally cover procedural issues like shareholder meeting notice and conduct, director removal, vacancies and other basic procedural requirements. The BCL provides the statutory overlay for the by-laws, including various procedural rules and shareholder rights, sometimes providing that the BCL rule will govern unless the by-laws or certificate of incorporation provide otherwise. For example, BCL § 608(a) provides that "the holders of a majority of the votes of shares entitled to vote thereat shall constitute a quorum," but subsection (b) goes on to say that "the certificate of incorporation or by-laws may provide for any lesser quorum not less than one-third of the votes of shares entitled to vote."[6] Similarly, every shareholder is entitled to "one vote for every share standing in his name on the record of shareholders unless otherwise provided in the certificate of incorporation."[7]The certificates of incorporation for most HDFCs do override the BCL on this point, providing each shareholder with one vote regardless of the number of shares. The by-laws and the certificate of incorporation and the BCL must be read carefully and in conjunction with each other to determine the applicable rules for a particular co-op.

The proprietary lease has a different purpose from the by-laws; it governs the use and occupancy of the apartment by the shareholder. Most proprietary lease forms provide that the board of directors must approve alterations and subletting of the apartment, among many other items, while the by-laws will describe the procedure for selecting the board and officers and for the decision-making process.

B. Government Approval of the Share Offering

As is typical in corporate share offerings, the building owner or the corporation's directors are not allowed simply to sell or offer share certificates without some form of disclosure to potential buyers. The New York State General Business Law Article 23-A, also known as the Martin Act, prohibits a public offering of investments in real estate, "including cooperative interests in

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realty" unless an "offering statement or prospectus" is filed with the department of law.[8] The division responsible for regulating and monitoring compliance with this provision is the Real Estate Finance Bureau (REF) of the New York State Attorney General's Office. REF has promulgated voluminous regulations regarding these offering statements.[9]

In certain instances, if there are reasons for lesser concern about offeree protection, REF will not take enforcement action for failure to file an offering statement and will provide a letter to that effect known as a no-action letter.[10] An example of a transaction that may qualify for a no-action letter is when the offering and sale of shares allocated to units in a property proposed to be acquired by all tenants of a building under a tenant-sponsored or promoted proposal, where the total number of dwelling units in the building does not exceed ten and all tenants join in the application for a no-action letter.[11] This provision has been useful over the years for small HDFCs whose residents undertook sweat equity work in the building and then pursued co-op conversion collectively. Practitioners should note, though, that these one-page letters might have seemed unimportant to residents and might not have been saved. REF does provide an offering plan search mechanism,[12] but inability to find a particular building referenced there isn't dispositive and a Freedom of Information Act request may have to be made.[13]

Some New York City affordable housing programs have been allowed to utilize abbreviated offering statements or no-action letters with formats pre-approved by REF. For example, an abbreviated model offering plan for the Third-Party Transfer Program is provided on REF's website.[14]

III. Cooperatives Whose Particular Purpose Is to Provide Housing for Low-Income People

Demographic changes, high fuel costs and generally difficult economic times in the 1970s led to a high incidence of housing abandonment. Real estate tax arrears built up so much that the city government officials became desperate to find solutions. Accordingly, in 1976, the city shortened the time before the city could foreclose multifamily properties from three years to one.[15] "The inevitable result of the new vesting and sales policy was the accumulation of troubled buildings in the City's portfolio."[16] Through its then newly-created Department of Housing Preservation and Development (HPD), the city began to explore transferring some of the less dilapidated buildings with fewer vacancies to tenant ownership.

Around that time, there was significant interest in a homeownership approach to affordable housing called limited-equity cooperatives. These have been defined as "a form of residential property ownership in which a corporate entity holds title to or a leasehold of an apartment building or other housing project, and is in turn owned by resident shareholders, subject to restrictions on the transfer price of shares and on shareholders' profit or equity appreciation."[17] A variation is the low-income or limited-income cooperative, which may only limit incomes but not transfer prices. The hope was that shareholders would be more involved in caring for their buildings than they had been as tenants and that they would benefit from the equity interest. Commentators have noted that "a resident's sense of home and its resulting stability improved physical health of the family, increased participation in civic activities, improved educational performance of the resident's children and increased racial and economic integration."[18]

HPD pursued tenant ownership mostly through its Division of Alternative Management Programs (DAMP) and a program called the Tenant Interim Lease Program (TIL).[19] TIL provided residents with the opportunity, after managing the building for a period of time, to purchase shares for $250 per dwelling unit and to obtain a proprietary lease from a corporation which was formed by HPD and turned over at closing to the purchasers. This turning over was orchestrated by the resignation of an HPD sole incorporator and designation of an initial board of resident shareholder directors. If current board members or shareholders are not able to find this designation of board members, HPD usually has it. More importantly, HPD also may have the list of initial purchasers completed at closing.[20] If any resident failed to pay his or her $250 by the time of the deed transfer from HPD to the HDFC, the HDFC was indicated, often by hand, as the owner of the unsold unit shares. This can become important later as proof of ownership if the HDFC seeks to sell the shares allocated for that unit.

Frequently, especially in the early years of TIL, individual closings for shareholders were not conducted. An attorney for the HDFC or the HDFC officers themselves would simply distribute share certificates and proprietary leases in a meeting with purchasers. Occasionally, even that step did not occur, leaving some purchasers with no ownership documents.

The Sweat Equity Program and the Ownership Transfer Project (OTP) were like TIL except that OTP buildings were purchased by residents from private owners with the city's help rather than from the city directly. OTP buildings may have fewer restrictions in their deeds and certificates of incorporation than TIL buildings, while Sweat Equity buildings may have more restrictions. HPD prepared abbreviated offering plans for the TIL buildings while most of the Sweat Equity and OTP buildings received no-action letters.

A. Article 11 of the New York State Private Housing Finance Law as a Vehicle for Low-Income Cooperative Formation

Some states, such as California and Vermont, have specific statutes to define, create and govern limited-equity or low-income cooperatives.[21] However, no statute defining limited-equity or low-income cooperatives exists in New York State. When HPD began TIL and other low-income cooperative programs, the agency's attorneys relied on Article 11 of the New York State Private Housing Finance Law (hereafter Article 11), which requires that corporations formed pursuant to it be "organized exclusively to develop a housing project for persons of low income"[22] without any reference to housing cooperatives. The PHFL requires that the term "housing development fund corporation" or "housing development fund company" be included in the corporate name,[23] so lawyers and potential purchasers should be alerted that the corporation has a special purpose when those words appear. A housing development fund company (HDFC) must be incorporated pursuant to the provisions of Article 11 "and the provisions of either: a) the business corporation law, b) the not-for-profit corporation law or c) the not-for-profit corporation law and article two of the PHFL."[24] Some rental buildings are owned by not-for-profit HDFCs; however, the buildings operating as low-income cooperatives are nearly all[25] formed pursuant to a combination of the BCL and the PHFL.

B. Definition of Low Income in the PHFL

Affordable housing advocates have long hoped for a clear definition of income limits, including some asset test along with specific resale price limits, in order to preserve the low-income cooperatives HPD has created. Unfortunately, though, asset tests and resale price limits are non-existent in Article 11, in HDFC certificates of incorporation and in HDFC deeds while income guidelines are often unclear. Some HDFCs may have added resale price limits through proprietary lease or by-law amendments, but these are very rare.

The certificates of incorporation for some HDFC's refer to PHFL § 576 for the definition of low income and other certificates of incorporation reference a percentage of the area median income. Section 576(1)(b) provides that:

> . . . dwellings in any such project shall be available for persons or families whose probable aggregate annual income does not exceed six times the rental (including the value or cost to them of heat, light, water and cooking fuel) of the dwellings to be furnished such persons or families, except that in the case of persons or families with three or more dependents, such ratio shall not exceed seven to one. For purposes of this paragraph, tenants in a housing project of a housing development fund company organized under the provisions of the business corporations law and this article shall have added to their total annual carrying charges an amount equal to six per centum of the original investment of such person or family in the equity obligations of such housing company.[26]

This definition is woefully inadequate. The first sentence of § 576(1)(b) establishes an income limit for potential purchasers that can be quite low ($50,400 if maintenance is $700), but the second sentence allows income limits to increase exponentially over time until they hardly seem low-income For example, if the maintenance (rent) and utilities for an apartment totals $1000 a month, the maximum income for potential purchasers will be $12,000 X 6 or $72,000. However, If the selling shareholder paid $300,000 cash for the apartment, then 6% of $300,000 ($18,000) would be added to the $12,000 for a total of $40,000. That amount would then be multiplied by six (if fewer than three dependents) to get the maximum income for purchasers of $240,000. A family earning $240,000 might have assets (for which the PHFL has no limit) or be able to borrow funds allowing them to pay $700,000 or more for the unit, a price that is not affordable for a low-income family. Once such a price is paid, § 576(1)(b) would again allow an increase in the income limit upon resale.

C. Other Low-Income Defiitions and Resale Fees

Not all certificates of incorporation created by HPD for New York City low-income cooperatives use this definition of low-income, though. Without a reference in the certificate of incorporation, § 576 only applies to HDFCs that have received advances from and signed regulatory agreements with HPD. HPD's approach for all others has been to insert income limits in the certificates of incorporation tied to a percentage of the area median income (AMI), defined each year by the U.S. Department of Housing and Urban Development (HUD). HPD's website indicates that the 2019 AMI for New York City is $96,100 for a three-person family.[27] Many HDFC certificates of incorporation include 120% of AMI as the definition of low-income while some refer to 165% of AMI as the definition.

