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Lauren C. Wittlin

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ACCESS DENIED: THE TALE OF TWO TENANTS AND BUILDING AMENITIES

*Lauren C. Wittlin**

I. INTRODUCTION

Throughout the last several decades, landlords and tenants have fought over rent regulations at the federal, state, and municipal levels. Landlords have been trying to eliminate rent control and rent stabilization regulations while tenants want to keep rent regulations intact. Thus far, landlords have not been successful in eliminating these regulations but some landlords have found offering amenities only to market rate tenants a viable alternative. Consider David, a rent stabilized tenant, who just came home from a long day at work. He went upstairs to use the new gym which the landlord recently built but found that it was only accessible to tenants who have approval.¹ Meanwhile, his neighbor, Lana, who lives in a market rate apartment in the same complex, swiped her keycard which was provided at no cost to gain access to the gym.² Apartment complexes such as Stonehenge Village on the Upper West Side have been

* J.D. Candidate 2016, Touro College Jacob D. Fuchsberg Law Center, B.S. 2013 in Business Management, Stony Brook University. I would like to thank Professor Heather K. Melniker for her guidance and encouragement throughout my law school career. I would also like to thank Professor Rena C. Sepowitz for her tireless efforts and valuable assistance with this Comment. A special thank you to my Notes & Comments Editor, Alyssa Wanser, for her dedication and valuable input throughout the development of this Comment. Additionally, I would like to thank the *Touro Law Review* staff, especially Matthew Ingber, for providing me with guidance and encouragement. Lastly, I would like to thank my parents, Helene and Mark Wittlin, and my brother, David, for their love, understanding, and support throughout my academic career.

¹ For a picture of the sign that was posted outside the Stonehenge gym, see Leigh Kamping-Carder, *4 Ways the Upper West Side Gym Debacle Could Play Out*, BRICK UNDERGROUND (Feb. 28, 2014, 8:59 AM), http://www.brickunderground.com/blog/2014/02/4_ways_the_upper_west_side_gym_debacle_could_play_out.

² *Id.*

allowing only market rate tenants to use amenities.³ Not only have some landlords banned rent regulated tenants such as David from using new gyms, but also have prohibited them from using the “pool, children’s playroom, lounge, and rooftop patio.”⁴ To date, many rent regulated tenants have not been given access to these amenities even if they offer to pay a fee.⁵ According to the human rights code, renter status is not considered a protected class.⁶ New York State Assembly Member Linda Rosenthal, Public Advocate Letitia James, and City Council Member Mark Levine of West Harlem are three politicians advocating for rent regulated tenants to obtain access to the same amenities as those given to market rate tenants.⁷ These amenity-related policies implemented by landlords have been characterized by State Senator Bill Perkins as a “form of apartheid.”⁸ Mark Levine added that amenity segregation “recalls memories of the pre-Civil Rights era.”⁹ On the other hand, Stonehenge Village’s owner, Stonehenge Partners, stated, “[w]e are a responsible building owner and manager and we want to assure all interested parties that everything we have done regarding this matter is in full compliance with all laws.”¹⁰ Stonehenge does not believe that limiting certain privileges to market rate tenants is improper.

³ *Id.* (noting that 60% of the building residents of Stonehenge Village, those who are subject to rent stabilization, would not be entitled to access the new gym).

⁴ Jan Ransom, *Uptown Councilman Mark Levine Touts Legislation to Give Rent-Stabilized Tenants Equal Access to Amenities in Their Apartment Buildings*, N.Y. DAILY NEWS (Apr. 7, 2014, 2:00 AM), <http://www.nydailynews.com/new-york/uptown/uptown-pol-give-access-building-amenities-tenants-article-1.1746377>.

⁵ Jennifer Peltz, *Haves, Have-Nots Divided by Apartment Poor Doors*, THE BIG STORY (Aug. 18, 2014, 10:25 AM), <http://bigstory.ap.org/article/haves-have-nots-divided-apartment-poor-doors>.

⁶ New York City, N.Y. Code § 8-107 (N.Y. Legal Publ’g 2014); Ransom, *supra* note 4 (noting that “[o]bviously, race and gender and sexual orientation, religion are all protected classes, but renter status is not—and until we change that, we’re not going to have a legal recourse to combat this”); *About the Commission on Human Rights*, NYC COMM’N ON HUMAN RIGHTS, <http://www.nyc.gov/html/cchr/html/about/about.shtml> (last visited Feb. 2, 2015) (indicating that the New York City Human Rights Law “prohibits discrimination in employment, housing, and public accommodations based on race, color, creed, age, national origin, alienage or citizenship status, [and] gender . . .”).

⁷ Mark Maurer, *Bill Would Give Rent-Stabilized Tenants Access to Amenities*, THE REAL DEAL (Apr. 7, 2014, 10:00 AM), <http://therealdeal.com/blog/2014/04/07/bill-would-give-rent-stabilized-tenants-equal-access-to-amenities/>.

⁸ Kamping-Carder, *supra* note 1.

⁹ *Id.*

¹⁰ *Id.*

Many Americans, specifically lower and middle-income individuals and families, consider it a struggle to secure affordable housing of decent quality.¹¹ In the United States, private sector landlords own the majority of rental housing.¹² Rent control and rent stabilization “affect[] over a million housing units within New York City, and another 75,000 units scattered throughout portions of Nassau, Westchester, and Rockland Counties, and certain upstate cities such as Buffalo.”¹³ According to the 2011 New York City Housing and Vacancy Survey, 987,000 apartments were subject to rent stabilization and 38,000 apartments were subject to rent control.¹⁴

In New York State, four systems of rent regulation are in effect. These systems include: “Rent Control within New York City, Rent Control outside New York City, Rent stabilization within New York City, and Rent stabilization outside New York City.”¹⁵ These reforms were made in response to the housing shortage caused by World War II.¹⁶ The New York State legislature indicated that this “emergency necessitated the intervention of federal, state and local government in order to prevent speculative, unwarranted and abnormal increases in rents.”¹⁷ In addition, the legislature believed

¹¹ JESSE DUKEMINIER ET AL., *PROPERTY 531* (Aspen Publishers, 8th ed. 2014); Ben Adler, *NYC Can't Fix its Housing Crisis Alone – The Suburbs Need to Step Up*, GRIST (Mar. 19, 2015), <http://grist.org/cities/nyc-cant-fix-its-housing-crisis-alone-the-suburbs-need-to-step-up/> (indicating that to help alleviate the affordable housing shortage in New York City, the NYC Planning Commissioner, Carl Weisbrod, supports the notion that building affordable housing in the surrounding suburbs would help to resolve this issue).

¹² DUKEMINIER, *supra* note 11, at 537.

¹³ DANIEL FINKELSTEIN & LUCAS A. FERRARA, *NEW YORK PRACTICE SERIES-LANDLORD AND TENANT PRACTICE IN NEW YORK* § 11.1 (2014).

¹⁴ MOON WHA LEE, *HOUSING NEW YORK CITY 2011*, at 26 (2013), *available at* <http://www1.nyc.gov/assets/hpd/downloads/pdf/hvs/HVS-report-2011.pdf> (stating that “[t]he combined 1,025,000 rent-stabilized and rent-controlled units housed 2,398,000 people in the City in 2011”).

¹⁵ ANDREW SCHERER, *RESIDENTIAL LANDLORD-TENANT LAW IN NEW YORK* § 1.9 (2014).

¹⁶ *Id.* § 4:1; *see also Post WWII Housing Crisis*, FAST & AFFORDABLE, A CENTURY OF PREFAB HOUS., <http://exhibits.mannlib.cornell.edu/prefabhousing/prefab.php?content=seven> (last visited Jan. 18, 2015) (indicating that the number of homes built during World War II decreased and after the war, there was insufficient housing to accommodate the large number of troops who returned home).

¹⁷ N.Y. Unconsol. Law tit. 23 § 8602 (McKinney 1962). According to Section 8602 of the New York Rent Control Law:

[T]he transition from regulation to a normal market of free bargaining between landlord and tenant, while still the objective of state policy, must be administered with due regard for such emergency; and that the

this action was necessary to “prevent such perils to health, safety and welfare.”¹⁸ In general, courts have upheld rent control and rent stabilization provisions under the federal and state constitutions.¹⁹ Since 1983, the New York State Division of Housing and Community Renewal (“DHCR”) has been the agency that regulates residential rents under rent control and rent stabilization laws within New York State.²⁰ The DHCR decides matters such as the amount a landlord can charge lawfully and oversees complaints.²¹

Over the past two decades, developers in New York City have been constructing mixed-income buildings in order to provide affordable housing.²² In these mixed-income buildings, many of the apartments are leased at market rate, while twenty percent are reserved for low and moderate-income tenants.²³ The problem with affordable housing in New York City is that the supply has not been able to meet the demand.²⁴ Also, “most affordable housing is in privately-owned, for-profit buildings that are subject to rent-regulation.”²⁵ Developers are actively involved in the construction of affordable housing because of the different benefits they receive, including: “lucrative tax abatements, permission to construct larger buildings, and bond financing.”²⁶ In some of these mixed-income buildings, apartments subject to rent regulations are located in

policy herein expressed should now be administered locally within cities having a population of one million or more by an agency of the city itself.

