

MUSIC IS THE ANSWER
NYC Nightlife and Live Events Reform Initiative

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BROOKLYN LAW INCUBATOR & POLICY (BLIP) CLINIC

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ABOUT BLIP

The **Brooklyn Law Incubator & Policy (BLIP) Clinic** functions as a modern, technology-oriented law firm. BLIP provides legal services to clients who require routine and/or creative and novel legal representation, and for whom expensive legal services would act as a barrier to entry. To date, BLIP has helped hundreds of clients with incorporation, intellectual property protection, contract negotiation and drafting, and web documentation, and has also provided litigation support, regulatory and policy advocacy, and general legal advice. Students advocate on behalf of causes and businesses, whose interests and concepts have not been represented in the legislative, regulatory and judicial arenas.

NYC NIGHTLIFE & LIVE EVENTS REFORM INITIATIVE

Website: nycnightlifereform.com.

PREFACE

In February 2015, the U.S. Copyright Office communicated to law and policymakers that due to our “outmoded rules for the licensing of musical works and sound recordings,” the very survival of our cultural identity was at stake. In the Copyright and the Music Marketplace Report, the Office stated the following:

Few would dispute that music is culturally essential and economically important to the world we live in, but the reality is that both music creators and the innovators that support them are increasingly doing business in legal quicksand.... While this view is hardly a surprising one for the U.S. Copyright Office, it is no simple matter to get one’s arms around our complex system of music licensing, or to formulate potential avenues for change.¹

To tackle the complexity of this issue, both the Senate and House of Representatives worked in concert with recording industry stakeholders to “find a path forward on music reform.”² As a result, the Music Modernization Act was passed and enacted into law on October 11, 2018.³ Hoping to facilitate similar bipartisan efforts in support of the live music industry, we have launched the **NYC Nightlife & Live Events Reform Initiative** with the intent to promote and preserve music and nightlife culture in New York City.

¹ U.S. Copyright Office, Copyright and the Music Marketplace, A Report of the Register of Copyrights Preface (May 2016), <https://www.copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf>.

² H.R. 1551, 115th Cong. (1st Sess. 2017) (amended background and section by section summary), https://www.copyright.gov/legislation/mma_conference_report.pdf (The MMA updated our federal licensing system to include, *inter alia*, a compulsory blanket mechanical license, compensation to artists for “pre-1972” sound recordings, and a formal “letters of direction” system to pay producers, mixers, and sound engineers).

³ *The Creation of the Music Modernization Act*, COPYRIGHT.GOV, <https://www.copyright.gov/music-modernization/creation.html#:~:text=Music%20Modernization%20Act-,The%20Creation%20of%20the%20Music%20Modernization%20Act,the%20unanimously%20passed%20Orrin%20G.&text=The%20landmark%20legislation%20impacts%20a,for%20pre%2D1972%20sound%20recordings> (last visited Aug. 6 2020) (“Both the House and Senate Judiciary Committees highlighted the consensus growing around the MMA. Artists including Smokey Robinson, Justin Roberts, Josh Kear, Aloe Blacc, Mike Clink, Tom Douglas, Booker T. Jones, and Dionne Warwick testified to creators’ support for the bill.... ‘Unlike many things in Washington, DC, these days, this legislation actually has bipartisan support,’ Blacc said. ‘Further defying the odds, the music and technology industries have also come together in support of it’”); see also H.R. 1551, 115th Cong. (1st Sess. 2017), <https://www.congress.gov/bill/115th-congress/house-bill/1551?q=%7B%22search%22%3A%5B%22Music+Modernization+Act%22%5D%7D>.

Music provides the soundtrack to the “City That Never Sleeps.” Although we cannot personally imagine living in an NYC devoid of dance floors and stages, due to high rent costs, regulatory red tape, and the COVID-19 crisis, this alarming dystopia could very well become a reality. Similar to the structural issues that prompted Congress’s effort to update our federal music licensing system, there is a widespread perception among live music stakeholders that NYC’s rules and regulations “are too difficult to comply with and do not adequately reward the artists and professionals responsible for creating American music.”⁴

Joining this perspective, the following pages are a product of our preliminary efforts to:

- (1) identify key issues faced by those in the nightlife and live events industry;
- (2) analyze existing laws and regulations; and
- (3) set forth realistic and impactful proposals for reform.

We hope these findings serve as a jump-off point for meaningful discussions held between music industry professionals, government officials, community board members, nightlife advocates, and other stakeholders. In order to achieve reform, we must find common ground.

THE PURPOSE OF THE NYC NIGHTLIFE & LIVE EVENTS REFORM INITIATIVE

We are passionate about music, live events, and our city’s dance floors. Our goal is to facilitate economic growth and content creation in the nightlife industry, while also protecting and promoting public health and safety. While we understand the gravity the present COVID-19 crisis poses to the industry, this project focuses on the applicable law and policy issues that threatened the industry well before the pandemic. NYC’s venues and festivals bring people together and serve as platforms for artists and creatives to develop, share their work, and spark important conversations. But operating a venue or producing an event in NYC is no easy task. Complex regulations and arcane administrative procedures create high barriers to entry and make business operations more difficult than they need to be. We want to help change that.

⁴ H.R. 1551, 115th Cong. (1st Sess. 2017) (amended background and section by section summary), https://www.copyright.gov/legislation/mma_conference_report.pdf.

After our city reopens, operating venues and producing live events should be easier -- not the same or harder -- than it was before COVID-19.

Research Methodology

In preparing our paper we conducted a survey, both on our website, and on calls with industry professionals in an effort to obtain an accurate reflection of the issues venue owners and event producers are confronted with on a daily basis. Additionally, we parsed through NYC-centric reports like NYC's Nightlife Economy: Impact, Assets, and Opportunities report⁵ and the 2018 Creative Footprint NYC | Music report,⁶ as well as identifying reforms and strategies cities like Amsterdam, Melbourne, and London have adopted to reform their nightlife economies. Lastly, we studied New York City and State law to identify specific legal-based hurdles that may be unduly hindering small business operations. We then used these sections of New York law to formulate the reforms the city (and state in specific cases) should adopt. In sum, it is our goal to help facilitate communication among nightlife stakeholders, increase transparency, streamline processes, and reduce unnecessary costs for small business owners who take the financial risks necessary to move our collective music culture forward. If we do not support the music industry, we will lose our cultural edge. Venue owners and event producers provide spaces for a diverse range of talent to practice their professions, build their audiences, and move up the billing roster and into progressively bigger rooms. If we want to continue leading as the "most innovative and influential music culture in the world," New York City must introduce policies that support small business owners and alleviate financial burdens caused by complex regulations and overburdensome red tape.⁷

⁵ THE NORTH HIGHLAND COMPANY, ECONSULT SOLUTIONS, INC. (ESI), AND URBANE DEVELOPMENT, MAYOR'S OFFICE OF MEDIA AND ENTERTAINMENT, NYC NIGHTLIFE ECONOMY: IMPACT, ASSETS AND OPPORTUNITIES (2019), https://www1.nyc.gov/assets/mome/pdf/NYC_Nightlife_Economic_Impact_Report_2019_digital.pdf.

⁶ THE CREATIVE FOOTPRINT, CREATIVE FOOTPRINT NYC | MUSIC 1 (2018), <https://www.24hourdallas.org/pdfs/NYC-Creative-Footprint-2018.pdf>.

⁷ US. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE, A REPORT OF THE REGISTER OF COPYRIGHTS 1 (MAY 2016), <https://www.copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf>.

Roadmap

Our paper consists of a background section, three sections of proposals, and a conclusion. We have outlined a brief overview of these sections below.

- **Background:** We provide historical and economic context to the nightlife industry and briefly touch upon the COVID-19 crisis.
- **Part I:** We identify drawbacks in City agency systems and procedures and recommend ways in which technology should be utilized to increase administrative efficiency and transparency as well as educate small business owners about applicable laws and regulations.
- **Part II:** We analyze specific regulations and administrative processes and make recommendations for how gray areas and ambiguities can be reduced. This section includes, *inter alia*, our initial analysis of the DEP, 311, and agency inspections generally.
- **Part III:** We set forth our policy recommendations and address issues in areas such as harm reduction, community boards, and city planning.
- **Conclusion:** We wrap up with a brief overview of our proposed bill package, **Support Live Music**, which builds off this paper and sets forth amendments to the Administrative Code of the City of New York.

Key Terminology

Before diving into the issues, we have highlighted and clarified a few key terms below.

Defining Small Business Owners (SBOs)

- For this project, we have chosen to focus primarily on **small business owners** in the nightlife economy, specifically **venue owners** and **event producers**.
- For ease of writing, we include “venue operators” in the “venue owners” category.
The terms may be used interchangeably.
- “Event producers” are also known as “event promoters.” We primarily use the term “event producers,” but the two terms may be used interchangeably.
- In certain sections, we abbreviate the term “small business owners” to “SBOs.”

While virtually all of the issues we identify and attempt to mitigate also afflict bigger businesses, it is the small business owners who are less likely to be able to absorb costs and weather financial burdens, and who are more likely to be put out of business or inhibited from ever starting up in the first place.

Defining Nightlife

- To be clear, when we talk about nightlife, we are not talking about bars, late-night restaurants, and other businesses that operate after the sun goes down. Instead, we are speaking specifically about the **music spaces** in which artists develop their craft and perform in front of both existing and potential fans.
- The nightlife we speak about does not necessarily have to take place at night *per se*, as it also includes events that occur during the day. Rather, we use nightlife as an all-encompassing term for the culture and economy we seek to promote and protect.

We define Nightlife as follows:

- Collective experiences centered around the dance floor and the stage, rather than around the bar; promoting all genres of music, including rock, pop, hip-hop, jazz, and dance; supporting a diverse range of artists, such as singers, bands, rappers, musicians, and DJs; and providing an accessible and inclusive space for people of all different backgrounds to come together, express themselves, and seek joy in music.