Most of the certificates of incorporation also require that a percentage of profits on resale of shares be paid to the HDFC. This sale percentage is also referred to as a "flip fee" or "flip tax" and is often set in HDFCs at 30% of the selling shareholder's profits. However, this requirement may be limited in certificates of incorporation, by-laws or regulatory agreements to10, 25 or 30 years from the time of the building purchase or regulatory agreement signing. Thirty percent is higher than the norm in market-rate co-ops, but some fee is common in market rate cooperatives in New York City.[28]

D. HPD Approval Certificates of Incorporation Amendments, Sales or Mortgages of the Property and Subordination of HPD Mortgages

HPD is named as the supervisory agency for New York City HDFCs in Article 11.[29] A certificate of incorporation cannot be filed or amended without approval of the supervisory agency,[30] so it is very difficult if not impossible for shareholders to amend the certificate of incorporation to eliminate a flip fee or change the corporate purpose. REF along with HPD and the New York State Division of Housing and Community Renewal issued a memorandum on July 16, 2015 clarifying that: "Because an HDFC certificate of incorporation cannot be amended to remove the statutorily required corporate purpose of developing a housing project for persons of low income, a BCL HDFC attempting to 'convert' property to market-rate ownership must transfer or sell its real property to an unrestricted entity."[31] That process involves obtaining HPD approval to authorize the sale as well as dissolution after the disposition. HPD also must agree to the distribution of assets for low-income housing purposes. After these consents, a new offering plan must be filed with REF. The memo clearly states, "if any proposed sale involves distributing the proceeds of the sale to a BCL HDFC's shareholders, such distribution is prohibited by law."[32]

HPD as supervisory agency must also approve mortgaging the property, according to most certificates of incorporation. This restriction may be limited to 30 years from the building purchase or mortgage or regulatory agreement signing, however. OTP buildings may not have these restrictions because their certificates of incorporation and deeds weren't prepared by HPD.

If there is an HPD loan or security agreement on the HDFC's building, HPD is often willing to subordinate its interest to new lenders seeking a first lien. However, practitioners should be aware that the process to obtain a subordination or approval to mortgage can be very time-consuming. HPD will not review the request until a fee is paid and a variety of information is submitted.[33]

E. Variations in Flip Fees and Income Limits Over the Years

There is no substitute for careful review of applicable documents for a particular HDFC, especially since HPD has not promulgated regulations to implement Article 11 of the PHFL. Instead, HPD has relied "almost exclusively on project-specific documents rather than general regulations. . . . One effect of two and a half decades of regulation by contract, involving hundreds of individual buildings, has thus been a lack of clarity surrounding the legal requirements applicable to HDFC cooperatives."[34]

Attorneys who are accustomed to housing co-op due diligence will hope to inspect board minutes, shareholder resolutions and amendments to proprietary leases and by-laws. However, many HDFCs do not have professional managers to maintain these records, so they either may not exist or may not be accessible. If policies do exist which purport to govern resale prices or flip fee amounts and they, arguably, apply to shareholders unequally, the BCL provides that the policies should have been approved as amendments to the proprietary lease.[35] Most proprietary leases require a vote of two-third of eligible shareholders for amendments. Attorneys should also watch for resale policies added as by-law amendments. While arguably not proper, boards may insist that the by-law provisions govern transfers.

HPD, the Board of Estimate and the City Council revamped the TIL program periodically over the years, which means that establishing what period or era a building belongs to will indicate what restrictions apply and in what array of legal documents. The city's Automated City Register Information System (ACRIS)[36] will provide the deed, including the date for the transfer from the city to the HDFC, as well as any regulatory agreements, security and mortgage documents, and transfer tax documents. The certificate of incorporation can be obtained, if necessary, from the Department of State, while the filing date and exact name can be confirmed in the Corporate Entity Search mechanism.[37] By-laws and proprietary leases sometimes are lost, but once the era is established, forms can be obtained from HPD to be reviewed and potentially adopted by the shareholders.

The following descriptions of the TIL eras provide clues for further investigation once an HDFC is identified with a particular time range.

1. 1980-1987. Ten-year restrictions, some expired.

The deeds in these years prohibited transfers of all or substantially all of the building for 10 years from the date of the disposition. In addition, the building had to be operated for low-income families as defined in § 576 of the PHFL. From 1980 to 1983, the latter restriction was also limited to 10 years.[38] The certificates of incorporation and by-laws required flip fees to be paid to the HDFC, but that requirement was also limited to 10 years. Many of these co-ops have not adopted anything to replace the expired flip fee, although it could be done at any time through a properly planned shareholder vote. Despite the expiration of the flip fee provision, the corporations are still HDFC's formed pursuant to the PHFL and must provide low-income housing, interpreted in some reasonable manner by the board of directors. For guidance in that interpretation, boards could look at HPD's definition of affordability; that is, the cost of housing should be less than one-third of what the family earns.[39]A 2010 letter to all HDFCs clarified this approach but was never promulgated as a regulation.

2. 1987-1995. 60-40 type. 40% of resale profits to the city for most buildings.

As property values in the city increased, Mayor Koch insisted that HDFC resale profits be shared with the city government. That approach was adopted by the Board of Estimate in 1982 for buildings with appraised values per apartment of more than $2,000.[40] Several years passed before legal documents were modified, but by the middle of 1987 the deeds as well as a security agreement for these building provided that 40% of all resale profits from units or the building as a whole be paid to the city for 25 years from the security agreement date. Out of the remaining 60%, a high percentage must be paid to the HDFC, but that can be changed by amending the by-laws. It is arguable that the percentage payable to the HDFC expires in 25 years as well, so boards must think ahead about setting some percentage of resale profits as a flip fee to take effect as soon as the 25-year period expires. The income limit for these buildings is set by PHFL § 576. There was no price cap or formula in these years, but the one-third of income formula provides an affordability guide. HPD has stated that the moment the 25-year period ends, 40% will no longer be due to the city, even if a satisfaction is not recorded yet. However, it is still important to obtain the satisfaction to clear the record and smooth the way for future financing.

3. 1995-2003. 165% of median type.

The income limit contained in the certificates of incorporation for most buildings sold in this era is 165% of AMI. The by-laws provide for some percentage of resale profits to be paid to the HDFC. There is no price cap or formula, but boards should examine whether purchasers are paying more than one-third of their income for housing costs.

4. 003-present. Regulatory Agreement type. Also includes any building that received real estate tax forgiveness or a loan from HPD requiring a regulatory agreement.

HDFCs that purchased buildings from the City in 2003 and after have restrictions not only in their deeds, certificates of incorporations and by-laws, but also in a thirty-year regulatory agreement. The income cap in this agreement is 120% of AMI. Thirty percent of resale profits must be paid to the HDFC. No more than 20% of the units can be rented; that is, 80% must be shareholder owned. Subletting and other restrictions were added. There is no specific price cap or formula, but boards should examine whether purchasers are spending more than one-third of their income on housing costs.

5. HPD's current model certificate of incorporation.

HPD has a model HDFC co-op certificate of incorporation that is currently required for HDFC co-ops seeking HPD loan funds or real estate tax exemptions. HPD is set out as the supervisory agency and the income cap is 165% of median income for most programs. Because the agency needs to approve the formation of HDFCs in New York City, it is advisable to simply work from HPD's recommended form and not to draft something from scratch or based on other forms.

F. Additional Restrictions Imposed by Loan Programs

Mortgages, security agreements, promissory notes and regulatory agreements, particularly with government agencies, may contain resale, income and other restrictions which augment restrictions found in the certificate of incorporation, by-laws and proprietary leases. Therefore, these must be examined carefully. For example, some HDFCs formed through HPD's Sweat Equity and Urban Homesteading programs received funds from New York State's Housing Trust Fund governed by Article 18 of the Private Housing Finance Law. These housing trust fund buildings are HDFCs with additional restrictions appended through a regulatory agreement. Interestingly, unlike the previously discussed HDFC versions, there is a statutory formula limiting resale prices for these buildings. A selling shareholder may add 6% per annum to the original equity paid and then add the cost of certain capital improvements and a portion of actual amortization paid to calculate the price.[41] A regulatory agreement should appear on ACRIS for these buildings and the resale provisions should also appear in the proprietary leases, by-laws and possibly the certificate of incorporation. However, with these and other HDFC's, it sometimes happens that the proprietary leases and by-laws, by mistake, do not match the regulatory agreement. Practitioners, shareholders and board members should watch for and correct these incompatibilities because Article 18 and the regulatory agreement take precedence over the by-laws and proprietary leases.

City loan programs may also add a layer of restrictions. HPD's Multifamily Housing Rehabilitation Program, for example, provides low-interest rehabilitation loans to finance replacement of major building systems and treatment of lead-based paint hazards. HDFC cooperatives receiving these funds are required to sign regulatory agreements restricting future sales to households whose incomes do not exceed 120% of AMI and also prohibiting rental of vacant units. For certain types of rehabilitation work, the restrictions may only extend for five years.

Rehabilitation in some buildings was partly funded through the HOME program, which funnels federal funds to state and local governments for creation or preservation of affordable housing. The HOME funds may be allocated to certain units reserved for families whose incomes are at or below 80% of AMI.[42] There should be a Home Agreement recorded on ACRIS or HOME language in a mortgage if these restrictions apply. If an HDFC has received HOME funds, the board of

directors must give attention to compliance throughout the term and will also be called upon to prove compliance at the end of the agreement period when they are seeking to satisfy the mortgage or agreement.