Id.

Id.

¹⁹ FINKELSTEIN & FERRARA, *supra* note 13, at § 11:5.

²⁰ *Id.* at § 11:7.

²¹ *Id.* at § 11:8.

²² Julie Satow, *Living in the Mix*, N.Y. TIMES (Aug. 31, 2014), available at <http://www.nytimes.com/2014/08/31/realestate/affordable-housing-in-new-yorks-luxury-buildings.html>.

²³ *Id.*; see also *Mixed-Income Housing*, BUS. DICTIONARY, <http://www.businessdictionary.com/definition/mixed-income-housing.html> (last visited Feb. 3, 2015) (stating that mixed-income refers to a multiple family dwelling “that provides affordable housing for a variety of low- to middle-income families.”).

²⁴ *New York City's Affordable Housing Programs*, METRO. COUNCIL ON HOUS., http://metrocouncilonhousing.org/help_and_answers/nyc_affordable_housing_programs (last visited Feb. 3, 2015).

²⁵ *Id.*

²⁶ Satow, *supra* note 22 (discussing how “[p]rivate developers have taken advantage of various programs to construct more than 100 mixed-income buildings like the Chelsea Park over the past two decades, mostly in Manhattan and gentrified parts of Brooklyn”).

separate buildings from those apartments subject to market rates.²⁷ Furthermore, some buildings, have a separate entrance, the so-called “poor door,” for the rent regulated tenants.²⁸ David, as a rent stabilized tenant, feels frustrated that not only is he unable to use the new gym, but he is not permitted to go through the same entrance as his neighbor who pays a market rate rent.

Although landlords have been striving to eliminate the rent regulation system, the likelihood that this will occur in 2015 is very slim. However, as June 2015 approaches, tenant advocates will push for changes including amenity provisions for rent regulated apartments. The restriction on tenants subject to rent stabilization who are not entitled to use certain amenities has led to a “debate over equality, economics and the tightness of the social fabric.”²⁹

This Comment examines the changes in rent regulation and the effect of these changes on amenities. Section II begins with a history of rent control and rent stabilization and the rationale for these rent regulations. Section III examines the impact of the changes resulting from the New York State rent laws of 1993, 1997, 2003 and 2011 on the landlord-tenant relationship and the failure of these rent laws to cover amenities. Next, Section IV includes the views of both landlords and tenants with respect to rent regulations and amenities. Section V provides three alternative views. First, this section discusses the implications of the enactment of a law that includes renter status as a protected class. Second, this section proposes an alternative approach which explores the potential effects of the elimination of rent regulations. Third, even if renter status is not considered a protected class, this section offers a reasonable fee approach for dealing with the building amenities issue. This Comment argues that the third approach, the reasonable fee approach, is the best mechanism to promote the availability of affordable housing units and provide a workable compromise for both landlords and tenants. Finally, Section VI provides relevant conclusions.

II. HISTORY

At common law, landlord-tenant relations were landlord

²⁷ *Id.*

²⁸ *Id.*

²⁹ Peltz, *supra* note 5.

focused.³⁰ Ultimately, the tenant took the premises “as is” and the landlord was under no obligation to ensure the premises were in a habitable living condition.³¹ This was a major problem for tenants who were being taken advantage of by landlords.³² Over the years, many landlord-tenant reforms expanded tenants’ rights and remedies.³³ Two rent regulations instituted in New York State that provide protections to tenants include rent control and rent stabilization.

Rent control is a program that regulates both the amount of rent an owner can charge each month and eviction proceedings.³⁴ The DHCR establishes the amount that the rent can be increased for a specific apartment.³⁵ To calculate the rent increase, the DHCR determines the cost for an owner to operate the building and also takes into consideration the right of the owner to make a reasonable profit.³⁶ Generally, tenants who are subject to rent control cannot be evicted if they pay the specified rent.³⁷

Rent control laws were enacted by the State Legislature “as an emergency police-power regulation in response to a severe housing shortage following World War II.”³⁸ Residential buildings that are subject to rent control laws include only those buildings constructed before February 1, 1947.³⁹ In order for an apartment to be regulated under rent control, the tenant or the lawful successor must have been living in the apartment continuously prior to July 1, 1971.⁴⁰ Rent control laws distinguish between buildings with fewer than six units

³⁰ DUKEMINIER, *supra* note 11, at 505.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ For additional information on rent control, see *About Office of Rent Administration Operations and Services*, N.Y. STATE HOMES & CMTY. RENEWAL, <http://www.nyshcr.org/rent/about.htm#rentcont> (last visited Feb. 3, 2015).

³⁵ *Id.*

³⁶ *Id.*

³⁷ ROBERT F. DOLAN, *RASCH'S NEW YORK LANDLORD AND TENANT* § 29:15 (2014).

³⁸ FINKELSTEIN & FERRARA, *supra* note 13, at § 11:2; see *supra* note 16.

³⁹ FINKELSTEIN & FERRARA, *supra* note 13, at § 11:2 (noting that only those apartments built during this time period are subject to rent control regulations).

⁴⁰ For a further discussion on rent stabilization, see *Rent Stabilization FAQ*, NEW YORK CITY RENT GUIDELINES BD., <http://www.nycrgb.org/html/resources/faq/rentstab.html> (last visited Feb. 3, 2015) (indicating that a “lawful successor [includes] a family member, spouse, or adult lifetime partner”); see *infra* note 88.

and those with six units or more.⁴¹ When a tenant vacates an apartment in a building with fewer than six units, the apartment becomes deregulated.⁴² On the other hand, if a rent controlled tenant vacates a building with six or more units, the apartment will then become subject to rent stabilization.⁴³ To continue to be subject to rent control regulations, the city where the building is located must not have “declared an end to the postwar rental-housing emergency.”⁴⁴ Since 1971, apartments subject to rent control have decreased significantly because no new apartments are being added to the rent control system and many have been deregulated.⁴⁵ Currently, a little under two percent of New York City apartments continue to be subject to rent control.⁴⁶

Outside of New York State, rent control is on the decline as well.⁴⁷ In fact, only four states plus the District of Columbia still have rent control laws in effect.⁴⁸ Rent control in several cities in Massachusetts, including Cambridge, was abolished in 1994 and rent control regulations were weakened in California in 1995 and 1996.⁴⁹ A Massachusetts Institute of Technology study regarding the elimination of rent control in Cambridge found an increased investment in housing after the repeal of rent control regulations.⁵⁰ In addition, a National Bureau of Economic Research paper concluded that Cambridge, Massachusetts benefited economically from the repeal of rent control. The research paper concluded that the “elimination of rent control added about \$1.8 billion to the value of Cambridge’s housing stock between 1994 and 2004.”⁵¹ The findings

⁴¹ *Rent Stabilization FAQ*, *supra* note 40.

⁴² *Id.*; *see also Deregulation*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining deregulation as the “elimination of governmental control of business”).

⁴³ *Rent Stabilization FAQ*, *supra* note 40.

⁴⁴ FINKELSTEIN & FERRARA, *supra* note 13, at § 11:2.

⁴⁵ *Id.* at § 11:51.

⁴⁶ *Rent Regulation*, NAKED APARTMENTS, <http://www.nakedapartments.com/guides/nyc/renting-in-new-york-city/rent-regulation> (last visited Feb. 3, 2015).

⁴⁷ DUKEMINIER, *supra* note 11, at 536.

⁴⁸ For a list of states with rent control regulations still in effect, see *Residential Rent Control Law Guide By State*, LANDLORD.COM, http://www.landlord.com/rent_control_laws_by_state.htm (last visited Feb. 3, 2015).

⁴⁹ DUKEMINIER, *supra* note 11, at 536.

⁵⁰ Peter A. Tatian, *Beware the Comeback of Rent Control*, CITYLAB (Jan. 3, 2013), <http://www.citylab.com/housing/2013/01/beware-comeback-rent-control/4291/>.

⁵¹ *Id.*

from this study have been used to support the argument that rent control regulations should be eliminated in New York.⁵² Furthermore, according to Judges Posner and Easterbrook, “Virtually all [American] economists . . . regard rent regulation as counterproductive.”⁵³ In a study by the Urban Land Institute in 1988, Anthony Downs concluded that, “many of the short-term benefits of rent controls (reduced rents) aid affluent rather than poor households, and some of the costs (reduced access to vacant units) must be borne by very poor households.”⁵⁴ Thus, wealthier tenants receive the benefits of rent controlled apartments while lower income households are deprived of the opportunity to obtain rent regulated apartments. On the other hand, the supporters of rent control contend that the rent control laws protect tenants from being taken advantage of and do not hurt new housing construction.⁵⁵ This argument, however, appears to be weak based on the Cambridge findings that the elimination of rent control regulations resulted in a positive effect on housing construction.