We define Music Space as follows:

- The term “**music space**” means a premises, whether owned or operated on a for-profit or non-profit basis, in which artists or musicians gather for the primary purpose of performing, rehearsing or recording music, or in which the public or patrons gather for the primary purpose of listening or dancing to musical programming. Other services or programming, if any, are secondary to or contingent upon the music operation. **Such term includes, but is not limited to, music establishments, music studios, temporary music establishments and outdoor music venues.**

As used in this definition:

1. **Music establishment.** The term “music establishment” means a premises that frequently features advertised or ticketed musical programming and serves food or beverage with or without alcohol. Such term includes, but is not limited to, nightclubs, performance venues, event spaces and concert halls. The term does not include adult establishments, arenas, auditoriums or stadiums.
2. **Music studio.** The term “music studio” means a rehearsal studio or recording studio.
3. **Outdoor music venue.** The term “outdoor music venue” means a public space in which an event producer holds a one or multi-day event or concert series that features advertised or ticketed musical programming and serves food or beverage with or without alcohol. Such term includes, but is not limited to, public parks,

streets, plazas and sidewalks, as well as publicly owned or leased land, piers and open-air stadiums.

4. **Temporary music establishment.** The term “temporary music establishment” means a premises that does not primarily function as a music establishment, but operates as such pursuant to a written agreement or lease term of equal to or less than one year. Such term includes, but is not limited to, a vacant storefront or warehouse in which an event producer holds a one or multi-day event, concert series or seasonal pop-up.

BACKGROUND

Historical Perspective

New York's Long History of Permissiveness

Artistic innovation, and tolerance for those who drive innovation, has long been at the core of New York City's cultural identity. Claimed by the Dutch in the early 1600s, "NYC was forged in the Netherlander's twinned ethos of free trade and a permissiveness famously known as 'Dutch tolerance' or *gedoogcultuur*, a culture that tolerates the breaking of the rules."⁸ This "turned the town that would become New York into a multicultural, socially flexible zone-- not a free-for-all, not a modern liberal utopia, but a different place from the more rigid society created in New England."⁹ Even "[t]hrough British rule and centuries of near-constant change" in the United States, "that open character endured."¹⁰ This atmosphere of relative tolerance extended into the 20th Century as "[w]ord of New York's relative tolerance for sexual nonconformity became a siren song to proto gay, lesbian, bisexual, and transgender Americans across the country, and like immigrants, along with cultural refugees from straight-laced America, they flocked to the city to be liberated."¹¹ But, while "[p]ermissiveness is in the city's DNA," "[s]o is capitalism and a hunger for real estate" and "[t]he two have been in tension ever since."¹²

To be clear, the recommendations set forth in our paper are aligned with the values of capitalism, as we are advocating for the implementation of laws and policies that support entrepreneurship and small business growth.¹³ The "capitalism" we refer to as being in tension

⁸ JEREMIAH MOSS, VANISHING NEW YORK: HOW A GREAT CITY LOST ITS SOUL 33 (2017); *see also* Andrea Valentino, *What's Left of New York's Dutch Past?*, BBC Travel (Nov. 18, 2019), <http://www.bbc.com/travel/story/20191118-whats-left-of-new-yorks-dutch-past#:~:text=The%20Dutch%20traded%20along%20the,of%20Manhattan%20island%20in%201625>.

⁹ *Id.* at 34.

¹⁰ *Id.*

¹¹ *Id.* at 58.

¹² *Id.* at 34.

¹³ Both liberals and conservatives, disillusioned with government economic policies, have expressed their frustrations with crony capitalism and the ever-widening income gap in America. For instance, both Senator Marco Rubio (R-FL) and Atlanta-based rapper and activist Michael Santiago Render p/k/a Killer Mike (a supporter of Bernie Sanders (D-VT)), have spoken out against our nation's lack of economic direction, advocating for the implementation of "common good capitalism" or "compassionate capitalism" into law and policy initiatives. *See Rubio: We Need to Restore Common Good Capitalism*, RUBIO.SENATE.GOV (Nov. 5, 2019), <https://www.rubio.senate.gov/public/index.cfm/2019/11/rubio-we-need-to-restore-common-good-capitalism#:~:text=Rubio%3A%20%E2%80%9CCommon%2Dgood%20capitalism,our%20people%2C%20and%2>

with “permissiveness” is the phenomenon of crony capitalism, short-termism, and disregard for community health that has attacked the soul of the City, particularly in the form of corporate real estate development.¹⁴

Spotlight on Harlem: Forced Blight, Gentrification, and Cultural Erasure

A well-documented example of New York’s historically open and creative spirit in action is the community of Harlem. In *Race Music, Black Cultures from Bebop to Hip-Hop*, musicologist and Professor of Music at the University of Pennsylvania, Guthrie P. Ramsey, Jr., writes that “[f]or African Americans, Harlem [in the 1920s] represented political, economic, and cultural opportunity.”¹⁵ Moreover, this “collective optimism and ‘sense of place’ were shared by” individuals of all different socio-economic backgrounds and schools of thought:

Harlem’s intrigue...existed as an important symbol in literature. While a “Euro-American vision of the living-dead megalopolis’ that offered ‘no home to the human body, social spirit, or soul’ thrived in American literature, black writers of the Renaissance presented an ‘alternative stream of urban imagery.’ Their vision portrayed Harlem, New York, as a ‘symbolic home’ in the same spirit as previous American literature had depicted ‘the sentimental, rural-cottage.’ These black writers collectively viewed Harlem’s neighborhoods as a ‘promised land,...birthright community, and a cultural aspiration.’ The potency of this literary vision and the reality of Harlem’s energy spilled over into and received energy from the musical world. Indeed, the music of black Harlem seemed to fuel the artistic landscape of the Renaissance....Black music in Harlem and the larger New York

Our%20society.&text=The%20market%20exists%20to%20serve%20our%20nation%20and%20our%20people.%E2%80%9D. (“Common-good capitalism is about a vibrant and growing free market. But it is also about harnessing and channeling that growth to the benefit of our country, our people, and our society. Because after all, our nation does not exist to serve the interests of the market. The market exists to serve our nation and our people”); see also Jonathan Easley, *Sanders, Killer Mike discuss socialism*, THE HILL (Dec. 15, 2015, 12:24 PM), <https://thehill.com/blogs/ballot-box/presidential-races/263258-sanders-killer-mike-discuss-socialism>. (“Render argued in favor of “compassionate capitalism,” which he said was lacking in today’s economic environment. He said part of what attracted him to Sanders was the belief that “compassionate capitalism” is one of the tenants of Democratic Socialism, which he said has been wrongly demonized in many quarters”).

¹⁴ MOSS, *supra* note 8, at 34.

¹⁵ GUTHRIE P. RAMSEY, JR., *RACE MUSIC: BLACK CULTURES FROM BEBOP TO HIP-HOP* 112 (2003).

musical scene enjoyed a mutual relationship in some ways. During the 1920s, for example, recording and performance opportunities for black musicians helped New York become the recognized commercial hub of jazz activity. By the end of the decade, Harlem itself was a fashionable entertainment center, home to several successful jazz venues, among them the Savoy Ballroom, the Cotton Club, Small's Paradise, and Connie's Inn.¹⁶

However, despite Harlem's long history of fostering creativity and success in its predominantly African American community, the neighborhood today is being threatened by unprecedented levels of cultural erasure and overdevelopment. As Michael Henry Adams, a 30-year resident of Harlem, explained in a NYT opinion piece: "Harlem has seen an influx of tourists, developers and stroller-pushing young families, described in the media as 'urban pioneers,' attracted by city tax abatements."¹⁷ New high-end housing and hip restaurants have also played their part. So have various public improvements, like new landscaping and yoga studios."¹⁸ Mr. Adams went on to describe the day he "picket[ed] a fund-raiser for a politician who was pushing for denser mixed-use zoning along 125th Street."¹⁹ "A few passers-by shot" him and the group he was with "ugly looks, as if to say, '[w]hy can't you accept a good thing?'"²⁰ "But even then," Mr. Adams shared, "a few boys passing by on their bikes understood what was at stake."²¹ As [he and the group] chanted, "'Save Harlem now!' one of" the boys asked the group what the slogan meant:

We explained that the city was encouraging housing on the historic, retail-centered 125th Street, as well as taller buildings. Housing's good, in theory, but because the median income in Harlem is less than \$37,000 a year, many of these new apartments would be too expensive for those of us who already live here.

¹⁶ *Id.* at 112-13.

¹⁷ Michael Henry Adams, *The End of Black Harlem*, N.Y. TIMES (May 27, 2016), <https://www.nytimes.com/2016/05/29/opinion/sunday/the-end-of-black-harlem.html>.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

Hearing this, making a quick calculation, one boy in glasses shot back at his companions, “You see, I told you they didn’t plant those trees for us.”

It was painful to realize how even a kid could see in every new building, every historic renovation, every boutique clothing shop — indeed in every tree and every flower in every park improvement — not a life-enhancing benefit, but a harbinger of his own displacement.²²

The effects of overdevelopment have also had a crushing effect on the preservation of Harlem’s historic entertainment venues and the long-standing local hangouts. “[N]ight life fixtures like Smalls’ Paradise and Lenox Lounge are gone,” as are the Renaissance Theater and Casino where, among others, Duke Ellington performed and iconic boxer Joe Louis fought.²³ “Bobby’s Happy House...one of the first black-owned businesses on 125th,” received an eviction notice in 2007.²⁴ “The building, along with several others, had been purchased by the multinational real estate development team of Kimco Realty and the Sigfield Group.”²⁵ These and similar changes have occurred mostly on 125th Street, a/k/a the “Main Street of Harlem.”²⁶

First, the Upper Manhattan Empowerment Zone (“UMEZ”) was signed into law in 1994 by President Bill Clinton.²⁷ The project, according to its website, has “provided a total of almost \$242 million of investments” including “\$87 million in loans to mixed-use real estate development projects, commercial businesses, and small business enterprises,” “\$57 million in tax-exempt bonds for real estate development projects,” and “\$98 million in grants focused on arts and culture and workforce development.”²⁸ However, while UMEZ has given some loans to “small business enterprises,” the overall result has been that larger “mixed-use real estate development projects” have displaced small businesses over time.

²² *Id.*

²³ Kia Gregory, *A Piece of Harlem History Turns to Dust*, N.Y. TIMES (Apr. 10, 2015), <https://www.nytimes.com/2015/04/12/nyregion/a-piece-of-harlem-history-turns-to-dust.html>.

²⁴ MOSS, *supra* note 8 at 299.

²⁵ *Id.*

²⁶ *Id.* at 292.

²⁷ UMEZ, <https://www.umez.org/about-umez> (last visited Aug. 7, 2020).

