

MEMORANDUM

TO: Interested Parties

FROM: Andrey Burin, Zoe Bush and Michelle Gomez-Reichman
Community Advocacy Lab

DATE: April 30, 2020

RE: Achieving Equality in Housing Repairs for NYCHA Residents

I. Introduction

The squalid conditions in buildings owned by the New York City Housing Authority (“NYCHA”) are well documented.¹ The disproportionate impact of COVID-19 on NYCHA tenants highlights the urgency of this problem. NYCHA buildings quickly became virus hotspots due to housing density and the vulnerability of residents, who are more likely to be frontline workers, to not be able to afford healthcare, and are subject to housing conditions that create and exacerbate health conditions that are comorbidities for COVID-19.²

This memo uses new data, compiled by the Housing Resource Center at Red Hook Community Justice Center, to explore the divergence in housing conditions and repairs for tenants in buildings owned by NYCHA compared to those owned privately. It also provides an analysis of the unequal treatment of NYCHA tenants as a matter of law and institutional practice,

¹ BART M. SCHWARTZ, NYCHA MONITOR, MONITOR’S FIRST QUARTERLY REPORT FOR THE NEW YORK CITY HOUSING AUTHORITY (July 2019), <https://nychamonitor.com/wp-content/uploads/2019/07/NYCHA-First-Report-7.22.19.pdf>; Luis Ferre-Sadurni, *New York City’s Public Housing Is In Crisis. Will Washington Take Control?*, N. Y. TIMES (Dec. 25, 2018), <https://www.nytimes.com/2018/12/25/nyregion/nycha-hud-deblasio-carson.html>; SCOTT M. STRINGER, OFFICE OF THE NEW YORK CITY COMPTROLLER, BUREAU OF FISCAL AND BUDGET STUDIES, HOW NEW YORK LIVES: AN ANALYSIS OF THE CITY’S HOUSING MAINTENANCE CONDITIONS (September 2014), https://comptroller.nyc.gov/wp-content/uploads/documents/How_New_York_Lives.pdf.

² Simon van Zuylen-Wood, *We Have No Idea How Many Public Housing Tenants - or Workers - Have Coronavirus*, NEW YORKER MAGAZINE (Apr. 15, 2020), <https://nymag.com/intelligencer/2020/04/nycha-buildings-are-likely-coronavirus-hot-spots.html>; Joe Anuta, *Coronavirus Wreaks Havoc on New York City’s Public Housing*, POLITICO (Apr. 13, 2020), <https://www.politico.com/states/new-york/albany/story/2020/04/10/coronavirus-wreaks-havoc-on-new-york-citys-public-housing-1274821>; Lili Pike, *In Public Housing, a Battle Against Mold and Rising Seas*, UNDARK (March 25, 2020), <https://undark.org/2020/03/25/public-housing-mold-climate-change/>.

and how this exacerbates the disparity between private and public housing conditions. In particular, we explore the unequal treatment of NYCHA tenants by the New York City Department of Housing Preservation and Development (“HPD”), the government agency entrusted with enforcing the Housing Maintenance Code (“Code”), and how this can be rectified. The reasons for the disparity between NYCHA and private housing conditions and repairs are complex and multi-faceted, and exist against a backdrop of systemic underfunding.³ Nonetheless, we suggest there are achievable changes to the law and institutional practice that can be implemented to ensure NYCHA tenants can obtain timely and adequate repairs like their private counterparts.

We recommend HPD hold NYCHA accountable in the same way it does other landlords. As a matter of law, HPD’s powers and duties under the Code apply to NYCHA. HPD should exercise these powers – such as inspections, fines, repairs, and reinspections – to protect NYCHA residents. HPD’s continued failure to do so may violate its duty under the New York City Charter (“Charter”), the Fair Housing Act, and the Equal Protection Clause of the New York Constitution.

We also recommend HPD make complaints and violations in NYCHA housing publicly available online, and allow NYCHA tenants to access the ‘311’ complaint system. We recommend courts hold NYCHA accountable in the same way they do private landlords by issuing fines for Code violations and contempt of court. Finally, we recommend legislators ensure NYCHA tenants are just as protected as their private counterparts by not exempting NYCHA from requirements in the Code that apply to private landlords.

A. Red Hook Community Justice Center

The findings of this report are informed by our work with the Housing Resource Center at Red Hook Community Justice Center. The Red Hook Community Justice Center is an innovative community court that integrates a multi-jurisdictional court within a community as an agent of problem-solving for positive community transformation.⁴ This includes a Housing Court, which deals with non-payment and housing part (“HP”) actions. The Red Hook Community Justice Center works closely with an in-house Housing Resource Center, which assists Red Hook residents with repair issues, rental arrears, or support navigating their housing court cases.⁵

³ Sally Goldenberg, *At \$31.8B, NYCHA’s Unmet Capital Needs Dwarf Government Allocations*, POLITICO (July 2, 2018), <https://www.politico.com/states/new-york/city-hall/story/2018/07/01/at-318b-nychas-unmet-capital-needs-dwarf-government-allocations-495925>; *New York City Preliminary Capital Budget for Fiscal Year 2021-2024: Hearing before the NYC Council Comm. on Public Housing*, March 13, 2020 (Statement of Vanessa Gibson, Council member); Samar Khurshid, *As NYCHA Teeters, Calls for More Funding in City and State Budgets*, GOTHAM GAZETTE (Mar. 17, 2020), <https://www.gothamgazette.com/state/9216-calls-more-nycha-funding-in-city-state-budgets-new-york-public-housing>.

⁴ Cynthia G. Lee, et al., *A Community Court Grows In Brooklyn: A Comprehensive Evaluation of the Red Hook Community Justice Center 2* (Williamsburg VA: National Center for State Courts, 2013).

⁵ *Housing Resource Centers*, Center for Court Innovation, <https://www.courtinnovation.org/housing-resource-center> (last visited April 18, 2020).

The Housing Resource Center, by working with the Red Hook court, seeks to help residents remain in their homes and preserve the vital public good of government housing.⁶ In practice, this involves supporting tenants, by: (a) assisting with filing court paperwork for repair and non-payment matters in collaboration with the court's Clerk's Office; (b) aiding court attendance by calling tenants prior to their appearance and providing personal organizer folders to store important papers; (c) helping navigate the court process and making it a welcoming environment for families and seniors such as providing breakfast snacks and children's coloring pages; and, (d) curating a 'one-stop-shop' environment for assistance on related financial, career and social services to "address the underlying issues that may contribute to, or arise from, their housing instability." The Housing Resource Center also engages multiple levels of NYCHA employees, including through semi-monthly partnership meetings, as well as the Red Hook community at-large through outreach events, tenant association meetings and regular door knocking.