Rent control is not the only type of rent regulation in New York. In 1969, the New York City Council enacted the rent stabilization statute in an attempt to reduce the shortage of residential housing because no new apartments would be subject to rent control regulations.⁵⁶ The recognition that rent control regulations make it more difficult for landlords to make a profit also led to the creation of rent stabilization.⁵⁷ The rent stabilization laws “seek[] to insure more balanced terms under which owners may apply for regulated rent increases and to protect primary occupants.”⁵⁸ Apartments subject to rent stabilization include only those that are in buildings with at least six units and were built between February 1947 and January 1974.⁵⁹ A building constructed after 1974 can also be subject to rent

⁵² *Id.*

⁵³ DUKEMINIER, *supra* note 11, at 534 (noting that both Judge Posner and Judge Easterbrook currently serve on the United States Court of Appeals for the Seventh Circuit. Formerly, they were faculty members at the University of Chicago Law School.).

⁵⁴ *Id.* at 534-35.

⁵⁵ Henry Hazlitt, *What Rent Control Does*, ECON. IN ONE LESSON, <http://steshaw.org/economics-in-one-lesson/chap18p1.html> (last visited Feb. 17, 2015).

⁵⁶ FINKELSTEIN & FERRARA, *supra* note 13, at § 11:3.

⁵⁷ *Manocherian v. Lenox Hill Hosp.*, 643 N.E.2d 479, 480 (N.Y. 1994).

⁵⁸ *Id.*

⁵⁹ *Rent Stabilization FAQ*, *supra* note 40 (noting that rent-controlled apartments refer to buildings with less than six units).

stabilization with the landlord's approval.⁶⁰ In return, the landlord would receive a tax-abatement.⁶¹ Similar to rent control, rent stabilized tenants receive protections in addition to the limitations regarding the amount a landlord may charge for rent.⁶² Rent stabilization requires a written lease contract and the offer of a renewal lease to the tenant before the end of the lease term.⁶³ Rent stabilized tenants have the opportunity to renew the lease for an additional one-year or two-year term.⁶⁴ In addition, the landlord must not only include the legal rent in the lease but must register the legal rent annually with the DHCR.⁶⁵ Rent stabilized tenants also cannot be evicted unless provided by law.⁶⁶

Certain rent stabilized tenants take unfair advantage of the rent stabilization system. Currently, although there are no income requirements for a tenant to obtain a rent stabilized unit, there are income requirements in order for a unit to remain subject to rent regulations.⁶⁷ According to Census data from 2010, of the 970,000 rent stabilized New York City apartments, an estimated 22,642 of their renters had annual household incomes that exceeded \$199,000.⁶⁸ In addition, approximately 2,300 had incomes of at least \$500,000.⁶⁹ This data show that a modest number of tenants are fortunate enough to earn a high income while receiving the benefits from a rent stabilized apartment. At first, one might feel sorry for David for not

⁶⁰ *About Rent Stabilization*, METRO. COUNCIL ON HOUS., http://metcouncilonhousing.org/help_and_answers/about_rent_stabilization (last visited Feb. 8, 2015).

⁶¹ *Id.* (noting that the tax-abatement is an incentive for landlords to agree to be subject to rent stabilization regulations).

⁶² *About Office of Rent Administration*, *supra* note 34.

⁶³ DOLAN, *supra* note 37, at § 2:40.

⁶⁴ *About Office of Rent Administration*, *supra* note 34.

⁶⁵ See Seth Miller, *Preferential Rents: A Fact Sheet for Rent Stabilized Tenants*, LAWHELP.ORG, <http://www.lawhelpny.org/files/B23B29BF-0DED-F7B9-2149-1DB14E1A7DE5/attachments/624392F1-A1E4-FA60-DFD3-E7E8DC1E22D2/224351Preferential%20Rent%20Fact%20Sheet.pdf> (last visited Feb. 8, 2015) (defining legal rent as "the highest rent an owner is allowed to charge for a rent stabilized apartment").

⁶⁶ *About Office of Rent Administration*, *supra* note 34.

⁶⁷ Sage Lazzaro, *Millionaires Are Ruining Rent-Stabilization for the Rest of Us*, N.Y. OBSERVER (Apr. 30, 2014, 3:44 PM), <http://observer.com/2014/04/millionaires-are-ruining-rent-stabilization-for-the-rest-of-us/>.

⁶⁸ *Id.* (indicating that although there are no income requirements to obtain a rent regulated apartment, an apartment can become subject to deregulation if a tenant's income exceeds \$200,000 (the income level currently in effect) for the previous two years).

⁶⁹ *Id.*

having access to the new gym. However, one might not be as sympathetic after finding out he is one of those 22,642 individuals earning over \$199,000 annually. Although this may represent an exception, it seems unreasonable that one tenant's rent can be subsidized while his neighbor pays market rate rent and the rent regulated tenant still wants the privilege of using certain amenities which the landlord has reserved for market rate tenants.

III. CHANGES THROUGH THE 20TH CENTURY

Over the past seventy-five years, there have been various laws enacted regarding rent regulations. First, the Emergency Price Control Act was signed into law by President Franklin D. Roosevelt in 1942.⁷⁰ This act established a price regulatory system for the entire nation and included price controls for apartments.⁷¹ After World War II, the Emergency Price Control Act expired, and was replaced by the Federal Housing and Rent Act of 1947.⁷² This act provided that buildings constructed before February 1, 1947 would remain subject to rent control while those constructed after February 1, 1947 would not be subject to rent control regulations.⁷³ Shortly thereafter, the enactment of the Federal Housing and Rent Act of 1949 authorized the states to set their own regulations.⁷⁴ The states were given the "authority to assume administrative control of rent regulation and the power to continue, eliminate or modify the Federal system."⁷⁵ During the 1950s, decontrol measures were set into place.⁷⁶ For example, New York City apartments that were vacated on or subsequent to April 1, 1953 would no longer be subject to rent control.⁷⁷ Also, landlords received the option to decontrol apartments located outside of New York City.⁷⁸

Between 1971 and 1973, approximately 300,000 apartments

⁷⁰ *Rent Regulation after 50 Years*, TENANT.NET, <http://www.tenant.net/Oversight/50yrRentReg/history.html> (last visited Feb. 8, 2015).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Rent Regulation after 50 Years*, *supra* note 70.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

subject to rent control were decontrolled and 88,000 apartments subject to rent stabilization were destabilized.⁷⁹ As a result of rising rent costs and a lack of affordable housing in New York, the Emergency Tenant Protection Act of 1974 was enacted.⁸⁰ This act provided rent stabilization in Nassau, Rockland, and Westchester counties.⁸¹ In 1983, the Omnibus Housing Act was passed which transferred the administration of rent regulations from New York City to New York State.⁸²

Furthermore, four acts, with the first enacted in 1993, followed by acts enacted in 1997, 2003, and 2011 have dealt specifically with rent regulation issues in New York State. First, the Rent Regulation Reform Act of 1993 (the “1993 Act”) was amended by the New York State Legislature and provided for deregulation of high-rent housing accommodations.⁸³ It amended both rent control and rent stabilization laws in the New York City area as well as outside the city.⁸⁴ The 1993 Act deregulated apartments either when the tenant vacated the apartment and the monthly rent was \$2,000 or more at the time, or when the tenant’s household income exceeded \$250,000 for the previous two years.⁸⁵

Second, the Rent Regulation Reform Act of 1997 (the “1997 Act”) amended rent control as well as rent stabilization regulations within and outside New York City and extended these rent regulations until June 15, 2003.⁸⁶ The 1997 Act provided that an apartment would be entitled to deregulation either when the monthly rent for the apartment was at least \$2,000 or the household income was at a minimum of \$175,000 for at least two years prior to the deregulation.⁸⁷ As compared to the 1993 Act, the 1997 Act provided somewhat greater protection to the landlord. The landlord could more easily deregulate an apartment due to the lower income requirement. However, another section of the 1997 Act protected the

⁷⁹ *Id.*

⁸⁰ *Rent Regulation after 50 Years*, *supra* note 70.

⁸¹ *Id.* (indicating that there continued to be a housing emergency at the time).

⁸² *Id.*

⁸³ SCHERER, *supra* note 15, at § 4:15.

⁸⁴ FINKELSTEIN & FERRARA, *supra* note 13, at § 11:30.

⁸⁵ *Id.* (noting a rent stabilized apartment does not automatically become deregulated when a tenant vacates the apartment which require either of the two conditions to be met.).

⁸⁶ *Id.* at §11:31.

⁸⁷ *Id.*

tenant by providing for succession rights which allowed the tenant to give the apartment to immediate family members without having to pay a vacancy increase.⁸⁸ In other words, the succession rights allowed for these successor tenants to avoid paying market rate rents.

Third, the Rent Act of 2003 (the “2003 Act”) replaced the 1997 Act. The 2003 Act made relatively minor changes. First, the 2003 Act “limit[ed] the ability of [New York City] to pass laws concerning rent regulatory issues controlled by the State.”⁸⁹ Second, it “allow[ed] for the deregulation of an apartment upon vacancy if the legal regulated rent may be raised above [\$2,000 per month], even if the new tenant is not actually charged an amount above [\$2,000].”⁹⁰ The 2003 Act extended the current rent regulations at the time for another eight years.

