ALLOCATING AND MANAGING PROPERTY RIGHTS ON MANHATTAN'S LOWER EAST SIDE

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INTRODUCTION

South of Fourteenth Street, north of Canal, and running east from the Bowery to Avenue D and the East River lies the region of Manhattan variously referred to as Alphabet City, the Lower East Side, and the East Village.[1] For nearly two decades, this neighborhood has weathered relentless socioeconomic change, undergoing a difficult cultural and demographic transformation that shows no signs of abating. In this Note, I argue that recent land use policies on the Lower East Side have failed to maximize the welfare of those who live and work there, and that they create incentives that may negatively affect both present and future users of the community's public spaces. In response to this problem, I suggest means by which a more useful property rights regime might yet be constructed to better serve this and comparable neighborhoods' various constituencies.

In Part I of this Note, I outline the history of the squatter movement on the Lower East Side, and study a recent decision by the city's Housing and Preservation Department ("HPD") to grant private and communal property rights to the illegal tenants of some eleven buildings held by the agency.[2] In Part II, I describe the orga-

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1. For the purposes of this Note I refer to this region as the Lower East Side. Alphabet City and the East Village are both terms that are used primarily to describe the area north of Houston Street, Alphabet City being an older term for a slightly smaller area (with its western border at Avenue A, as opposed to the Bowery). The "Lower East Side," while often perceived as having its northern boundary at Houston Street, is nevertheless the most inclusive and vaguely defined of the three terms, and is the only one to clearly include Orchard Street within its boundaries. An alternative name for the region, Loisaida, is rarely used outside of the activist community.

2. *See* APPENDIX, *Fig.* 1.

nizational structure of business improvement districts ("BIDs") and their history in New York City, and I analyze the effects of a 1992 decision that granted a BID the right to manage communal property located along three blocks of Orchard Street.[3] I conclude, in Part III, by examining how these two case studies might refocus our attention upon the communicative element of property, and I consider ways by which a new institution might employ communicative principles to solve the old problem of allocating and managing property rights for the "greatest good."

I.
PROPERTY RIGHTS ALLOCATION TO ILLEGAL SQUATTERS

A. Background

Squatting, the "unauthorized, illegal occupation of a residence,"[4] is fundamentally an act of trespass.[5] Although squatting may serve a variety of purposes and needs—it may be a political statement, an act of perceived necessity, or the first step towards establishing a claim of adverse possession—illegal squatters share certain characteristics and behaviors:

> Informal squatters often use ingenious means to enter boarded-up buildings, to pirate electricity, to find food and water, and to generate heat. Such efforts often take place without the support of neighbors, and they do not add permanent, safe units to the City's housing stock. The squatters generally lack the financial and political resources to transform their rundown housing into permanently liveable homes, to avoid eviction, and to obtain the deeds to abandoned buildings.[6]

It has been said that no American city "has experienced more urban squatting activity than New York City,"[7] and few parts of New York City have experienced more squatting than the Lower East

3. *See* APPENDIX, *Fig.* 2.

4. Eric Hirsch & Peter Wood, *Squatting In New York City: Justification and Strategy*, 16 N.Y.U. Rev. L. & Soc. Change 605, 605 (1988).

5. N.Y. PATTERN JURY INSTRUCTIONS, Civil 3:8 ("A person who, without justification or permission, intentionally (goes, causes a (person, thing) to go) upon the property of another person commits what is known in the law as a trespass and is liable for any damages caused by that trespass.").

6. Hirsch & Wood, *supra* note 4, at 605–06 (describing squatters who enter apartments without the support of organized, community-based campaigns).

7. Brian Gardiner, Comment, *Squatters' Rights and Adverse Possession: A Search for Equitable Application of Property Laws*, 8 Ind. Int'l & Comp. L. Rev. 119, 141 (1997).

Side; this is at least partially due to the presence of a "large cache of city-owned properties" in the neighborhood, "a legacy of the wholesale abandonment and arson that swept the area in the 1970's," when "[l]andlords literally walked away from their buildings, especially on blocks east of Avenue A."[8]

1. East 13th Street Cases

Although squatters in publicly owned properties have, for over a decade, clashed with police on a regular basis,[9] the two groups typically solve their differences informally,[10] beyond the gaze of the state's judicial system. In 1995 and 1996, however, two lawsuits arose from the city's attempt to evict squatters from a series of buildings located along East 13th Street.[11] Assuming that these cases were followed within the squatting community,[12] they may be seen as having helped to shape that community's current understanding of what the government prioritizes when it decides how to allocate property; accordingly, any understanding of squatters' perceived incentives must take account of these cases and use them as a touchstone.

All of the 13th Street squatters claimed ownership of their buildings through the doctrine of adverse possession, but one subset of the squatters was never able to have this claim heard by the court. In *East 13th Street Homesteaders' Coalition v. Wright*,[13] HPD premised its eviction upon a portion of the Administrative Code of the City of New York that grants the agency the right to issue an immediate order to vacate premises, regardless of title issues, wherever it

8. Andrew Jacobs, *The Wild, Wild Lower East Side*, N.Y. Times, Mar. 3, 1996, at CY1.

9. *See, e.g.*, Michael Cooper, *Police Evict Band of Squatters Barricaded in the East Village*, N.Y. Times, Apr. 28, 1999, at B3; John Kifner, *Worlds Collide in Tompkins Sq. Park*, N.Y. TIMES, July 31, 1989, at A1; James C. McKinley, Jr., *Police Seal Building After a Protest by Squatters*, N.Y. TIMES, Oct. 28, 1989, at 29. *See generally* SETH TOBOCMAN, WAR IN THE NEIGHBORHOOD: A GRAPHIC NOVEL (1999).

10. *See, e.g.*, James C. McKinley, *36 Arrested During Protest Over Squatters*, N.Y. Times, Oct. 27, 1989, at B1 (demonstrating the legal informality of these interactions, as "all but about six squatters . . . agreed to leave the school building [where they were squatting] in return for immunity from trespassing charges").

11. *See* Thomas J. Lueck, *Tension on East 13th Street as Squatters Await Eviction*, N.Y. Times, Aug. 10, 1996, at B11; Lynette Holloway, *25 Are Arrested in Protests Over the City's Eviction of Squatters on the Lower East Side*, N.Y. TIMES, Aug. 15, 1996, at B4.

12. This is a fair assumption given the tight-knit nature of the squatter community and its general interest in the use of law for activist purposes. *See, e.g.*, Not Bored!, *Squatters Evicted from E. 13th Street*, #26 (1996), *at* http://www.notbored.org/squatters.html.

13. 635 N.Y.S.2d 958 (App. Div. 1995).

finds "imminent danger to [the] life [or] safety of the occupants."[14] The Appellate Division of the New York State Supreme Court applied a highly deferential "arbitrary and capricious" standard for review of HPD's fact-finding and decision-making procedures,[15] and after extensive consideration of the factual record pertaining to the squatters' building repairs,[16] the court held not only that there was no sign of capriciousness on the agency's behalf but that the relevant provisions in the Code should be interpreted as granting HPD "broad discretion" in deciding whether or not to issue an immediate vacate order. Moreover, the court declared that HPD need not limit its definition of "imminent danger" to "whether or not the buildings are on the immediate precipice of collapse"; instead, it ruled that the agency could consider such other factors as "danger to the safety, health, and well being of occupants, as well as passersby."[17]

Almost a year later, in *East 13th Street Homesteaders' Coalition v. Lower East Side Coalition Housing Development*, another subset of squatters located in better-renovated buildings managed to have their adverse possession claim addressed in court through the requirement that courts consider a party's "likelihood of success on the merits" when weighing the pros and cons of granting a preliminary injunction.[18] In New York, trespassers seeking to employ the adverse possession doctrine must prove by clear and convincing evidence that "for a period of ten years they actually possessed the subject property at issue, and that their possession was open and notorious, exclusive, continuous, hostile, and under claim of right."[19] In this case, the court denied the squatters' motion for a preliminary injunction without considering any of these prongs except continuous possession (defeated because of privity and tacking problems).[20]

In both of the 13th Street cases the evictions were permitted to proceed as planned, indicating to squatters that the dispositive factors in squatting law are (1) the relative safety and skill of building

14. §§ 26-127(b), 26-243(c), 26-245(a), and 27-2139.

15. 635 N.Y.S.2d at 963.

16. *Id.* at 958 *passim.*

17. *Id.* at 964. The court also held that the city need not repair the buildings in such circumstances, "since petitioners have not demonstrated a legal right to be occupying the premises or that the City had any legal obligation to make the repairs." *Id.*

18. 646 N.Y.S.2d 324, 325 (App. Div. 1996).

19. *Id.*

20. *Id.* at 326.

renovations, and (2) the length of time that a discrete group spends in a single building.

2. Current Developments

Six years after the *East 13th Street* opinions were handed down, HPD presided over "a drastic shift"[21] in its squatter policy. This shift was prompted by the actions of the Urban Homesteading Assistance Board ("UHAB"), a nonprofit organization that, at the request of squatters, negotiated with HPD for over three years and two mayoral administrations in order to win the right to buy eleven "vacant" buildings from HPD.[22] After closing this deal with the city, the UHAB awarded its newly won property rights to those squatters already inhabiting the buildings in question ("2002 Grant"): "Under the deal . . . 167 apartments on the Lower East Side have been turned over for $1 per building to the Urban Homesteading Assistance Board, which in turn will turn them over to the squatters."[23] The former squatters now own their individual apartments as part of a co-op arrangement, but are restricted in their ability to transfer these ownership rights to new tenants (conditions of sale prevent the residents from subletting or selling the residences at a profit).[24]

To place the 2002 Grant in political and economic context, cooperative fees in some of the newly transferred buildings will total less than $1,000.00 per month, while comparable spaces on the private market might rent for $2,300.00 per month.[25] Also, the City of New York is in the midst of a massive effort to reduce its holdings of *in rem* property, which totaled 3,847 units at the end of 2003 (a

21. Jennifer Steinhauer, *Once Vilified, Squatters will Inherit 11 Buildings*, N.Y. Times, Aug. 20, 2002, at A1.

22. The addresses of the eleven buildings are: 292 East Third Street, 719 East Sixth Street, 209 East 7th Street, 274 East 7th Street, 278 East 7th Street, 733 East 9th Street, 377 East 10th Street, 544 East 13th Street, 7 1/2 2nd Avenue, 21-23 Avenue C, 155 Avenue C. Annia Ciezadlo, *Squatters' Rites: Homes Above Ground*, City Limits Monthly, *available at* http://www.citylimits.org/content/articles/articleView.cfm?articlenumber=862.