G. Tax and Other Benefits of Incorporating as an HDFC

There are several tax and other benefits provided for HDFCs either in the PHFL or in other statutes and regulations. Some of them are only granted in HPD's discretion:

- The city can sell property to an HDFC without public auction.[43]
- HPD may grant extensions for payment of real estate tax arrears.[44]
- HPD may grant forgiveness for real estate tax arrears through 2001.[45]
- Mortgages of an HDFC are exempt from mortgage recording tax.[46]
- HDFCs are exempt from city franchise tax.[47]
- HDFCs are exempt from state franchise tax.[48]
- HDFCs are exempt from the NYC Real Property Transfer tax[49] if certain criteria are met, including a 30-year regulatory agreement and a showing that 50% of the floor area is residential and two-thirds of the residential property is limited to low-income people.[50]
- HPD may grant real estate tax exemptions up to 40 years.[51]These exemptions may be full or partial. HPD staff reviews the application and the City Council must approve it.[52]
- Most HDFCs also have a cap on the assessed value of units which reduces their real estate tax obligation. [53]

The cap on assessed value is called the "DAMP Tax Cap" because it was devised for HDFCs sold through HPD's Division of Alternative Management Programs (DAMP). The Board of Estimate resolution, which established it in 1989, provided that:

> The real property owned by each housing development fund company listed in Schedule A attached hereto shall be exempt from real property taxes on that portion of the assessed valuation attributable to the residential potion of the property owned by it which exceeds an amount equal to $3500 per residential unit, provided that such $3500 ceiling shall be increased by six per cent (6%) per annum commencing July 1, 1990; provided, however, that such ceiling shall not be increased by more than an aggregate amount of twenty per cent (20%) in any five year period.[54]

For 2018, the calculation of the cap came out to approximately $11,000 per dwelling unit. The partial exemption is scheduled to continue until July 1, 2029. It should be noted, though, that any portion of the property used for commercial purposes is fully taxable. The resolution also provides that "such partial tax exemption shall be effective only for so long as the projects are owned and operated by housing development fund companies in conformity with the requirements of Article XI of the PHFL."[55]

The 2029 end date is a looming problem for HDFCs. Even now, lenders are concerned because most loan terms are longer than 10 years and HDFC operating budgets after 2029 could be drastically impacted.

Most buildings purchased by HDFCs to operate as co-ops after 1989 have a reference to the tax cap in their deeds with City Council approval attached. However, some post-1989 HDFCs as well as pre-1989 HDFCs that were not included on the list attached to the resolution did not receive the DAMP tax cap. Most of these were in programs like the Sweat Equity Program, the Urban Homesteading Program or the Community Management Program. Some of them are not-for-profit HDFCs not approved as co-ops. It is possible for these HDFCs to apply to HPD and their City Council members for inclusion in the program, but it can be a lengthy process and will require a regulatory agreement with HPD.[56]

H. Comparisons to Market Rate Co-ops

HPD structured these co-ops differently from market rate co-ops in several respects. For example, to reflect the $250 initial purchase price, the number of shares was set at 250 shares per unit regardless of apartment size. (A few sweat equity buildings might be different). As a result, deductions for portions of real estate taxes and mortgage interest under § 216 of the Internal Revenue Code may not be available for shareholders because the section arguably requires that an individual's number of shares should have a "reasonable relationship to the portion of the value of the corporation's equity in the house or apartment building and the land on which situated which is attributable to the house or apartment which such person is entitled to occupy."[57] An accountant or tax expert should be consulted because there may be several ways to interpret this issue. In addition, the certificates of incorporation generally provide for one vote per shareholder rather than the typical one vote per share.

Most by-laws also provide in their director removal provisions that the term of any director who becomes more than two months behind in payment of his or her maintenance charges shall be automatically terminated and a replacement shall be duly elected. If the remain-

ing board members fail to implement a proper replacement process, vacancies can linger and increase to the point that many or all board members are technically terminated. This provision is not common in market rate co-ops.

Similarly uncommon in market rate co-ops is a provision in most HDFC certificates of incorporation providing that no shareholder may vote if he or she is delinquent in the payment of two months maintenance. In buildings with ineffective or no professional management or with serious code violations or other problems, many shareholders may be delinquent and thus be excluded from decision-making because of this provision. Occasionally this has led to frustrating situations when every shareholder in a building is three months or more behind in maintenance and no one is authorized to select a board or make decisions.

IV. Problems Facing HDFCs

HPD sold buildings to HDFCs for very low prices but did little or no rehabilitation work before many of the building transfers. As a result, boards of directors had to juggle paying real estate taxes and other expenses while catching up on repairs. Although there are many success stories, some buildings have struggled or strayed from their original mission.

A. High-priced Sales

A problem that has received a great deal of attention in the media and among government regulators is high-priced unit sales. As discussed, every iteration of the TIL program had an income limit for subsequent purchasers, but none of the versions had a resale price limit or a limit on purchaser assets. While some HDFCs, even in trendy neighborhoods, have voluntarily adopted price limits in the $40,000 - $120,000 range, other boards have abdicated the responsibility to hew to their corporate purpose and have allowed prices to skyrocket. A 2014 *New York Times* article referred to a unit that sold for over a million dollars.[58] Several other articles have addressed the trend as well.[59] Because the buildings often retain 30% of resale profits, these sales can be extremely helpful for boards trying to balance budgets, especially with concerns about losing the tax cap. However, the loss of affordable units is lamentable.

B. No Maintenance Increases

One downside of resident control is that it is difficult for residents serving on co-op boards to raise their own maintenance fees. Professional managers could recommend appropriate increases, but some HDFCs don't have them, especially if they are smaller than 10 units. As the years go by without increased income, the problems are magnified. HDFCs with regulatory agreements are required to increase maintenance at least 2% per year, but not all HDFCs have regulatory agreements.

C. Deceased and Departed Shareholders

Shareholders in HDFCs who are under the impression that the units are not particularly valuable, or who are behind in maintenance, or who cannot afford an estate lawyer, may not make inheritance arrangements. For the same reasons, some shareholders abandon their units without a proper transfer of the shares. This creates a potentially expensive limbo period for the co-op and is an extremely common problem. Boards can resort to obtaining a housing court judgment to terminate the proprietary lease and then proceed with a non-judicial foreclosure sale under Article 9 of the Uniform Commercial Code[60] to gain ownership of the shares. However, the cost of this process may seem prohibitive to boards of directors. Another approach when no heirs come forward is for the HDFC itself to present a petition for probate to the Surrogate Court as a creditor[61] asking to be appointed as executor so that an official transfer can occur. Most boards will not want to take on this responsibility.

A preventive measure boards can consider is to add relatives, upon request by shareholders, to share certificates and proprietary leases as joint tenants with right of survivorship. This process is relatively simple, but is likely to require some assistance from a manager or lawyer, which may dissuade boards or delay the process. In addition, adding non-resident relatives may violate primary residency provisions in proprietary leases.

D. Failure to Collect Maintenance Arrears or Pursue Other Lease Violations

Some boards have difficulty pursuing their neighbors in housing court or delay doing so because of the legal costs. Common violations include maintenance arrears and subletting without approval, often for long periods of time.

E. Failure to Hold Annual Elections

Some boards hesitate to give up control or to face questions from shareholders, so they fail to schedule annual elections or only hold them sporadically. In the worst situations, board members may have resigned or abdicated responsibility, leaving one or two board members wielding control. Most of the by-law forms allow 10% of shareholders to call a special meeting to elect board members pursuant to § 602 of the BCL,[62] but these meetings can be very difficult to orchestrate. Shareholders also can, but seldom do, resort to their power under § 603 of the BCL[63] to call a meeting skirting the usual quorum requirements.

F. Inadequate or Corrupt Management Companies

Although some problems, as noted, might be avoided with professional management, inadequate or corrupt managers have also caused problems for some

HDFCs. HDFCs attempting to fire one manager and move to another have also faced difficulties and delays.

G. Lack of Technical Assistance or Mediation Assistance

HPD has contracted with not-for-profit groups to provide training sessions and on-site assistance for individual HDFCs. The Urban Homesteading Assistance Board did both for many years and now continues with training sessions while Neighborhood Housing Services took over the assistance to individual boards of directors a few years ago. Unfortunately, the funds have not been adequate to meet the need for well-informed advisors to travel to buildings throughout the city to provide ongoing assistance. In addition, there is no affordable mediation service or ombudsman to respond to complaints from shareholders about their HDFC boards or about other shareholders. A hopeful sign, though, is that Assemblymember Harvey Epstein introduced a bill in January 2020 to establish an ombudsman specifically for HDFCs.[64]

H. Failure to Inform Shareholders

Many boards fail to distribute or even prepare annual financial reports or otherwise keep shareholders informed about operational issues. Section 624 of the BCL[65] entitles shareholders to an annual balance sheet on request and access to a shareholder list and minutes of shareholder meetings. By-laws may go further, allowing shareholder access to books and records generally. Shareholders sometimes demand access to rent rolls and check ledgers, which they are, arguably, not entitled to review. However, boards often frustrate shareholders by not even providing the bare minimum.

I. Tax Arrears

As a result of the issues described above and others, many HDFCs fall into arrears on real estate tax and water payments. They can enter into payment agreements with high interest rates or they can seek loans, which can be extremely complicated. Some HDFCs have landed on the city's foreclosure list, with 74 losing their buildings since 1997.[66] A recent court decision held that a few of those foreclosures were improper,[67] though, which may slow the foreclosure process in the future and, hopefully, inspire HPD and city government to aim more resources at struggling HDFCs.