Finally, the Rent Act of 2011 (the “2011 Act”) superseded the 2003 Act. The 2011 Act is set to expire on June 15, 2015.⁹¹ In 2012, Mayor Michael Bloomberg indicated that rent regulations were extended due to the “citywide residential vacancy rate of 3.5 percent.”⁹² The 2011 Act provides that an apartment can be deregulated when the monthly rent is at least \$2,500 or the annual income for the tenant is at least \$200,000.⁹³ The purpose of the

⁸⁸ *Rent Regulation Reform Act of 1997*, NYC RENT GUIDELINES BD., <http://www.nycrgb.org/html/resources/reform.html> (last visited Feb. 9, 2015); see also *Rent Regulation Reform Act of 1997*, N.Y. STATE HOMES & CMTY. RENEWAL, <http://www.nyshcr.org/Rent/inforent.htm> (last visited Feb. 9, 2015) (noting “[t]he right of succession without a vacancy allowance shall be limited to one generation only.” In addition, any relative successor tenant would be subject to the lower income requirement as mandated in the 1997 Act.); see also *Family*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining immediate family as “[a] person’s parents, spouse, children, and siblings.”); see *supra* note 40.

⁸⁹ *Rent Law of 2003*, NYC RENT GUIDELINES BD., <http://www.nycrgb.org/html/resources/renewal2003.html> (last visited Feb. 9, 2015).

⁹⁰ *Id.*

⁹¹ See Warren Estis & Jeffrey Turkel, *The Economics of Luxury Deregulation*, N.Y. L.J. (July 13, 2011) (discussing the basic provisions of the Rent Act of 2011).

⁹² *Bloomberg extends rent control for three more years*, THE REAL DEAL (Mar. 27, 2012, 6:30 PM), <http://therealdeal.com/blog/2012/03/27/bloomberg-extends-rent-control-for-three-more-years/> (noting that “[l]egally, rent regulations must be terminated if a citywide vacancy rate higher than 5 percent exists”).

⁹³ Estis & Turkel, *supra* note 91. A situation can include:

For example, pursuant to Rent Guidelines Board Order No. 43, the renewal increase for a one-year lease is 3.75 percent and 7.25 percent for a two-year lease. Thus, if the tenant paying \$2,100 per month takes a two-year renewal, his or her rent has now increased to \$2,252.25 per month. One or two more similar increases will bring the rent over \$2,500 per month.

increase in household income from \$175,000 in 1997 to \$200,000 in 2011 and the increase in monthly rent from \$2,000 in 1997 to \$2,500 in 2011 is to ensure that the 100,000 plus units remain rent regulated and available to New York's working class.⁹⁴ Therefore, the 2011 Act provides a generous safety net for tenants to be covered under rent regulations. On the other hand, from 1994 through 2011, New York had deregulated more than 238,000 apartments.⁹⁵

The rent acts of 1993, 1997, 2003 and 2011 cover many aspects of rent regulation. However, none of these acts mention amenities. When the new rent act is signed into law on June 15, 2015, a provision should be included indicating that a rent stabilized tenant should have access to certain amenities. In addition, the provision would need to include the amount a rent stabilized tenant should pay for the amenities available in the building. Section V further discusses proposed changes to the rent act slated for June 2015.

IV. LANDLORD/TENANT VIEWS ON RENT REGULATIONS AND THE EFFECT OF THESE REGULATIONS ON AMENITIES

Many landlords oppose rent regulations because they lose money on rentals that would not be lost if the apartments were rented at the market rate.⁹⁶ Not only does the rent increase once the rent regulated tenant leaves the apartment but the additional rent increases the value of the entire building.⁹⁷ According to 2011 data from the New York University Furman Center for Real Estate and Urban Policy, "[t]he median rent for a rent-regulated apartment in Manhattan was \$1,321 a month, compared with \$2,696 for a market rate apartment."⁹⁸ Recently, in response to continued rent

Id.

⁹⁴ For a further description of any of the rent acts, see *2012 Annual Review Office of Rent Administration*, N.Y. STATE HOMES & CMTY. RENEWAL, <http://www.nyshcr.org/Rent/2012AnnualReview.pdf> (last visited Feb. 9, 2015).

⁹⁵ *Id.* at 12.

⁹⁶ Kamping-Carder, *supra* note 1.

⁹⁷ *Id.* (indicating that once a rent stabilized tenant moves out of the apartment, the landlord is entitled to an increase in rent. In effect, higher rental incomes lead to an increase in the value of the apartment building.).

⁹⁸ Ronda Kaysen, *What's Next, a Bouncer?*, N.Y. TIMES (May 16, 2014), available at <http://www.nytimes.com/2014/05/18/realestate/rent-regulated-tenants-excluded-from-amenities.html>.

regulations, some landlords have banned rent stabilized tenants from accessing new building amenities while other landlords have retroactively deprived tenants from accessing amenities already in place.⁹⁹ Although landlords are entitled to prohibit rent stabilized tenants from access to new services, landlords should provide access for all tenants to services which were in existence at the time the apartment became subject to rent stabilization.¹⁰⁰ Rent stabilized tenants are frustrated that they are unable to use building amenities such as pools, fitness centers, and children's playrooms to which market rate tenants have access.¹⁰¹ Many rent regulated tenants believe that this is a discriminatory policy and that they should have the option to pay a fee in order to access the building amenities.¹⁰² Until a bill is passed that addresses the amenities issue, rent stabilized tenants do not appear to have a valid case against their landlords.¹⁰³

A. Landlords

In recent years, landlords have been faced with rent regulations that many believe should not even exist. For example, some landlords have asserted that rent regulations are unconstitutional. The Fifth Amendment of the United States Constitution states, "nor shall private property be taken for public use, without just compensation."¹⁰⁴ In 2012, the United States Supreme Court declined to hear a case brought by two New York landlords, James D. Harmon Jr. and Jeanne Harmon, who were challenging the rent stabilization law.¹⁰⁵ The Harmons lost in both

⁹⁹ Jan Ransom, *Another Upper West Side Landlord Gives Short Shrift to Rent-Stabilized Tenants*, N.Y. DAILY NEWS (Feb. 28, 2014, 10:11 PM), <http://www.nydailynews.com/new-york/uptown/rent-stabilized-tenants-booted-fancy-roof-article-1.1706974>.

¹⁰⁰ Kamping-Carder, *supra* note 1.

¹⁰¹ Ransom, *supra* note 99.

¹⁰² *Pressure Rising on Multiple 'Unequal' Rent-Stabilized Buildings*, WEST SIDE RAG (Mar. 10, 2014, 6:03 AM), <http://www.westsiderag.com/2014/03/10/pressure-rising-on-multiple-unequal-rent-stabilized-buildings>.

¹⁰³ *Id.*

¹⁰⁴ U.S. CONST. amend. V.

¹⁰⁵ *Harmon v. Markus*, 412 F. App'x 420 (2d Cir. 2011), *cert. denied*, *Harmon v. Kimmel*, 132 S. Ct. 1991 (2012); Adam Liptak, *U.S. Supreme Court Declines to Hear Suit Challenging the Rent Stabilization Law*, N.Y. TIMES (Apr. 23, 2012), available at http://www.nytimes.com/2012/04/24/us/supreme-court-declines-to-hear-rent-control-challenge.html?_r=0.

the district court and the United States Court of Appeals.¹⁰⁶

These two landlords argued that the rent stabilization law “amounted to an unconstitutional taking of their property” because it required that they lease apartments in their building at below market price.¹⁰⁷ Here, the tenants who were subject to rent stabilization paid only \$1,000 per month for an apartment. This was significantly less, in fact, approximately sixty percent below the monthly rate that a market rate tenant would pay.¹⁰⁸ Harmon indicated, “[w]e still believe that the Constitution does not allow the government to force us to take strangers into our home at our expense for life.”¹⁰⁹ In addition, Harmon asserted, “[e]ven our grandchildren have been barred from living with us. That is not our America.”¹¹⁰ Harmon also mentioned that as of 2012, “there [were] 68,000 vacant apartments in the city. That is not an emergency by any definition.”¹¹¹

At the time the petition for certiorari was filed in *Harmon*, the use of amenities was not at issue. Today, there is controversy over whether a rent regulated tenant should have the right to enjoy the use of amenities while paying approximately sixty percent less than the amount a market rate tenant pays.¹¹² Arguably, landlords should be entitled to give a market rate tenant a “perk” for paying the higher monthly rent. Requiring landlords to offer amenities to rent regulated tenants without obtaining any other compensation should be considered an unconstitutional taking of the landlords’ property. This could be considered an unconstitutional taking because although landlords are required to provide basic services such as adequate heat and hot water, they are not required to provide building amenities such as a fitness center or a swimming pool, if those amenities were not in existence at the time the rent regulated tenant moved into the

¹⁰⁶ *Harmon v. Markus*, 412 F. App’x 420 (2d Cir. 2011) (holding rent stabilization is not unconstitutional under the Takings Clause, the Contracts Clause, the Due Process Clause, and the Equal Protection Clause of the United States Constitution).

¹⁰⁷ Liptak, *supra* note 105.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* (indicating that the government is preventing the landlord’s grandchildren from living in the apartment because the landlord is unable to evict rent stabilized tenants due to rent regulations).