23. Steinhauer, *supra* note 21.

24. Amy Barrett, *Abandon It, And They Will Come*, N.Y. Times Magazine, Oct. 6, 2002, § 6, at 104 ("The squatters got a deal, but one with several catches. Owners can sell only to individuals or families making no more than 80 percent of the median income of New Yorkers, as arrived at by the federal department of Housing and Urban Development . . . . And over the next three years, no former squatter can get more than $9,000 for a nonstudio apartment, a fraction of its worth.").

25. *See id.*; Steinhauer, *supra* note 21.

decrease of 1,063 units from the beginning of that year),[26] although HPD has developed a number of innovative programs to allocate real property for housing use, "it is highly unusual for . . . a program to benefit squatters who have lived in the buildings against the city's wishes."[27]

Given that the city is aware that at least some of the Grant buildings were not safely renovated prior to the award,[28] the Grant may be seen as undercutting the importance of the *13th Street* court's "relative safety" property-distribution principle within the squatter community, adding even greater weight to the importance of its second principle (length of stay).[29]

B. Analysis of the 2002 Grants

Was it wise for HPD to institute this sea change in municipal land-use policy? In a recently released report, the agency describes itself as seeking to deploy, as efficiently as possible, "[t]he City's assets and resources . . . in order to create new markets for affordable housing, bring housing into the marketplace that has gone underutilized, and leverage new sources of funds to invest in our neighborhoods, which must be sustained for future generations of New Yorkers."[30] Carol Abrams, speaking on behalf of HPD, defended the department's policy shift in similarly utilitarian terms, as a "pragmatic solution" to create "decent and affordable living spaces for residents of the neighborhood."[31] Examined in light of utilitarian principles, however, it is difficult to find much merit in the 2002 Grant.

In this section, I draw three theoretical conclusions, all of which support the notion that the present and future costs of the 2002 Grant exceed its benefits: first, the 2002 Grant's potential posi-

26. The City of New York, Dep't of City Planning, *Consolidated Plan: Annual Performance Report 2003 I-5* (2004), *at* http://www.nyc.gov/html/dcp/pdf/pub/approved2003apr.pdf.

27. Steinhauer, *supra* note 21.

28. *See* Robert Neuwirth, *Squatters' Rites*, City Limits Monthly, Sept./Oct. 2002, *available at* http://www.citylimits.org/content/articles/articleView.cfm?article number=860 ("[W]hen the Fire Department threatened to vacate Umbrella House for building code violations last fall, HPD pulled strings for the squatters, telling the city's building and fire inspectors to back off . . . .").

29. *See id.* (suggesting that the 2002 Grant was facilitated by the stable membership of certain squats).

30. *See* The City of New York, Dep't of Housing Preservation and Dev., *The New Housing Marketplace: Creating Housing for the Next Generation* 3, Dec. 10, 2002, *available at* http://www.nyc.gov/html/hpd/html.

31. Steinhauer, *supra* note 21.

tive impact is reduced because of the effect of diminishing marginal returns; second, the 2002 Grant will not bring about the increased-investment benefits that in some selective circumstances accrue from formalizing informal property rights; finally, the 2002 Grant does a poor job of diminishing (either directly or indirectly) negative externalities on the Lower East Side, considered in light of the theory that private property results from an evolution towards the internalization and reduction of external costs.[32] In other words, these three subsections deal respectively with the 2002 Grant's across-the-board failure to maximize recipient pleasure, to produce efficient or welfare-maximizing development, or to benefit the surrounding community.

1. Diminishing Marginal Returns

Basic utilitarian precepts dictate that property should be assigned so as to create the greatest "pleasure" for society as a whole, or to create the greatest good for the greatest number.[33] Although the squatters affected by the 2002 Grant certainly experienced an increase in pleasure as a result of HPD's policy shift, the value of this increase should be measured in light of Bentham's suggestion that if pleasures "are the ends which the legislator has in view . . . it behoves him . . . to understand their value."[34] Traditional utilitarian measures used to gauge the extent of an increase in pleasure[35]

32. It is noteworthy that all of this is true despite the fact that in some respects, the squatter community is very diverse (e.g., in terms of the socioeconomic backgrounds of its members) while in others, the squatter community essentially operates cohesively (e.g., in terms of its inability to reduce certain externalities).

33. *See* Leigh Raymond, Comment, *The Ethics of Compensation: Takings, Utility, and Justice*, 23 Ecology L.Q. 577, 583–84 (1996) ("The ultimate object is to maximize happiness (or 'human benefit') through every action to the greatest extent possible. For the utilitarian, the principle of utility is the ultimate definition of the 'good' to be sought by human society."). *See generally* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (Oxford University Press 1879) (1823).

34. BENTHAM, *supra* note 33, at 29.

35. Admittedly, focusing on the pleasure *decrease* resulting from loss of housing might change this analysis, since most individuals are loss averse, valuing the loss of property more than they would value its acquisition (a phenomenon also termed the "endowment effect"). *See* Jeffrey Evans Stake, *The Uneasy Case for Adverse Possession*, 89 Geo. L.J. 2419, 2459 (2001) ("The endowment effect is a pattern of behavior in which people demand more to give up an object than they would offer to acquire it. This difference between the amount a person is willing to pay (WTP) and the amount she is willing to accept (WTA) has been explained by reference to the theory of loss aversion. According to the theory of loss aversion, losses have greater subjective impact than objectively commensurate gains. In graphical terms, utility curves are asymmetrical in that the disutility of giving up an object is

are its relative intensity, duration, certainty, and remoteness, as well as the number of individuals or entities affected.

The remoteness of this pleasure increase and its certainty cancel out each other when used to evaluate the degree to which the 2002 Grant allocated property optimally—the residents of a building can obviously take possession of their building faster than any other group, but the lifestyle of certain squatters suggests that they may not necessarily be the group most likely to meet the long-term challenges associated with retaining homeownership over the long term.[36] Similarly, the number of individuals affected cannot be a decisive factor in this case—presumably, given a scarce resource (housing) with nearly unlimited demand, both the squatters and the city will eventually benefit a similar number of individuals by filling space up to its maximum safe capacity.

Investigation into the relative intensity of the pleasure increase resulting from the 2002 Grant, however, suggests that the city should not have abdicated its right to screen *ex ante* the recipients of its property distribution; this becomes clear when notions of diminishing marginal returns are used to augment a traditional intensity analysis. Although "the intensity of a rich man's wants may well exceed that of a poor person's wants," implying that valuation is a

greater than the utility of acquiring it.") (footnotes omitted); *see generally* Daniel Kahneman et al., *The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSPECTIVES 193 (1991). From this perspective, it could be seen as "cheaper" for the city, in terms of utilitarian satisfaction-maximizing effect, to allow squatter residents to retain their buildings than for the city to deprive them of housing. However, though it is difficult to measure the value of the squatters' loss aversion against the differences in marginal return of acquisition satisfaction between squatters and potential alternative tenants, the rootless lifestyle that many of the illegal squatters chose, and the obvious risk of loss associated with squatting as a means of acquisition, imply that the endowment effect is not as meaningful to the squatter population as it would be to the mainstream. *See*, *e.g.*, Neuwirth, *supra* note 28 ("'I think this idea of having the building owned will be a big change,' he says. 'People will begin to have the concept of 'this is mine.' That wasn't what it was about originally, and I'm worried about that.'"). Moreover, the general dissatisfaction (on both economic and fairness grounds) that would presumably result from organizing property allocation around deference to the endowment effect would presumably outweigh any satisfaction savings resulting from acknowledgment of this principle. See Jacobs, *supra* note 8 ("What happens when these kids decide it's no longer fashionable to squat? Things have to be a little more organized than first come, first serve.").

36. *See* Annia Ciezadlo, *Squatters' Rites: Homes Above Ground*, City Limits Monthly, Sept./Oct. 2002, *available at* http://www.citylimits.org/content/articles/articleView.cfm?articlenumber=862 (observing, in one of the buildings described as "very low income," that "at one point, the person with the most stable job was a waitress").

near-impossible task that is inconsistent with notions of wealth redistribution, it becomes easier to weigh the relative intensity of increases in happiness when "wants" are not compared to each other but to "needs" ("[t]he key difference between a want and a basic need [being] that if the latter is not satisfied the organism perishes").[37] Put simply:

> the distribution of income will matter to social welfare because a dollar of income often will raise the utility of some individuals more than that of others. Notably, redistributing income from the rich to the poor will tend to raise social welfare, assuming that the marginal utility of income is greater for the poor than for the rich.[38]

This conclusion may as easily be applied to distribution of property rights as to distribution of the fungible money resources used to purchase such rights.

While squatters would appear to fall into the category of those who need housing, rather than those who "merely" want it, this is not necessarily the case. Leslie Steven, a squatter since 1985 (and, thanks to the 2002 Grant, a newly minted owner of 274 East Seventh Street), states:

> There isn't a typical squatter. There are lots of professional people in our buildings who work in media, who work in theater, who are artists, who are office professionals. I do interior design work at Ralph Lauren. Of course, there's a socioeconomic difference between me and some of the other squatters, but I feel more commonalities than differences.[39]

While Steven is presumably a fairly affluent member of the larger squatter community, she does not appear to be an egregious outlier in this respect.[40] Indeed, it is far from unheard of for squatters to be from a more privileged socioeconomic background than

37. *See* Bruce E. Kaufman, *Expanding the Behavioral Foundations of Labor Economics*, 52 Indus. & Lab. Rel. Rev. 361, 375 (1999); *see also id.* at 374–75 (describing debate between early twentieth century economists and contemporary workers' rights supporters who would focus on needs, and thereby support the redistributive prospect, versus those who focus on wants, and do not see a coherent way to measure non-fiscal utility of wants across different people); H.L.A. HART, *Utilitarianism and Natural Rights, in* ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 181, 182 (1983).

38. LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 30 (2002).

39. *See* Barrett, *supra* note 24, at 106.

40. *See* Anemona Hartocollis, *A Sledgehammer and Pluck Pay off after 18 Years*, N.Y. Times, Sept. 22, 2002, § 14, at 1 (noting that one recipient under the 2002 Grant works as an Adjunct Professor at School of Visual Arts); Ciezadlo, *supra* note 36 (stating that the family of actress Rosario Dawson, star of *Men In Black II*, is

those who own or rent in the neighborhoods that they "settle."[41] Moreover, squatters existing outside of the community's normal channels for interaction have in the past frustrated more efficient and systematic attempts by better-organized and more knowledgeable community groups to determine who might receive the most intense (and continuous) gains in pleasure from a grant of property rights.[42] The 2002 Grant does not solve but exacerbates this problem, in that it may be perceived (in conjunction with the 13th Street cases' focus on privity and tacking) as setting the precedent that illegal squatters who stay put will receive property, regardless of the squatters' socioeconomic position relative to other potential tenants;[43] such precedent creates incentives for future rational, self-interested illegal squatters to find a building and cling to it, even if they frustrate other potential rehabilitation efforts in the process.

2. Formalizing Informal Property Rights

The 2002 Grant might alternatively be justified on utilitarian grounds as a way to spur development by formalizing the property rights held by occupiers who would otherwise be at risk for penal-

among the recipients, along with a businessman who "imports fish from South America").

41. *See* Tobocman, *supra* note 9, at 284 (observing that the community had elected to city council "[a] right-wing, Puerto-Rican, anti-park, anti-squatter, anti-homeless candidate"); *id.* at 254 (referring to "neighborhood people who say that the squatters don't belong in these buildings").

42. *See* Elaine Chan, Letter to the Editor, *Lower East Side Squatters Block Community Housing Projects*, N.Y. Times, Nov. 29, 1989, at A30 ("There is a great housing need in the Lower East Side. Given the increase in homelessness and limited resources of land and money, we need to work together as a community for the best possible plan. Those who are not part of the solution are part of the problem."); *East 13th Street Homesteaders' Coalition v. Wright*, 635 N.Y.S.2d 958, 959 (App. Div. 1995) (confirming that the squatters were being evicted "so that the City could implement a federally subsidized plan to rehabilitate the buildings and create 41 low-income housing units"); Jacobs, *supra* note 8 ("While they once worked in tandem, the area's dozen or so nonprofit agencies now compete with the squatters for the same stock of city-owned property . . . . Ms. Kaplan sees the new generation of squatters as spoilers. The vacant buildings, she believes, should house the neighborhood's working poor, many of whom live doubled up in the housing projects that line Avenue D. 'The young people motivated by political ideals are taking away housing for people who desperately need it,' Ms. Kaplan said.").

43. *See*, *e.g.*, Steinhauer, *supra* note 21 ("'We have weathered and survived the onslaught of gentrification and the enormous increases in the price of housing on the Lower East Side,' [a 2002 Grant recipient] said, 'and due to our tenacity and adaptability we're still here.'").

ties.[44] This argument is based on the premise that it is "totally uneconomical" when:

> informals are forced to reverse the procedure followed by formals: instead of acquiring land legally, developing it, building on it, and finally moving in, they begin by moving in, then building, then developing, and it is only at the end of a lengthy process that they acquire legal ownership of the land.[45]

When the development-oriented justifications for formalizing property rights are considered carefully, however, it becomes clear that they cannot be transposed onto the 2002 Grant.

The most compelling argument for formalization identifies a basic market inefficiency that retards the development of property held by informals:

> People build less if they think there is a risk that the state or another person might take away or occupy what they have built, just as no one invests in costly innovations if anyone might later appropriate their invention without compensation. The effect of all this is to reduce aggregate investment. Secure property rights, on the other hand, encourage holders to invest in their property because of their certainty that the property will not be usurped. From a strictly economic standpoint, therefore, the true purpose of property rights is not to benefit the individual or entities holding those rights, but to give them the incentive to increase the value of their assets by investing, innovating, or combining them advantageously with other resources, something which would have beneficial results for society.[46]

While it is true that this argument calls for redistribution of property rights in certain situations, it does not call for such redistribution when better capitalized outside parties are willing to invest their resources in the property once held by informals.

Consider a hypothetical example: municipality X, organizing its land use policy around relatively pure utilitarian and economic principles, wants to construct new buildings on its underutilized Lower West Side, in order to decrease its residents' commute while increasing its tax base; municipality X is indifferent towards the question of who should supervise this development—setting aside

44. HERNANDO DE SOTO, THE OTHER PATH: THE ECONOMIC ANSWER TO TERRORISM 153 (1989) (arguing that informal businesses make large investments to avoid penalties).

45. *Id.* at 163.

46. *Id.* at 159–60.

issues of deterrence, X would be irrational to reject competitive bids from companies that, in the past, treated its vacant lots as private storage areas. However, there are limits to X's indifference, and developers' past track records cannot be disregarded entirely. Even if municipality X is concerned enough with matters of fairness to refuse to ration its development rights through auction,[47] it will, understandably, want to confirm that the party receiving property rights to develop its vacant lots is in fact able to perform the necessary work safely and effectively, and at a high level of quality such that the buildings might be desired by future users; it might also be supposed that X would be prepared to award property rights to otherwise undesirable developers if there was no alternative party willing to do the work, and if the benefits from successful development, discounted by the uncertainty of this outcome, outweighed the potential harm of shoddy development.

Returning to the Lower East Side, it becomes apparent that illegal squatters cannot meet even these few restrictions upon a utilitarian city's relative indifference towards the identity of its developers. Where the property to be redeveloped is located in a rapidly gentrifying area of skyrocketing property values, and where a formal, private market would be happy to make profitable use of the buildings awarded in the 2002 Grant,[48] the barely acceptable alternative has been chosen over the ideal solution. Illegal squatters are simultaneously the least likely parties to pay for the right to develop property and the most likely to develop such property in a manner dangerous to themselves and others. In the *East 13th Street Homesteaders* cases, for instance, squatters' attempts to renovate involved the removal of "numerous internal load-bearing walls," the installation of "dangerous wood burning stoves with flues running to the roof," and the use of "undersized joists" to support the entire structure.[49] Similarly, one of the squatters whose rights were recently formalized notes that after putting "in the toilet, the vanity, every-

47. *See* Dep't of Citywide Admin. Servs., *Real Estate Public Auction* (July 23, 2003), on file with the *NYU Annual Survey of American Law* (showing only one parcel available on the Lower East Side, and only three others in Manhattan).

48. *See* John Leland, *On Avenue C, Renewal and Regret*, N.Y. Times, Aug. 3, 2000, at F1 (noting that "the avenue is in a state of rapid, some say rabid, churn," with rising property values and significant amounts of new development); Hartocollis, *supra* note 40 ("Alphabet City, once Manhattan's South Bronx, has changed in 18 years. With a keen eye, you can still spot a junkie, but they aren't nodding off on street corners the way they used to. Cappuccino joints are more in demand than free bleach to sterilize hypodermic needles. Young executives, students and even artists are paying $2,000 a month for luxury housing.").

49. 635 N.Y.S.2d at 963–64.

thing," she "came home one day to find her bathroom collapsed through the floor to the basement."[50] Such sub-optimal renovation is not only non-ideal but also the natural result of entrusting redevelopment to undercapitalized, under-trained labor.[51] Moreover, it is difficult to ascribe shoddy and dangerous renovations to the informal nature of the squatters' pre-Grant property rights, since larger joists, for example, would hardly tip police off to the presence of squatters in a building, and since the squatters' survival instinct (prompting them to renovate at what they perceive to be an ideal level of safety versus effort expended to achieve that standard) is presumably a constant unaffected by the informal or formal nature of their relationship to the property being improved.

The 2002 Grant also fails to remedy other inefficiencies that result from informal property rights. For example, while Hernando de Soto recommends that informal rights be formalized so that squatters may be better able to transfer their property,[52] the 2002 Grant discourages such transfer even as it facilitates it, by placing restrictions upon the benefits that accrue from alienation,[53] and by permitting the squatters to rehabilitate their property in a way that only they find comfortable.[54] Moreover, the 2002 Grant does little to diminish the duplicative and substantial costs incurred by informals in defending their possessions without recourse to public law enforcement institutions;[55] by distributing property rights to squatters only after years of self-governance, rather than before-

50. Michael Wilson, *Squatters Get New Name: Residents*, N.Y. Times, Aug. 21, 2002, at B3.

51. In the short term, the solution to this problem appears to be the city stepping in to make costly emergency repairs to the squatters' haphazard attempts at renovation. *See* Neuwirth, *supra* note 28 ("[W]hen the Fire Department threatened to vacate Umbrella House for building code violations last fall, HPD pulled strings for the squatters, telling the city's building and fire inspectors to back off, informing them that the city was working to fix the problems, and fixing stairs and fire escapes. 'That was, like, amazing,' says Meow. 'It's hard to be bitter enemies when they fix the stairs and fire escapes for free.'").

52. DE SOTO, *supra* note 44, at 159–60.

53. Barrett, *supra* note 24, at 104.

54. The UHAB has set itself extraordinarily limited rehabilitation assistance goals that are actually below the standard of living typically used in low-income housing, and which will presumably be difficult to transfer even to users of such housing. *See* Neuwirth, *supra* note 28 ("The construction credo can be summed up in a few words: 'You make it legal,' says Center. 'You don't do anything else. These buildings are going to become barely legal.' The number of electrical outlets, for example, will be the code minimum instead of UHAB's more generous standard of one outlet per wall.").

55. DE SOTO, *supra* note 44, at 165; *see also* TOBOCMAN, *supra* note 9, at 298 (depicting a typically inefficient eviction meeting at a Lower East Side squat), 307

hand as part of an organized homesteading program,[56] the city has set a bad precedent, encouraging future squatters to expect a period of inefficient self-reliance prior to receiving secure rights and a concurrent ability to rely upon the assistance of such otherwise publicly-accessible order-maintenance institutions as the police department.