Red Hook Community Justice Center's collaborative approach facilitates some emergency repairs being addressed much more promptly than the traditional HP court process would otherwise allow. Strong relationships between the court (specifically Judge Calabrese), Housing Resource Center staff and NYCHA employees mean urgent repairs can be brought to NYCHA's attention outside the court process – a process that has proven critical during the physical closure of courts as a result of COVID-19.

These services tangibly improve access to justice for NYCHA residents in Red Hook. In 2019, the Housing Resource Center served 43% of all NYCHA residents in the area. Tenants initiated 34% of Housing Court filings during 2019 in Red Hook, compared to only 7% in the rest of Brooklyn, indicating Red Hook tenants are better able to access court resources. The Housing Resource Center's court attendance initiatives and local outreach are also helping reduce the number of default judgments by minimizing the number of tenants who fail to appear for their court date. While 14% of cases resulted in default judgment during 2019 in the rest of Brooklyn, less than 1% (4 cases) resulted in default judgment in Red Hook.⁷

II. NYCHA in Crisis

A. History and Context

NYCHA, created in 1935, is the largest public housing authority in the country and home to over 400,000 residents.⁸ This makes it New York City's largest landlord, with public housing representing 8% of the city's entire housing stock.⁹ It remains a vital resource to hundreds of

⁶ *Id.*

⁷ RED HOOK COMMUNITY JUSTICE CENTER, HOUSING RESOURCE CENTER, *Info Sheet* (Aug. 2019) (on file with authors).

⁸ NYCHA, *NYCHA 2019 Fact Sheet*, https://www1.nyc.gov/assets/nycha/downloads/pdf/NYCHA-Fact-Sheet_2019_08-01.pdf.

⁹ *Id.*

thousands of families as both a home and a source of employment.¹⁰ However, decades of disinvestment have contributed to dangerous and deteriorating buildings that are a threat to residents' health.¹¹

The experience of Carmen Torres is a stark example of the risk poor conditions pose to residents and the inadequate processes for repair. The primary issues afflicting her Red Hook apartment were chronic leaks and mold in her hallway and bathroom. Because she is a NYCHA tenant, the only way to make her landlord repair her apartment is to go to court. She first filed a HP action in Housing Court to have her apartment fixed in July 2017. As ordered by the court, HPD completed an inspection later that month and recorded the violations that Ms. Torres raised in her complaint. Yet no repairs followed. It was only when she reached out to the media and a story was published in September that progress was made.¹² The leak was abated in October 2017 and painting repairs were completed in November 2017. Less than a year later, the leak reappeared and the apartment suffered floor damage. This time, it took over five months for the repairs to be made. In February 2020, Mrs. Torres filed another complaint because the problems had reoccurred and her home would flood when it rained.¹³ So Ms. Torres went back to court. After Ms. Torres suffered a seizure during her hearing in Red Hook Housing Court in February, Judge Calabrese issued a repair order and sent the Court's attorney to Ms. Torres's home in March 2020 to watch plumbers complete the repairs. Her case is now administratively adjourned due to COVID-19, though all repairs except plastering and painting have been resolved.

Unfortunately, Ms. Torres' story is not a unique one. Former Public Advocate (now New York State Attorney General) Letitia James first named NYCHA the City's worst landlord in 2018.¹⁴ Of the NYCHA buildings that were the basis for this assessment, those in Red Hook were the worst offenders.¹⁵ In June of 2018, NYCHA entered into a consent decree with the federal Department of Housing and Urban Development ("HUD") which acknowledged NYCHA's continued mismanagement and failure to provide "decent, safe, and sanitary housing."¹⁶ The ensuing agreement between NYCHA and HUD installed a federal monitor to oversee and ensure future NYCHA compliance with federal housing standards.¹⁷ In February 2020, law firm Berg & Androphy filed a class action lawsuit against NYCHA for its failure to

¹⁰ *Id.*

¹¹ *Id.*

¹² Lauren Gill, *Living in Jeopardy: Hook Houses Residents Not Paying Rent, Going to Court to Force Fixes*, BROOKLYN PAPER (Sept. 22, 2017), <https://www.brooklynpaper.com/living-in-jeopardy-hook-houses-residents-not-paying-rent-going-to-court-to-force-fixes/>.

¹³ This was confirmed through a home visit made by an HRC staff member.

¹⁴ Noah Manskar, *NYC's 'Worst Landlord' Is The City Itself*, PATCH (Dec. 19, 2018), <https://patch.com/new-york/new-york-city/nycs-worst-landlord-city-itself>.

¹⁵ Anna Quinn, *Red Hook NYCHA Buildings Are The Worst Of The Worst: Report*, PATCH (Dec. 20, 2018), <https://patch.com/new-york/gowanus/red-hook-nycha-buildings-are-worst-worst-report>.

¹⁶ U.S. DEPARTMENT OF HOUSING & URBAN DEVELOPMENT, *HUD-NYCHA Agreement*, 2 (Jan. 31, 2019), <https://www.hud.gov/sites/dfiles/PA/documents/HUD-NYCHA-Agreement013119.pdf>.

¹⁷ *Id.* at 5-7.

comply with its legal duty “to alleviate widespread substandard living conditions across [NYCHA’s] properties.”¹⁸

B. Absence of Violations and Repairs Data

New York City maintains a public and free online database of Code violations in private rentals.¹⁹ Thus, private landlords in NYC are incentivized to respond to resident complaints and ensure their properties are in compliance with local laws. The same does not exist for NYCHA. While NYCHA publishes online data about the number of open work orders and repair delays in each NYCHA development, it does not publish information about each complaint and violation. Furthermore, HPD does not publish data on their court-ordered inspections of NYCHA housing. This lack of data makes it difficult to ascertain the nature and extent of the problem, let alone address it.

1. Number of Violations in Red Hook

Nonetheless, recent data collected by the Red Hook Community Justice Center’s Housing Resource Center in one set of NYCHA properties helps reveal the enormity of the issue. This data concerns HPD violations: housing conditions where a tenant has gone to housing court to request a repair. Thus this data understates housing conditions problems in that it does not capture repair requests that have not gone to court.²⁰

In December 2019, NYCHA claimed to have two violations at Red Hook since 2016. The Housing Resource Center data tells a different story, capturing almost three thousand violations found by the Red Hook Housing Court in the same time period:

¹⁸ Press Release, Berg & Androphy, Berg & Androphy Files Class Action Lawsuit Against New York City Housing Authority Over Rampant Neglect and Deplorable Conditions of City-Owned Housing (Feb. 26, 2020).