J. Difficulty Paying for Rehabilitation and Violation Fees

Loan funds for emergency situations are extremely difficult for HDFCs to obtain, even for small amounts, if time is short. Market-rate buildings might have or be able to obtain a line of credit or they might assess shareholders, but those options are not viable for most HDFCs. HPD has several low-interest rehabilitation loan programs, mentioned above, but the contractor approval and closing processes are lengthy. Similarly, while a few credit unions and not-for-profit lenders make loans to financially distressed HDFCs, the underwriting process is very time-consuming.

K. Terminating 60-40 Security Agreements and Determining Post-60-40 Flip Fees

Some HDFCs pursuing loans have encountered long delays at HPD in their efforts to satisfy or obtain subordinations of HPD loans or security agreements, particularly those from the 60-40 era. These delays can be very harmful if the HDFC needs financing quickly. Because HPD never monitored whether the 40% of profit payments were made, HPD staff compares the original shareholder list from 25 years ago to the current rent roll in order to identify presumed transfers. If HPD didn't receive 40% of the profits from what they suspect was a sale, the HDFC must submit documents explaining the discrepancy. Any amounts that should have been paid must be paid before the satisfaction will be issued. HPD might also ask for audits and financial information to reassure the agency about the HDFC's ability to undertake a new loan.

By-laws may also need to be amended to assure a flip fee for the HDFC after the 25 year term of the 60-40 security agreement. The 60-40 form of by-laws provides that during the first 10 years of the resale period, the 60% remaining after the city is paid should be split between the HDFC and the shareholder. For the remaining 15 years, another percentage split is provided, but there is no provision for a split of profits with the HDFC after the resale period ends. This unfortunate oversight could result in no profit split whatsoever after the resale period ends if HDFC boards fail to plan ahead.

V. HPD's Response to the Problems

A. New Regulatory Agreement

HPD has an asset management unit, which now includes three HDFC specialists who are often aware of and trying to help troubled buildings. They facilitate real estate tax exemptions and loans and field calls from an array of HDFC shareholders, board members, managers and attorneys. Until 2016, though, there was only one full-time person and one part-time person to help over a thousand buildings. HPD staff can assist, but they assert that they only have enforcement power for the small portion of those buildings governed by regulatory agreements.

In order to expand their enforcement power and attempt to deal with the problems described here, HPD began in 2014 to draft a new regulatory agreement that the agency planned to offer in exchange for a larger real estate tax exemption. Various affordable housing advocates pushed for a complete real estate tax exemption at that time.[68] As the HPD lawyers proceeded with drafting over the next two years, many new restrictions were

added and it was also decided that HDFCs who refused to sign would lose their DAMP tax cap.

When a draft was released to the public,[69] a great furor ensued, and many City Council members expressed concern.[70] HPD held hearings and meetings and now seems to have stalled in the larger effort while using the new regulatory agreement for HDFCs receiving loans and tax forgiveness.

Some of the most controversial requirements in the new regulatory agreement are:

1. Owner occupancy requirements set at 270 days a year and limiting ownership of other property within a 100-mile radius.
2. A requirement that buildings—even if currently well run—have both outside managers and monitors (paid for by the HDFC). Monitors are given the power to deliver and enforce "prohibited event notices" to shareholders. A waiver of the outside management requirement may be available.
3. Price limits which some HDFCs oppose completely and some think are too high (i.e. approximately $400,000 for a two-bedroom apartment).
4. A requirement that HPD must approve commercial leases more than two years in length.
5. 100% flip fee if apartments are sold in less than three years after purchase.

VI. Conclusion

HDFCs are an extremely valuable resource in a city with a huge demand for housing and limited affordable options. The problems are not insurmountable, particularly if HPD, the City Council and the Assembly commit themselves to addressing them. More money must be spent on technical assistance, loan funds and tax exemptions, among other approaches; the expenditure is likely to be less than the cost of replacing more than 33,000 affordable units.

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Sealing the Bawdy House Door Open: An Examination of Unintended Consequences of Decriminalization and Sealing Statutes Upon Bawdy House Eviction Proceedings

By Brian Krist

Introduction

Cities and prosecutors transitioning from broken windows criminal enforcement to lower-impact and civil enforcement are finding that sealing statutes designed to protect offenders from the consequences of criminal records are hindering civil enforcement. Particularly in New York, criminal justice agencies trying to shift away from more severe criminal enforcement are finding that alternative civil abatement remedies—many from the 19th century—are being derailed by sealing statutes, pushing them back to the very criminal enforcement and concomitant consequences they were trying to avoid. Reforming sealing statutes and civil abatement laws to accommodate society's new emphasis on decriminalization would allow prosecutors and law enforcement agencies to better achieve their quality-of-life goals while maintaining a softer touch in the criminal justice system.

This article addresses a number of potential reforms, including changes to evidentiary presumptions in New York's civil abatement laws and exceptions to New York's broad sealing laws, potential ramifications of those choices, and recommends a blended approach protecting offender privacy while ensuring that civil tools to halt quality-of-life issues can still be robustly used.

Background

Initially conceived in 1868 as a tool to expedite closing brothels, New York has slowly expanded what is known as the "Bawdy House Law" to allow landlords, neighbors, certain civic groups and law enforcement agencies to start eviction proceedings against those using "demised property . . . for any illegal trade, business or manufacture."[1] Now codified as N.Y. Real Property Actions and Proceedings Law § 715 and N.Y. Real Property Law § 231, the Bawdy House Law allows authorized plaintiffs to file summary—with more rapid case schedules and little as-of-right discovery—to evict anyone involved in illegal activity.[2] Bawdy House Law cases are exempted from notice-to-cure requirements and other tenant protection measures otherwise enshrined in New York law.[3]

While the Bawdy House Law has become controversial, that is largely because the law has proven ruthless in effectiveness and efficiency.[4] Functionally mandatory eviction eliminates judicial discretion.[5] Where ordinary eviction cases required 30 calendar days' notice, Bawdy House Law evictions could occur in as little as 72 *hours* in Buffalo.[6] Despite the severity of remedy and the inherent controversy surrounding eviction, a recent *Shepard's* search revealed a comparative paucity of reported appeals of Bawdy House Law cases since modern codification in 1962. As more and more offenses have been brought within the ambit of the Bawdy House Law—and more and more offenses created generally—the scope of the Bawdy House Law has expanded exponentially from its beginnings as a simpler way to close brothels.[7] Courts and the legislature have expanded the law's reach beyond traditional criminal offenses codified in New York's Penal Law, and brought *any* banned business activity within the Bawdy House Law's ambit.[8] As one court dryly noted:

> It is true that many courts have recognized RPAPL 715(1)'s vital importance as a tool in the protection of owners, tenants and entire neighborhoods from the dangers of illegal activity such as drug dealing, prostitution and gambling. A reading of the statute, however, reveals that its application cannot be limited to only those illegal businesses which detrimentally impact on the quality of life in a given building or neighborhood.[9]

Beyond the Bawdy House Law's brothel-busting origins, litigants have successfully sought evictions based upon trademark counterfeiting, fireworks dis-

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tribution, and the sale of obscene materials, and the law has been used to combat illegal conversions of permanent dwellings to short-term hotels for nearly a century.[10] One landlord even tried to evict a securities broker following a trading scandal and, while an appellate panel reversed and dismissed that petition, the panel did so only because the landlord had not shown that the illegal conduct was "customary and habitual," and did not foreclose the idea per se.[11] If anything, the law's versatility was deliberate, as bill jackets from 1947 and 1976 amendments—broadening both the types of offenses that could underpin a Bawdy House Law proceeding and expanding the types of agencies allowed to demand eviction—show clear efforts to "broaden[] the scope of the law," sought from the mayor and police commissioner of New York City, by including "not merely cases of lewdness, but also any illegal trade or business."[12]

Coupled with broken windows enforcement strategies that provide fodder for landlords and others to establish Bawdy House Law claims through "an explosion in the number of misdemeanor arrests" in New York City beginning in the mid-90's, the breadth and scope of the Bawdy House Law became remarkably broad.[13] Where that expansion of quality-of-life enforcement does not provide rapid and sufficient facts, law enforcement agencies have a broad and unique power to issue subpoenas and seek court orders for records and testimony under threat of prosecution through a 1978 Bawdy House Law amendment.[14]

The Problem

As broken windows has become subject to more study and more criticism—challenging both its efficacy and its political expedience—New York and other jurisdictions have begun to shift to different enforcement strategies that de-emphasize criminal enforcement and punishment.[15] While New York—particularly New York City—has shifted away from full-throated broken windows prosecution, however, that policy shift has started to run into a problem: New York's broad sealing statutes codified as N.Y. Criminal Procedure Law §§ 160.50 and 160.55. Enacted to limit the stigma of prior prosecution resulting in no or lesser punishments, New York's sealing statutes restrict access to a broad range of criminal records, even where defendants have been convicted and/or admitted guilt, and those cases where defendants have been ordered to perform community service or attend educational programs.[16] This includes defendants sentenced to jail or probation-like conditions, for a wide range of offenses codified throughout New York law, including a host of quality-of-life offenses combatted through the Bawdy House Law.[17] In particular, drug-related offenses, which had been the basis of the Bawdy House Law's renaissance in the 1980's, have now become a focus of legislative efforts at decriminalization, reducing offenses that had been misdemeanors—which are not subject to sealing—to violations subject to C.P.L. § 160.55.[18] Additionally, prosecutors, either for programmatic or case-specific reasons, also reduce cases in pleas bargaining. While accomplishing the goal of reducing criminal penalties, these prosecutorial choices can have unintended consequences, as only prompt action at the time of disposition prevents other automatic sealing.[19]