3. Externality Reduction

Finally, it is important to consider the role played by external costs (detrimental "social or monetary consequences" that accrue to neighboring land users as a result of certain types of land use) in the 2002 Grant.[57] Harold Demsetz has argued that property rights evolve so as to prompt private owners to take responsibility for negative externalities associated with their use of the land,[58] claiming that property rights develop so as to concentrate "the risks and rewards of investment on designated individuals, thus assuring a correspondence between those who sow and those who reap."[59] While the 2002 Grant may on some level illustrate this welfare-maximizing story, it does so only superficially, without taking account of timing issues or precedential value.

Some of the negative effects of illegal squatting may be seen through a study of the "broken windows" theory of criminology:

> Urbanologist Jane Jabos and criminologist Wesley Skogan have both stressed that maintaining the invitingness of streets, sidewalks, and parks is essential to the viability of an urban neighborhood. The well-known 'broken windows' thesis of James Q. Wilson and George L. Kelling also sounds this theme. Wilson and Kelling assert that the persistence of a minor disorder not only disturbs a neighborhood on its own account, but also, like an unrepaired broken window, signifies that social controls are attenuated at that locale. Passersby, sensing this diminished control, become prone to committing additional, perhaps more serious, criminal acts . . . . A specialist in property law

(depicting a victim of domestic violence declaring that rarely called "cops . . . were more willing to listen than our people").

56. *See, e.g.*, Pratt Planning and Architectural Collaborative (providing "technical assistance to community-based development organizations for over twenty years"), *available at* http://www.picced.org (last visited Dec. 6, 2004).

57. BLACK'S LAW DICTIONARY 604 (7th ed. 1999).

58. Harold Demsetz, *Toward a Theory of Property Rights*, 57 Amer. Econ. Rev. 347, 350 (1967) ("[P]roperty rights develop to internalize externalities when the gains of internalization become larger than the cost of internalization").

59. Thomas W. Merrill, *Introduction: The Demsetz Thesis and the Evolution of Property Rights*, 31 J. Legal Stud. S331, S332 (2002).

> approaches the issue of street order as a problem not of speech or of crime, but of land management."[60]

This suggests the following: if the potential for increased crime throughout an area is a negative externality arising from the presence of a seemingly desolate, unoccupied home, and if illegal squatters must keep their homes looking desolate and unoccupied so as not to be evicted by the city, and if the 2002 Grant permits squatters to reveal, like other property owners, that their home is neither desolate nor unoccupied, then the Grant appears to work so as to maximize the welfare of all concerned, removing the stumbling block that prevents a typical evolution towards a reduction in negative externalities.

However, Demsetz' evolution is not a before/after, on/off phenomenon;[61] in fact, the speed and nature of the evolution towards property rights is of critical importance to those users of public space who are affected by the externalities in question (prior to the formalizing process that permits internalization of and encourages response to negative externalities). In this respect, the Grant creates particularly poor precedent by creating incentives that reward those who have squatted, illegally and secretly, for the longest period of time, rather than those who have reduced the most externalities by living in the most public manner possible during the shortest amount of time.[62]

Illegal squatters are often aggressive creators and facilitators of negative externalities: members of the larger community have frequently complained that inconsiderate squatters may themselves directly create a disproportionate quantity of negative externalities in the neighborhoods where they reside,[63] but the more interesting cases are those in which squatters also harm their neighborhood

60. Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 Yale L.J. 1165, 1171 (1996).

61. Merrill, *supra* note 59, at S336 ("The original Demsetz article was an exercise in comparative static analysis, offering before-and-after snapshots of a society in which changes in relative resource values give rise to changes in property institutions. But the actual process that leads from one state to another was a black box.").

62. *See supra* notes 19, 29, and accompanying text.

63. *See*, *e.g.*, Christine L. Wilson, Note, *Urban Homesteading: A Compromise Between Squatters and the Law*, 35 N.Y.L. Sch. L. Rev. 709 n.49 (1990) ("Squatters often do not invite community support. In early 1990, when squatters in New York City's East Village were evicted from an abandoned schoolhouse, neighborhood residents were pleased because of the construction noise and garbage accumulation they attributed to the squatters."); Ciezadlo, *supra* note 36 (noting that the building at 733 East 9th Street's "punk rock aesthetic has not endeared it to the neighbors; they continually report it to the Fire Department").

indirectly (by failing to assert ownership in ways that legitimate tenants might, and thereby failing to reduce the negative externalities generally associated with abandoned or unused property—this can also be seen as an "opportunity cost," or the cost of a lost opportunity by another party to reduce the negative externality). For instance, substance-abusing squatters may harm the street life in a neighborhood by cultivating an aura of lawlessness through their illegal transactions[64] (a direct externality cost to the neighborhood), while simultaneously refusing to interfere or even make their presence known to third-party drug dealers operating outside their buildings, for fear that those dealers might report the squatters' trespass to the police (an indirect externality cost to the neighborhood).[65] Electricity use by squatters is a better example: by stealing electricity, squatters raise the rates of other customers in the area, who must subsidize the lost resource (a direct externality cost to the neighborhood);[66] at the same time, when illegal squatters live in buildings that are "shrouded in black curtains to hide the pirated electricity,"[67] they increase the impression of abandonment in their neighborhood, along with the attendant problems described above by the "broken window" theorists (an indirect externality cost to the neighborhood).[68]

As discussed above, this unfortunate trend is partially the fault of the city's judicial and legislative policy:[69] although the open and notorious use of illegally occupied property might be the best way to reduce the negative externalities associated with apparently

64. *See* Tobocman, *supra* note 9, at 246–47, 251, 235 (depicting drug use and dealing by squatters, and alcohol-fueled altercations between drunken squatters and members of the public).

65. *See id.* at 228 ("Our house was a ruin. It needed years of work. The street below was controlled by drug dealers. The best way to keep these guys out of our business was to stay out of theirs.").

66. DE SOTO, *supra* note 44, at 175.

67. Hartocollis, *supra* note 40; *see also* Tobocman, *supra* note 9, at 291 (showing how one group of squatters covered a building's windows "so Con-Ed inspectors would not see that our illegal electricity was back on").

68. The direct costs also illustrate what has been termed the "tragedy of the commons," where communal public ownership of property prevents internalization of negative externalities in such a way that the negative effects from a single party's actions are shared equally by all, while corresponding positive effects (such as the ability to use drugs or electricity) accrue solely to the acting party. *See* Garrett Hardin, *The Tragedy of the Commons*, 162 Sci. 1243, 1244 (1968) (noting that from a rational individual's perspective, if the positive component to overuse of a commons is 1, then the negative component to overuse of a commons is one fraction of 1, meaning that what is in the self interest of every individual eventually leads to something not in the self interest of anyone).

69. *See supra* Part I, sec. A, subsec. 1; Part I, sec. B.

abandoned buildings, squatters whose priorities were shaped by the 13th Street cases (as augmented by the Grant) have likely not considered the need to use their property in this fashion. However, the city cannot bear total responsibility for the compounded negative externalities associated with illegal squatting. Along Avenue C, where squatters have always lived, externalities have recently been reduced by activities that were never forbidden to squatters by the courts. A *New York Times* article describes the recent construction of "[n]eat row house co-ops" alongside former squats, observing that "[t]he changes on the avenue become most striking after dark. A few years back . . . the strip was deserted save for the drug traffic and the Latino social clubs. Now, the same sidewalks bustle with well-dressed young people promenading among a handful of new bars and restaurants."[70] Although squatters knew that they could be evicted for actions taken within their homes (unsafe improvement, visible occupation), another reason must be found to explain why they did such a poor job of encouraging the sort of externality-reducing community-claiming mentioned in this article.[71] One former homesteader writes of the squatter movement that "they don't eat at our restaurants, they are not interested in the community, they don't shop there, they are not people you might see at church or at any other community thing."[72] For this reason, the 2002 Grant may not only create a bad general precedent for future squatters (by encouraging them to think that there is no rational, self-interested reason to reduce externalities), but it may also have had an unfortunate immediate and specific effect, in that it apparently distributed property to squatters who are unable or unwilling to reduce through indirect means the negative externalities that exist independently in their neighborhood, even when the means associated with reducing those costs do not threaten the squatters' own housing interests.

70. *See* Leland, *supra* note 48.

71. In one of the Grant buildings located on Avenue C, where "[a]bout one-third make their living doing seasonal farm work, picking blueberries in Maine and cranberries in Massachusetts," the answer to this question may perhaps be found. Ciezadlo, *supra* note 36.

72. MALVE VON HASSELL, HOMESTEADING IN NEW YORK CITY, 1978-1993: THE DIVIDED HEART OF LOISAIDA 123 (1999); *see also* Andrew Van Kleunen, *The Squatters: A Chorus of Voices . . . But Is Anyone Listening?*, *in* FROM URBAN VILLAGE TO EAST VILLAGE: THE BATTLE FOR NEW YORK'S LOWER EAST SIDE 285, 304 (Janet L. Abu-Lughod ed., 1994) ("Most Lower East Side people didn't mix with the squatters. The squatters were 'outsiders' to us. I'm not saying this in any pejorative sense . . . . It's just that the squatters tended to stay within their own type of community.").

II.
PROPERTY RIGHTS ALLOCATION TO BUSINESS IMPROVEMENT DISTRICTS

A. Background

Business Improvement Districts are "territorial subdivisions" in which property and business owners agree to pay a special assessment tax that the municipality remits to a designated nonprofit association formed to manage and promote their neighborhood.[73] Under New York General Municipal Law, Chapter 24, Article 19A, Section 980 et seq., interested parties submit BID proposals (crafted with the help of the city's Small Business Services Department) to a planning board and to potential BID members at a public hearing, after which individual property owners may object to being included in the entity.[74] At present, New York City is home to forty-six Business Improvement Districts, nineteen of which are located in Manhattan. Services typically provided for by BIDs, out of the

73. Brian R. Hochleutner, Note, *BIDS Fare Well: The Democratic Accountability of Business Improvement Districts*, 78 N.Y.U. L. Rev. 374, 374–75 (2003) ("A BID is a territorial subdivision within a municipality in which property or business owners pay a district-specific tax to fund district-specific services—e.g., sanitation, policing, social services, infrastructure improvements, and marketing—that supplement the services already provided by local government . . . . BID formation is generally governed by statutes that require local government and property owners to approve the district; BIDs are usually managed by a public or private BID board that advises, or is advised by, local government officials; BIDs are financed primarily by assessments on local property; and BID activities tend to focus on the delivery of traditional municipal services, such as providing street and sidewalk maintenance and security in the district.").