¹⁹ <https://data.cityofnewyork.us/Housing-Development/Housing-Maintenance-Code-Violations/wvxf-dwi5>

²⁰ Abigail Savitch-Lew, *Should NYCHA Be Treated Like a Private Landlord?*, CITY LIMITS (Jan. 12, 2018), <https://citylimits.org/2018/01/12/should-nycha-be-treated-like-a-private-landlord/>.

| Red Hook Housing Code Violations | | | | | | |
|---|-------------|-------------|-------------|-------------|--------------------------|--------------|
| Year | 2016 | 2017 | 2018 | 2019 | 2020²¹ | Total |
| Total Violations | 482 | 490 | 838 | 1083 | 50 | 2943 |
| Class A²² | 78 | 75 | 188 | 334 | 4 | 679 |
| Class B | 325 | 383 | 513 | 551 | 26 | 1798 |
| Class C²³ | 37 | 15 | 32 | 131 | 11 | 226 |

While this data is in stark contrast to NYCHA’s public data about housing conditions violations, other data from NYCHA suggests that the Red Hook data is consistent with reality. NYCHA’s records of open work orders (in theory reflecting repair requests in and out of the court system) shows 8,460 open work orders in Red Hook in April 2020.²⁴

For perspective, the difference between NYCHA housing and private housing is drastic. The below graphic illustrates the alarming disparity between the number of Code violations recorded in NYCHA’s Red Hook East building and in a private building of comparable size over the same time frame.

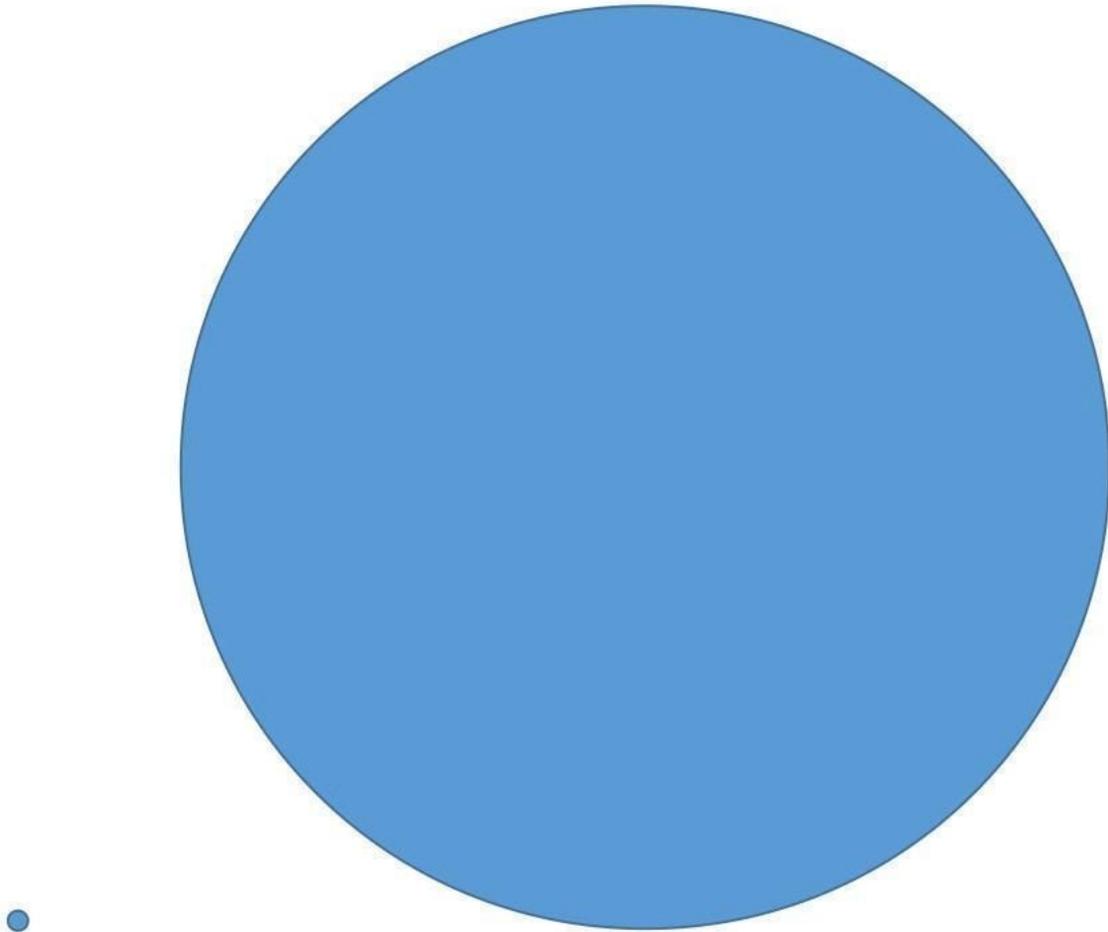
²¹ Through January 19, 2020.

²² Housing conditions violations are classified according to severity. Class A is “non-hazardous,” Class B is “hazardous,” and Class C is “immediately hazardous.” Class C includes conditions such as lead exposure or the absence of heat or hot water. NYC ADMIN. CODE §§ 27-2001–27-2152 (2020).

²³ Although the NYC Administrative Code excludes NYCHA from recent amendments to mold and pest regulations the violation data compiled by the Red Hook HRC indicates a dramatic increase of Class C pest violations since enactment of the amendments. *See* 2018 N.Y.C. Local Law No. 55. N.Y.C. ADMIN. CODE §§ 27-2017 et seq. Full history available at <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1812831&GUID=4D6B3532-B1A2-4A7E-8134-549BFD1ED2A2&Options=ID|Text|Search=55>; *see also* N.Y.C. ADMIN. CODE §27–2017.12(d) (explicit exclusion of NYCHA from the new regulations)

²⁴ NYCHA, *Public Housing Charts*, NYCHA METRICS https://eapps.nycha.info/NychaMetrics/Charts/PublicHousingChartsTabs/?section=public_housing&tab=tab_repairs (last visited April 11, 2020) (showing 3,690 and 4,770 in Red Hook East and Red Hook West, respectively).