²⁸ *Id.*

Among these projects, in 1999, a new Pathmark supermarket was brought to the east side of Harlem's main street by a real estate company that used the supermarket to anchor a 275,000 square foot mall.²⁹ This same site was eventually sold in 2014 to Extell Development for \$39 million, where Extell plans to construct a "nine-story, 354,000-square-foot commercial building."³⁰ Perhaps ironically, the Pathmark supermarket has since closed, thus becoming a victim of the very gentrification it helped stimulate.³¹ Unfortunately, long-time neighborhood residents are caught in the middle, as shoppers have grown to rely on Pathmark after the supermarket "forced many small grocers to shutter."³²

At the same time UMEZ was being passed into law, Mayor Giuliani's administration cracked down on the street vendor activity that lined 125th Street, starting on October 16, 1994 with a police raid that involved "scuffles" between officers and street vendors.³³ The street sweeps of 125th Street, in concert with UMEZ investments, led to real-estate ventures that also attracted big chains and pushed out small businesses.³⁴

This process of gentrification upticked with the passage of the Bloomberg administration's plan to rezone the Main Street of Harlem in 2008.³⁵ The plan called for "24 blocks of Harlem to be rezoned, stretching from Broadway east to Second Avenue, and from 124th to 126th Street."³⁶ As Jeremiah Moss points out in *Vanishing New York*,³⁷ the City Planning Commission (CPC) knew of the obvious displacement effects this rezoning would have on 125th Street and the surrounding area, and clearly stated so in its Environmental Impact Statement (EIS):

²⁹ MOSS, *supra* note 8, at 295.

³⁰ Katherine Clarke, *Extell makes deal for Harlem Pathmark official*, THE REAL DEAL (Apr. 16, 2014, 6:45 PM), <https://therealdeal.com/2014/04/16/extell-makes-deal-for-harlem-pathmark-official/>; *see also* Erin Hudson & Mary Diduch, *Extell's plan for East Harlem development site revealed*, THE REAL DEAL (Apr. 10, 2020, 2PM), <https://therealdeal.com/2020/04/10/extells-plan-for-east-harlem-development-site-revealed/>.

³¹ MOSS, *supra* note 8, at 307-308.

³² *Id.* at 307.

³³ Jonathan P. Hicks, *Police Move Street Vendors In Harlem*, N.Y. TIMES (Oct. 18, 1994), <https://www.nytimes.com/1994/10/18/nyregion/police-move-street-vendors-in-harlem.html>; *see also* MOSS, *supra* note 8, at 294.

³⁴ MOSS, *supra* note at 294-295.

³⁵ *Id.* at 296.

³⁶ *Id.*

³⁷ *Id.* at 298.

Indirect Displacement

According to the CEQR Technical Manual, the issue related to indirect residential displacement resulting from a proposed action is whether an action could result in rising property values, and thus rents, making it difficult for some existing residents to afford their homes. The direct effects of an action that can lead to such indirect changes include the following:

- It would add a substantial new population with different socioeconomic characteristics compared to the size and character of the existing population.
- It would directly displace uses or properties that have had a “blighting” effect on property values in the area.
- It would directly displace enough of one or more components of the population to alter the socioeconomic composition of the study area.
- It would introduce a substantial amount of a more costly type of housing, compared to existing housing and housing expected to be built in the study area by the time the action is implemented.
- It would introduce a “critical mass” of non-residential uses such that the surrounding area becomes more attractive as a residential neighborhood complex.³⁸

The CPC further “estimated 71 businesses would be directly displaced” in a neighborhood long seen as a bastion of small minority-owned businesses.³⁹ Despite all of these negative findings, the CPC’s rezoning plan to “support the ongoing revitalization of 125th Street, Harlem’s Main Street,” was approved.⁴⁰

The CPC’s finding that rezoning would “directly displace uses or properties that have had a ‘blighting’ effect on property values in the area”⁴¹ leads us into the discussion of forced

³⁸ N.Y. City Department of City Planning, 125th St. Corridor Rezoning and Related Actions 3.2-6-3.2-7 (Feb. 29, 2008), https://www1.nyc.gov/assets/planning/download/pdf/applicants/env-review/125th/0302_feis.pdf.

³⁹ *Id.* at 3.2-6-7.

⁴⁰ *Id.* at 1.01-1, https://www1.nyc.gov/assets/planning/download/pdf/applicants/env-review/125th/0100_feis.pdf.

⁴¹ *Id.* at 3.2-6.

blight and the disinvestment tactic of “[b]enign neglect”⁴² that dates back to the Nixon administration (if not earlier).

In a 1970 memo to Nixon on the state of the America Negro, adviser Daniel Patrick Moynihan suggested “the issue of race could benefit from a period of ‘benign neglect.’” In other words: do nothing. In the memo’s section on “Social Pathology,” he predicted that, due to “the types of personalities that slums produce,” American cities like NY would soon be facing a “genuinely serious fire problem.” He blamed the problem on arson fires set by what he called antisocial blacks. This idea came from the RAND Corporation.... In partnership with RAND, the city created the Fire Project. Its goal was to save money by cutting back on fire services, and those cutbacks were made in poor black and Latino neighborhoods. The city let its most vulnerable people burn. Once again, it wasn’t natural, it was policy.⁴³

Once NYC neighborhoods grew blighted after periods of benign neglect, government and affiliated entities subsequently had the power of eminent domain to take private property for public use projects, which included private development.⁴⁴ And when private property was acquired without the owners’ consent, these government actions were generally upheld by the courts.⁴⁵

Even today, government and affiliated entity acquisition of private property through eminent domain is rarely cabined by the judiciary. For example, in *Kaur v. New York State*

⁴² MOSS, *supra* note 8, at 293.

⁴³ *Id.* at 74-75.

⁴⁴ U.S. Const. Amend V. (“nor shall private property be taken for public use without just compensation”).

⁴⁵ See *Takings*, LAW.CORNELL.EDU (“Courts broadly interpret the Fifth Amendment to allow the government to seize property if doing so will increase the general public welfare. In *Kelo v. City of New London*, 545 U.S. 469 (2005), the Supreme Court allowed a taking when the government used eminent domain to seize private property to facilitate a private development. The Court considered the taking to be a public use because the community would enjoy the furthering of economic development. Further, the *Kelo* court determined that a governmental claim of eminent domain is justified if the seizure is rationally related to a conceivable public purpose. The *Kelo* decision significantly broadened the government's takings power. This caused significant controversy, and states were quick to act to quell concerns about this expansion of power. In response to *Kelo*, many states have passed laws which have restricted governments' takings abilities (such as implementing a stricter definition of what constitutes a “public use,” requiring heightened levels of scrutiny to justify an action categorized as a taking, etc”).

Urban Development Corp., 15 N.Y.3d 235 (2010), which involved the government takings of gas stations and warehouses in Harlem to complete the acquisition of a 17-acre block for the construction of Columbia University's satellite campus, the Court of Appeals upheld the validity of the Empire State Development Corporation's (ESDC) taking of private property without the property owners' consent.⁴⁶ The NYT reported:

In a unanimous decision, the Court of Appeals overturned a lower court ruling that barred the state from using its power of eminent domain to take private property in the 17-acre expansion zone west of Broadway without the property owner's consent. The ruling held that the courts must give deference to the state's determination that the area was "blighted" and that condemnation on behalf of a university served a public purpose, two requirements under the law.⁴⁷

In making its determination that the 17-acre block was sufficiently blighted, Urbitran Associates, a third-party "engineering, architecture and planning firm," based "its analysis on four major criteria: (1) signs of deterioration, (2) substandard or unsanitary conditions, (3) adequacy of infrastructure and (4) indications of the impairment of sound growth in the surrounding community."⁴⁸ Urbitran Associates "determined that the conditions in the study area merited a designation of blight" and that several of the buildings throughout West Harlem were dilapidated."⁴⁹ The ESDC also commissioned a study which labeled the prospective Columbia University project site as "substantially unsafe, unsanitary, substandard, and deteriorated" or, in short, blighted."⁵⁰ Siding with the findings in these reports, the *Kaur* court rejected the property owners' argument that the ESDC's approval of Columbia's project fell

⁴⁶ Charles V. Bagli, *Court Upholds Columbia Campus Expansion Plan*, N.Y. TIMES (June 24, 2010), <https://www.nytimes.com/2010/06/25/nyregion/25columbia.html>; see also Empire State Development, *Our Mission Statement*, ESD.NY.GOV, <https://esd.ny.gov/about-us> (last visited Aug 7, 2020) (the ESDC is a state entity that purports "to promote a vigorous and growing state economy, encourage business investment and job creation, and support diverse, prosperous local economies across New York State through the efficient use of loans, grants, tax credits, real estate development, marketing and other forms of assistance").

⁴⁷ *Id.*

⁴⁸ *Kaur v. New York State Urban Development Corp.*, 15 N.Y.3d 235, 246 (2010)

⁴⁹ *Id.*

⁵⁰ *Id.*

outside the meaning of “public use.”⁵¹ A summary of the parties’ claims and the court’s decision is provided below.

First, petitioners vociferously contend that ESDC's blight findings were made in bad faith and the Project only serves the private interests of Columbia. ESDC counters that the duly approved Project qualifies as a “land use improvement project” within the meaning of the [Urban Development Corporation]⁵² UDC Act and that the Appellate Division plurality erred as a matter of law when it conducted a *de novo* review of the administrative record and concluded that the Project site was not blighted. We agree with ESDC.⁵³

In doing so, the court reasoned:

[I]t is indisputable that the removal of urban blight is a proper, and, indeed, constitutionally sanctioned, predicate for the exercise of the power of eminent domain. It has been deemed a “public use” within the meaning of the State Constitution's Takings Clause at least since the *Matter of New York City Hous. Auth. v. Muller*, 270 N.Y. 333, 1 N.E.2d 153 (1936) and is expressly recognized by the Constitution as a ground for condemnation” *Matter of Goldstein v. New York State Urban Dev. Corp.*, 13 N.Y.3d 511 (2009)....Here, the two reports prepared by ESDC consultants—consisting of a voluminous compilation of documents and photographs of property conditions—arrive at the conclusion that the area of the Project site is blighted. Just as in *Matter of Goldstein*, “all that is at issue is a reasonable difference of opinion as to whether the area in question is in fact substandard and insanitary,” which is “not a sufficient predicate ... to supplant [ESDC's] determination” 13 N.Y.3d at 528.⁵⁴

⁵¹ N.Y. Const. Art. I sec. 7 (a) (“[p]rivate property shall not be taken for public use without just compensation”).