¹¹¹ *Id.*

¹¹² Liptak, *supra* note 105.

apartment.¹¹³ According to the Fifth Amendment, the apartment complexes which are considered private property cannot be taken for public use, without just compensation. An apartment complex may be considered taken for public use because the complex would be subject to regulations by the DHCR, a state agency, if a landlord is required to provide amenities to rent regulated tenants. Provided any of the proposals¹¹⁴ are passed, landlords may be entitled to “just compensation” from the government because the government will enforce access to building amenities for the rent stabilized tenants. Ultimately, rent stabilized tenants should not be banned from using these amenities. However, the tenants who are not paying market rate rents should be required to pay fair compensation in order to have access to these amenities either by the rent regulated tenant paying privately or through a subsidy by the government. A consideration of fair compensation is explored in Section V.

The purpose of rent regulation is to protect low and middle-income tenants. However, it is apparent that rent regulation laws are doing quite the opposite. In June 2011, Governor Andrew Cuomo signed into law the 2011 Act which extended the current rent laws through June 15, 2015.¹¹⁵ As previously mentioned, if a vacant unit’s rental is at least \$2,500 per month or the annual income level of the tenant’s household income is a minimum of \$200,000, the apartment can be deregulated.¹¹⁶ Many wealthier tenants have taken advantage of the generous income and rent levels for rent regulated apartments. These highly successful tenants include: an oral surgeon, a hedge fund principal, a magazine editor, and individuals who serve important roles for major companies.¹¹⁷ Several of these wealthier tenants are able to afford second homes because of the low rentals established under rent regulations.¹¹⁸ Landlords are frustrated

¹¹³ Kamping-Carder, *supra* note 1.

¹¹⁴ See *infra* Section V.

¹¹⁵ Estis & Turkel, *supra* note 91.

¹¹⁶ *Id.*; see *supra* note 93.

¹¹⁷ James Fanelli, *Millionaires Are Living Cheap in New York's Rent-Stabilized Apartments*, BUS. INSIDER (May 1, 2014, 11:04 AM), <http://www.businessinsider.com/millionaires-are-living-cheap-in-new-yorks-rent-stabilized-apartments-2014-5>. A landlord can deregulate an apartment when the tenant has income over \$200,000 for the prior two consecutive years. *Id.* This is one instance showing how high income tenants take advantage of the rent regulation system. *Id.*

¹¹⁸ *Id.* (“While living in his government-regulated unit, he and his wife bought a \$275,000 weekend home in the Berkshires in 2005, according to property records.”).

because these wealthier tenants are using the system to their advantage while the landlords are losing opportunities to receive the market value for those apartments. Many landlords do not want to provide rent regulated tenants with access to building amenities, or would even consider removing amenities because of new rules and regulations which the DHCR may implement.¹¹⁹ The new rules would result in more control and oversight by the DHCR.¹²⁰ For example, a landlord could potentially be required to obtain approval from the DHCR to remove an amenity from the building. If approval is given to remove the amenity, the landlord may incur additional loss.¹²¹ This, in effect, would discourage developers from providing access to amenities for rent regulated tenants for fear of additional regulations enforced by the DHCR.

There are also financial reasons why developers have been treating rent regulated tenants and market rate tenants differently.¹²² In a Human Rights Commission filing, the landlord, Stonehenge Partners Inc., indicated that its policy with respect to the gym amenity is “an inducement to rent” apartments at a market rate.¹²³ A market rate tenant who lives in a one-bedroom apartment at the Stonehenge Village pays approximately \$3,450 per month.¹²⁴ On the other hand, a rent stabilized tenant at Stonehenge Village pays only \$1,107 per month for a two-bedroom apartment.¹²⁵ In effect, the market rate rents provide an inducement to landlords to limit amenities to the market rate tenants. There is little financial incentive for landlords to provide amenities to rent regulated tenants especially due to the disparity in rent paid.

The amenities that developers have been constructing are costly. For example, Stonehenge Village incurred a cost of \$5

¹¹⁹ Scott Spiegel, *Forcing Us to Subsidize Rent-Controlled Apartments Is Downright Mean*, LIBERTARIAN HAWK (May 21, 2014), <http://www.libertarianhawk.com/2014/05/21/forcing-new-yorkers-to-subsidize-rent-controlled-apartments-is-downright-mean/>.

¹²⁰ *Id.*

¹²¹ *Id.* (indicating that there is a “[g]reater discount to rent-stabilized tenants” upon removal of an amenity).

¹²² Peltz, *supra* note 5.

¹²³ *Id.*

¹²⁴ Kamping-Carder, *supra* note 1.

¹²⁵ Kaysen, *supra* note 98 (showing the disparity because not only does the rent regulated tenant pay over \$2,000 less in rent but also obtains a second bedroom as part of the lease agreement).

million to modernize the building.¹²⁶ A portion of the \$5 million upgrade was designated for the new gym.¹²⁷ A second example is the \$10 million renovation being completed on the Windermere property run by Stellar Management.¹²⁸ A portion of this renovation includes additional amenities on the roof including “a sky lounge, a bar and planters.”¹²⁹ These renovations are incentives for the market rate tenants to remain as tenants as well as an inducement to future market rate tenants.¹³⁰ In fact, at Windermere, rent regulated tenants will no longer be permitted to access the rooftop garden.¹³¹

To offset some of the renovation costs and increase rental revenues, many landlords attempt to have rent regulated tenants move out in order to rent the apartments at market value. For example, landlords try with some success to buy out rent regulated tenants. Specifically, at Windermere, the landlord has offered some rent regulated tenants \$10,000 to \$50,000 to move out of the apartment complex.¹³² Other landlords either delay or do not make repairs in the apartment complex.¹³³ Others even threaten these tenants with eviction.¹³⁴

Not only have landlords excluded rent regulated tenants from accessing amenities such as gyms, rooftops, and pools, but in some cases they have barred rent regulated tenants from using the same door as the market rate tenants.¹³⁵ This is commonly known as the “poor door” policy.¹³⁶ Developers indicate that the policy for amenities, including the “poor door” policy, has been implemented based on business strategy.¹³⁷ Landlords also use restrictive policies

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Kaysen, *supra* note 98.

¹³¹ *Id.* (indicating that rent stabilized tenants originally had access to the rooftop garden).

¹³² Ransom, *supra* note 99 (noting the lengths that landlords will go to in order to increase rents and, in effect, increase the value of the apartment buildings).

¹³³ Hazlitt, *supra* note 55.

¹³⁴ Mireya Navarro, *As New York Landlords Push Buyouts, Renters Resist*, N.Y. TIMES (July 9, 2014), available at <http://www.nytimes.com/2014/07/10/nyregion/as-new-york-landlords-push-for-buyouts-tenants-stand-their-ground.html>.

¹³⁵ Lucy Westcott, *NYC Gives Green Light for Buildings with Separate Door for Poor Residents*, AFRICANGLOBE (July 22, 2014), <http://www.africanglobe.net/business/nyc-green-light-buildings-separate-door-poor-residents/>.

¹³⁶ *Id.*

¹³⁷ Peltz, *supra* note 5.

regarding amenities as a strategy to entice market rate tenants to move into the building as well as to encourage rent regulated tenants to vacate their apartments.¹³⁸ They contend that “reserving some prime features for higher-paying residents is the price of having affordable housing in hot neighborhoods.”¹³⁹ For example, Brooklyn condominium owner Courtney Harding stated that “owners pay as much as \$1,000 a month on top of their mortgages to maintain the building and its services.”¹⁴⁰ She added, “[i]f you’re not paying the doorman’s salary, is it fair for you to use the doorman?”¹⁴¹ Although a condominium is not subject to rent regulations, the same idea should apply. Just as a condominium resident pays for additional services, a rent stabilized tenant should pay for amenities.

Landlords, faced with the challenge of whether to provide building amenities to rent regulated tenants, should make them available to all tenants as well as to provide “equal access” by rejecting the “poor door” policy. However, landlords are running a business and are investing time and money into providing these amenities. As discussed in Section V, a middle ground to help resolve this problem would require rent regulated tenants to pay landlords fair compensation for use of the amenities.

B. Tenants

Many tenants vehemently object to the new amenity policies that their landlords have implemented. Rent stabilized tenants have been banned from using new amenities such as fitness centers, children’s playrooms, as well as pools.¹⁴² Rent stabilized tenants also have been banned from using amenities that they have had access to for years including lounges and rooftop patios.¹⁴³ Furthermore, in one apartment complex, rent stabilized tenants have been unable to use the free shuttle service that is available to market rate tenants.¹⁴⁴ This free shuttle service provides accommodations from the

¹³⁸ Kaysen, *supra* note 98.

¹³⁹ Peltz, *supra* note 5.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Ransom, *supra* note 99.

¹⁴³ *Id.*

¹⁴⁴ *Pressure Rising*, *supra* note 102.

apartment complex to nearby subway stops.¹⁴⁵ Many rent stabilized tenants have even offered to pay a fee to access or continue to use these different services.¹⁴⁶ Although some landlords have allowed rent regulated tenants access to different building amenities by paying an additional fee, not all landlords have provided this option.