Code Violations between 10/11/2016 - 03/03/2019



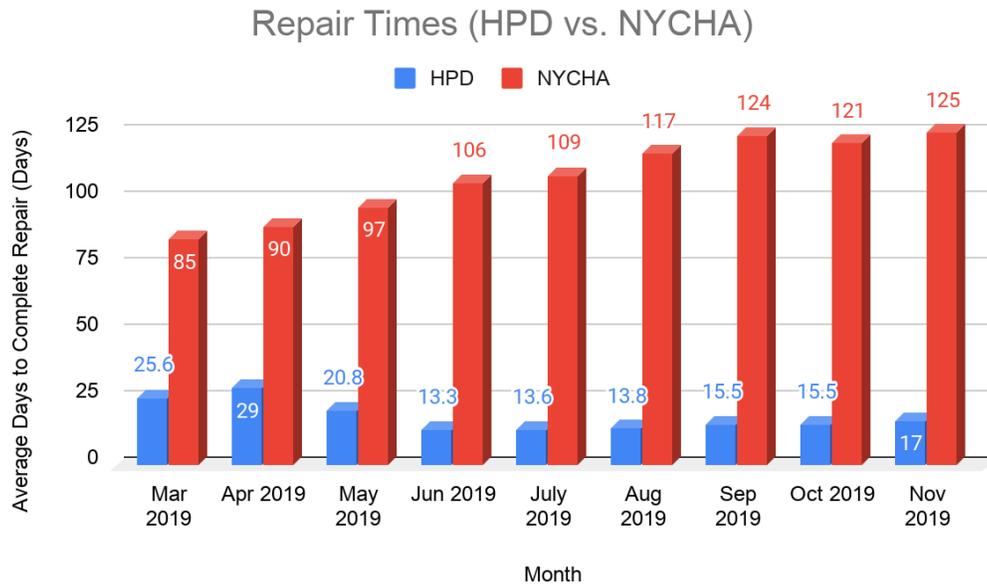
Private housing
16 violations
605 W. 42nd Street, Manhattan
Total units: 1175
Source: OpenData

Public housing
746 violations
Red Hook East, Brooklyn
Total units: 1411
Source: Data compiled by HRC

2. Repair Times

As Ms. Torres’s experience demonstrates, the repairs process is plagued by delays. Across the city, the average length of time it took NYCHA to complete repairs in March 2020

was 153 days.²⁵ As illustrated by the chart below, the difference between the repair times for NYCHA and private housing is jarring.²⁶ Clearly, the current repairs process for NYCHA residents is unlikely to provide timely relief to tenants such as Ms. Torres living in barely-habitable conditions.



III. How Did We End Up Here? A Legal Analysis

The reasons for the disparity in housing conditions and repair times in NYCHA rentals compared to private rentals are complex and multi-faceted. A key reason is the unequal treatment of NYCHA tenants under both law and institutional practices and policies.

A. Unequal Laws

Some new laws designed to protect tenants' health and safety have explicitly excluded NYCHA housing. For example, a 2018 law strengthening mold assessments and remediation explicitly excluded NYCHA.²⁷ This loophole means NYCHA properties have hundreds of documented cases of mold while simultaneously allowing remediation to be performed by untrained and unlicensed workers, putting residents at risk for serious health issues.²⁸

²⁵ *Id.*

²⁶ Chart Excerpted from NYC, *Citywide Performance Reports*, AGENCY PERFORMANCE REPORTS, <https://www1.nyc.gov/site/cpr/agency-performance/agency-performance-reports.page> (last visited Apr. 11, 2020); NYCHA, *Public Housing Charts*, NYCHA METRICS https://eapps.nycha.info/NychaMetrics/Charts/PublicHousingChartsTabs/?section=public_housing&tab=tab_repairs (last visited Apr. 11, 2020).

²⁷ N.Y.C. ADMIN. CODE § 27-2017.12(d) (2020).

²⁸ Abigail Savitch-Lew, *Should NYCHA Be Treated Like a Private Landlord?*, CITY LIMITS (Jan. 12, 2018), <https://citylimits.org/2018/01/12/should-nycha-be-treated-like-a-private-landlord/>.

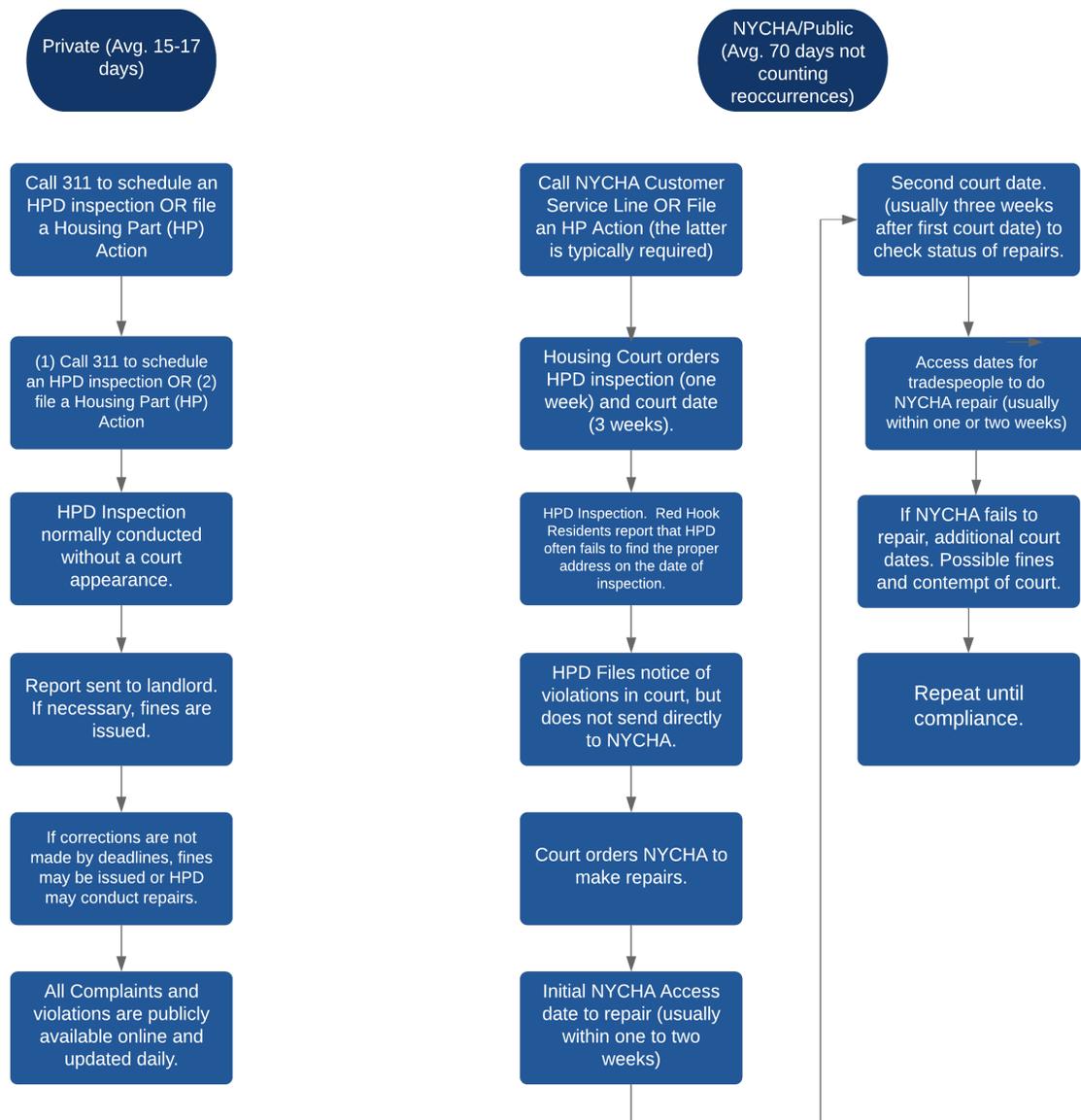
Fortunately, NYCHA is not exempt from new requirements regarding lead poisoning.²⁹ The legislative history makes clear that this inclusion is intentional.³⁰

B. Unequal Policies and Practices

The unequal treatment of NYCHA and private tenants with regard to housing conditions and repairs is not confined to statute. Existing statutory discrepancies are exacerbated by institutional policies and practices that serve to discriminate against NYCHA residents in Code enforcement.