⁵² N.Y. Urban Development Corporation Act §3(c) (Consol. 2020),
<https://www.nysenate.gov/legislation/laws/UDA/3>.

⁵³ *Kaur*, 5 N.Y.3d at 252.

⁵⁴ *Id.* at 252, 254.

Of course, the *Kaur* decision only affirmed *Goldstein v. New York State Urban Development Corp.*, 13 N.Y.3d 511 (2009), which held that the ESDC’s taking of private property for the construction of a “22-acre mixed use development” in Downtown Brooklyn was a valid exercise of the state’s eminent domain power.⁵⁵ In upholding the ESDC’s condemnation of homes and small businesses in the “blighted” Brooklyn area, the court opined:

Article XVIII, § 1 of the State Constitution grants the Legislature the power to “provide in such manner, by such means and upon such terms and conditions as it may prescribe ... for the clearance, replanning, reconstruction and rehabilitation of substandard and insanitary areas,” and section 2 of the same article provides “[f]or and in aid of such purposes, notwithstanding any provision in any other article of this constitution, ... the legislature may ... grant the power of eminent domain to any ... public corporation....” Pursuant to article XVIII, respondent ESDC has been vested with the condemnation power by the Legislature...and has here sought to exercise the power for the constitutionally recognized public purpose or “use” of rehabilitating a blighted area.⁵⁶

The court further stated that the terms, “substandard and insanitary,” were “general terms.”⁵⁷ And, therefore, the petitioners’ arguments that the homes and small businesses in question were not actually “blighted,” did not outweigh the ESDC’s findings of blight in the area.

[The Petitioners’] are doubtless correct that the conditions cited in support of the blight finding at issue do not begin to approach in severity the dire circumstances of urban slum dwelling described by the *Muller* court in 1936, and which prompted the adoption of article XVIII at the State Constitutional Convention two years later

⁵⁵ *Goldstein v. New York State Urban Development Corp.*, 13 N.Y.3d 511, 517 (2009); *see also* Empire State Development, *Atlantic Yards Community Development Corporation*, esd.ny.gov, <https://esd.ny.gov/atlantic-yards-community-development-corporation-1> (last visited Aug. 7, 2020) (the site is now home to the Barclays Center, as well as “16 buildings for residential and commercial uses, including up to 6,430 apartments”).

⁵⁶ *Id.* at 525.

⁵⁷ *Id.* at 518.

(see 1938 Rep. of N.Y. Constitutional Convention Comm., vol. 6, part 2, at 636–639). We, however, have never required that a finding of blight by a legislatively designated public benefit corporation be based upon conditions replicating those to which the Court and the Constitutional Convention responded in the midst of the Great Depression....It is important to stress that lending precise content to these general terms [(“substandard and insanitary”)] has not been, and may not be, primarily a judicial exercise. Whether a matter should be the subject of a public undertaking—whether its pursuit will serve a public purpose or use—is ordinarily the province of the Legislature, not the Judiciary, and the actual specification of the uses identified by the Legislature as public has been largely left to quasi-legislative administrative agencies.⁵⁸

The *Goldstein* court concluded:

It is only where there is no room for reasonable difference of opinion as to whether an area is blighted, that judges may substitute their views as to the adequacy with which the public purpose of blight removal has been made out for those of the legislatively designated agencies; where, as here, “those bodies have made their finding, not corruptly or irrationally or baselessly, there is nothing for the courts to do about it, unless every act and decision of other departments of government is subject to revision by the courts” (*Kaskel*, 306 N.Y. at 78, 115 N.E.2d 659).⁵⁹

In sum, due to the separation of powers principle and overall judicial deference to quasi-legislative administrative agency actions, NY courts will rarely find for the former private property owners on eminent domain issues.

It is important to note that, generally, those who are forced to leave properties condemned by the government (and the ESDC in this case) are occupied by small business

⁵⁸ *Id.* at 524-26.

⁵⁹ *Id.*

owners and long-time community residents.⁶⁰ And as this spotlight on Harlem intends to demonstrate, these neighborhoods are often cradles of creativity that once housed a multiplicity of music venues and cultural hotspots before becoming the target of benign neglect and subsequent government takings. To combat these effects, NY eminent domain laws, such as the Urban Development Corporation Act⁶¹ and the Eminent Domain Procedure Law,⁶² should be updated to protect and promote the communities and spaces that perpetuate New York's historic "permissiveness" and "tolerance." Two specific examples for the Urban Development Corporation Act are that the "Land Use Improvement Project"⁶³ and "Civic Project"⁶⁴ should be more narrowly defined. With regard to the Eminent Domain Procedure Law, the definition of "Public project"⁶⁵ should be more specific and the condemnation of private property should not be justified with condemnor confirmation bias.

New York City is Losing its Standing as a Global Cultural Capital

While NYC has long been recognized as a cultural mecca for the music industry, we cannot take it for granted that this will be the case in perpetuity. Since the early 2000s, NYC has become increasingly bland as chains replace the small businesses that have always given each city neighborhood its distinct character. Accordingly, through collective effort, our city has the opportunity to stop these changes and, to an extent, reverse the effects of their negative impacts.

NYC is only as good as its last performance. In *Vanishing New York*, Jeremiah Moss makes this point succinctly:

From its beginnings, but especially since the late 1800s, NY was the unbridled engine of the nation's progressive culture and creativity, sustaining a diversity of

⁶⁰ Matt A.V. Chaban, *In Arena's Shadow, Holdouts at Atlantic Yards Site Must Now Leave*, N.Y. TIMES (Feb. 16, 2015), <https://www.nytimes.com/2015/02/17/nyregion/in-arenas-shadow-holdouts-at-atlantic-yards-site-must-now-leave.html?searchResultPosition=17>; see also MOSS, *supra* note 8, at 353.

⁶¹ See generally N.Y. Urban Development Corporation Act (Consol. 2020), <https://www.nysenate.gov/legislation/laws/UDA/3>.

⁶² N.Y. Eminent Domain Procedure Law (Consol. 2020), <https://www.nysenate.gov/legislation/laws/EDP>.

⁶³ N.Y. Urban Corporation Act § 3(c) (Consol. 2020), <https://www.nysenate.gov/legislation/laws/UDA/3>.

⁶⁴ *Id.* at § 6(d).

⁶⁵ N.Y. Eminent Domain Procedure Law § 103(G) (Consol. 2020), <https://www.nysenate.gov/legislation/laws/EDP/103>.

people, feeding the world with art, ideas, and ways of life that pushed the boundaries of convention. But now it seems this period has come to an end. The spirit of the city as we knew it has vanished in the shadow of luxury condo towers, rampant greed, and suburbanization.⁶⁶

Today, we see a similar “suburbanization” of NYC’s subversive music scenes of the 1970s and 80s. No longer does City government tolerate underground venues like CBGB, which closed in 2006,⁶⁷ and nurtured a generation of iconic artists and bands like Patti Smith, the Ramones, and Talking Heads.⁶⁸ Instead, the location where CBGB once stood is now a John Varvatos store⁶⁹ that has co-opted the space’s history with \$98 CBGB t-shirts,⁷⁰ the iconic CBGB awning sits in the air conditioned halls of the Rock & Roll Hall of Fame in Cleveland,⁷¹ and the Met has “recreated” CBGB’s legendarily horrific bathroom behind plexiglass in its sanitized halls.⁷² Perhaps worst of all, CBGB has been “reborn” as a restaurant and bar in Newark Liberty International Airport where hungry travelers can order chicken wings or a prime rib from an iPad.⁷³

This story of cultural erasure and subsequent sanitized glorification is not an isolated incident. The systematic co-option of underground music and art culture can be traced back even to the period when CBGB was operating at its creative peak. In *Life and Death on the New York Dance Floor*, author Tim Lawrence describes how the death of the nightclub scene in the mid to late 1980s was due in part to a combination of neoliberalism, appropriation, and

⁶⁶ MOSS, *supra* note 8, at 6.

⁶⁷ Jon Pareles, *Fans of a Groundbreaking Club Mourn and Then Move On*, N.Y. TIMES (Oct. 17, 2006), <https://www.nytimes.com/2006/10/17/arts/music/17cbgb.html>.

⁶⁸ Michael McGrath, *10 Artists Who Made Their Mark at NYC’s CBGB*, CULTURE TRIP (Jan. 13, 2017), <https://theculturetrip.com/north-america/usa/new-york/new-york-city/articles/10-artists-who-made-their-mark-at-nycs-cbgb/>.

⁶⁹ Run Through, *By Moving Into CBGB, Varvatos Saved the Bowery From a Bank*, N.Y. Mag.: The Cut (Apr. 15, 2008), https://www.thecut.com/2008/04/john_varvatos_store_hiring_mus_1.html.

⁷⁰ BrooklynVegan Staff, *John Varvatos, which has a store in the old CBGB space, selling \$98 CBGB t-shirt*, BROOKLYN VEGAN (Aug. 28, 2016), <https://www.brooklynvegan.com/john-varvatos-which-has-a-store-in-the-old-cbgb-space-selling-98-cbgb-t-shirt/>.

⁷¹ Jen Carlson, *The CBGB Awnings: Where Are They Now?*, GOTHAMIST (Jan. 28, 2016, 3:20 PM), <https://gothamist.com/arts-entertainment/the-cbgb-awnings-where-are-they-now>.

⁷² Eric Wilson, *A Necessary Stop*, N.Y. Times (May 29, 2013), <https://www.nytimes.com/2013/05/30/fashion/a-necessary-stop-at-re-creation-of-cbgb-restroom.html>.

⁷³ Serena Dai, *CBGB’s is Now Open in Newark With iPad Ordering*, EATER N.Y. (Dec. 28, 2015, 11:05 AM), <https://ny.eater.com/2015/12/28/10674286/cbgb-newark-open>.

gentrification:

Capturing the broader shift in an April feature titled “The Death of Downtown,” Michael Musto lamented the fragmentation of a scene. “Downtown ‘87 is by Ralph Lauren out of the Reagan White House,” he wrote. “The trend is toward exclusive palaces of the faux elite, tailor-made for...new conservatives whose goal in life is to get their loose jaws to lock.” A scene once marked by its vibrant, organic, spontaneous character had been supersized and hollowed out.