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The facts in the First Department's 2017 decision in *People v. F.B.* are illustrative.[20] In November 2013, F.B. was arrested and charged in Bronx County, New York with drug and weapons-related offenses after the police executed a search warrant upon the apartment F.B. shared with his mother and other relatives.[21] The following month, the Bronx County District Attorney's Office ("BXDA") referred F.B. to his landlord for Bawdy House Law eviction, based upon the facts and circumstances of F.B.'s arrest.[22] Although initially charged with misdemeanors, and despite its earlier decision to refer F.B. for eviction, BXDA offered to allow F.B. to plead guilty to disorderly conduct, a violation subject to C.P.L. § 160.55 sealing.[23] F.B. accepted the offer, was convicted

of disorderly conduct upon his plea of guilty in March 2014, and sentenced to a one-year conditional discharge. BXDA took no action at the time of the plea or after to prevent the automatic sealing, and there was no dispute that the records were subsequently sealed by operation of C.P.L. § 160.55.[24]

Despite offering F.B. the opportunity plead to a violation, and taking no action to prevent the automatic sealing of F.B.'s records, BXDA did not withdraw its Bawdy House Law referral based upon those now-sealed records, and the Bawdy House Law eviction proceeding against F.B. proceeded as required in the Housing Part of Bronx County Civil Court. The eviction proceeding was repeatedly adjourned however, and did not proceed to trial until June 2015, well over a year after F.B. has pled guilty to a violation.[25] When F.B.'s landlord attempted to introduce records of F.B.'s arrest—which had been provided as part of BXDA's Bawdy House Law referral—F.B. objected on the ground that they were sealed pursuant to C.P.L. § 160.55, and also moved to strike references to those records from the pleadings in the Housing Part.[26] The Housing Part granted F.B.'s application, "holding that to allow the records to be admitted, even though previously disseminated prior to sealing, would be in contravention of the sealing statutes and a violation of [F.B.'s] due process."[27] F.B.'s landlord sought reargument—but apparently did not notice appeal—and while BXDA appeared as *amicus curiae* in support of reargument, the Housing Part denied leave to reargue.[28] Only after the Housing Part denied reargument did BXDA challenge sealing in the underlying criminal prosecution, filing an *ex parte* application in the Bronx County Supreme Court to unseal under the law enforcement agency investigation rule in C.P.L. § 160.55(1)(d)(ii), which permits unsealing to:

> a law enforcement agency upon ex parte motion in any superior court, or in any district court, city court or the criminal court of the city of New York provided that such court sealed the record, if such agency demonstrates to the satisfaction of the court that justice requires that such records be made available to it.

Bronx County Supreme Court granted the *ex parte* application in a decision entered in August 2016, nearly two and a half years after F.B. pled guilty.[29] Noting that the Bawdy House Law "allows any law enforcement agency, such as the District Attorney's Office to compel the landlord to bring eviction proceedings when premises are used for any illegal trade, business or manufacture," the court found:

> [i]t is in the interest of justice to give landlords the tools necessary to evict persons who use or allow the use of residential premises for the manufacturing and distribution of narcotics or other illegal enterprises. . . . It is the responsibility of this Court . . . to see the housing court has all relevant information before making such a determination. . . . It is the opinion of this Court that as [defendant] did enter a plea of guilty to a violation of the penal law, it is the prerogative of the housing court to be aware of the circumstances of that arrest and conviction for purposes of enforcing the Real Property Actions and Proceedings Law.[30]

F.B. appealed the unsealing order however, and the Appellate Division, First Department reversed. Citing lower court precedent in a previous case also involving BXDA finding that the proper procedure would have been to oppose sealing at the outset rather than seek a later ex parte unsealing, the First Department found that BXDA was not acting as a law enforcement agency for Criminal Procedure Law purposes when trying to assist a landlord in a Bawdy House Law proceeding.[31] In particular, the lower court noted that:

> In granting the defendant's request to seal these records, this court acknowledges the legitimate interest of the prosecution in ensuring that the residents of Bronx County are able to live in housing without being exposed to illegal narcotics trafficking. This court fully understands the problems faced by landlords who are trying to ensure that the tenants in their buildings are law abiding. Indeed, the prosecution could have, pursuant to C.P.L. 160.50(1), sought a stay or denial of sealing at the time it moved to dismiss the criminal case against Ms. Canales. This court has obtained the minutes of the calendar call on the date the case was dismissed and the minutes show that the prosecution never made a request to postpone sealing. This is noteworthy because the District Attorney's Office had written to Ms. Canales' landlord almost two months before the criminal case was formally dismissed. Thus, the prosecutor could have brought this issue to the Judge's attention before the case was sealed.
>
> At the oral argument on the instant motion, the prosecutor explained that the Assistant District Attorney (ADA) handling the criminal matter does not necessarily communicate with the narcotics eviction unit. Therefore, an ADA may move to dismiss the criminal case without considering whether the records will be needed for a Housing Court case which is being coordinated by a different unit of the District Attorney's Office. This court understands the logistical problem presented when several prosecutors must review the same file, but this difficulty is insufficient to provide a compelling reason to unseal a file in contravention of the clear language of the statute and the controlling appellate

> decisions. Rather, the impact of sealing on the eviction proceeding and the possible need for those records in that civil proceeding should be considered prior to or at the time of dismissal.[32]

Although BXDA sought to appeal the First Department's decision to the New York Court of Appeals, New York's highest court denied leave to appeal without an opinion.[33] The First Department's decision became final, and published reports do not indicate what became of the Bawdy House Law proceeding against F.B. without BXDA's now-sealed records. Absent a split in New York's Appellate Divisions or action by the Court of Appeals, prosecutors throughout the state are bound by *F.B.'s* aftermath.[34]

What Can Be Done?

Simply abolishing the Bawdy House Law is, of course, theoretically a solution, but there appears to be neither a desire to do so nor a suitably effective replacement on the horizon. Since its 1980's revival in *Kellner* as a blight-clearing tool with a private right of action, the Bawdy House Law's power and utility as a NIMBY weapon against quality-of-life issues—where neighbors can demand eviction and effectively veto lesser action through Real Property Actions and Proceedings Law § 715(1) intervention—is seemingly unparalleled.[35] Also, by putting the onus on landlords to file and diligently prosecute eviction proceedings at their own cost under threat of fines and penalties, the Bawdy House Law effectively impresses landlords to serve as cost-free quality-of-life enforcement for their neighbors and the government. Especially compared to the high cost of recruiting, training and retaining additional police officers, a Bawdy House Law enforcement program forcing landlords to do the government's work for it is extraordinarily cost effective.[36] Buffalo has noted the positive impact on local budgeting and tax revenue by using the Bawdy House Law and other laws to remove drug activity from neighborhoods.[37] The law has simply been too successful and too economical in achieving that success, and given the longstanding legislative history of successful efforts to expand the Bawdy House Law's reach contrasted with equally unsuccessful efforts to limit the law over the past 150+ years, there is no indication that the Bawdy House Law will be getting repealed any time soon.

One could theoretically advocate for abolishing the sealing statues, but given the legislature's recent expansion of defendants' procedural rights in New York—including revisions to the sealing statutes themselves—that argument is a fool's errand.[38] Enormous amounts of political blood and treasure have been spent on criminal justice reform in New York and elsewhere in recent years, and local political considerations likely limit any legislative will to make criminal records more easily used beyond the status quo even if issues arise.[39] In New York in particular, the sheer amount of change legislated into the criminal justice system in 2019 lends itself to the idea of waiting to see how those reforms play out before suggesting even further reform, even if public discussion of possible reforms to reforms begins quickly.[40] In any event, given the charged nature of criminal justice reform, this may not be an ideal time to raise yet another issue for potential reform.

Efforts to change plea bargaining policies—offering fewer non-criminal dispositions to defendants—are likely equally unfeasible. Defendants will likely resist pleading guilty to more serious charges carrying misdemeanor penalties, especially as the reasoning behind the policy change becomes apparent. Not only would defendants saddle themselves with more readily accessible criminal records, but with more damaging admissions as well.[41] It would certainly not track with current efforts to "lighten the touch of the justice system."[42] In any event, the primary benefit of the Bawdy House Law in contrast to the criminal justice system has been its ability to incapacitate conduct, not merely temporarily punish it, and that can be accomplished with civil tools rather than increased and costly criminal sanctions.[43] So, that leaves what can be done within the existing framework as it is.

Nearly everything that could go wrong in *F.B.* did, and a number of opportunities under existing law to prevent the facts from developing as they did were apparently not taken. Beyond not opposing sealing at the time of F.B.'s guilty plea—which would have been expressly permissible by statute and an eminently reasonable demand to make in plea negotiations given the pending eviction proceeding brought upon BXDA's insistence pursuant to the Bawdy House Law—there is no indication in the First Department's decision that BXDA leveraged its power under Real Property Actions and Proceedings Law § 715(1) to demand diligent prosecution of the Bawdy House Law eviction and oppose the many adjournments in the Housing Part that pushed a trial out to after the records had been sealed.[44] Beyond the initial Bawdy House Law referral, there is no indication from *F.B.* that BXDA took any follow-up action at all until appearing as an amicus to the landlord's motion for re-argument after the landlord had lost the initial motion to strike the records. Although the landlord apparently pursued re-argument, there is, critically, no indication in *F.B.* that the landlord or BXDA undertook an appeal of the initial Housing Court decision.[45] That BXDA had seemingly found itself in the same predicament 20 years prior in *Canales*, and repeated the same (if not worse) actions that *Canales* rejected, the First Department's decision in *F.B.*—while perhaps harsh—is somewhat unsurprising.