²⁹ 2020 N.Y.C. Local Law No. 28. N.Y.C. ADMIN. CODE §§ 17-1920 et seq. Full history available at <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3498486&GUID=C44E1098-18F0-4821-A9EE-8FC5355230F0&Options=&Search=>.

³⁰ See *New York City Council Stated Meeting*, January 23, 2020 (Statement of Council Member Mark Gjonaj: “I am pleased to see that we have not excluded NYCHA from this requirement. NYCHA is the single-largest landlord and we have more children that are being poisoned by lead paint in NYCHA facilities than any other properties out there. So I am not only pleased to see that they're included and going to be held to the same standard and accountability as we protect all of our children, but most importantly the most vulnerable and those are the residents of NYCHA facilities.”).



1. Requesting a Repair

As demonstrated by the above infographic, separate and unequal institutional practices begin at the point of complaint.³¹ Private tenants can call the 311 system for a City inspection to register Housing Code violations and repairs needed, while NYCHA tenants cannot. For NYCHA tenants, making a complaint to NYCHA’s Customer Contact Center does not result in HPD being notified of the complaint, nor are complaints or violations made publicly available

³¹ Victor Bach and Tom Waters, Strengthening New York City’s Public Housing: Directions for Change 24 (Community Services Society, 2014), https://smhttp-ssl-58547.nexcesscdn.net/page/-/images/uploads/pubs/CSS_NYCHA_FinalWeb.pdf.

online.³² In essence, this system amounts to NYCHA tenants reporting housing maintenance issues and hoping their own landlord makes the necessary repairs without any external accountability. This inequality continues throughout the process.

2. Code Enforcement

The unequal treatment of NYCHA tenants extends beyond the repair process to enforcement. A key discrepancy is that although HPD has a duty to enforce the Code, it does not do so for NYCHA residents.³³

a) HPD's Powers and Duties under the Code

HPD is established in the Charter with the power and duty to enforce any law, rule or regulation relating to the maintenance, use, occupancy, safety or sanitary condition of *any building or portion thereof* which is occupied or intended to be occupied as a home, residence or dwelling place.³⁴ The Code names HPD as the department charged with its enforcement, and enumerates HPD's powers and duties, including entering dwellings to conduct inspections and issuing notices and orders to enforce compliance with the Code.³⁵ NYCHA housing falls within the definition of 'multiple dwellings' in the Code.³⁶ Many of HPD's powers and duties under the Code pertain to 'owners', which includes NYCHA, as the owner of the freehold of public housing such as Red Hook East and West.³⁷ Courts have confirmed HPD's power to impose or seek sanctions and remedies against NYCHA for violations of the Code.³⁸ This means that, on its face, HPD's powers and duties under the Code that concern the owners of multiple dwellings apply to NYCHA housing, including in Red Hook.

In practice, HPD does not exercise its powers or fulfill its duties under the Code with regard to NYCHA. HPD will only inspect a NYCHA dwelling unit if ordered to so by a court. This inaction by HPD is not consistent with the Code and seems to be a historical, institutional arrangement. In the course of preparing this memorandum, a HPD attorney confirmed HPD's position that it does not have "jurisdiction" to issue violations against NYCHA, but does inspect

³² Justin R. La Mort, *Public Housing and Public Health: The Separate and Unequal Protection of Private and Public Housing Tenants' Health in New York City*, 27 J. Affordable Housing & Community Dev. L. 385, 389 (2018); Abigail Savitch-Lew, *Should NYCHA Be Treated Like a Private Landlord?*, CITY LIMITS (Jan. 12, 2018), <http://citylimits.org/2018/01/12/should-nycha-be-treated-like-a-private-landlord/>. While NYCHA publishes online data about the number of open work orders and repair delays in each NYCHA development, it does not publish information about each complaint and violation: https://eapps.nycha.info/NychaMetrics/Charts/PublicHousingChartsTabs#tab_repairs.

³³ *N.Y.C. Coalition to End Lead Poisoning v. Kosh*, 524 N.Y.S.2d 314, 316 (Sup. Ct. N.Y. 1987), *aff'd* 526 N.Y.S.2d 918, 918 (App. Div. 1st Dept. 1988).

³⁴ NYC CHARTER §§ 1800–1802.

³⁵ NYC ADMIN. CODE § 27-2004(1) (2020).

³⁶ NYC ADMIN. CODE § 27-2004(a)(7) (2020). NYCHA properties, including those in Red Hook, are rented to be occupied, or are occupied, as the residence or home of three or more families living independent of each other, and none of the listed exemptions apply.

³⁷ See the definition of "owner" in NYC ADMIN. CODE § 27-2004(a)(45) (2020).

³⁸ *Delgado v. New York City Hous. Auth.*, 888 N.Y.S.2d 19, 21 (App. Div. 1st Dept. 2009).

NYCHA buildings if ordered to do so as part of a HP action in court. The attorney was not sure how this came to be the case, “but it’s always been this way”. This sentiment was echoed by numerous stakeholders we interviewed.

b) Registration Exemption

One theory for why HPD and NYCHA operate in this way is that NYCHA is exempt from registering with HPD. However, our legal analysis refutes that theory.

Subchapter 4, Article 2 of the Code requires that an owner of a dwelling register with HPD.³⁹ And Section 27-2108 explicitly exempts ‘the City of New York, its agencies and [NYCHA]’ from the application of Article 2. However, for the following reasons, HPD’s powers and duties under the Code are not confined to owners who are registered under Article 2.

First, there is nothing in the statutory text that explicitly exempts NYCHA from HPD’s powers and duties under the Code.

Second, the sole way in which the Code utilizes registration under Article 2 is to facilitate service on owners.⁴⁰ This suggests the primary purpose of registration under Article 2 is to provide HPD with an up-to-date record of the owner for each premise and their contact details, for the purposes of enforcement and service. NYCHA’s exemption from registration is consistent with this purpose. As a public authority, the premises owned by NYCHA and its contact details are a matter of public record, rendering registration moot.