Real estate inflation played a major part in developments. As early as 1 January 1980 Colab⁷⁴ staged the Real Estate Show in a boarded-up city building on Delancey Street in order to draw attention to the way ‘mercantile and institutional structures’ used artists for the purpose of gentrificationIn May 1984, *New York Magazine* noted how apartments that had been let for \$115 per month under rent control were now going for \$700 per month. “If an East Village resident didn’t have a place nailed down they would be forced to either leave or spend a lot more time working for somebody else instead of doing their own stuff,” confirms [East Village Eye editor-in-chief, Leonard] Abrams. “So the new blood, the young enthusiastic artists, were confronted with a whole different set-up.”

Such developments were related to a city-led strategy that saw Mayor Koch grant \$1 billion in tax abatements (dubbed “corporate welfare” by critics) that “reduced real estate taxes for a period of years in return for a particular kind of development,” notes [Koch biographer,] Jonathan Soffer....Meanwhile the property market inflated by a frenetic 19 percent, 20 percent, 25 percent, and 17 percent in 1984-1987 before dropping back to 4 percent in 1988. “We were heading into the reheating of the real estate market,” recalls Steve Mass [founder of Mudd Club] of his failure to land a venue after leaving White Street. “You couldn’t find anything.”

⁷⁴ For more information on Collab, see [COLLABORATIVEPROJECTS.WORDPRESS.COM](https://collaborativeprojects.wordpress.com/), <https://collaborativeprojects.wordpress.com/> (last visited Aug. 7, 2020).

Although the development appeared benign for those who locked into a good lease, he adds, “[t]hese rich owners were now saying we want the whole neighborhood to be improved because our property will be devalued if there’s a needle on the sidewalk.” As it happens, nightlife businesses that held a lease faced rental increases of 35 percent between 1983 and 1985, while those without a lease faced a 66 percent rise, notes law professor and civic activist Paul Chevigny. Danceteria eventually closed down due to incontrovertible real estate imperatives. “We rented the whole building for \$1.20 per square foot and he [real estate mogul, Alex Di Lorenzo] was getting offers of \$25 per square foot,” recalls [owner of Danceteria] John Argento. “His siblings pressed him to rent the building for more money....”

Whereas the backlash against disco didn’t dampen the downtown scene, its synergistic capacity diminished significantly between 1984 and 1988. Increasingly, cultural exchanges took place in well-heeled galleries and fashionable restaurants rather than inclusive party spaces.... The city came to focus less on the creation of culture and more on its licensing, marketing, showcasing, and consumptions as it hurtled into an era of gentrification, global finance, and tourism. Meanwhile Reagan’s framing of the poor as being welfare scroungers and the newly wealthy as pioneering heroes brought to the surface the “alienations” and anomie” that social geographer David Harvey maintains are integral to the operation of neoliberalism.... “[And while] [p]laces like the [Paradise] Garage⁷⁵ and the Loft⁷⁶ maintained their sense of collectivity, ... what was around them changed. To some extent the people who went to these parties felt they were almost under

⁷⁵ See also Miles Raymer, *Paradise Garage: The oral history of NYC’s greatest club*, TIMEOUT (Aug. 21, 2018), <https://www.timeout.com/newyork/nightlife/paradise-garage-the-oral-history-of-nycs-greatest-club>.

⁷⁶ See also William Grimes, David Mancuso, *Whose New York Loft Was a Hub of ’70s Night Life, Dies at 72*, N.Y. TIMES (Nov. 18, 2016), <https://www.nytimes.com/2016/11/19/nyregion/david-mancuso-dead-the-loft.html>.

siege,” [says news radio producer Mark Riley].⁷⁷ Reagan’s refusal to speak publicly about AIDS until May 1987 contributed to their sense of embattlement.⁷⁸

We are watching this same cycle of cultural erasure and co-option repeat itself at an unprecedented pace today. While the City actively markets the sanitized version of its cutting-edge musical past, it does not support the music spaces in which new free-thinking movements have the potential to take place today. Commodification, hyper-gentrification, and the COVID-19 crisis are pushing the vitality of our underground music and nightlife scene to the brink of death. If we do not actively protect and promote the spaces in which cultural movements are created, our city will lose its authentic edge.

Venue and Promoter Consolidation in the New York Music Scene

The consolidation of the live music business is not unique to NYC, as the national concert industry as a whole is rapidly consolidating toward a limited number of big promoters, namely Live Nation and AEG.⁷⁹ The COVID-19 crisis has only exacerbated the situation as it is “threatening the already fraught balance of power among concert giants Live Nation and AEG, the independent promoters struggling to compete against them and the major talent agencies that are already coming to terms with a rapidly consolidating business.”⁸⁰ For

⁷⁷ See also Piotor Orlov, Still Saving The Day: *The Most Influential Dance Party In History Turns 50*, NPR.ORG (Feb. 19, 2020), (“The primary constituency in The Loft community was, of course, the *dancers*, who were never in doubt that the music was playing them. Mark Riley was a news radio producer at WLIR who began attending on Broadway, and points out that Mancuso “had a special relationship with the dancers who came to The Loft. David really gravitated toward people who expressed their freedom through dancing.” That freedom was reliant on the comfort of individual expression — or as every woman interviewed for this article said at one point or another, the liberty to dance in peace and not be hit upon, as they were in most every other club environment”).

⁷⁸ TIM LAWRENCE, LIFE AND DEATH ON THE NEW YORK DANCE FLOOR 468-471 (2016).

⁷⁹ Dave Brooks, *How Coronavirus Will Reshape The Concert Business*, BILLBOARD (Apr. 2, 2020, 12:17 PM), <https://www.billboard.com/articles/business/9342389/coronavirus-touring-concert-business-billboard-cover-story-2020>.

⁸⁰ *Id.*

instance, Live Nation has acquired venues across the country, including in Los Angeles,⁸¹ San Antonio,⁸² and the entire House of Blues chain of venues.⁸³

New York City has not been spared this consolidation, as AEG has acquired a stake in Bowery Presents⁸⁴ and currently owns, manages or exclusively books shows at Webster Hall, Brooklyn Steel, the Music Hall of Williamsburg, Rough Trade NYC, Terminal 5, and Forest Hills Stadium.⁸⁵ Live Nation, on the other hand, “owns or operates Irving Plaza, Gramercy Theatre, Nikon at Jones Beach Theater” in the New York City area.⁸⁶

While we are certainly not opposed to large companies like Live Nation and AEG having a presence in NYC, the industry is becoming increasingly top-heavy as financial barriers to entry have become more and more stark. This is resulting in the music industry, at large, finding itself lacking in new artists that push the way we think about and enjoy the artform.

First, the big venues simply do not have the economic incentive to book new, potentially up-and-coming artists. Larger venues, like any business, need to fill their spaces in order to make a profit and continue operating. And, logically, an artist who is just beginning to make their way into the business will not fill large venues.

Second, although AEG and Live Nation do book and support up and coming talent in festival settings and smaller rooms, due to the increased lack of independents, there are simply not enough opportunities for the experimentation, risk taking, informality, and artistic spontaneity necessary to cultivate new music movements and cultural scenes.

⁸¹ Wendy Lee, *Live Nation buys owner of Echoplex and the Regent in a wave of acquisitions*, L.A. TIMES (May 17, 2019, 5 AM), <https://www.latimes.com/entertainment/la-fi-ct-live-nation-buys-spaceland-presents-echoplex-20190517-story.htm>.

⁸² W. Scott Bailey, *Live Nation acquires managing interest in historic downtown San Antonio theater*, SAN ANTONIO BUS. J. (Aug. 20, 2015 9:21 AM), <https://www.bizjournals.com/sanantonio/news/2015/08/20/live-nation-acquires-historic-downtown-san-antonio.html>.

⁸³ Charles Duhigg, *House of Blues Sold to Live Nation*, L.A. TIMES (July 6, 2006, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2006-jul-06-fi-live6-story.html>.

⁸⁴ Ben Kayeon, *AEG Live owns all New York City music following purchase of Bowery Presents*, CONSEQUENCE OF SOUND (Apr. 20, 2016, 3:40 PM), <https://consequenceofsound.net/2016/04/aeg-live-owns-all-new-york-city-music-following-purchase-of-bowery-presents/>.

⁸⁵ The Bowery Presents, <https://www.bowerypresents.com/venues/> (last visited Aug. 6, 2020); see also Andrew Sacher, *AEG signs deal to exclusively book Forest Hills Stadium past 2030*, BROOKLYN VEGAN (Apr. 24, 2017), <https://www.brooklynvegan.com/aeg-signs-deal-to-exclusively-book-forest-hills-stadium/#:~:text=Bowery%20Presents%20and%20the%20AEG,at%20the%20venue%20each%20year>; see also *AEG Live Partners with The Bowery Presents*, AEG (Jan. 30, 2017), <https://www.aegworldwide.com/press-center/press-releases/aeg-live-partners-bowery-presents>.

⁸⁶ Kayeon, *supra* note 84; see also *Venues*, LIVENATION, <https://specialevents.livenation.com/venues> (last visited Aug. 6, 2020).

In sum, it is the smaller, independent venues that serve as the foundation on which our entire multi-billion-dollar live music industry is built. As a city, therefore, we should be incentivizing, rather than punishing, these small businesses for taking the risks necessary to nurture cultural innovation and economic creativity.

Economic Perspective

Not only is the availability and proliferation of live music important to NYC culturally, it is also vital to NYC's economy. According to the 2019 Economic Impact Report, which was commissioned by the Mayor's Office of Media and Entertainment ("MOME"),⁸⁷ "[i]n 2016 ..., the nightlife industry supported 299,000 jobs with \$13.1 billion in employee compensation and \$35.1 billion in total economic output."⁸⁸ Additionally, "[t]his annual economic impact ... yielded \$697 million in tax revenue for New York City."⁸⁹ While MOME's definition of "nightlife" is wider than ours (comprising five "subsectors": "Food Service, Bars, Arts, Venues, and Sports and Recreation"), the report does contain venue-specific economic impact numbers (the report defines "venues" as including "concert and entertainment venues, independent venues, informal cultural and performance spaces—commonly referred to as "do-it-yourself," or DIY venues").⁹⁰ According to the report, in 2016 there were 2,400 venues that "generated 19,900 direct jobs, \$373 million in wages, and \$1.2 billion in direct economic output."⁹¹

Nightlife has a further impact on NYC's economy beyond the jobs and revenue streams created from direct economic output. This includes (also in 2016), "goods and services locally purchased by nightlife establishments hav[ing] an indirect impact in the NYC economy of 25,000 jobs, \$1.8 billion in employee compensation, and \$5.1 billion in economic output."⁹² Generally, [f]or every \$1 spent on a ticket at small venues, a total of \$12 in economic activity is generated within communities on restaurants, hotels, taxis, and retail establishments."⁹³ In NYC

⁸⁷ NYC NIGHTLIFE ECONOMY: IMPACT, ASSETS AND OPPORTUNITIES, *supra* note 5 at 4.