74. Richard Briffault, *A Government for Our Time? Business Improvement Districts and Urban Governance*, 99 Colum. L. Rev. 365, 383 (1999) ("New York City's Department of Business Services ('DBS')—the agency responsible for overseeing the City's BID program—notes that 'no BID effort will succeed without the active support of a local sponsoring organization which is willing to undertake the work.' According to DBS's guide to BID formation, the sponsor ought to select a project leader and a steering committee who will be responsible for proposing district boundaries; for assembling a detailed database on the property owners, properties, and merchants within the proposed BID; for determining the BID's services, budget, and assessments; and for building support for the BID within the proposed district. The sponsor will need to hire consultants to inventory the district's properties to determine uses, vacancies, and other factors relevant to the BID's finances; to undertake studies to determine whether the area can sustain additional assessments and whether the service program will benefit owners; and to develop a strategy to win the support of those who would be subject to BID taxation. DBS reviews the contents of the BID proposal, requires the sponsor to develop a community outreach plan, and assesses the adequacy of the sponsor's mailings, meetings, and use of media to notify property owners in the proposed district.").

money that they receive in assessments, include sanitation, graffiti removal, parking arrangements, advertising and publicity, light security, business assistance, capital improvements, tree planting services, and tourism coordination.[75]

1. Grand Central Issues

A key component of BIDs is their desire to provide independently or to augment services that have traditionally been performed by the city itself, on the theory that they are more effective and efficient providers of those same services.[76] Although an early hallmark of BIDs was their ability to field large, private security forces,[77] this function has since been effectively limited in New York by the actions of the Grand Central Partnership; during the mid-1990s, this midtown BID allegedly ordered its workers to use any means necessary to evict the homeless people lingering in Grand Central Terminal, fanning a media controversy and leading to HUD penalties.[78] Only after the city secured the departure of those primarily responsible for setting the BID's security-focused agenda, and asserted its control over BIDs in general,[79] was the Grand Cen-

75. *See, e.g.*, Lower East Side BID promotional material, on file with the *NYU Annual Survey of American Law*; The City of New York, Dep't of Small Bus. Servs., *Business Improvement Districts*, *at* http://nyc.gov/html/sbs/html/bid.html (Aug. 31, 2004); Village Alliance, *available at* http://www.villagealliance.org/info.html (another Lower East Side BID offering "supplemental public safety and sanitation services, graffiti removal, economic development and community revitalization, facade improvement, marketing and promotion, streetscape enhancements and tourist information and tours" all performed by workers in distinctive, trademark uniforms); *see also* Hochleutner, *supra* note 73.

76. *See, e.g.*, Hochleutner, *supra* note 73 (describing BIDs as "[m]ore nimble than traditional city bureaucracies").

77. *See, e.g.*, Ralph Blumenthal, *And Now a Private Midtown 'Police Force,'* N.Y. Times, Aug. 22, 1989, at B1.

78. *See* Grand Cent. Partnership, Inc. v. Cuomo, 166 F.3d 473 (2d Cir. 1999) ("In early 1995, several newspapers published reports that GCP employees used abusive and sometimes violent tactics to remove homeless persons from public spaces near Grand Central Station, in New York City. On January 26, 1996, following an investigation of GCP's conduct, HUD issued a sanction in the form of a Limited Denial of Participation ('LDP') pursuant to 24 C.F.R. § 24.705(a). This LDP denied GCP participation in HUD programs for one year on the basis of the alleged misconduct of GCP's employees and the alleged misuse of HUD funds."); *see also* Thomas J. Lueck, *Grand Central Partnership is Subject of U.S. Inquiry*, N.Y. Times, May 26, 1995, at B4; David Firestone, *3 Tell Council They Beat Homeless to Clear Out Business District*, N.Y. TIMES, May 11, 1995, at B1.

79. *See* Thomas J. Lueck, *City Council Orders Review of 33 Business Improvement Districts*, N.Y. Times, Apr. 19, 1995, at B1; Editorial, *Improving the Improvement Districts*, N.Y. TIMES, Apr. 21, 1995, at A30; Clifford J. Levy, *Mayor Seeks Stricter Curbs on*

tral Partnership permitted to survive as an entity.[80] Following this affair, many BIDs have refocused their energy on seemingly more harmless "improvement" activities, such as promotion and advertisement of the neighborhoods that they represent.[81]

2. L.E.S. BID

The Lower East Side Business Improvement District ("L.E.S. BID") was incorporated in 1992; its original mission was to promote commercial activity along a three-block stretch of Orchard Street that is closed to traffic on Sundays ("Pedestrian Mall"), although it has since expanded east to Clinton Street and south to Hester Street, and is continually attracting new members. According to the BID's most recent pamphlets, it:

> currently serves over 400 businesses, with a total assessment collected from property owners of $200,000 per year. Broken down, this averages roughly $500 per business per year. Depending on the terms of the lease, this cost may or may not be passed on by the property owner to the merchant (in those cases where the property owner and merchant are different people).[82]

As a *New York Times* article observed, the L.E.S. BID's efforts have always been "frankly promotional," in keeping with the lessons later learned from Grand Central, and "[o]ne of the group's early actions was to hire a public relations firm . . . ."[83] Immediately after the L.E.S. BID's formation, it posted signs naming the stretch of Orchard Street from Houston to Delancey "The Historic Orchard Street Bargain District," and it instituted an advertising campaign intended to promote the Pedestrian Mall (a 1973 invention[84] intended to facilitate neighborhood customs noted in the *New York*

Business Improvement Districts, N.Y. TIMES, Sept. 5, 1996, at B1; Vivian S. Toy, *Further Restraint is Sought for Improvement Districts*, N.Y. TIMES, Nov. 12, 1997, at B3.

80. *See* Thomas J. Lueck, *Business Improvement District at Grand Central is Dissolved*, N.Y. Times, July 30, 1998, at B1; Terry Pristin, *After Giuliani Foes Quit, Business Group Drops Plan to Reorganize*, N.Y. TIMES, Dec. 24, 1998, at B7.

81. *See e.g.*, David Kirby, *Trashcraft, or Making an Art of Garbage Cans*, N.Y. Times, Apr. 11, 1999, at CY7.

82. Lower East Side BID promotional material, *supra* note 75.

83. Douglas Martin, *Selling History on the Lower East Side*, N.Y. Times, Dec. 19, 1993, at CY4.

84. *See* Laurie Johnston, *Orchard Street Tries Mall, but Sales Lag*, N.Y. Times, Jan. 29, 1973, at L33; Ari L. Goldman, *After Crash, Street Regains its Rhythm*, N.Y. TIMES, May 25, 1981, at B3 (describing, after a stolen car veered onto the mall, how "the rhythm of Orchard Street returned to what it has been for virtually every Sunday since the turn of the century. Sunday shopping on the Lower East Side has been a New York tradition since the early Jewish and Italian immigrants became peddlers.

Times as early as 1920,[85] when the street's predominantly Jewish merchants were exempted from municipal blue laws requiring businesses to close on Sundays for the Christian Sabbath).

B. Analysis

A study of the Orchard Street Pedestrian Mall highlights problematic aspects of the drive to grant increased property rights to BIDs in their current form (*e.g.*, controlled by select merchants and informally limited in action to light nuisance-abatement and advertising/promotion). In this section, I argue that in certain areas (and specifically on the Lower East Side), BID land governance in its current form may realize limited benefits while simultaneously failing to prevent (and in fact encouraging) development that significantly harms the public spaces that BIDs have been awarded to safeguard.

1. Taxonomy

As a preliminary matter, it is worth considering the extent to which the Orchard Street Pedestrian Mall can be classified as a formal property right. Gary D. Libecap defines property rights as "the social institutions that define or delimit the range of privileges granted to individuals to specific assets," identifying a number of specific rights that can be seen as so many sticks bundled together: "[p]rivate ownership . . . may involve a variety of rights, including the right to exclude nonowners from access, the right to appropriate the stream of rents from use of and investments in the resource, and the right to sell or otherwise transfer the resource to others."[86] Other thinkers have reached similar conclusions, defining property rights as the combined "right to exclude others, the right to use and possess without interference by others, and the right to transfer ownership to others."[87]

The primacy of Orchard Street as a bargain hunter's haven was solidified in 1973 when the street was closed to traffic on Sundays.").

85. *See* Bella Cohen, *East Side's Outdoor Department Store*, N.Y. Times Book Rev. and Mag., Dec. 26, 1920, at 2; Lacey Fosburgh, *Sunday Bazaar Shoppers Throng the Lower East Side*, N.Y. TIMES, Dec. 2 1968, at L52; Joan Cook, *Pumpernickel and Plates Still East Side Bargains*, N.Y. TIMES, Feb. 23, 1961, at L32 (identifying blocks 1-3 as the heart of Orchard Street); *Shop Talk on the City's Lower East Side: Orchard Street, Between Houston and Delancey, Is A Busy Section of Town on Sunday Afternoons*, N.Y. TIMES, July 7, 1959, at L28.

86. GARY D. LIBECAP, CONTRACTING FOR PROPERTY RIGHTS 1 (1989).

87. John E. Fee, *The Takings Clause as a Comparative Right*, 76 S. Cal. L. Rev. 1003, 1011–12 (2003).

Under these formulations, the L.E.S. BID holds a weak but cognizable[88] form of ownership over the Orchard Street Pedestrian Mall, thanks to the fortunate coincidence of informal customs and formal traffic ordinances. The BID's "bundle of sticks" includes a periodic right to exclude non-owners riding in vehicles from the Mall, to use the street itself for commercial purposes (in the person of its members, who set up weekly stands), and to appropriate rents from those tenant-like members who use this property right (indirectly, through assessments). The BID cannot profit from the sale of its property rights (although it may transfer them from one nonprofit subcontractor to another), but the squatters discussed in Part I also have had restrictions placed upon their right to alienate property received under the 2002 Grant, lessening the impact of this distinction for purposes of this Note. I refer to the L.E.S. BID's Pedestrian Mall property right as a form of communal ownership ("a right which can be exercised by all members of the community"),[89] although it also resembles what Margaret McKean refers to as "public property" (in that it is "held in trust for the public by the state, to which the general public often has access");[90] I choose the former term over the latter in no small part because I think that BIDs are closer in meaning to "communities" than to "states," given their limited geographic scale and membership.