Accordingly, the purpose of exempting NYCHA from the requirements of Article 2 (avoiding the redundancy of registration given NYCHA’s status as a public authority) is fulfilled by a narrow interpretation of the implications of registration. That is, fulfilling the primary purpose of registration, and NYCHA’s exemption from it, does not depend on NYCHA also being exempt from HPD’s powers and duties under the Code. Therefore, the purpose of registration and the NYCHA exemption does not justify an implication that the exemption in fact applies more broadly to exempt NYCHA from HPD’s powers and duties under the Code.

Third, the Code explicitly exempts NYCHA from a number of provisions that apply to ‘owners’.⁴¹ The explicit exemptions evince a legislative intention that, unless explicitly exempted from the Code, provisions that apply to ‘owners’ will apply to NYCHA. None of these explicit exemptions concern HPD’s powers or duties regarding owners. If the legislature had intended for NYCHA to be exempted from these powers and duties, it would have explicitly done so.

³⁹ NYC ADMIN. CODE § 27-2097(a) (2020).

⁴⁰ For example, § 27-2095(a)(3) requires service of any notice or order on an owner through the address provided in the owner’s registration statement. NYC ADMIN. CODE § 27-2095(a)(3) (2020).

⁴¹ NYC ADMIN. CODE §§ 27-2009.1 (rights and responsibilities of owners in relation to pets), 27-2017.12 (prohibiting owners from seeking tenants waive the benefit of protections regarding extermination and rodent eradication), 27-2108 (registering with HPD), 27-2033 (access to boiler room), 27-2056 (janitorial services) (2020).

c) Charter Exemption

Another possible explanation is that §1802(3) of the Charter, the same section mentioned above, which details HPD’s broad functions, powers and duties, provides an exemption. It provides as follows:

Except as otherwise specifically provided by law the commissioner may exercise or delegate any of the following functions, powers and duties which are vested in the department:

...

(3) All functions of the city, and all powers, rights and duties as provided by any federal, state or local law or resolution, relating to ... prevention and rehabilitation of blighted, substandard, deteriorated or insanitary areas, and publicly-aided and public housing, including the regulation of rents in housing built with state or local financing, *except housing under the jurisdiction of the New York city housing authority...* [emphasis added]

However, § 1802(3) does not exempt NYCHA housing from HPD’s broader responsibility for enforcing housing conditions laws for two reasons. First, as a matter of grammar, the exemption “except housing under the jurisdiction of [NYCHA]” appears to modify “regulation of rents in housing built with state or local financing,” rather than modifying the broader “publicly-aided and public housing.” This is because the provision’s modifiers operate to clarify that “prevention and rehabilitation” includes “the regulation of rents in housing built with state or local financing.” The NYCHA housing exception then qualifies this inclusion, with the result that “prevention and rehabilitation” includes “the regulation of rents in housing built with state or local financing”, except with regard to NYCHA housing. Second, for the reasons stated above, HPD’s powers and duties under the Code apply to NYCHA. That is inconsistent with an interpretation of § 1802(3) that exempts NYCHA housing from any of HPD’s functions, powers and duties regarding public housing.

Our statutory review and discussions with stakeholders, including HPD, did not identify any other possible sources of an exemption. Therefore, it would appear HPD’s powers and duties under the Code pertaining to ‘owners’ and ‘multiple dwellings’ apply to NYCHA housing. This conclusion is consistent with the Appellate Division of the Supreme Court of New York’s decision in *Delgado v. New York City Hous. Auth.*⁴², where the Court confirmed that HPD is authorized to seek sanctions and remedies against NYCHA for violations of the Code.

d) Unlawfulness of HPD’s Practice or Policy

This means HPD only enforcing the Code with regard to non-NYCHA housing is a matter of practice or policy, not law. Such a practice or policy likely violates a number of laws.

⁴² 888 N.Y.S.2d at 21 (App. Div. 1st Dept. 2009).

As mentioned above, HPD is responsible under §1802(1) of the Charter for enforcing laws relating to housing maintenance, use, occupancy, safety or sanitary conditions. This responsibility is framed broadly; it concerns *any building or portion thereof* which is occupied or intended to be occupied as a home, residence or dwelling place. This broad framing evidently captures NYCHA housing, particularly given NYCHA housing is explicitly exempt from other HPD functions under § 1802 (see § 1802(3) above). This indicates that, if the legislature had intended for NYCHA to be exempted from §1802(1) of the Code, it would have similarly explicitly done so. Given courts have construed §1802(1) of the Charter as imposing a mandatory duty on HPD to enforce relevant provisions of the Code,⁴³ HPD’s practice or policy of not using its enforcement mechanisms against NYCHA is likely in violation of § 1802(1) of the Charter.

In 2016, over 90% of all NYCHA residents were people of color.⁴⁴ Consequently, as explored further below, HPD’s failure to enforce the Code against NYCHA has a disparate impact on Black and Latinx persons. This means HPD’s practice or policy may violate the Fair Housing Act’s prohibition on discriminating against anyone in the provision of services or facilities in connection with a rental of a dwelling because of their race.⁴⁵ It may also violate the Equal Protection Clause in the New York Constitution for similar reasons.⁴⁶

3. Unequal Code Enforcement in Practice

HPD’s failure to perform Code enforcement in NYCHA properties has practical implications throughout the repair process for NYCHA residents.

For example, if a court orders HPD to inspect a NYCHA dwelling, HPD will often go to the incorrect address. When HPD cannot inspect, they then leave and the tenant must go back to housing court to schedule another inspection. This means residents can wait an entire day for a HPD inspector, often missing work to do so, to no avail, causing unnecessary delays in the repair process.

Once HPD does inspect a NYCHA dwelling, HPD will send a “notice of violation” directly to the court and not NYCHA. This means NYCHA is not “served” with the notice until the next court date, delaying the time within which it must remedy the violation(s).⁴⁷ HPD may also send the tenant a letter saying their complaints have been “cancelled”. A HPD staff member stated that these notices were sent because “HPD does not have jurisdiction over NYCHA and thus does not issue violations.” These letters cause tenants confusion as they are simultaneously being told by the court that a violation was found and by HPD that their complaint is cancelled.

In addition, even after a court orders a repair for a NYCHA resident, NYCHA’s repairs are frequently inadequate and result in the same issues reoccurring. Whereas HPD has the power

⁴³ 524 N.Y.S.2d at 316 (Sup. Ct. N.Y. Cty 1987).

⁴⁴ NYCHA, *Special Tabulation of Resident Characteristics* (Jan. 1, 2016).

⁴⁵ 42 U.S.C. § 3604(b) (2012).

⁴⁶ N.Y. CONST. art. I, § 11.

⁴⁷ NYC ADMIN. CODE §§ 27-2115(b)–(c) (2020).

and, in some cases, the duty to conduct follow-up inspections for private tenants, NYCHA is not held accountable in the same way as private landlords.