Clearly, the ban on amenities has frustrated many tenants who are also unsure of their legal rights. For example, some tenants are “perplexed by a back-room deal being hashed out between their tenant association and management, which calls for the rent-stabilized tenants to relinquish their right to sue, or file a complaint with any agency, concerning certain disputed amenities in exchange for maintaining their Reagan-era rents.”¹⁴⁷ Regarding new building amenities, rent stabilized tenants likely do not have a valid case against their landlords because current laws do not guarantee access to the amenities.¹⁴⁸ David Kaminsky, a landlord-tenant attorney, asserted, “[i]f the rent stabilized tenants were not provided the service of a gym amenity at the inception of their tenancy they have no right to the service and no right to complain about the refusal of the landlord to provide such service.”¹⁴⁹ If building amenities were available to tenants at the inception of their tenancy but subsequently taken away, it is unclear whether these tenants have a valid cause of action. Tenants’ rights regarding amenities could change if Linda Rosenthal’s bill¹⁵⁰ is passed because it would clarify the rights of rent regulated tenants.¹⁵¹ There are several issues that need to be resolved. The first issue is whether rent stabilized tenants should

¹⁴⁵ *Id.*

¹⁴⁶ Peltz, *supra* note 5 (suggesting landlords reject these offers by rent stabilized tenants to pay a fee for building amenities because they would prefer these tenants to move out in order to obtain market-rate rents).

¹⁴⁷ Ransom, *supra* note 99.

¹⁴⁸ *Pressure Rising*, *supra* note 102.

¹⁴⁹ *Id.* There is apparently no valid case for rent stabilized tenants:

[S]ince the gym service was not initially provided to [them], it is not a service that the tenants were initially paying for as a portion of the rent. However, the only way to be absolutely sure is to file a complaint with the State of New York DHCR and see if DHCR concludes that the rent stabilized tenants are entitled to use the Gym without paying an extra gym fee.

Id.

¹⁵⁰ *See infra* Section V.

¹⁵¹ *Pressure Rising*, *supra* note 102.

have access to these amenities. The second issue is whether they may be required to pay a fee if these rent stabilized tenants are given access to the amenities. The third issue is the appropriate amount of any fee.

Some rent regulated tenants believe that the amenity policies implemented by landlords may constitute age discrimination. For example, in the Stonehenge Village apartment complex, many tenants were very excited when they heard that one of the rooms in the complex was being renovated to create a new gym.¹⁵² This excitement ended when they learned the fitness center would only be accessible to market rate tenants.¹⁵³ In fact, fewer than forty percent of the tenants at Stonehenge Village will have access to the new gym.¹⁵⁴ Many rent stabilized tenants at Stonehenge Village, as well as several New York City politicians including Letitia James, believe this may be a discriminatory policy.¹⁵⁵ In this apartment complex, sixty-six percent of the rent stabilized tenants are 65 or older.¹⁵⁶ Stonehenge Tenant Association President Jean Green Dorsey, a rent stabilized tenant, filed a complaint with the New York City Human Rights Commission.¹⁵⁷ In the complaint, Dorsey alleged that the new gym policy discriminates against older tenants especially since Stonehenge is “targeting ‘young and trendy’ professionals.”¹⁵⁸ In fact, according to data from the New York University Furman Center for Real Estate and Urban Policy, many elderly tenants are subject to rent regulations.¹⁵⁹ The 2011 data indicate that, “[w]hile fewer than 5 percent of market rate tenants are seniors, nearly 20 percent of rent-regulated tenants are age 65 or older.”¹⁶⁰ Dorsey believes that rent

¹⁵² Jan Ransom, *Upper West Side Rent-Stabilized Tenants Crying Foul over Gym Woes*, N.Y. DAILY NEWS (Feb. 25, 2014, 7:45 PM), <http://www.nydailynews.com/new-york/uptown/tenants-banned-new-upper-west-side-apartment-gym-article-1.1701717>.

¹⁵³ *Id.*

¹⁵⁴ Kaysen, *supra* note 98.

¹⁵⁵ Julie Strickland, *James to File Discrimination Complaint Against Stonehenge*, THE REAL DEAL (Feb. 25, 2014, 4:15 PM), <http://therealdeal.com/blog/2014/02/25/james-to-file-discrimination-complaint-against-stonehenge-management/>.

¹⁵⁶ Emily Frost, *Building Discriminates Against Older Tenants with Gym Ban, Complaint Says*, DNAINFO (Feb. 24, 2014, 7:24 AM), <http://www.dnainfo.com/new-york/20140820/upper-west-side/building-discriminates-against-older-tenants-with-gym-ban-complaint-says>.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*; Kaysen, *supra* note 98 (indicating “[n]obody makes me a second-class citizen in my own home”).

¹⁵⁹ Kaysen, *supra* note 98.

¹⁶⁰ *Id.*

stabilized tenants should have access to these amenities by paying an additional fee.¹⁶¹

On the other hand, the following example demonstrates that despite a restrictive policy, some rent regulated tenants can be given access to building amenities. The apartment complex Windermere West End has made major renovations to its facility.¹⁶² This complex added a pool, children's playroom, lounge, and rooftop patio.¹⁶³ This is an instance in which rent stabilized tenants initially were unable to access building amenities that are available to market rate tenants.¹⁶⁴ Stellar Management, the company that manages Windermere, has rented the new pool to a swimming school called SwimJim. SwimJim gives swimming lessons to children who live in the building as well as those who do not live in Windermere.¹⁶⁵ Originally, only market rate tenants were given access to the swimming pool.¹⁶⁶ Windermere changed this rule recently to include rent stabilized tenants. Windermere's rent stabilized tenants are now given the opportunity to register and pay for their children to obtain swimming lessons.¹⁶⁷ SwimJim even offers Windermere rent regulated tenants a discount for this service.¹⁶⁸ This change in policy by Stellar Management appears to be a reasonable solution to the amenities issue. The rent stabilized tenants can now use the pool at a discounted rate as compared to individuals not living in the building.

Furthermore, while some affordable housing units are within the same building as market rate tenants, other developments have separate buildings for market rate and rent stabilized tenants. In

¹⁶¹ Eva Kalikoff, *State Assembly Pushes Bill to End Tenant Discrimination in City Apartment Complexes*, COLUMBIA SPECTATOR (Apr. 3, 2014, 2:33 AM), <http://columbiaspectator.com/news/2014/04/03/state-assembly-pushes-bill-end-tenant-discrimination-city-apartment-complexes>. Dorsey does not contend the rent stabilized tenants should be able to obtain access to these amenities based on the rent they currently pay. *Id.* Dorsey believes a deal can be worked out in order for rent stabilized tenants to have access to these building amenities. *Id.*

¹⁶² Jan Ransom, *Outsiders Welcomed, Rent Stabilized Tenants Banned at Upper West Side Indoor Pool*, N.Y. DAILY NEWS (Apr. 10, 2014, 5:01 PM), <http://www.nydailynews.com/new-york/uptown/indoor-upper-west-side-pool-open-public-rent-stabilized-tenants-article-1.1752497>.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Ransom, *supra* note 162.

¹⁶⁸ *Id.*

order for a New Yorker to obtain an affordable housing apartment, this individual must go through the housing lottery.¹⁶⁹ It is a very strict application process and the apartments are in high demand.¹⁷⁰ For example, one affordable housing apartment, Chelsea Park, received 15,000 applications for only fifty-one available apartments.¹⁷¹ To obtain an affordable housing apartment, an applicant must have good credit, meet the income requirements, and provide bank statements as well as other documentation.¹⁷² In some affordable housing apartments, market rate tenants do not even know that the building they live in also rents to low income tenants.¹⁷³ However, in other buildings, the disparity between rental rates cause tension between the two groups.¹⁷⁴

In some instances, a tenant who wins the lottery for affordable housing is unable to obtain the same privileges a market rate tenant enjoys. For example, in an affordable housing development, the affordable apartments face the street while the luxury apartments face the river or have another view.¹⁷⁵ Evidence indicates that most tenants who are subject to market rate rents are not opposed to these new policies.¹⁷⁶ These tenants indicate, “separate lobbies and amenities are about sharing expenses, not creating social distance.”¹⁷⁷ Even so, some rent stabilized tenants accept the situation especially since they are paying about a quarter of what a market rate tenant in the neighborhood pays.¹⁷⁸

A mixed income development called AVA High Line has

¹⁶⁹ Satow, *supra* note 22 (indicating that after certain requirements including income and credit are met, the names are selected from the computer at random).

¹⁷⁰ *Id.* The application process has stringent requirements. For example:

“They tell you to submit the application by regular mail—not express, not registered mail—and you have to follow every direction perfectly or you will be disqualified,” said Natalia Padilla, an agent at Citi Habitats, who has applied to the housing lottery herself and has helped clients with their applications.

Id.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ Satow, *supra* note 22.

¹⁷⁴ *Id.*

¹⁷⁵ Westcott, *supra* note 135.