⁸⁸ *Id.* at 3.

⁸⁹ *Id.*

⁹⁰ *Id.* at 4.

⁹¹ *Id.*

⁹² *Id.*

⁹³ NIVA, NIVA Policy and Fact Sheet, 1 (2020), <https://static1.squarespace.com/static/5e91157c96fe495a4baf48f2/t/5f0dd24567420b67f67e5236/1594741318191/NIVA+Policy+and+Fact+Sheet+7-14-20.pdf> [hereinafter NIVA Policy and Fact Sheet].

specifically, this is the “ancillary impact on NYC’s economy from additional spending on retail, transportation, lodging, and other services that happens only because of people enjoying New York City’s nightlife.”⁹⁴ The ancillary spending, outlined above, “supports 48,000 jobs, \$2.3 billion in wages and \$6.0 billion in economic output.”⁹⁵ Lastly, the nightlife industry brings much needed money to the city and state in the form of taxes and fees. In 2016, “the nightlife industry generate[d] a fiscal impact of \$1.8 billion in tax revenues to New York City and New York State.”⁹⁶ “This includes taxes from nightlife employees, sales, liquor and hotel taxes, totaling \$697 million to the City and \$1.1 billion to the State.”⁹⁷ Based on these numbers alone, the government should approach its relationship with the nightlife industry as though it were in partnership with these small businesses, rather than in opposition.

COVID-19⁹⁸

To uplift morale in the COVID-19 crisis, Governor Andrew Cuomo has urged New Yorkers to rally around the phrase, “NY Tough.”⁹⁹ In the nightlife industry, venue owners and event producers practice “NY Grit,” and have been doing so for years.

In her book, *Grit, The Power of Passion and Perseverance*, Professor Angela Duckworth at the University of Pennsylvania and CEO of Character Lab breaks down her definition of Grit into two parts: “passion and perseverance.”¹⁰⁰ Professor Duckworth equates perseverance with diligence and never giving up.¹⁰¹ Passion is the practice of “*consistency over time*.”¹⁰² “It is a *compass*--that thing that takes you some time to build, tinker with, and finally get right, and that then guides you on your long and winding road to where, ultimately, you want to be.”¹⁰³ Professor Duckworth further explains:

⁹⁴ NYC NIGHTLIFE ECONOMY: IMPACT, ASSETS AND OPPORTUNITIES, *supra* note 5 at 4.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ While not the focus of our paper, we would be remiss if we did not briefly discuss the impact of COVID-19 on the live music industry.

⁹⁹ Convicts, *NY TOUGH*, YOUTUBE (Apr. 8, 2020), <https://www.youtube.com/watch?v=JssJFxZ03BA>.

¹⁰⁰ ANGELA DUCKWORTH, *GRIT: THE POWER OF PASSION AND PERSEVERANCE* 56 (2016).

¹⁰¹ *Id.*

¹⁰² *Id.* at 57.

¹⁰³ *Id.* at 60.

Passion is not just that you have something you care about.... You care about that *same* ultimate goal in an abiding, loyal, steady way. You are not capricious. Each day, you wake up thinking of the questions you fell asleep thinking about. You are, in a sense, pointing in the same direction, ever eager to take even the smallest step forward than to take a step to the side, toward some other destination. At the extreme, one might call your focus obsessive. Most of your actions derive their significance from their allegiance to your ultimate concern, your life philosophy. You have your priorities in order.¹⁰⁴

The music community that we both respect and celebrate embodies this quote. But having passion and perseverance can only take venue owners and event producers so far. For more than a year, the COVID-19 crisis has shut down 100% of the live music industry. At present, venue owners and event producers simply cannot take care of their own.¹⁰⁵

If the music industry does not bounce back from the COVID-19 crisis, the City's economy will suffer.¹⁰⁶ NPR's recent post about economic side effects of the pandemic illustrates this point:

Music festivals and concerts have exploded into a \$12 billion business over the last ten years. The biggest festivals, like Coachella or the Electric Daisy Carnival, can attract more than 100,000 people a day, and gross more than \$10 million. The festivals don't just generate revenue for the organizers, the musicians and their crews. Each event spawns a kind of mini-municipality. There's all the things you'd expect from a music festival, like the merchandise vendors and food sales; and then there's all the things you might not necessarily think of, but which every festival needs: police and fire services; water and power; port-a-potties; healthcare. Put all of these services together, and these festivals have a massive economic impact.

¹⁰⁴ *Id.*

¹⁰⁵ Bruce Springsteen, *We Take Care of Our Own* (Columbia Records 2012).

¹⁰⁶ It is also important to note that most artists generate about 75% of their income through touring and live performances. See NIVA Policy and Fact Sheet, *supra* note 93 (a NIVA letter to Congress seeking COVID-19 support for music venues states that “[l]ive events provide 75% of all artists’ income”).

They employ thousands of people. So when the coronavirus struck, and the festivals began announcing cancellations, it wasn't just the end of a good day out for music fans: for many people, it was the end of their livelihoods.¹⁰⁷

Fortunately, there is at least one organization prominently working to save independent music venues in these difficult times. The National Independent Venue Association's ("NIVA") "mission is to preserve and nurture the ecosystem of independent live music venues and promoters throughout the United States."¹⁰⁸ The association "now represents 3000+ members in all 50 states and Washington, DC."¹⁰⁹ Further, "NIVA [m]embers include some of the preeminent independent music venues, comedy clubs, performing arts centers, concert promoters, and festivals in America."¹¹⁰ NIVA has been heavily involved in petitioning the government for support for venues, both by directly sending a letter to Congress requesting support,¹¹¹ and producing an "Artists' Letter To Congress" "in support of NIVA's request for federal assistance for independent music venues and promoters across the United States."¹¹² This letter has been signed by artists such as Lady Gaga, Billy Joel, and Cher, among many others.¹¹³

The scale of challenges to the industry NIVA points out are enormous:

- Independent venues were the first to close and will be the last to fully reopen.
- Venues have zero revenue, but obligations like mortgage/rent, bills, loans, taxes, and insurance continue.
- We have no work to offer our employees for the foreseeable future.
- The shutdown is indefinite and likely to extend into 2021 as our venues are in the last stage of reopening.

¹⁰⁷ Stacey Vanek Smith, *Live Music Industry Blues*, NPR (July 7, 2020, 5:00 PM), <https://www.npr.org/2020/07/07/888333857/live-music-industry-blues>.

¹⁰⁸ NIVA | NAT'L INDEP. VENUE ASS'N, <https://www.nivassoc.org/> (last visited Aug. 6, 2020).

¹⁰⁹ Affiliate Membership Program, <https://www.nivassoc.org/affiliates> (last visited Feb. 2, 2020).

¹¹⁰ *Id.*

¹¹¹ NIVA Letter to Congressional Leaders, <https://www.nivassoc.org/niva-letter-to-congressional-leadership> (last visited Feb. 2, 2020).

¹¹² Artists' Letter to Congress, <https://www.nivassoc.org/artists-letter-to-congress> (last visited Aug. 6, 2020).

¹¹³ *Id.*

- The ability to open at partial capacity is not economically feasible. Rents, utilities, payroll, taxes, insurance, and artist pay are not on a sliding scale matching the capacity we're permitted to host. They are fixed costs.
- Due to the national routing of most tours, our industry will not recover until the entire country is open at 100% capacity. NIVA members need assistance in order to survive until that day.¹¹⁴

As a result of the above challenges, NIVA announced “90% of independent venues report they will close permanently in a few months without federal funding.”¹¹⁵

Congress eventually heeded the pleas of NIVA and its associated music venues across the country, as well as the artists who perform at these venues, and “passed the Save Our Stages Act as part of a \$900 billion COVID-19 relief package on December 21, 2020.”¹¹⁶ The bill itself provides “\$15 billion in non-repayable grants to live venues, independent movie theaters, and cultural institutions,” while “\$10 billion is earmarked for live venues.”¹¹⁷ Further,

According to NIVA, the COVID-19 relief bill will provide a grant equal to 45% of gross revenue from 2019 with a cap of \$10 million per entity. These grants can only be used to pay operating costs such as payroll and benefits, rent and mortgage, utilities, insurance, PPE, and other necessities. The grant money is not just limited to venues, as event promoters and producers, booking agents, and managers can also apply for assistance.¹¹⁸

While we are glad the Save Our Stages Act is in effect, the relief this legislation provides functions solely as a stopgap. Long-term structural change is needed, and this can only take place through meaningful local law and policy reform. In Parts I, II, and III below, we focus primarily on NYC laws and policies and set forth recommendations for reform.

¹¹⁴ NIVA Policy and Fact Sheet, *supra* note 93.

¹¹⁵ *Id.*

¹¹⁶ Michael Broerman, *Save Our Stages Act Passes In Congress, Paving The Way For Billions In Grants*, Live For Live Music (Dec. 22, 2020), <https://liveforlivemusic.com/news/save-our-stages-act-passed-congress/>.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

PART I: Harnessing Technology to Increase Efficiency and Transparency in City Administrative Processes and Educate SBOs About Applicable Laws and Regulations

Even before COVID-19 forced venue owners and event producers to shutter their doors and cancel their shows indefinitely, the industry was operating in “legal quicksand.”¹¹⁹ Under normal business conditions, NYC venue owners and event producers operate on slim profit margins, if any. As a result, one procedural mistake or miscommunication can lead to a barrage of crippling fines or the complete shutdown of a venue or event. To the point of industry professionals being passionate about music, which is of course true, we cannot use this fact to assume that venue owners and event producers do not also want to operate successful businesses that can sustain themselves, their families, and their employees. In other words, we cannot just assume that a so-called passion gap exists where industry professionals do not care about turning profits because they are satisfied to just be working in the business. There is no reason why these New Yorkers cannot both enjoy what they do and be financially successful at doing it.