2. Potential Benefits of Granting BIDs Property Management Rights

There is, clearly, potential for an increase in BIDs' property rights to create utilitarian welfare-maximizing benefits to the communities that they serve. First, BIDs internalize in a single body the negative externalities and problems associated with whole neighborhoods; that is to say, a multi-block BID is forced to suffer the full expense associated with isolated signs of disorder, while a single merchant suffers only a fraction of that expense. Such internalization by a BID increases its incentives to fix the problem causing the negative effect, while also reducing the transaction costs associated with cooperative attempts to solve these problems (*e.g.*, an unhappy merchant need only speak to a single BID representative to negotiate for the removal of a problem, rather than to every merchant in

88. Admittedly, this is not as robust a property right as that enjoyed by the squatters, in that the freedom associated with full exclusion is not permitted (*i.e.*, the BID cannot decide that it would prefer to shut off the street altogether, or open it only to a select group of people).

89. Demsetz, *supra* note 58, at 354.

90. Margaret A. McKean, *Success on the Commons*, 4 J. Theoretical Pol. 247, 251 (1992).

a position to do the same). Moreover, a BID is likely to facilitate consistent and efficiently scaled solutions to urban problems, particularly those that are recurring (*e.g.*, a block with a graffiti problem may only successfully solve its problem through a uniform and rigorous anti-graffiti program, best administered by a single entity capable of coordinating efforts and purchasing the necessary equipment at volume discounts inaccessible to individual merchants). Finally, a BID composed of profit-maximizing businesses located in an urban area dependent upon foot traffic might have an even better motivation to create a pleasant neighborhood environment than would more democratic forms of local government.

Although all of these potential benefits are not necessarily addressed in this context by property theorists,[91] they nevertheless present a compelling case for continuing the trend towards privatization of public spaces; indeed, Robert Ellickson has suggested specifically that BIDs may serve as "organizations that enforce street decorum,"[92] although he reached this conclusion prior to the Grand Central controversy, which changed BIDs from glorified private security forces[93] into marketing and advertising powerhouses.

3. Problems in the Pedestrian Mall

The Pedestrian Mall is divided naturally by the street grid into three zones: a northernmost block, between Houston and Stanton Streets ("Block 1"), a central block, between Stanton and Rivington Streets ("Block 2"), and a southernmost block, between Rivington and Delancey streets ("Block 3"). These blocks are also subject to corresponding cultural and commercial delineations: Block 3 is primarily a street of tenement buildings containing small, densely concentrated, ground-floor shops selling discounted apparel; Block 1, by contrast, has been highly gentrified, and is home to a cluster of restaurants, art galleries, hairdressers, and fashion boutiques; Block 2 is, appropriately, in transition between these two extremes, although a rash of interior construction work marks it as being in the midst of an evolution towards parity with Block 1.

91. Merrill, *supra* note 59, at S334 (arguing that Demsetz is concerned only with explaining "when and why private-exclusion rights emerge, and ideally . . . the rise and fall of exclusion rights, not the rise and fall of any and all organized efforts to 'internalize externalities.'").

92. *See* Ellickson, *supra* note 60, at 1198.

93. *Id.* at 1199 n.167.

i. No Comedy on Block 1

A walk north through the Mall on Sundays, from Delancey to Houston, proves a study in contrasts. In Block 3, and to a lesser extent in Block 2, the streets on Sunday resemble a bazaar—they are filled with tables displaying merchandise, and small businessmen hawk their goods to crowds of bargaining shoppers. The street's actors are no longer primarily Jewish; instead, a range of ethnicities mingle, including Middle Easterners, Blacks, and Whites, some dressed in discount clothing, others clutching apparently genuine Louis Vuitton bags. North of Stanton Street, however, the Pedestrian Mall is empty. The stores on this block are either closed on Sunday afternoon or they have no use for the property rights that they have received in the street; they offer goods with a high profit margin catering to a smaller market less dependent on foot traffic, and are less interested in facilitating chance encounters between individuals.

Describing the area of the Lower East Side surrounding the Orchard Street Pedestrian Mall, one trend has been noted again and again. Christopher Mele notes:

> [A] simple gentrification narrative could not fully capture the area's transformation. While clearly catering to an upscale clientele, the aesthetic designs of new apartment buildings as well as the themes of local nightclubs and other commercial spaces seem to gesture toward and even mimic the look and feel of the very social elements they threatened to displace.[94]

The *New York Times* phrases this trend in stronger terms, declaring that many of the area's new businesses resemble "a secret club of cool people hanging out, with an intimidating members-only feel," and noting that the neighborhood's most recently arrived entrepreneurs studiously cultivate this effect: "Taking a page from a formula adopted years ago by studiously hip New York club entrepreneurs, they have made a cult of anonymity. Tucked behind or above old and abandoned storefronts, few advertise and fewer still post signs—and most show no inclination to change their molelike ways."[95] Such redevelopment also extends to residential

94. CHRISTOPHER MELE, SELLING THE LOWER EAST SIDE: CULTURE, REAL ESTATE, AND RESISTANCE IN NEW YORK CITY VII (2000).

95. Ruth La Ferla, *So of Ho, and About to be Hot*, N.Y. Times, Apr. 14, 2002, § 9 at 1 (also describing a business identified only by a name scratched into the concrete near its entrance, and a merchant who notes that "[n]obody is fixing up their buildings on the outside"); *see also* Edward Helmore, *East Side Story: New York Groovers' Paradise, the Lower East Side*, VANITY FAIR, Sept. 2003, at 176 ("By day, the L.E.S. is a self-contained playground of shopping opportunities. Storefronts are often

buildings, which "combine the appeal of the two extremes—the indulgence within and the worn urban landscape outside,"[96] and the *New York Times* connects such anti-populist development with intensified racial self-segregation, observing that on the Lower East Side, "it is as if two parallel worlds were co-existing," one white and professional, one Latino and working class.[97]

This pattern of gentrification is particularly poisonous towards what has been termed the "comedy of the commons," a phenomenon that results from the presence of public square and fairgrounds environments where individuals may gather together to engage in commerce.[98] Such forms of property, "fully controlled by neither government nor private agents," have been described as no less than venues "to enhance the sociability of the members of an otherwise atomized society."[99] Although there is an inherent tension in this theory between the need to exclude disturbing influences from atmospheric commercial spaces, and the need to permit the free entry that creates their vitality,[100] encouragement and preservation of this phenomenon is the overriding goal:

> Commerce still seems to be our quintessential mode of sociability. Despite its appeal to self-interest, it also inculcates rules, understandings, and standards of behavior enforced by reciprocity of advantage. To do business one must learn the ways and practices of other businesspeople; and, arguably, doing business can make even the hard-bargaining trader more accustomed to dealing with strangers, and more ready to sympa-

disguised in order to support the current conceit of shopping—that no one wants to feel victimized by overt marketing. But within these obscured emporiums . . . is a world of highly specialized thrift stores, young designers, makeup boutiques, and sneaker shops with all the hushed importance of art galleries."); Ingrid Abramovitch, *Hipification Reaches the Street where Peddlers Once Pushed Carts*, N.Y. TIMES, Nov. 15, 1997, at ST1 ("From the outside, the new Xuly-Bet Funkin' Fashion store fits in so seamlessly with the discount clothing shops on Orchard Street that it's easy to pass by without noticing the first New York outpost of this hot Parisian label. . . . [The store's manager] and his team even went as far as preserving the decayed interior of the old shop by clear-coating the paneling and linoleum floor.").

96. MELE, *supra* note 94, at 296.

97. Jim Nelson, *Hip-ification*, N.Y. Times Magazine, Oct. 6, 2002, § 6, at 118.

98. Carol M. Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. Chi. L. Rev. 711, 721–23 (1986).

99. *Id.* at 720, 723.

100. *Id.* at 769 ("But what created the 'rent'? The very 'publicness' of the festival use; its non-exclusivity makes it valuable, because this activity is exponentially enhanced by greater participation. . . . [P]articipants need encouragement to join these activities, where their participation produces beneficial 'externalities' for other participants.").

> thize with them and feel responsibility for their needs . . . . And like the dancers on the green, the more members of the community that are engaged in commerce, the better—not only for the sake of greater productivity, but also for the sake of socialization and the inculcation of habits of considering others.[101]

Manifestation of this problem can be seen on the Lower East Side in the observation that "[m]inorites and the poor are . . . indirectly 'pushed out' or made to feel like strangers in their own neighborhood by the . . . [n]ew commercial spaces geared toward middle- and upper-class consumers."[102]

ii. 'Broken Windows' on Block 1

Additionally, development like that seen on Block 1 fails to create the sense of visible occupation and order that a "broken window" theory of criminology values[103]—a seemingly abandoned storefront, often shuttered because of irregular hours, scarcely improves upon an actual abandoned storefront, at least in terms of creating a sense of order in the street and public spaces. Indeed, the purpose of post-1970s gentrification on the Lower East Side may be to de-order the neighborhood's public spaces: "[u]nderground subcultures, especially punk, were characterized by symbolic violence and aggression articulated in rituals played out in a suitable environment of decay and despair that reinforced a stylized notion of alienation."[104] A New York Times article observes three waves of gentrifying renovation in the area between Orchard and Clinton Streets, all of which retain the same problematic external signifiers:

> Hallivis also owns and runs the faded old jewelry store next to Alias, with its foreboding walls of bulletproof glass—relics from the bad drug days, when his mother was shot in there (she survived).
>
> . . . .
>
> [W]hen Buket Hasman opened Mina in November 1999, she installed a buzzer to let customers in, she says, "for security reasons." The neighborhood was still a little scary, and she was often working alone. In September, 2001, when Alife Rivington Club, a discreet designer sneaker store, opened a block

101. *Id.* at 776.
102. MELE, *supra* note 94, at 304.
103. *See* Ellickson, *supra* note 60.
104. MELE, *supra* note 94, at 214.