¹⁷⁶ Peltz, *supra* note 5.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* (noting that some rent stabilized tenants are content not having a beautiful view or other building amenities because of the benefit of a discounted rental).

allowed low income tenants to pay an additional fee to use different amenities. The AVA High Line has 710 market rate apartments and 142 affordable apartments for low income tenants.¹⁷⁹ Farse Omar, one of the low income tenants, was able to obtain a studio apartment through the housing lottery for a very reasonable price of \$520 per month.¹⁸⁰ Mr. Omar was fortunate especially since a market rate apartment at AVA High Line usually starts at \$3,065 per month.¹⁸¹ At this development, residents, whether they are in an apartment for low income tenants or tenants subject to market rate rents, are all entitled to use the backyard and the lounge.¹⁸² However, the low income tenants pay an annual fee of \$500 in addition to the monthly rent in order to access the fitness center.¹⁸³

The new amenity policies have been referred to as a “slippery slope.”¹⁸⁴ Selective access to some new amenities, such as a public bathroom or mailroom, is controversial.¹⁸⁵ May landlords deny rent stabilized tenants access to these building amenities?¹⁸⁶ Different types of amenities should be treated differently. In our example, since David is a rent stabilized tenant, he is unable to obtain access to building amenities, such as the fitness center and the rooftop patio. David, as well as other rent stabilized tenants, should be entitled to access these amenities provided they pay a reasonable fee because denial of access is unreasonable. However, a rent regulated tenant such as David should have access to a public bathroom or the mailroom without payment of a fee. It is appropriate for rent regulated tenants to pay a fee to access less essential but desirable amenities because giving them free access would be unfair to the tenant who is paying market rate rent and to the landlords and developers who are investing time and money into implementing these new building amenities.

¹⁷⁹ Satow, *supra* note 22.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ Kaysen, *supra* note 98. See also *Slippery Slope*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/slippy%20slope> (last visited Feb. 22, 2015) (defining slippery slope as “a course of action that seems to lead inevitably from one action or result to another with unintended consequences”).

¹⁸⁵ Kaysen, *supra* note 98.

¹⁸⁶ *Id.*

V. PROPOSALS

Several pro-tenant politicians have made different proposals in order to ensure that rent stabilized tenants have equal access to the same amenities as market rate tenants. Three of these politicians include: City Council Member Mark Levine of West Harlem, New York State Assembly Member Linda Rosenthal, and Public Advocate Letitia James.¹⁸⁷ Currently, none of the bills proposed by these politicians¹⁸⁸ have been enacted.

A. Human Rights/Discrimination Issue

Some elected officials, including City Councilman Mark Levine, believe that the human rights code should include renter status as a protected class.¹⁸⁹ Levine, as well as other politicians, believes that excluding rent stabilized tenants from building amenities should be considered a discrimination issue.¹⁹⁰ According to Levine, renter status, to date, is not considered a protected class in the human rights code.¹⁹¹ Levine indicated, “[o]bviously, race and gender and sexual orientation, religion are all protected classes, but renter status is not—and until we change that, we’re not going to have a legal recourse to combat this.”¹⁹² The proposal to make renter status a protected class is also supported by Councilmember Corey Johnson and is currently being drafted.¹⁹³ If the bill is signed into law, the human rights code would change by expanding protections for rent stabilized tenants.¹⁹⁴

Supporters of equal access to amenities contend that the denial of access is discriminatory because it is unfair treatment to deny building amenities to one tenant yet offer them to other tenants in the same building.¹⁹⁵ In addition, many of these supporters also

¹⁸⁷ Maurer, *supra* note 7.

¹⁸⁸ *See infra* Section V.A.

¹⁸⁹ Ransom, *supra* note 4.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ Peltz, *supra* note 5.

¹⁹⁴ Maurer, *supra* note 7.

¹⁹⁵ *Pol Still Working out Details of Creating a New Protected Class*, GILDED CITY (Apr. 11, 2014), <http://www.gildedcity.com/pol-still-working-out-details-of-creating-a-new-protected-class/>.

believe that the fees to use building amenities should be the same for both market rate and rent stabilized tenants despite the difference in the rent each group pays.¹⁹⁶ For example, in a twitter conversation between Gilded City and Levine, Gilded City asked Levine if his plan is to raise everyone's rent, so everyone pays the same amount.¹⁹⁷ Levine responded, "[n]o their rents are set by law."¹⁹⁸ He added, "[w]e are talking about amenities. All should pay the same price and have equal access."¹⁹⁹ Levine failed to address the concern that market rate tenants are paying higher rents and therefore, building amenities, at the option of the landlord, should be included in the market rate rentals.²⁰⁰ Levine was quick to respond that he cannot help the rent prices and that individuals should be focusing on equal amenities for market rate and rent stabilized tenants.²⁰¹

New York State Assembly member Linda Rosenthal, who also advocates equal access to amenities for all tenants, sponsored New York State Assembly Bill A09061B.²⁰² The purpose of this bill is to "[p]rohibit landlords from discriminating against rent regulated tenants by banning them from utilizing new amenities and common areas, such as fitness rooms, rooftop decks, pools, and playrooms in their building of residence."²⁰³ The justification for the bill is to end this discrimination in order to ensure that rent regulated tenants do not feel like second-class citizens in their own home.²⁰⁴ In addition, the bill provides that landlords can be fined up to \$25,000 if they only allow market rate tenants to use these amenities.²⁰⁵ Landlords would also be prohibited from raising rents until the violations at issue are removed.²⁰⁶ Lastly, Rosenthal wants to include a provision for rent regulated tenants to pay a reasonable fee to use these building

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Pol Still Working out Details of Creating a New Protected Class*, *supra* note 182.

²⁰¹ *Id.*

²⁰² A.B. 9061B, 2014 Leg., 9061B, 237th Sess. (N.Y. 2014).

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ Julie Strickland, *Bill Would Penalize Landlords Restricting Access to Amenities*, THE REAL DEAL (Mar. 10, 2014, 5:15 PM), <http://therealdeal.com/blog/2014/03/10/bill-would-penalize-landlords-who-restrict-access-to-building-amenities/>.

²⁰⁶ *Id.*

amenities.²⁰⁷ Since June 9, 2014, there has been no further action on this bill.²⁰⁸

Letitia James, the Public Advocate for the City of New York, also supports equal access to amenities for rent stabilized and market rate tenants.²⁰⁹ The owners of Stonehenge Village have denied rent stabilized tenants access to the building's gym.²¹⁰ As a result of this policy, in March 2014, James filed a complaint with the Commission on Human Rights against the owners of the apartment complex.²¹¹ James believes that Stonehenge Village's policy violates New York City's anti-discrimination laws.²¹² The complaint refers to a "2008 law prohibiting discrimination based on income" which James believes may be applicable regarding building amenities.²¹³

Mark Levine, Linda Rosenthal, and Letitia James are just three of several politicians who are supporting legislation which would provide equal access to building amenities to all tenants.²¹⁴ The legislation would expand rent regulated tenants' rights and would make it discriminatory to deny rent regulated tenants access to building amenities.²¹⁵ If any of the bills were to pass, it would put landlords at a financial disadvantage because they would have to provide amenities without receiving fair compensation.

B. Three Possible Approaches

There are three possible approaches to resolve the amenities issue. These include: (1) classifying renter status as a protected class; (2) eliminating rent regulations; and (3) imposing a reasonable fee for amenities. The first approach favors rent regulated tenants while the second approach favors landlords and developers. The third

²⁰⁷ Peltz, *supra* note 5 (noting Rosenthal has not specified what a reasonable fee might be for rent regulated tenants to access building amenities).

²⁰⁸ See *supra* note 202.

²⁰⁹ Ransom, *supra* note 4.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² Jan Ransom, *Public Advocate Slaps Upper West Side Landlord with Discrimination Complaint After Gym Ban*, N.Y. DAILY NEWS (Mar. 4, 2014, 5:50 PM), <http://www.nydailynews.com/new-york/uptown/gym-ban-upper-west-side-pad-leads-complaint-public-advocate-letitia-james-article-1.1710680>.

²¹³ *Id.*

²¹⁴ Maurer, *supra* note 7.

²¹⁵ *Id.*

approach appears to be the best alternative to meet the needs of both landlords and tenants.

1. Renter Status as a Protected Class

The first approach would include renter status as a protected class. If the legislature passes a law that includes renter status as a protected class, there would no longer be an issue as to whether the denial of access to building amenities to rent regulated tenants is discriminatory. As a protected class, all rent regulated tenants would have the same access to building amenities as do the market rate tenants. This would benefit the rent regulated tenants greatly. These tenants could then enjoy using amenities without having to pay an additional fee to access them. In addition, they would have the legal right to sue if the landlord were to deny them access to building amenities.

On the other hand, implementing this approach would create a financial loss to landlords because they would have to provide these services to a greater number of tenants without obtaining any compensation. In addition, the landlords would be subject to more stringent rules and regulations implemented by the DHCR. Market rate tenants might resent the continued rent differential, despite the absence of a difference in fees for access to these amenities. This outcome appears to be one-sided in favor of the rent regulated tenants. Under these circumstances, the negative impact on the landlords and developers would significantly outweigh the benefits to the rent regulated tenants. Therefore, this approach would not be a preferred outcome to resolve the amenities issue.