Through the First Department's hard lesson in *F.B.*, law enforcement agencies operating Bawdy House Law programs need to take heed that loose C.P.L. Art. 160 practices are maintained at their peril. Ideally, the simplest solu-

tion—the intra-office communication between prosecutors that apparently was not happening in *Canales* and *F.B.* to ensure that the cases being pitched to landlords for Bawdy House Law eviction were not being sealed in the first place—is the most effective. At the C.P.L. § 160.55(1) stage, the strictures of C.P.L. § 160.55(d) that gave the First Department pause do not apply, and a more generic interests-of-justice standard apply.[46] While there is a dearth of binding case law, New Jersey faced a similar question in 1990, in which the Supreme Court of New Jersey found that a state attorney general proceeding to dissolve a corporation acting *ultra vires* could be a basis for unsealing expunged criminal records of the corporation in *State v. XYZ Corp*.[47] Coupled with the reasoning in *Nicholas*, an application to deny—or at the least delay—sealing to facilitate a Bawdy House Law proceeding would seem to stand a high likelihood of success at the pre-sealing stage.

After cases have sealed however, agencies seeking *ex parte* unsealings need to establish the ongoing nature of investigations of potential criminal activity—not merely a need for discovery in a civil proceeding—to survive scrutiny following *F.B.* However, through careful tactics, agencies can thread the needle. Nothing requires law enforcement agencies to halt all investigative work after initiating civil or criminal cases.[48] Continuing an investigation even after taking initial rounds of enforcement action—whether in the civil or criminal courts—in good faith keeps the door to unsealing open. Although agencies will likely face allegations of sham in a subsequent motion to vacate, courts have the capacity to evaluate the scope of investigations on an *ex parte* basis to protect ongoing investigations.[49] As Bawdy House Law cases inherently involve sustained business activity that had been occurring over time—not merely one-off incidents of criminal activity—there should often be a natural opportunity for continued investigation.[50] Additionally, in situations where preliminary equitable relief has been obtained, there is a clear interest in continued investigation to ensure compliance.[51] Thus, diligent agencies should be able to continue investigating, be able to articulate that investigation, and obtain unsealing orders.

Failing that, litigating agencies should carefully review their adversaries' pleadings for possible arguments that waive the sealing protections. Historically, civil rights claims—42 U.S.C. § 1983 claims in particular—have often resulted in waiver, and courts have not hesitated to find as much.[52] Courts have expanded this to nuisance abatement cases where defendants have incorporated the facts and circumstances of sealed proceedings into their responsive pleadings, thus opening the door.[53] A defendant's mere contest of allegations however may not always be sufficient however, and counsel are well-advised to focus on allegations of government misconduct—not just mere defense against the government's charges—in articulating waiver arguments.[54] These evaluations will likely be very fact-specific.

All of these options involve additional time and resource commitments by law enforcement agencies however, cutting against the brutal efficiency that has been the Bawdy House Law's primary charm.[55] Agencies hoping to operate comparatively 'set it and forget it' Bawdy House Law referral programs will have to abandon their post-referral approaches to subject properties and do far more than simply coordinate document productions to prosecuting landlords. Courts—and respondents, assuredly—will be on guard for sham representations of continued investigation offered to avoid the pitfalls of *F.B.*, and agencies risk becoming 'why we can't have nice things,' if they fall into the trap of not engaging in the good faith work needed to continue investigations and circumvent *F.B* that befell BXDA. But, all is not lost, and those agencies that do the serious work of investigating conditions, following up on them, and digging at problems until they are actually resolved will find little trouble in the post-*F.B.* era. While that work may diminish the pure economical efficiency of the Bawdy House Law, it may also greatly mitigate *F.B.'s* impact on overall operations. Given the effectiveness of the law however, the cost-benefit analysis of that change may not trouble agencies long.

Conclusion

Without doubt, *F.B.* made civil enforcement in the age of de-criminalization harder. But, there are still multiple ways to avoid the full ramifications of *F.B.'s* holding, and government agencies can still operate efficient and effective Bawdy House Law enforcement programs with a modicum of additional, albeit careful, work. As the trial courts grapple with applying the First Department's holding, and agencies adapt to the post-F.B. landscape, local governments and interest groups will be able to develop ways to achieve both the lighter touch in the criminal courts society is seeking today while also utilizing civil tools to preserve and protect neighborhoods.

Endnotes

1. *1165 Broadway Corp. v. Dayana of N.Y. Sportswear*, 166 Misc. 2d 939, 944-47, 633 N.Y.S.2d 724, 727-29 (N.Y. City Civ. Ct., N.Y. Co. 1995) (discussing legislative history of the Bawdy House Law).
2. N.Y. Civil Practice Law and Rules 408 (CPLR) and N.Y. Real Property Actions and Proceedings Law § 745 (RPAPL). In New York City, specialized narcotics eviction parts have been existed for decades to provide a fast lane for Bawdy House Law cases separated from the rest of the City's very congested housing docket. Scott Duffield Levy, *The Collateral Consequences of Seeking Order Through Disorder: New York's Narcotics Eviction Program*, 43 Harv. C.R.-C.L. L. Rev. 539, 545 (2008) (citations omitted).
3. *Aurora Assocs. LLC v. Hennen*, 157 A.D.3d 608, 608, 70 N.Y.S.3d 186, 187-88 (1st Dep't 2018); *410 Lenox Ave. Apts., LLC v. Community II Supermarket, Inc.*, 135 Misc. 2d 628, 629, 516 N.Y.S.2d 432, 433 (N.Y. City Civ. Ct., N.Y. Co. 1987) (holding there is "no need to serve any notice to start a summary proceeding based on illegality"); and *Boulevard Gardens Owners Corp. v. 51-34 Blvd. Gardens Co., L.P.*, 170 Misc. 2d 755, 758-59, 651 N.Y.S.2d

1001, 1004 (N.Y. City Civ. Ct., Queens Co. 1996) (granting Bawdy House Law petition against tenants engaged in drug trafficking without notice to cure).

4. Duffield Levy, *supra* note 3, at 546 ("Measured by rate of eviction, [the New York County District Attorney's Offices Bawdy House Law-based Narcotics Eviction Program] has been quite successful.").

5. *91st St. Co. v. Robinson*, 242 A.D.2d 502, 662 N.Y.S.2d 497 (1st Dep't 1997) (availability of eviction as a remedy prevented court from issuing permanent injunction to halt illegal child care business in apartment, as eviction was an adequate remedy at law). Although landlords proceeding under Real Property Law § 231 (RPL)—which provides for injunctive relief—have an option other than eviction, nothing prevents other qualified parties from demanding eviction under RPAPL § 715. So, for example, even if the landlord and the majority of neighbors in an apartment building would be satisfied with an injunction, a lone neighbor within two hundred feet of the subject address or the government could drive a successful eviction campaign in the face of that settlement. *Perdomo v. Morgenthau*, 60 A.D.3d 435, 436, 874 N.Y.S.2d 443, 444 (1st Dep't 2009) (while finding that district attorney lacked authority to demand right to veto landlord's settlements, noting that the Bawdy House Law permits the district attorney file his own eviction proceeding in the face of a landlord's refusal). Given the population density of Manhattan—over 69,000 per square mile in 2010 according to the Census Bureau—the potential number of stakeholders vested with effectively absolute veto authority in Bawdy House Law proceedings there is quite substantial. United States Census Bureau, *QuickFacts: New York City, New York; Bronx County (Bronx Borough), New York; Kings County (Brooklyn Borough), New York; New York County (Manhattan Borough), New York; Queens County (Queens Borough), New York; Richmond County (Staten Island Borough), New York*, https://www.census.gov/quickfacts/fact/table/newyorkcitynewyork,bronxcountybronxboroughnewyork,kingscountybrooklynboroughnewyork,newyorkcountymanhattanboroughnewyork,queenscountyqueensboroughnewyork,richmondcountystatenislandboroughnewyork/PST045219 (last visited Jan. 9, 2020).

6. Jane Kwiatkowski, *South District Police Use Evictions to Deal with Criminals*, The Buffalo News (Jun. 18, 2013), https://buffalonews.com/2013/06/18/south-district-police-use-evictions-to-deal-with-criminals/.

7. Commentators have lamented that "[p]olicymakers at all levels of government have criminalized so many activities," and that "[i]n addition to the thousands of criminal laws, there are now tens of thousands of regulations that carry criminal penalties." Tim Lynch, *Cato Handbook for Policymakers, Chap. 17: Overcriminalization*, Cato Institute, https://www.cato.org/cato-handbook-policymakers/cato-handbook-policymakers-8th-edition-2017/overcriminalization (last visited Sept. 15, 2019). *See also* James Copland, *NY Prosecutors Have Too Much Power*, New York Post (Jun. 19, 2012, 4:00 AM), https://nypost.com/2012/06/19/ny-prosecutors-have-too-much-power/#ixzz1yFC4ZJVm; and James Copland and Rafael Mangual, *Overcriminalizing America: An Overview and Model Legislation for the States*, Manhattan Institute (August 8, 2018) https://www.manhattan-institute.org/html/overcriminalizing-america-overview-and-model-legislation-states-11399.html.

8. *Tomjai Enters. Corp. v. Laboratorie Pharmaplus U.S.A., Inc.*, No. 12 Civ. 3729(RWS), 2012 U.S. Dist. LEXIS 107033, *25-26, 2012 WL 3104891, *25-26 (S.D.N.Y. July 31, 2012) (collecting cases and finding that Bawdy House Law could be applied to trademark and trade dress infringement).