SBOs generally feel as though they are navigating multiple fiefdoms while they seek necessary permitting and inspection approvals for operating their businesses. Two major areas of focus that produce unnecessary administrative obstacles for SBOs are: (1) permitting; and (2) inspections. According to our research and conversations, there is a general consensus among industry professionals and City agencies that administrative processes can be intimidating, burdensome, and overly complex. Throughout this section, we highlight problems created by a lack of transparency and interoperability in agency processes and systems, suggest ways in which technology can be utilized to ameliorate these issues, and provide rationales for the solutions we are proposing.

¹¹⁹ US. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE, A REPORT OF THE REGISTER OF COPYRIGHTS PREFACE (MAY 2016), <https://www.copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf>.

Improving Transparency in Administrative Processes

A music space should be a safe place to congregate, not a hazardous trap. The City's music industry professionals understand this better than anyone and, thus, go to great lengths to maintain compliance and keep their spaces up to code. No music space operator wants to put their patrons, their staff, or themselves at risk. Nor do they seek to incorrectly follow agency rules or guidelines and get slapped with fines. Unfortunately, due to gaps in regulation guideline materials, incongruencies among department operating systems, and inconsistent application and enforcement of the law and agency policies, it is inevitable that communication breakdowns will occur, and avoidable mistakes will be made. A positive is that this gap between procedure and practice can be addressed through comprehensive law and policy reform. Three of our working ideas are provided below.

- **Music Industry Portal**

- The Music Industry Portal (MIP) would include, *inter alia*, centralized permit application review and inspection scheduling processes, comprehensive project checklists, and real-time updates of project progress for relevant parties.

- Inspiration: Mayor's Office of Contract Services (MOCS) PASSPort

- <https://www1.nyc.gov/site/mocs/systems/about-go-to-passport.page>

- **NYC Music Industry Legal Manual**

- The NYC Music Industry Legal Manual would be provided in an interactive digital format (as well as print). SBOs would have access to a comprehensive source of laws, rules, and guidelines that pertain to venue owner and event producer operations.

- Inspiration: Combination of the following NYC City Planning assets:

- Zoning Handbook
 - <https://www1.nyc.gov/site/planning/zoning/zh-2016.page>
- Enhanced online Zoning Resolution
 - <https://zr.planning.nyc.gov/>

- ZoLa (Zoning and Land Use Map)
 - <https://zola.planning.nyc.gov/about/#9.72/40.7125/-73.733>.
- Note: for print form, in the context of event producers, *The Comprehensive Event Permitting Guide For the City of New York* (https://www1.nyc.gov/assets/cecm/downloads/pdf/NYC_CECM_Comprehensive_Event_Permitting_Guide_2018%20FINAL.pdf), prepared by the Mayor’s Office of Citywide Event Coordination and Management (CECM) is a great start, but needs improvement (*e.g.*, more cites to relevant laws and rules).
- **200/500 Foot Rule Digital Measuring Tool**
 - While liquor licensing is controlled at the state level pursuant to the Alcohol Beverage Control (ABC) Law and enforced by the State Liquor Authority (SLA), it would be helpful if New York State created a 200/500 foot rule open map to facilitate 200/500 foot line drawing processes and reduce subjectivity in application processes.
 - **The 200 foot rule** prohibits an on-premises liquor license “on the same street or avenue and within two hundred feet of a building occupied exclusively as a school, church, synagogue or other place of worship.”¹²⁰ The actual measurement is “to be taken in straight lines from the center of the nearest entrance of the premises sought to be licensed to the center of the nearest entrance of such school, church, synagogue or other place of worship.”¹²¹
 - **The 500 foot rule** states that “[n]o special on-premises license shall be granted for any premises which shall be within five hundred feet of three or more existing premises licensed and operating pursuant to this section

¹²⁰ N.Y. Alcohol Beverage Control Law § 64-A (Consol. 2020), <https://www.nysenate.gov/legislation/laws/ABC/64-A> (Special license to sell liquor at retail for consumption on the premises).

¹²¹ *Id.*

and sections sixty-four, sixty-four-b, sixty-four-c, and/or sixty-four-d of this article.”¹²² In other words, no license shall be granted if it is within five hundred feet of three or more existing establishments operating with liquor licenses. The measurement guidelines above that apply to the 200 foot rule also apply to the 500 foot rule, *i.e.* it is to be “taken in straight lines from the center of the nearest entrance of the premises sought to be licensed ... the center of the nearest entrance of each such premises licensed and operating pursuant to this section and sections sixty-four, sixty-four-b, sixty-four-c, and/or sixty-four-d of this article.”¹²³

- While the foregoing rules seem relatively straightforward, SBOs are currently responsible for drawing the maps themselves. There is no reason why this process should not be moved online so that time can be saved, mistakes can be avoided, and subjectivity in the approval process can be reduced.
- Inspiration: NYC Open Restaurants Map created by the Department of Transportation (DOT)
 - <https://experience.arcgis.com/experience/ba953db7d541423a8e67ae1cf52bc698>
 - “With this new interactive page, you can search by name of restaurant, borough and zip code, as well even check out whether your desired spot is serving alcohol. At the time of publication, a graph on the page demonstrates that, currently, there are 266 open restaurants in the Bronx, 1,400 in Brooklyn, 2,800 in Manhattan, 1,100 in Queens and 112 in Staten Island. If it interests you, you can even find out when spots applied for their outdoor license. And of course, businesses interested in applying for their own permits for outdoor dining can also find information on the site as well (at Mayor Bill de Blasio's press conference

¹²² *Id.*

¹²³ *Id.*

this morning, it was announced that at least 5,500 restaurants had applied for permits so far).”¹²⁴

Music Industry Portal (MIP) Idea Explained

The City has been making a concerted effort toward integrating technology into government functions and updating and streamlining administrative processes. The Mayor’s Office of Contract Services (MOCS) is a strong example.¹²⁵ MOCS is an “oversight and service agency that is dedicated to optimizing existing operations and transforming processes to make it easier to do business with the City.”¹²⁶ The mission of MOCS is to lead “procurement for the City” with a vision of “[f]air, responsible, and timely procurement.”¹²⁷ Moreover, the office expects its teams to operate in a “fast-paced, collaborative, service-oriented environment, where flexibility and ability to achieve results are valued.”¹²⁸ Other agencies, such as the Department of Buildings (DOB), would do well to adopt the ethos of MOCS.

While the City has been making strides in updating systems and streamlining processes among agencies and outside parties, not all departments are updating at the same pace, and no initiatives, to our knowledge, are focused on facilitating business operations in the live music industry. Like MOCS, government agencies involved in regulating nightlife should work toward “unlocking excellence” in our communities and “making New York City the fairest big city in America” for operating a music venue or producing an event. **Accordingly, the “Strategic Priorities” outlined by MOCS (in the graphic below) should be applied and specifically tailored to government-SBO interactions in the music industry.** For example, instead of “enhancing centralized procurement services” the City could “enhance centralized permit approval processes.”

¹²⁴ Emma Orlow, *New interactive map shows all the open restaurants in NYC*, Timeout (June 26, 2020, 1:49 PM), <https://www.timeout.com/newyork/news/new-interactive-map-shows-all-the-open-restaurants-in-nyc-062620>.

¹²⁵ “MOCS provides policy & operational advice, and technical assistance to agencies as they manage daily procurement activities. MOCS continues to evolve its work, relying on technology and strong partnerships to transform procurement. Teams are currently organized in eight divisions and collectively mobilize to drive impact in five areas: Technology Solutions, Learning Management and Support, Compliance and Partnerships, Data and Reporting, [and] Internal Operations.” Mayor’s Office of Contract Services, *Who We Are*, NYC.GOV, <https://www1.nyc.gov/site/mocs/about/about-mocs.page> (last visited Aug. 7, 2020).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*



*MOCS Infographic:*¹²⁹

In addition to changing applicable agency strategic priorities toward SBOs, a “PASSport” should be created for the music industry. To “eliminate paperwork” and “make it easier to do business,” MOCS is in the process of rolling out an updated version of PASSport, “the City’s digital Procurement and Sourcing Solutions Portal,” with “features designed to make the procurement process easier, more transparent and accessible to all businesses.”¹³⁰

The website states the following:

Developed with and for vendors, along with City agencies, PASSPort leverages technology to address long-standing issues and support faster contract approval, more timely registration, and prompt approval of invoices and payment.

[Learn more about key PASSPort features at a glance here](#)

[PASSPort Vendor Awareness Video](#)

[Award Milestone Tracker One Pager](#)¹³¹

¹²⁹ Mayor’s Office of Contract Services, *Unlocking Excellence: A Blueprint for Procurement Transformation*, CITY.GOV, https://www1.nyc.gov/assets/mocs/downloads/pdf/MOCS_MissionVisionValues.pdf (last visited Aug. 7, 2020).

¹³⁰ Mayor’s Office of Contract Services, *About PASSPort / Create an Account*, NYC.GOV, <https://www1.nyc.gov/site/mocs/systems/about-go-to-passport.page> (last visited Aug. 7, 2020).

¹³¹ *Id.*

The music industry, and the nightlife economy as a whole, would benefit from a system such as PASSPort. PASSPort seeks to achieve the following goals:

- Improved service through radical transparency, so vendors can see how the procurement process works, how long it takes and where any particular contract is at any given time.
- A simpler solicitation process for all contractors, which is especially helpful for new vendors, small businesses, community based nonprofit organizations, and Minority and Women Owned Businesses (M/WBEs).
- Information sharing among agencies, so contracts can be finalized more quickly.
- Greater collaboration and support between agencies, and contractors through an online workspace, and redesigned business practices.
- Greater accessibility to City contracting opportunities.
- More timely registration of contracts and payment of invoices.¹³²

These goals are translatable and adaptable to venue owner and event producer operations and engagement with city agencies.