2. Eliminate Rent Regulations

A second approach to resolving the amenities issue would be the elimination of rent regulations altogether. Although this outcome is highly unlikely, there would no longer be an issue as to whether rent stabilized and market rate tenants should be given equal access to building amenities. The rent stabilized and market rate tenants would pay comparable amounts for their apartments. In addition, if all tenants pay the market rate rent, the landlord would have additional funds to re-invest in the apartment complex. The issue of discrimination would become moot because all tenants would then be

entitled to access building amenities. The drawback of the elimination of rent regulations is that it would place a burden on those tenants who could not afford the market rate rents. These tenants would most likely be forced to relocate.

The elimination of rent regulations will likely not occur, in the foreseeable future, because, according to the 2011 Housing and Vacancy Survey, there were 68,000 vacant units in New York City.²¹⁶ This amounts to a vacancy rate of 3.12 percent and results in a housing emergency shortage.²¹⁷ In order to deregulate apartments in New York, the vacancy rate needs to be at least five percent.²¹⁸ This approach obviously favors the landlords and would satisfy the market rate tenants because everyone in the building would be paying comparable rents. However, under these circumstances, the negative impact on the rent regulated tenants would significantly outweigh the benefits to the landlords and developers. Therefore, this second approach would not be a suitable outcome to resolve the amenities issue.

3. *A Reasonable Fee Approach*

A third approach would be to add a reasonable fee provision to the upcoming rent act slated for June 2015. Since amenities were not included in the New York State rent laws of 1993, 1997, 2003 and 2011, a provision regarding amenities should be included in the 2015 rent act. This provision would ensure that rent stabilized tenants have access to the same building amenities that market rate tenants are given. Also, the provision should include a formula to determine the additional fee, separate from the rent regulated tenants' monthly rent, for access to the building amenities. New York State Assembly Member Rosenthal's proposed bill appears to be a fair compromise even though her bill fails to specify what a reasonable fee might be. For example, with respect to how much a rent stabilized tenant should pay to access the building's gym, as indicated in the AVA High Line development, an annual fee of \$500 seems reasonable.²¹⁹ This amount could vary depending on the

²¹⁶ LEE, *supra* note 14, at 31.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ Satow, *supra* note 22. To some tenants, \$500 appears reasonable but if it does not

equipment in the gym, the availability of a pool, the number of staff members on duty at a given time, the hours of the gym, and the presence of a day care center and babysitting services. Family discounts could also be made available. Going back to our example, if David wanted to use the gym in his apartment complex, he would be entitled to do so as long as he paid the annual fee of \$500 in addition to his monthly rent. On the other hand, his neighbor, Lana, would not be required to pay an additional fee to access the gym since she is a market rate tenant.

The amount to charge rent stabilized tenants would be difficult to ascertain for other building amenities such as a rooftop patio, lounge, backyard or children's playroom.²²⁰ Building owners spend large sums of money to renovate their apartment complexes and should be entitled to a reasonable fee for these upgrades. Landlords should look at the costs involved to renovate these areas as well as the cost to maintain them. The landlords would then spread the costs among all of the tenants to help pay for renovations and maintenance regardless of their interest in using the amenities. The landlord could then give rent regulated tenants the option to pay a reasonable fee for use of the new building amenities. If the rent stabilized tenants opt in, they would pay the extra fee in addition to their monthly rent, while the fee would be included in the market rate tenant's rent. This option, on the part of the rent regulated tenant, would apply for access to the building's gym as well. On the other hand, a landlord should not be entitled to an additional fee for a rent stabilized tenant to access certain low maintenance amenities such as a snack room, mailroom or even a bathroom. It would be unreasonable for the landlord to impose a fee because they are relatively basic to an apartment complex. Therefore, the rent act slated for June 2015 should include an extensive list identifying the building amenities to which all tenants should have access and which ones would require payment of an additional fee.

The reasonable fee approach provides benefits to both landlords and tenants. Landlords would be entitled to a reasonable fee for the building amenities available to the rent regulated tenants.

seem reasonable, the rent regulated tenant is under no obligation to pay the additional fee. *Id.* In addition, the article does not specify how the AVA High Line development determined the additional annual fee of \$500. *Id.*

²²⁰ Ransom, *supra* note 4.

In effect, the landlords would be receiving a return on their investment. Market rate tenants would also be somewhat satisfied. They would not have to subsidize the rent regulated tenants because the rent regulated tenants would be paying for the use of the facilities. The rent regulated tenants would also be relatively satisfied for several reasons. First, they would have access to building amenities for a reasonable fee. Second, the rent regulated tenants would not be discriminated against since they would be given the option of whether to pay for the use of the building amenities. In effect, the rent regulated tenants would no longer believe they are being treated like “second-class citizen[s] in [their] own home.”²²¹

However, this approach has a few minor drawbacks. For example, landlords would be subject to rules and regulations instituted by the DHCR.²²² The landlords might resent the rent regulated tenants because they may believe they are not receiving a full return on their investment. The market rate tenants might be frustrated that they have to share these building amenities with the rent regulated tenants. Although the rent regulated tenants would be paying an additional fee, there would still be a disparity in the amount of rent each group pays. Also, the additional members could result in less favorable conditions for the use of amenities. For example, if David and the other rent regulated tenants are given access to the gym, the waiting time to use the equipment in the fitness center could increase. Despite these minor drawbacks, the reasonable fee approach appears to be the best alternative for landlords and tenants.

VI. CONCLUSION

Currently, landlords are legally entitled to prohibit rent stabilized tenants from accessing certain building amenities.²²³ Many politicians, including City Council Member Mark Levine of West Harlem, New York State Assembly Member Linda Rosenthal, and Public Advocate Letitia James, argue that the ban on amenities is

²²¹ See *supra* note 202; Kaysen, *supra* note 98.

²²² FINKELSTEIN & FERRARA, *supra* note 13, at § 11:7 (noting that “[i]n 1983, the Legislature designated the DHCR as the sole agency to administer the regulation of residential rents throughout the state under both the rent-control and rent-stabilization statutes.”).

²²³ *Pressure Rising*, *supra* note 102.

discriminatory and inconsistent with the values of New York City.²²⁴ On the other hand, many pro-landlord lawyers believe it is a landlord's legal right to have these bans on amenities for rent regulated tenants in place.²²⁵ Although "[i]t's illegal to discriminate based on the source of your income, it's perfectly legal to discriminate based on the size of your income."²²⁶ In other words, although a landlord cannot discriminate based on where the tenant's income comes from, a landlord can discriminate based on the amount the tenant has available.

From the standpoint of the developers, the amenity policies are considered a business proposition and these policies have nothing to do with landlords' hostility to the lower rentals that rent regulated tenants pay.²²⁷ Rent regulated apartments are approximately fifty-one percent less than the average rate for a market rate apartment.²²⁸ The amenity ban is considered a marketing tool to keep market rate tenants, as well as to entice prospective tenants into renting an apartment based on the market value.²²⁹ Some market rate tenants agree with landlords that the ban on amenities is beneficial to ensure that expenses are shared and does not create tension between market rate and rent regulated tenants.²³⁰

There are three possible approaches as to how the amenities situation could be resolved. First, by including renter status as a protected class, rent regulated tenants would have a cause of action if they were denied access to building amenities. Second, the elimination of rent regulations would eliminate the issue of access to building amenities since all tenants would have equal access. Third, the reasonable fee approach supports the notion that rent regulated tenants would be entitled to access building amenities for a

²²⁴ *Bill Would Require Equal Access to NYC Tenant Amenities*, EYEWITNESS NEWS (Mar. 9, 2014, 12:11 PM), <http://7online.com/archive/9459905/>.

²²⁵ *Pressure Rising*, *supra* note 102.

²²⁶ Kamping-Carder, *supra* note 1.

²²⁷ Peltz, *supra* note 5.

²²⁸ *New York City's Rent-Regulated Tenants Excluded From Amenities*, THE GENTLEMAN ECONOMIST (May 22, 2014), <http://www.gentlemaneconomist.com/2014/05/new-york-citys-rent-regulated-tenants-excluded-amenities/> (displaying data from New York University Furman Center for Real Estate and Urban Policy indicating that "[t]he median rent for a rent-regulated apartment in Manhattan in 2011 was \$1,321 a month, 51% lower than the \$2,696 median for market-rate units").

²²⁹ Kaysen, *supra* note 98.

²³⁰ Peltz, *supra* note 5.

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reasonable fee. This approach appears to be the best compromise to resolve the amenities issue between landlords and tenants. Under this approach, the tenants are given the option to use the building amenities by paying an additional reasonable fee. The landlords, by obtaining this additional fee, are receiving a return on their investment.²³¹ Passage of New York State Assembly Bill A09061B would ensure that rent regulated tenants have equal access to building amenities.²³² Ultimately, rules regarding building amenities and reasonable charges for access to these amenities for rent regulated tenants should be addressed in the upcoming rent act slated for June 2015.

²³¹ *Pressure Rising*, *supra* note 102 (noting, for example, the owners of Stonehenge Village have invested at least \$5 million for improvements to the lobby as well as improvements to the courtyard).

²³² *See supra* note 202.