This disparity in accountability also extends to courts. While some courts will fine NYCHA for Code violations or failing to make court-ordered inspections,⁴⁸ others are hesitant to do so because NYCHA is a government agency.

The story of Mrs. Bernetta Greene illustrates the unequal repairs process. Mrs. Greene had a chronic leak in her bathroom and kitchen ceilings in her NYCHA apartment in Red Hook. After withholding rent and attending court for a non-payment case in September of 2018, repairs still had not been made as of July 10, 2019. Judge Calabrese then conducted a judicial home visit on July 12 and observed repairs to the leak and damaged areas. Shortly after, the leak reoccurred and Mrs. Greene filed another HP action on August 28, 2019. On September 5, HPD recorded four class B violations at her apartment. Approximately two weeks later, the source of the leak was discovered (a waste line piper buried into a bathroom floor above the apartment). Follow-up repairs were not completed until December 2019, and the case settled in early January 2020.

In addition to the time and energy that Mrs. Greene spent trying to have her apartment repaired and the extraordinary intervention of a housing court judge going to her home to observe the repairs, she lost all of her vacation days and several days of work because she had to be home to provide access and attend court. Her daughter and newborn grandson were also displaced from the apartment due to the uninhabitable conditions. Even with the community-focused and collaborative approach at Red Hook Community Justice Center, the process of repairs for NYCHA residents is a fundamentally flawed system.

IV. Why It Matters: Exacerbating Inequality and Losing a Vital Public Good

Separate repairs processes for public and private tenants, lack of Code enforcement by HPD, and NYCHA's failure to adequately respond to tenants' repair needs not only violate fundamental notions of fairness and equality in the eyes of the law, but also defeat the goals of HPD and NYCHA themselves.

NYCHA states its goal as being "to increase opportunities for low- and moderate-income New Yorkers by providing safe, affordable housing and facilitating access to social and community services."⁴⁹ HPD, per its website, "promotes the quality and affordability of the city's housing and the strength and diversity of its many neighborhoods," through various channels, including enforcement of the Code.⁵⁰ Both NYCHA and HPD seek to achieve the interlocking goals of improved public health and improved "opportunities" for lower-income NYC residents.

⁴⁸ See, e.g., *Rivera v. N.Y.C. Housing Auth.*, 2017 NYLJ LEXIS 2796 at *7 (Civ. Ct. Bronx Cty. Decided Sept. 22, 2017); *Oteng v. N.Y.C. Housing Auth. St. Mary's Park Houses*, 2017 NYLJ LEXIS 1543 at *7 (Civ. Ct. Bronx Cty. Decided May 23, 2017).

⁴⁹ Justin R. La Mort, *Public Housing and Public Health: The Separate and Unequal Protection of Private and Public Housing Tenants' Health in New York City*, 27 J. Affordable Housing & Community Dev. L. 385, 389 (2018); NYCHA, *NYCHA - About* (Apr. 2020), <https://www1.nyc.gov/site/nycha/about/about-nycha.page>.

⁵⁰ HPD, *About HPD* (April, 2020), <https://www1.nyc.gov/site/hpd/about/about-hpd.page>.

It is evident that neither agencies' goals are being met, at least partially due to the unequal and ineffective repairs process that public tenants must endure and the lack of enforcement towards actual completion of repairs.

Moreover, the differences in laws and processes create an underclass of NYCHA tenants who are primarily low-income people of color, who receive a worse process and living experience than their private tenant peers.⁵¹ In 2016, over 90% of all NYCHA residents were people of color, and 33% of all families had a female head of household, with 11% of families consisting of a single mother and her children.⁵² These staggering statistics, pulled from NYCHA's own data, reflect the legacies of pervasive racial and economic discrimination that have plagued America for centuries. After 30 years of "white flight" in which affluent and working class white families fled cities to the surrounding suburbs, redlining and other racially discriminatory housing practices, and disinvestment in public housing generally, NYCHA and other public housing authorities became home to low income minorities,⁵³ a trend which NYCHA's current data reflects.⁵⁴ The exponential rise in costs of living in New York City exacerbated this trend.⁵⁵

Public housing has enduring value in providing an affordable housing option for low-income families, who are often also families of color. These populations are directly affected by the complicated and protracted HP action process, HPD's failure to enforce the Code, and NYCHA's chronic repair delays. Without NYCHA and government agencies providing them the necessary condition of safe housing, these already-disadvantaged groups are subjected to living conditions and legal procedures that their private peers are not. This unequal treatment and experience exacerbates the same histories of racial, economic, and gender inequity that New York City government agencies have been attempting to ameliorate and undermines the indispensable value of affordable housing for our most vulnerable populations.

V. Levelling the Playing Field: Recommendations

The reasons for the disparity between NYCHA and private housing conditions and repairs are complex and multi-faceted. In particular, our recommendations exist against a backdrop of systemic underfunding of public housing. The need for proper funding of public housing has been eloquently articulated by many, and we do not intend to traverse it here. Further, the intersection of public health and public housing is a necessary perspective on these

⁵¹ Justin R. La Mort, *Public Housing and Public Health: The Separate and Unequal Protection of Private and Public Housing Tenants' Health in New York City*, J. Affordable Housing & Community Dev. L., 2018, at 385, 391.

⁵² NYCHA, *Special Tabulation of Resident Characteristics* (Jan. 1, 2016).

⁵³ Justin R. La Mort, *Public Housing and Public Health: The Separate and Unequal Protection of Private and Public Housing Tenants' Health in New York City*, J. Affordable Housing & Community Dev. L., 2018, at 385, 388.

⁵⁴ NYCHA, *Special Tabulation of Resident Characteristics* (Jan. 1, 2016).

⁵⁵ Justin R. La Mort, *Public Housing and Public Health: The Separate and Unequal Protection of Private and Public Housing Tenants' Health in New York City*, J. Affordable Housing & Community Dev. L., 2018, at 385, 388.

same issues, and we intend our recommendations to complement existing efforts focused on particular challenges such as lead or mold.

We have chosen not to make recommendations directly for NYCHA, despite the ultimate object of many of these recommendations being an improvement in NYCHA's practices. We have done this for two reasons. First, sound recommendations to improve NYCHA's practices abound. Second, given its underfunding, NYCHA has a limited ability to implement recommendations. To that extent, our recommendations may be criticized for not directly getting to the 'core' of the issue. Nonetheless, we believe our recommendations *complement* calls for reform within NYCHA and more funding by presenting opportunities for incremental changes that could materially improve housing conditions for NYCHA tenants and help address a seeming impasse regarding public housing funding.

A. HPD Should Hold All Landlords Accountable

First, HPD should be exercising its enforcement powers with regard to NYCHA housing. Despite the legal analysis above regarding HPD's powers and duties under the Code applying to NYCHA, HPD continues to not enforce violations of the Code against NYCHA. HPD should be conducting inspections, issuing fines, doing repairs if NYCHA fails to repair in a timely manner, and doing reinspections to ensure the adequacy of repairs. This is all within HPD's powers and duties under the law and would play an important role in ensuring the timeliness and adequacy of repairs.