> and a half away, it installed a buzzer to instill an air of exclusivity. "We wanted it to be a destination store," says Sara Fisher, an associate. "And a lot of that is word of mouth. And the buzzer says that." Here you have the cycle of hipness: less than two years for a security device to become a fetish object.[105]

4. The L.E.S. BID's Use of Advertisement To Create Problems on Block 1

Is the pattern of gentrification described above the inevitable result of granting property management rights to a BID? Given the informal Grand Central limitations on BIDs, and the caveat that rapidly gentrifying areas may attract businesses with different priorities than would more mainstream areas, the answer to this question would appear to be "yes." By focusing less on performing services than on advertising (a decision encouraged city-wide by the Grand Central controversy), the L.E.S. BID may be using publicity to create a self-fulfilling prophecy that proves destructive to the inherent but non-quantifiable comedic and public-order values that result from more traditional uses of its Mall.

A study of the L.E.S. BID's marketing technique is illuminating in this respect. The organization provides potential new members with newspaper clippings that essentially highlight its ability to transform blocks resembling Block 3 into blocks resembling Block 1 through the use of aggressive and idiosyncratic forms of promotion. By including an article entitled "Sweet 'n Ludlow" (stating that "St. Marks was once the epicenter of East Village hip, then Avenue A took the title, but now Ludlow Street is the main vein in Manhattan's coolest neighborhood"),[106] the L.E.S. BID shows its inclination to reposition itself as the heir to a tradition of what one commentator termed "hipification," rather than a more holistically valuable tradition of commercial interaction between a range of demographic groups. Notably, the three businesses from the Mall that are mentioned in this article—Basso Est, Bauhaus, and Café Charbon—are all located on Block 1 or on the dividing line (Stanton Street) between Blocks 1 and 2. By including another clipping, from *Vanity Fair* magazine, the L.E.S. BID demonstrates its comfort with literally remapping the neighborhood that it promotes, tacitly endorsing a feature in which enormous cartoon signs highlight the most gentrified businesses in the area, skipping over those that are

105. Nelson, *supra* note 97, at 118.

106. Sarah Gilbert, N.Y. Post, Apr. 26, 2003, at 22.

responsible for the bulk of order-production and comedic interaction.[107]

Unsurprisingly, given this selection of representative materials, members of the L.E.S. BID have complained that newcomers to the neighborhood dominate their organization and disproportionately influence its policymaking, at the expense of members who want "continued foot traffic and a more physically attractive area for shoppers," and who lament that "in the past, the district [has] 'pushed aside the wishes of some of the smaller businesses.'"[108] Although every organization in the L.E.S. BID may be presumed to share an interest in maximizing profits, it appears that those members whose profit motive is least dependent upon the factors that cultivate a comedy of the commons, and those who are most likely to perpetuate existing negative externalities in the community, are those who have gained control over the BID as a property-rights-managing institution. The extent to which this scenario might be repeated in comparable future situations should give policymakers pause before they again grant such rights to BIDs or BID-like entities.

III.
A PROPOSED SOLUTION

In this Part, I revisit, briefly, the case studies performed in Parts I and II, and I propose a new means of structuring property rights on the Lower East Side so as to promote more effectively the needs of the community and those who use its public spaces.

A. Recapping Parts I and II

As I have argued in Parts I and II of this Note, the public spaces of the Lower East Side are being at best neglected and at worst mismanaged under the city's current land use policies. The 2002 Grant is flawed because:

- it fails to pre-screen recipients of property rights to ensure that these recipients are the ones most likely to experience the greatest increase in pleasure as a result of the award,

107. *See* Helmore, *supra* note 95.

108. *See* Eric V. Copage, *Business District Hangs Its Hopes on a New Manager*, N.Y. Times, Dec. 12, 1999, at CY8; *see also* Eric V. Copage, *Orchard Plan Provokes Doubts*, N.Y. TIMES, May 2, 1999, at CY6 (noting that "many dry-goods sellers and other older merchants are skeptical of these [promotional] efforts, which are embraced by the hip boutiques and other new entrepreneurs," and which lure "mostly Soho people" to a neighborhood where they do not patronize the pre-existing businesses).

- it is an inefficient and costly means to spur development in the neighborhood, and
- it rewards with property those who are both likely to create negative externalities in a neighborhood and unlikely to reduce the negative externalities of others in a neighborhood.

The award of rights to manage common-pool property to the L.E.S. BID is flawed because, in hip, gentrifying neighborhoods, BIDs appear to promote their property in such a way that they attract businesses that:

- undermine that positive good described as the "comedy of the commons," and
- may fail to address the negative issues associated with "broken window" theories of crime.

To distinguish between the two case studies explored here on the basis that one involves residential users and one involves commercial users, or on the basis that one involves full exclusion private property rights and the other involves partial exclusion communal ownership property rights, would be to miss the forest for the trees—both of these land use policies affect the users of public space on the Lower East Side, and any attempt to protect public space on the Lower East Side (or anywhere with similar spaces)[109] may incorporate lessons gleaned from both the 2002 Grant and L.E.S. BID case studies.

B. Certainty and 'Open and Notorious Use' as Guiding Principles of Property Law

One of the cautionary principles of property theory is that "uncertainty about property rights invites conflicts and squanders resources."[110] The internalization theory of property rights, and the related "broken window" theory of crime, both have their roots in this principle (*i.e.*, uncertainty as to social mores in a neighborhood encourages users of public space to think that there are none, creating an atmosphere that constitutes a negative externality). Similarly, Carol Rose asserts that property rights are or should be awarded where they communicate with the public in such a way as

109. The existence of a thriving system of "private streets" in St. Louis and "private police beats" in San Francisco suggest that it is not only in New York that kinks are still being worked out between local and municipal land use goals and governance. Andrew P. Morriss, Review, *Returning Justice to its Private Roots*, 68 U. Chi. L. Rev. 551, 559 (2001).

110. Rose, *supra* note 98, at 715–16.

to reduce uncertainty,[111] although she acknowledges that "[i]t is not always easy to establish a symbolic structure in which the text of . . . possession can be 'published' at such a time as to be useful to anyone."[112] One way to establish such an uncertainty-reducing "symbolic structure," in the context of neighborhood land use policy, might be to grant greater deference to the principle of communication as it is embodied in the "open and notorious use" requirement of the New York adverse possession doctrine. This is a clear and pragmatic organizing principle that has received little attention to date.[113]

"Open and notorious possession" has been defined as use that is "sufficient to put a person of ordinary prudence on notice of the fact that the land in question is held by the claimant as his or her own."[114] Consider its two component terms individually: "The requirement that the possession be 'open' means that the claimant's acts on the land were not covered up or concealed. The requirement of 'notorious' possession contemplates possession which is so conspicuous that it is generally known by the public or by people in the neighborhood."[115] The justification for requiring "open and notorious" use in adverse possession cases is twofold: although the requirement's primary purpose is to provide the owner of buildings with notice of their use by an unauthorized party, its secondary purpose is to provide notice to the community of such use.[116] This secondary purpose is an interesting one that might go far towards reducing the overabundance of Lower East Side public spaces that appear relatively (perhaps unnecessarily) abandoned, anarchic, and/or unwelcoming.

111. Carol M. Rose, *Possession as the Origin of Property*, 52 U. Chi. L. Rev. 73, 78–79 (1985) ("Possession now begins to look even more like something that requires a kind of communication, and the original claim to the property looks like a kind of speech, with the audience composed of all others who might be interested in claiming the object in question.").

112. *Id*. at 83.

113. *See, e.g.*, Jesse Dukeminier & James E. Krier, PROPERTY 132 (4th ed. 1998) (Introductory casebook on property law devotes a scant seven sentences to the requirement in its chapter on adverse possession, stating merely that "the notoriety requirement of adverse possession doctrine is usually straightforward, but not always.").

114. 3 Am. Jur. 2d. *Adverse Possession* § 63 (2002).

115. 39 Am. Jur. POF 2d. 261 *Acquisition of Title to Property by Adverse Possession* § 8 (1984).

116. 3 Am. Jur. 2d. *Adverse Possession* § 64 (2002) ("It has been held that the possession of an adverse claimant must be so conspicuous that it is generally known and talked of by the public; in other words, it must be manifest to the community.").

As noted above, both squatters and businesses have been permitted to ignore the communicative purpose of property; squatters actively avoid it so as to extend their time in a building (with the encouragement of the 2002 Grant), while businesses avoid it so as to cater to a more exclusive clientele (with the encouragement of the L.E.S. BID).[117] In the future, distribution of property rights to squatters could be made contingent upon their open and notorious use of the property sought, while BIDs could use informal "moral suasion" to nudge their constituents towards a more welcoming form of gentrification, or impose formal requirements to that effect (perhaps in exchange for increased services). The benefit in either scenario would be found in decreased broken window costs, increased comedic benefits, and a reinvigorated community; indeed, game theory analysis implies that implementation of this principle might generate a bootstrap effect upon community morale and interaction (studying the prisoners' dilemma, theorists have discovered that "although cooperation declines when social dilemma games are iterated, 'restarting' the game leads to an abrupt jump in contributions to the collective good . . . . Similarly, interrupting a repeated social dilemma with a period of communication produces an immediate increase in cooperation.").[118] Admittedly, in the case of squatters it is difficult to reconcile the prioritizing of "open and notorious use" with the tenets of adverse possession law; as the 2002 Grants indicate, however, transfer of property is feasible even when the specific dictates of adverse possession law are not met. Assuming that there is some merit to the goals and principles of adverse possession doctrine, the challenge is not to blindly enforce or extend that doctrine but to implement a program and a structure for land use allocation, in conjunction with a new enforcement entity, whereby the desired goal is emphasized and used as a basis for policymaking. Understanding this proposal in that sense also clarifies its relevance to the allocation of commercial property, an issue otherwise unrelated to adverse possession caselaw.