9. *1165 Broadway Corp.*, 166 Misc. 2d at 941, 633 N.Y.S.2d at 725-26. Quoting a memorandum in the bill jacket to a 1976 amendment, "the tenant's behavior need not be illegal only under the Penal Law." *Id.* at 947, 633 N.Y.S.2d at 729 (quotation omitted).

10. *Saportes v. Hayeck*, 111 Misc. 620, 182 N.Y.S. 295 (N.Y. App. Term, 1st Dep't 1920) (tenant who operated illegal rooming house in tenement subject to summary removal); *Midcenter Equities Assocs. v. Nghiem My Quack Tran*, 10 Misc. 3d 141(A), 814 N.Y.S.2d 562 (Table) (N.Y. App. Term, 1st Dep't 2006) (trademark counterfeiting operation sufficient to establish Bawdy House Law violation); and *Tsang Realty v. Sepulveda and Nunez* (N.Y. Civ. Ct., New York Co., Index No. L&T 109064/94), *as cited in Samayoa LLC v. Nelson*, 56 Misc. 3d 1201(A), *4, 61 N.Y.S.3d 193 (Table), *4 (N.Y. City Civ. Ct., Bronx Cnty. 2017) (sale and distribution of fireworks).

11. *Solow Bldg. Co., II, L.L.C., v. Banc of Am. Sec., LLC*, 13 Misc. 3d 55, 56, 823 N.Y.S.2d 815, 816 (N.Y. App. Term, 1st Dep't 2006).

12. *1165 Broadway Corp.*, 166 Misc. 2d at 946, 633 N.Y.S.2d at 729 *citing* Bill Jacket, 1947 N.Y. Laws Ch. 284. A comment from what is now the New York City Bar that "the kind of trade, business or manufacture intended is not certain," did not trouble the Legislature. *Id*.

13. Duffield Levy, *supra* note 3, at 548.

14. 1978 N.Y. Laws Ch. 627. While enacted in 1978, the subpoena provision laid relatively dormant in reported case law until recently however, with the first reported decision ordering production to a law enforcement agency coming in 2017, and the first fully contested case enforcing a Bawdy House Law subpoena only coming in the early summer of 2019, both relating to illegal hotel operations. *City of New York v. New York City Midtown LLC*, Index No. 450151/2015, 2017 N.Y. Misc. LEXIS 2861 (Sup. Ct., N.Y. Co. July 27, 2017) (ordering platform to produce records to City to support investigation); and *City of New York v. Airbnb, Inc.*, 2019 NY Slip Op 31377(U) (Sup. Ct., N.Y. Co. May 16, 2019) (enforcing subpoenas issued by the Office of Special Enforcement for short-term rental and advertising records). *See also Dennis Lane Apts., Inc., v. Green*, 21 Misc. 3d 480, 483, 864 N.Y.S.2d 247, 249 (N.Y. Civ. Ct., Bronx Co. 2008) (in discussing limitations upon district attorney's powers, noting that Bawdy House Law did confer subpoena power).

15. Center for Evidence-Based Crime Policy, Department of Criminology, Law, and Society, *Broken Windows Policing*, George Mason University, https://cebcp.org/evidence-based-policing/what-works-in-policing/research-evidence-review/broken-windows-policing/ (last visited Sept. 16, 2019) (questioning efficacy of Broken Windows and noting that "there is concern that any effectiveness of broken windows policing in reducing crime (where the evidence, as noted above, is mixed) may come at the expense of reduced citizen satisfaction and damage to citizen perceptions of the legitimacy of police" in any event); and New York City Mayor's Office of Criminal Justice, *Strategic Plan: Fiscal Years 2019-2021*, 9-11 (2018), http://criminaljustice.cityofnewyork.us/wp-content/uploads/2018/11/Strategic-Plan-2019-2021.pdf (detailing strategic priorities in the City's criminal justice agenda, including plans to "rethink and remake the City's justice system, and "lighten the touch of the justice system on low-level offenses"). *See also* New York City Mayor's Office of Criminal Justice and Office of the Mayor, *Breaking the Frame? Remaking the Criminal Justice System in New York City* (July 2019), http://criminaljustice.cityofnewyork.us/wp-content/uploads/2019/11/Breaking-the-Frame___.pdf.

16. N.Y. Criminal Procedure Law §§ 160.50, 160.55, and 170.55 (CPL). New York seems to be an outlier in that its deferred adjudication scheme—adjournment in contemplation of dismissal—is also subject to immediate and automatic sealing. Compare N.Y. CPL. § 160.50(3)(b) with, e.g., Md. Code Ann. Crim. Proc. § 10-105 (expungement of charges resolved through probation before judgment available upon application on notice to local prosecutor, typically not less than three years after conclusion of case without good cause); Del. Code. Ann. tit. 11, § 4373 (providing for mandatory expungement upon completion of probation before judgment, but requiring defendant to apply for said expungement); and N.J. Stat. Ann. § 2C:52-6(a) (providing for mandatory expungement upon completion of

conditional dismissal, but requiring defendant to apply for said expungement). Also, while Delaware and New Jersey are closer to New York in ease of obtaining expungement than Maryland, expunged records are also far easier to unseal in Delaware and New Jersey. Compare N.Y. CPL § 160.50(1)(d) and Md. Code Ann. Crim. Proc. § 10-108 (requiring good cause, notice to defendant and a hearing prior to unsealing absent evidence that life or property would be endangered by immediate notice) with N.J. Stat. Ann. § 2C:52-19 (permitting state superior court to unseal expunged records upon good cause) and Del. Code. Ann. tit. 11, § 4376(a)(1) (permitting court that expunged record to order unsealing, and permitting inter-agency disclosure to investigate criminal activity without court order).

17. Although decidedly uncommon, violations in New York can result in up to fifteen days' imprisonment, or a conditional discharge of up to one year, extendable for two additional years. N.Y. Penal Law §§ 65.05(3)(b), 65.10, and 70.15(4) (PL).

18. 2019 N.Y. Laws Ch. 131. *See also Kellner v. Cappellini*, 135 Misc. 2d 759, 516 N.Y.S.2d 827 (N.Y. Civ. Ct., N.Y. Co. 1986) (ordering eviction of tenants and occupants in "crack house").

19. N.Y. CPL §§ 160.50(1) and 160.55(1).

20. 155 A.D.3d 1, 63 N.Y.S.3d 314 (1st Dep't 2017).

21. *Id.* at 3, 63 N.Y.S.3d at 315.

22. *Id*.

23. *Id*. *See also* N.Y. PL § 240.20.

24. Although the First Department noted that the records of F.B.'s prosecution sealed in March 2015 at the conclusion of his conditional discharge, the text of CPL § 160.55 suggests that the record ought to have sealed upon conviction in March 2014 rather than the conclusion of the defendant's sentence in March 2015, the precise timing of the seal was not contested in *People v. F.B.* 155 A.D.3d at 3, 63 N.Y.S.3d at 315. In any event, the records were indisputably sealed at relevant times in the case.

25. *Id.*

26. *Id*.

27. *Id.* (internal quotations and brackets omitted).

28. *Id.* at 3, 63 N.Y.S.3d at 316.

29. *Id.* at 3-4, 63 N.Y.S.3d at 316.

30. *Id.* at 4, 63 N.Y.S.3d at 316.

31. *Id.* at 7, 63 N.Y.S.3d at 318, *citing People v. Canales*, 174 Misc. 2d 387, 664 N.Y.S.2d 228 (Sup. Ct., Bronx Co. 1997), and *People v. Diaz*, 15 Misc. 3d 410, 833 N.Y.S.2d 372 (Sup. Ct., N.Y. Co. 2007).

32. *Canales*, 174 Misc. 2d at 391-92, 664 N.Y.S.2d at 231.

33. *People v. F.B.*, 30 N.Y.3d 911, 71 N.Y.S.3d 5 (Table) (2018).

34. As the First Department noted in *D'Alessandro v. Carro*, 123 A.D.3d 1, 6, 992 N.Y.S.2d 520, 523 (1st Dep't 2014), *citing Mountain View Coach Lines v. Storms*, 102 A.D.2d 663, 664-65, 476 N.Y.S.2d 918, 919-20 (2d Dep't 1984) and *People v. Turner*, 5 N.Y.3d 476, 481-82, 806 N.Y.S.2d 154, 157-58 (2005):

> It is axiomatic that Supreme Court is bound to apply the law as promulgated by the Appellate Division within its particular Judicial Department… and where the issue has not been addressed within the Department, Supreme Court is bound by the doctrine of stare decisis to apply precedent established in another Department, either until a contrary rule is established by the Appellate Division in its own Department or by the Court of Appeals.

35. One community group in Buffalo once remarked that it was "looking to have this law occupy a crucial niche in a range of choices a neighborhood can bring to bear on problem houses," as "[i]t's a way a neighborhood can get quick relief from a problem." Gene Warner, *Block Clubs See State 'Bawdy House Law' as Lethal Legal Weapon Against Drug Houses*, The Buffalo News (June 18, 1995), https://buffalonews.com/1995/06/18/block-clubs-see-state-bawdy-house-law-as-lethal-legal-weapon-against-drug-houses/. A Buffalo judge overseeing housing matters was quoted saying that "[e]victions are one of the best community police tools available for quality-of-life issues," adding that "[y]ou want to wear criminals down. You want to make it as difficult as possible for drug dealers to conduct their business. You make them move enough times, maybe they will stop." Kwiatkowski, *supra* note 6. Or, as a reporter noted, "maybe they will flee the city." *Id.*

36. *Compare* Rachel Bardin and Michael Dardia, *City Budget Blog: The Cost of More Cops: A Full Accounting*, Citizens Budget Commission (Aug. 3, 2015), https://cbcny.org/research/cost-more-cops-full-accounting (analyzing cost of hiring additional police officers in New York City and noting that "police officers have a greater budget impact than most other City employees"), *with* Kwiatkowski, *supra* note 7 (quoting Buffalo police chief discussing Bawdy House Law referrals to landlords, who said that "[n]inety-nine percent of the time it works. We tell them to evict the problem tenant or face a $5,000 fine in Housing Court.").