Second, HPD should allow NYCHA tenants to access the same '311' system available to private tenants. Together, these two recommendations would enable NYCHA tenants to obtain external oversight of Code violations by NYCHA in an easier and more prompt way than a HP action. This would hopefully expedite the repair process so as to make repair times closer to the average of 10.3 days for private housing (as opposed to the current average of 153 days for NYCHA housing as of March 2020).⁵⁶

It would also help ensure the adequacy of repairs. For example, if a tenant complained about a hazardous or immediately hazardous mold violation, and NYCHA attempted to correct it, HPD would have a duty to conduct a reinspection to ensure the violation had in fact been corrected.⁵⁷ If the violation had not been corrected, HPD could bring actions or proceedings to recover penalties against NYCHA⁵⁸ and/or execute the order itself.⁵⁹ This second option would provide an important 'safety net'; it would ensure NYCHA tenants do not bear the cost of being exposed to serious health issues or stuck in uninhabitable dwellings because NYCHA does not or cannot comply with court orders. In the event HPD commenced proceedings against NYCHA, this could provide tangible relief to a tenant by the court ordering that any penalties imposed be provided to the tenant in the form of a rent abatement under Civil Court Act § 110(c) - relief not

⁵⁶ See fn 46.

⁵⁷ NYC ADMIN. CODE § 27-2115(o)(3) (2020).

⁵⁸ NYC ADMIN. CODE §§ 27-2110, 27-2116(a), 27-2143 (2020).

⁵⁹ NYC ADMIN. CODE §§ 27-2125(b), (d) (2020).

otherwise available unless tenants withhold rent on their own initiative, and NYCHA commences non-payment proceedings against them.

Third, HPD should systematically record complaints and violations in NYCHA housing and make them publicly available online, as it does for tenants in private rentals. The inconsistency between NYCHA's violation records and those kept by Red Hook's Housing Resource Center highlights the importance of this recommendation - without an accurate public record of complaints and violations, the nature and extent of the problem cannot be ascertained, let alone addressed.

Fourth, HPD should work with NYCHA to ascertain how it can obtain tenants' correct addresses before conducting inspections. This would avoid HPD routinely attending the incorrect address for inspections, thereby avoiding unnecessary inefficiencies and delays in the repair process.

Fifth, HPD should cease 'cancelling' complaints by NYCHA tenants and improve the language of notices sent to tenants. This is consistent with HPD's duty to enforce the Code, and would avoid unnecessary confusion for NYCHA tenants navigating an already difficult repairs process in housing court.

Finally, after conducting an inspection, HPD should send its 'notice of violations' to NYCHA in addition to the Court. This would allow for a more timely response, and help reduce exorbitant delays in the repair process for NYCHA housing as compared to private housing.

B. Courts Should Hold All Landlords Accountable

Courts should hold NYCHA accountable in the same way they do private landlords. This means NYCHA should be fined for Code violations and be held in contempt of court if it fails to make court-ordered repairs. NYCHA's budget is split between capital and operations.⁶⁰ Repairs and maintenance ordinarily come under its operations budget. Anecdotally, we have been told it is only when NYCHA is at risk of serious penalties that its capital budget becomes available for repairs. The experience of advocates in courts other than Red Hook has been that once this becomes available, tenants are able to obtain repairs in a timely manner.

There is a risk that courts fining NYCHA for Code violations or contempt of court would be ineffective due to only shifting money between government agencies. This risk could be avoided by courts using Civil Court Act § 110(c) to order that any penalty be provided to the tenant in the form of a rent abatement.⁶¹ In this way, fines would simultaneously provide immediate relief for tenants, and build pressure on government agencies and elected officials to properly fund repairs in NYCHA housing.

⁶⁰ NYCHA, ADOPTED BUDGET FOR FY 2019 AND THE FOUR-YEAR FINANCIAL PLAN FY 2020-2023 (Apr. 2019), <https://www1.nyc.gov/assets/nycha/downloads/pdf/nycha-2019-budget-book.pdf>.

⁶¹ See, e.g., *Rivera v. N.Y.C. Housing Auth.*, 2017 NYLJ LEXIS 2796 at *7 (Civ. Ct. Bronx Cty. Decided Sept. 22, 2017); *Oteng v. N.Y.C. Housing Auth. St. Mary's Park Houses*, 2017 NYLJ LEXIS 1543 at *7 (Civ. Ct. Bronx Cty. Decided May 23, 2017).

Another potential risk is that penalizing NYCHA for Code violations or holding it in contempt of court may undermine the collaborative relationship that exists between courts and NYCHA, as in Red Hook. As detailed above, the collaborative relationship at Red Hook Community Justice Center has been critical in ensuring tenants can obtain urgent repairs despite a deeply flawed repair process. Nonetheless, the cost of not holding NYCHA accountable is significant. As discussed above, contempt of court offers immediate relief to tenants in the form of timely NYCHA repairs or rent abatement in the event such repairs do not occur, and places pressure on government agencies and officials to act on the urgent need for extra funding. Without this, housing conditions that pose serious risks to tenants' health and safety, and government inaction in response to those risks, will likely continue unabated.

C. Legislators Should Apply Protections to NYCHA Tenants

Legislators should ensure NYCHA is not exempt from requirements in the Code that apply to private landlords. This would help materially improve housing conditions for NYCHA tenants. For example, the adequacy of mold abatement in NYCHA housing has been an ongoing problem in Red Hook, which unfairly exposes tenants to serious health issues.⁶² If NYCHA were not exempt from the 2018 amendments to the Code requiring that mold assessments and remediation be conducted by licensed professionals, NYCHA tenants could be assured mold abatement would be completed properly.

VI. Conclusion

At its inception, NYCHA was considered “one of the finest housing authorities in the nation”.⁶³ This memorandum charts how unequal laws and institutional practices have contributed to NYCHA’s remarkable fall from grace, and provides concrete recommendations to improve conditions in NYCHA housing.

Some of our recommendations, such as the use of fines and contempt of court, would increase the cost of continued inaction on NYCHA housing conditions and repairs. In doing so, they would impress on government agencies and elected officials the urgent need for extra funding that NYCHA tenants already feel so acutely.

⁶² *New York City Council Meeting before the Committee on Environmental Protection Jointly with the Committee on Public Housing*, January 2, 2017 (Statement of Council Member Carlos Menchaca).

⁶³ Phillip Thompson, *Public Housing in New York City*, in *HOUSING AND COMMUNITY DEVELOPMENT IN NEW YORK CITY* 139 (Michael H. Schill ed., 1999).