117. It is worth noting that the squatters' rights in their new buildings have a similar likelihood of encouraging the "secret club" mentality of Block 1 development, given their limits on transferability and the ability of a tight-knit group of residents to vet newcomers. *See* Neuwirth, *supra* note 28 ("The squatters have signed agreements that there will be no subleasing—indeed, no renting of apartments at all—and that all units must be sold back to the tenant association rather than to new shareholders, reducing the chance that anyone who suddenly becomes greedy will demand under-the-table payments for the right to purchase an apartment.").

118. GREEN & SHAPIRO, PATHOLOGIES OF RATIONAL CHOICE THEORY 92 (1996).

C. Potential and Need for Creating New Property-Rights Allocating Institutions

For purposes of coherence and organization, it makes sense to grant a single local entity the right to regulate shared public space; BIDs are effective entities[119] that should be put to better use, bridging the gap between "big picture" government plans and on-the-ground details, and allocating and managing both residential and commercial property around the "open and notorious use" principle outlined above. However, for BIDs to play an increased and more effective role in the community, their requirements for membership would have to be changed. Specifically, the case studies explored above indicate that they would need to grow from, or at least interact on the level of, the communities that they seek to govern: "people on the ground recognize that property in land is a positive-sum game and play it cooperatively."[120] In the case of squatters, a BID-like entity would have to be able to identify viable property for redevelopment prior to its possession by illegal squatters who have not been vetted to ensure that they are the appropriate users of the property, and that they are the best users to maximize its potential benefits (through optimized development and externality reduction); in the case of communal property management, the same entity would have to be capable of tracking and tweaking the on-the-ground effects of its policies, requiring members to utilize the rights that they are granted to benefit the community as a whole, or at least to ensure a healthy mix of commercial types.[121] The idea of allowing such an entity to distribute and regu-

119. See Part II, Section B, Subsection 2. While the government itself might be reformed so as to better address the issues noted above, it is already seen by many as a poor provider of traditional city services (when contrasted with BIDs), and its policymaking appears haphazard and even counterproductive in the area of land use, suggesting that another entity working in partnership, at the grassroots level, might be a better approach. However, if the government itself were to seek to encourage "open and notorious" land use as discussed above, and were willing and able to be more aware of developments at the local community level, and to engage in the informal, small scale coercion and dialogue that policing of this value would require, it would be more than acceptable, although it seems that such interactions would be easier and more effective when undertaken by members of the specific community involved.

120. Robert C. Ellickson, *Property in Land*, 102 Yale. L. J. 1315, 1320 (1993).

121. In a time when the Mayor has proposed "to redress an enormous budget crisis by selling naming rights to city parks," Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 Harv. L. Rev. 1229, 1238 (2003), it is especially important to reevaluate the less obvious negative consequences that may arise from the interaction of profit-driven entities and public or quasi-public spaces.

late neighborhood property rights is appealing from both a theoretical and practical level; HPD[122] and legal thinkers[123] alike have recognized the advantages that lie in delegating policy execution and adjustment responsibilities to local, well-intentioned, and representative groups that lie somewhere between disorganized individual actors and bureaucratic municipal agencies.[124]

One good place to begin crafting a new group for this purpose might be to build on the model of the city's existing Community Boards, which currently:

122. *See*, *e.g.*, Steinhauer, *supra* note 21 ("The Bloomberg administration took up the agreement, in part because the Urban Homesteading Assistance Board was a reputable group, Ms. Abrams said. Several calls to officials at the board were not returned last night. According to its Web site, the group was created in 1973 by a group of young architects, urban planners and inner-city activists living and working in the Cathedral of St. John the Divine 'to support innovative solutions.'"); Neighborhood Redevelopment Program, *available at* http://www.nyc.gov/html/hpd/html/for-developers/nrp.html ("NRP conveys clusters of occupied and nearby vacant City-owned buildings to selected community based not-for-profit organizations for rehabilitation and operation as rental housing. Following the sale, the buildings' rehabilitation is funded through City Capital, Community Development Block Grant Federal HOME funds and proceeds from federal low income housing tax credits.") (last updated Mar. 18, 2004).

123. *See*, *e.g.*, Hirsch & Wood, *supra* note 4, at 612–13 (describing positive benefits associated with engaging "[l]ocal churches, politicians, social service offices, and Legal Aid and Legal Services offices that deal with housing cases in Brooklyn," as well as holding community meetings and placing advertisements in newspapers explaining the method and purpose of the property rights distributions being discussed); Robert C. Ellickson, *New Institutions for Old Neighborhoods*, 48 Duke L.J. 75, 76–77, 80 (1998) (proposing that institutions termed BLIDs might be used to avoid the free-rider problem inherent in many kinds of group action while providing "block-level public goods." Like BIDs, a BLID would "levy assessments on its members in order to finance services supplementary to those ordinarily provided by local governments," although it would be at least partially composed of residential property owners, and would spend the funds garnered through assessments on services that would benefit the entire community, as opposed to only business interests.); Rose, *supra* note 98, at 742–43 (noting that commons could be managed through "a means different from exclusive ownership by either individuals or governments," and asserting that "[f]rom a resource-management perspective, a group capable of generating its own customs ought to be a less objectionable holder of 'public property' than the unorganized general public, because a customary public comes closer to the management capacities of a government.").

124. McKean, *supra* note 90, at 275–76 (a "successful system of common property management" is generally characterized by a healthy mix of cooperation and coercion, where "monitoring and enforcement . . . must be conducted or supervised by members of the community itself rather than by an overlord or superordinate layer of government.").

> must be consulted on placement of most municipal facilities in the community and on other land use issues. They may also initiate their own plans for the growth and well being of their communities. Also, any application for a change in or variance from the zoning resolution must come before the Board for review, and the Board's position is considered in the final determination of these applications.[125]

However, there are flaws with this existing regulatory mechanism, and the Lower East Side is served particularly poorly by its current Board. In principle the Board is "selected by the Borough Presidents from among active, involved people of each community, with an effort made to assure that every neighborhood is represented. Board members must reside, work or have some other significant interest in the community."[126] In practice, appointment to the Board is largely divorced from the democratic process, and is thoroughly opaque to a majority of constituents. Furthermore, the Boards are caught in a self-perpetuating cycle of powerlessness to shape development[127] coupled with radical opposition to almost any form of practical, utilitarian development.[128] Although the existence of the Boards may therefore serve to balance out the purely economic goals of BIDs, neither of the two entities is ideal, and the presence of twinned oppositional entities is less efficient in its function, and less coherent in its long-term policy, than would be a single holistic entity engaging the same issues.

D. Conclusion

Richard Epstein has observed that "societies have devised multiple intermediate legal positions that often outperform systems of

125. The City of New York, Mayor's Community Assistance Unit, Community Boards: Responsibilities, *available at* http://www.nyc.gov/html/cau/html/cb/cb_responsibilities.shtml (last visited Dec. 6, 2004).

126. *Id.*

127. *See, e.g.*, Jessica Mintz, *With lawsuits and bus convoy, residents are taking it to S.L.A.*, The Villager, Dec. 17–23, 2003, *available at* http://www.thevillager.com/villager_33/withlawsuits.html (In liquor license grants, for instance, the Board may advise the state only where a request triggers a red flag, and even in those cases, "'[t]he community does not have veto power,' says Thomas G. McKeon, counsel to the S.L.A. 'They make a recommendation, which the authority considers.' . . . It isn't the place of the community boards, he argues, to do things like impose moratoriums on liquor licenses in their neighborhoods.").

128. *See, e.g.*, Lincoln Anderson, *Dorm developer: Lopez and community board left me no other choice*, The Villager, May 5–11, 2004, *available at* http://www.thevillager.com/villager_53/dormdeveloperlopez.html; Barry Mallin, Letters to the Editor, *Board 3 Is Taking Wrong Approach*, The Villager, Feb. 25–Mar. 2, 2004, *available at* http://www.thevillager.com/villager_43/letterstotheeditor.html.

pure private property."[129] By creating a new type of BID-like property-allocating and property-managing entity, organized around the notion of rewarding "open and notorious" land use, it may very well be possible to create a welfare-maximizing property regime on the Lower East Side that could solve the problems created by its current batch of incoherent land use policies, providing other rapidly gentrifying neighborhoods in New York with a new model for sound development.

129. Richard A Epstein, *The Allocation of the Commons: Parking on Public Roads*, 31 J. Legal Stud. S515, S521 (2002).

APPENDIX

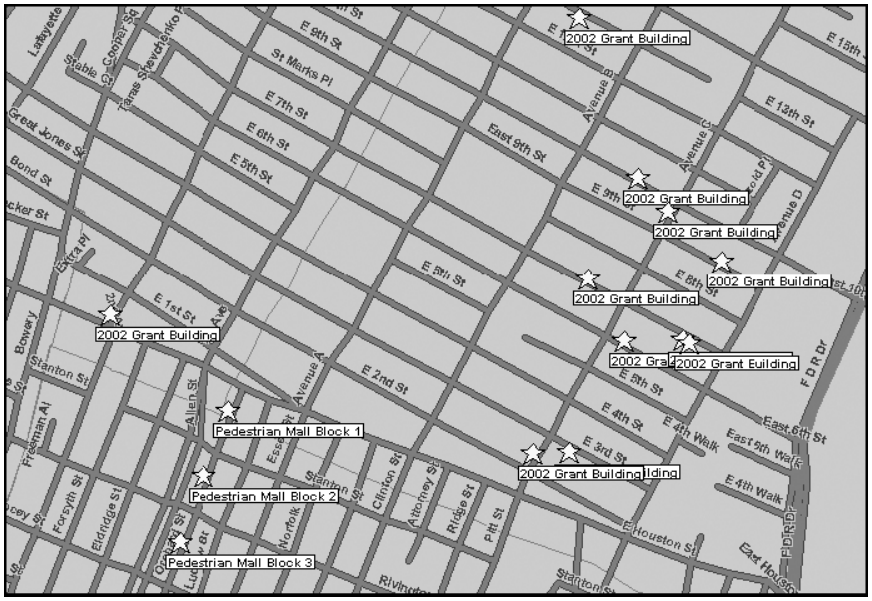

Fig. 1: Lower East Side, showing 2002 Grant buildings and Orchard Street Pedestrian Mall.

Fig. 2: Detail of Orchard Street Pedestrian Mall.