37. City of Buffalo Division of Citizens Services, *Operation SOS*, https://www.buffalony.gov/272/Operation-SOS (last visited Jan. 9, 2020) (stating that vigorous use of the Bawdy House Law and others will allow for reallocation of police resources, that "other public agencies will see cost savings," and that by restoring just "10 modest properties per year back on the tax rolls, the City of Buffalo could easily realize $30,000 per year").

38. 2019 N.Y. Laws Ch. 59 and 359.

39. As an example, New York City has locally enacted "one of the nation's most comprehensive 'ban-the-box' laws restricting employers' use of criminal history in the hiring process," creating a broad ban and elaborate process before criminal histories can be considered in many employment decisions. *New York City 'Ban the Box' Law Among the Nation's Strongest*, OPENonline (Dec. 11, 2017), https://www.openonline.com/Resources/News/News-Article-View/new-york-city-ban-the-box-law-among-the-nations-strongest. *See* 2015 N.Y.C. Local Law No. 63, N.Y.C. Admin. Code § 8-102.5 [the Fair Chance Act]. *But see* Tammy La Gorce, *As 'Ban the Box' Spreads, Private Employers Still Have Questions*, New York Times (Nov. 22, 2017), https://www.nytimes.com/2017/11/22/business/small-business-criminal-record.html.

40. Nick Reisman, *Cuomo Calls Bail Law Changes 'A Work in Progress,'* State of Politics (Jan. 6, 2020), https://www.nystateofpolitics.com/2020/01/cuomo-opens-door-to-bail-law-changes/ (Governor of New York publicly remarked, in discussing 2019 bail reforms, that "changing the system is complicated," and even though "the bail reform laws just went into effect a couple days ago," that "we're going to work on it, because there are consequences that we have to adjust for").

    As was said about another broad and controversial reform a decade ago, sometimes "we have to pass the bill so you can find out what's in it." Jonathan Capehart, *Pelosi Defends Her Infamous Healthcare Remark*, Washington Post (Jun. 20, 2012), https://www.washingtonpost.com/blogs/post-partisan/post/pelosi-defends-her-infamous-health-care-remark/2012/06/20/gJQAqch6qV_blog.html.

41. *See, e.g.*, N.Y.C. Admin. Code §§ 15-216 and 15-223.1 (punishing simple violations of fire regulations as violations while punishing knowing violations as misdemeanors).

42. New York City Mayor's Office of Criminal Justice, *Strategic Plan: Fiscal Years 2019-2021*, *supra* note 15.

43. Warner, *supra* note 35. (noting that "[i]nstead of just arresting people and having them go back out on the streets," the Bawdy House Law "has the effect of driving [offenders] out of the neighborhood").

44. *People v. Nicholas*, 19 Misc. 3d 322, 332, 854 N.Y.S.2d 877, 884-85 (Watertown City Ct.) (finding that prosecution motion to oppose sealing must ordinarily be made five days prior to entrance of plea but accepting late filing due to unique circumstances), *records subsequently denied sealing*, 19 Misc. 3d 1144(A), 867 N.Y.S.2d 19 (Table), *5 (N.Y. Watertown City Ct. 2008) (denying seal warranted to promote society's interest in "just enforcement of its laws").

45. As one commentator has astutely noted, "a party should critically evaluate whether to move to reargue and assess the chances that the same judge that just denied the party's motion is going to have an epiphany and find in the movant's favor," and notice appeal as a hedge against the likelihood that reargument will not be successful. David Ferstendig, Commentary, *CPLR 2221: Practice Insights, Moving for Leave to Renew or Reargue*, Lexis, available at https://advance.lexis.com/search/?pdmfid=1000516&crid=2669759d-a8ab-4441-aa52-b731722e464d&pdsearchterms=ny+cplr+2221&pdstartin=hlct%3A1%3A1&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdqttype=or&pdquerytemplateid=&ecomp=1gr9k&prid=1e9cc8ff-7d1d-411a-9d5d-ea9520bbf5ca (last visited Jan. 4, 2019). As much as the First Department criticized BXDA for inaction, F.B. arguably sat on his rights as well, allowing ostensibly sealed records to sit in the open in a public court file without any apparent effort to seal until the moment of trial. That inaction should not be encouraged by the courts either, as a prompt motion to strike in light of the sealing would have been to the benefit of all concerned. *Compare, e.g., New York Times Newspaper Div. v. Lehrer McGovern Bovis, Inc.*, 300 A.D.2d 169, 172, 752 N.Y.S.2d 642, 645-46 (1st Dep't 2002) (requiring, *inter alia*, prompt action to seek clawback of inadvertently produced documents in order to preserve privilege).

46. *People ex rel. Phoenix v. District Attorney of Onondaga County*, 95 Misc. 2d 573, 576, 407 N.Y.S.2d 790, 792 (Onondaga County Ct. 1978) ("each court must proceed on a case-by-case basis and consider all factors presented before granting or denying" motion concerning access to records sealed by C.P.L. §160.50); and *People v. White*, 169 Misc. 2d 89, 94 and 97, 642 N.Y.S.2d 492, 496 and 497 (Sup. Ct., Bronx Co. 1996) (citing *Phoenix* and declining to seal investigative records as the court "must consider fairness to the community in protecting itself against a possible future predator as well as fairness to the defendant in determining whether to seal the record in the instant case," and that the court was "of the opinion that the community at large will be well served if police and prosecutors are not delayed in obtaining the information contained in this record").

47. 119 N.J. 416, 422, 575 A.2d 423, 426 (1990) ("Expunging the indictment of a corporation, therefore, would not preclude the Attorney General from using it in an appropriate case.").

48. Though of a vastly different nature, the recent special counsel investigation by Robert Mueller is an example, in which defendants were charged in waves, and investigation continued throughout.

49. *City of New York v. Airbnb, Inc.*, 2019 NY Slip Op 31377(U), *18 (Sup. Ct., N.Y. Co. May 16, 2019), *citing Hearn v. N.Y.C. Dept. of Investigation*, 2007 N.Y. Misc. LEXIS 9428 (Sup. Ct., N.Y. Co. May 7, 2007) and *Hearn v. N.Y.C. Dept. of Investigation*, 2007 N.Y. Misc. LEXIS 9429 (Sup. Ct., N.Y. Co. May 7, 2007) (directing City agency to submit *ex parte* filing detailing scope of investigation in considering petitions to quash and compel administrative subpoenas *duces tecum*).

50. *855-79 LLC v. Salas*, 40 A.D.3d 553, 555-56, 837 N.Y.S.2d 631, 633-34 (1st Dep't 2007) (proceeding under Bawdy House Law must be predicated upon "customary or habitual" rather than isolated illegal activity); and *498 W. End Ave. LLC v. Reynolds*, 2018 NY Slip Op 31708(U) (Civ. Ct., N.Y. Co. July 23, 2018) (finding that scale of illegal Airbnb activity by tenant relevant to whether tenant had a right to cure lease violation).

51. *See, e.g., City of New York v. NYC Midtown LLC*, 2017 N.Y. Misc. LEXIS 2729, *1 (Sup. Ct., N.Y. Co. July 19, 2017) (finding that City investigation of alleged injunction violation in nuisance abatement proceeding was a criminal investigation in ordering booking platform to produce records to City).

52. *See, e.g., Rodriguez v. Ford Motor Co.*, 301 A.D.2d 372, 753 N.Y.S.2d 63 (1st Dep't 2003); and *Taylor v. New York City Transit Auth.*, 131 A.D.2d 460, 516 N.Y.S.2d 237 (2d Dep't 1987) (discussing waiver by putting sealed arrests and prosecutions at issue).

53. *People v. Eason (In re New York City Mayor's Office of Special Enforcement)*, 2018 N.Y. Misc. LEXIS 1603, *4 (Sup. Ct., N.Y. Co. May 4, 2018), *citing In re New York City Civilian Complaint Rev. Bd.*, 2015 N.Y. Misc. LEXIS 5214 (Sup. Ct., N.Y. Co. Sep. 23, 2015) and *Burns v. State & Local Police & Fire Retirement Sys.*, 258 A.D.2d 692, 685 N.Y.S.2d 322 (3d Dep't 1999) (finding that defendants' "affirmative choice to place the facts and circumstances of their conduct and the prosecution thereof directly at issue" in their defense to nuisance abatement action justified unsealing).

54. Courts have rejected seeking already-sealed records for impeachment purposes in related administrative proceedings. *New York State Police v. Charles Q.*, 192 A.D.2d 142, 600 N.Y.S.2d 513 (3d Dep't 1993). *See also In re Police Commr. of the City of New York*, 44 Misc. 3d 1205(A), 997 N.Y.S.2d 100 (Table) (Sup. Ct., Bronx Co. June 26, 2014) (denying unsealing application for use in police officer's disciplinary trial regarding same underlying incident).

55. Warner, *supra* note 35. (quoting treasurer of local community group that remarked that the Bawdy House Law was "faster than any law-enforcement tool").