If the City were to invest in updating systems applicable to venue owner and event producer operations, small business owners, the City, and the people of New York would benefit in multiple ways. SBOs would benefit because they would have more time and money to invest in business operations, artists bookings, and patron experiences. The City would benefit because more revenue would be generated from nightlife operations and agency officials would have more time to dedicate toward protecting and promoting public safety and health. And as competition flourishes at the independent venue and promoter level, patrons will be exposed to different artists and scenes, as well as having access to more affordable ticket price options.

¹³² *Id.*

The Music Industry Portal (MIP) should have roadmaps for the following broad categories:

Venue Owners

- Opening
- Maintaining compliance

Event Producers¹³³

- Planning an event
- Load-in
- Day(s) of show
- Load-out

SBOs with MIP accounts would have access to similar features as the new PASSport rollout, which includes the following:

PASSPort Release 3: Making it Easier to Do Business with City of New York

About PASSPort

PASSPort is the City of New York's digital procurement system, developed and maintained by the Mayor's Office of Contract Services (MOCS). Already a major step forward in streamlining Citywide procurement, PASSPort is about to launch enhanced capabilities to create a complete, end-to-end process that is transparent, easy to access, paperless and more timely. Designed with and for vendors, PASSPort leverages technology to address long-standing issues and make it easier to do business with the City of New York.

¹³³ The E-Apply portal for SAPO permits is a good start but needs to be improved and broadened. Mayor's Office of Citywide Event Coordination Management, *Permit Process*, nyc.gov, <https://www1.nyc.gov/site/cecm/permitting/permit-process.page> (last visited Aug. 7, 2020).

Real-Time Tracking of Submissions, Awards & Contracts



- System notifications support complete and on-time vendor submissions.
- Award decisions communicated immediately through the platform.
- Follow contract progress towards registration with a digital milestone tracker – understand what steps are completed, what more are necessary and the length of time for each.

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Digital Signatures

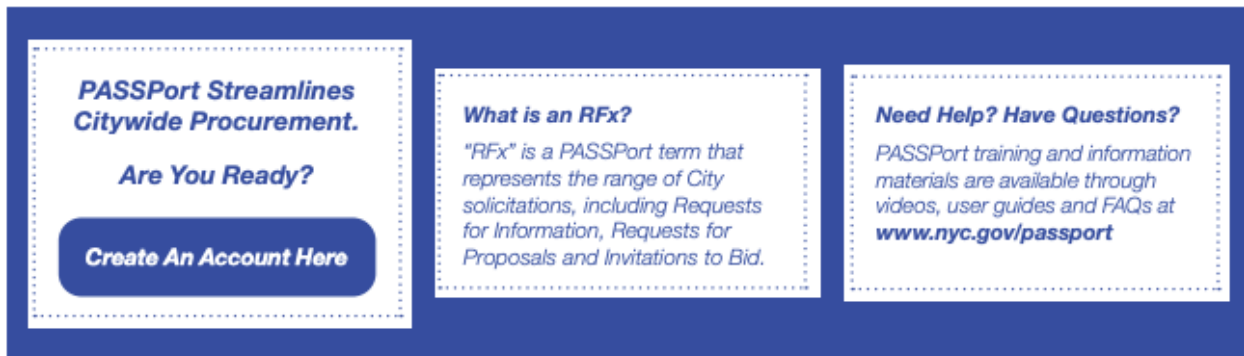


- No more paper!
- Documents are executed through DocuSign – fully digital.
- Notary requirement eliminated.

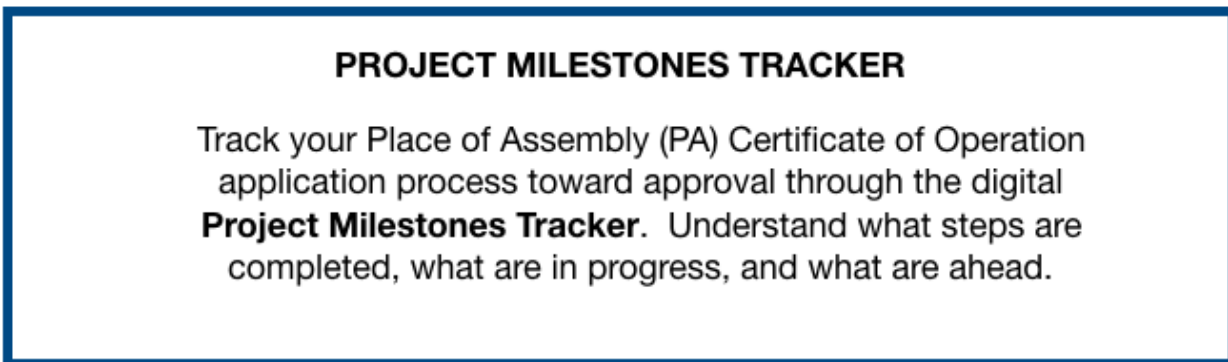
Dashboards and Metrics



- Manage your government contracting business with key metrics and data points.
- Customize information to effectively plan and forecast.

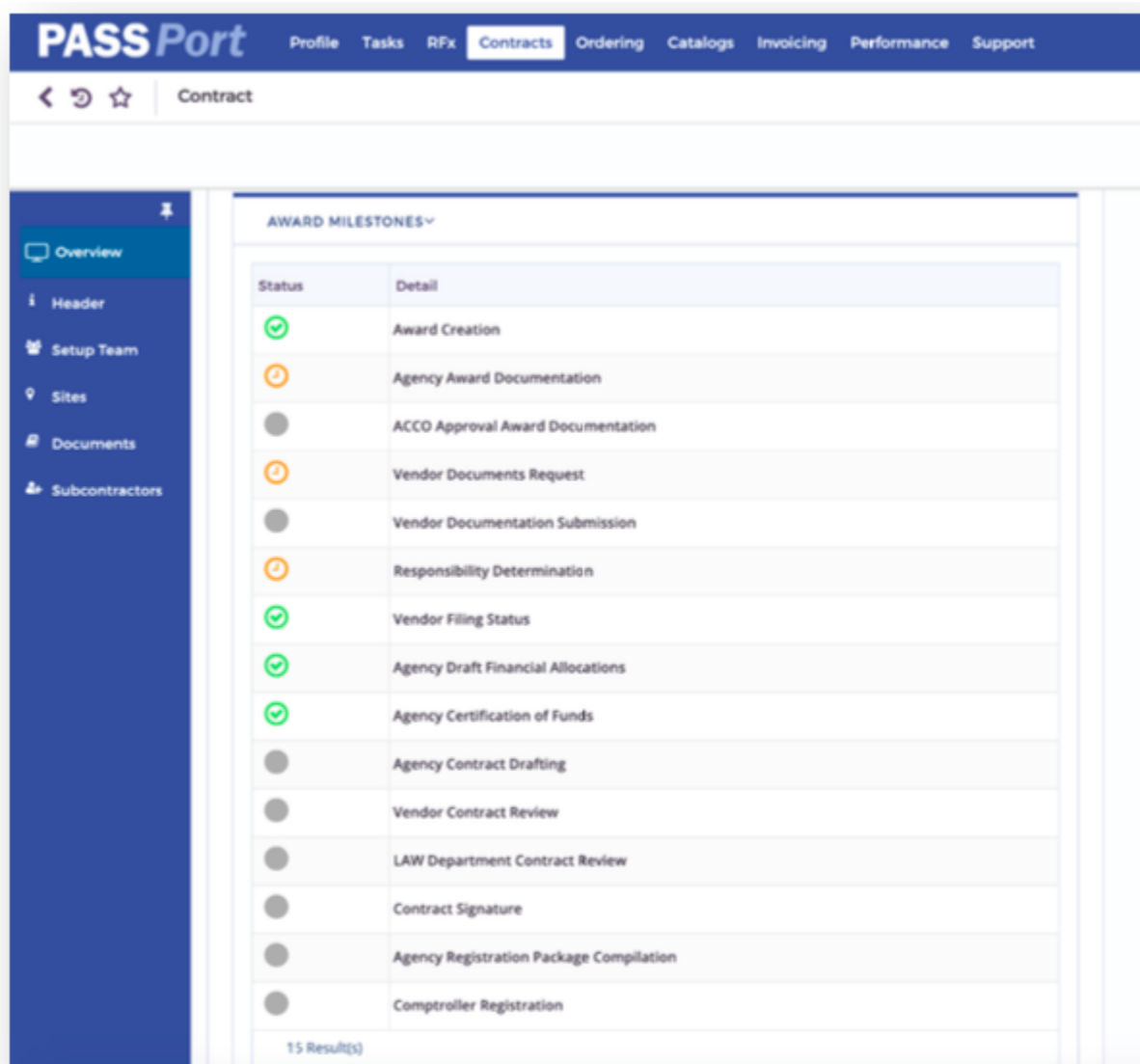
A screenshot of a website banner with a blue background. It features three white boxes with dashed borders. The first box on the left contains the text "PASSPort Streamlines Citywide Procurement." followed by "Are You Ready?" and a blue button labeled "Create An Account Here". The middle box is titled "What is an RFx?" and explains that "RFx" is a PASSPort term representing the range of City solicitations, including Requests for Information, Requests for Proposals, and Invitations to Bid. The third box on the right is titled "Need Help? Have Questions?" and states that PASSPort training and information materials are available through videos, user guides, and FAQs at the website www.nyc.gov/passport.

Further, MIP would equip SBOs with a **Project Milestones Tracker** for each step they must complete within each area of focus (for example):

A screenshot of a box titled "PROJECT MILESTONES TRACKER". The text inside the box reads: "Track your Place of Assembly (PA) Certificate of Operation application process toward approval through the digital **Project Milestones Tracker**. Understand what steps are completed, what are in progress, and what are ahead."

Formatting could be similar to the PASSport Award Milestones Tracker (screenshot on the next page).¹³⁴

¹³⁴ Mayor's Office of Contract Services, *Award Milestones Tracker One Pager* (June 3, 2020), NYC.GOV, https://www1.nyc.gov/assets/mocs/passport-downloads/pdf/resources-for-vendors/Award_MilestonesTracker_OnePager.pdf.



The screenshot shows the PASSPort system interface. The top navigation bar includes links for Profile, Tasks, RFx, Contracts (selected), Ordering, Catalogs, Invoicing, Performance, and Support. The left sidebar contains links for Overview, Header, Setup Team, Sites, Documents, and Subcontractors. The main content area is titled 'Contract' and displays a table of 'AWARD MILESTONES'.

| Status | Detail |
|--------|---|
| ✓ | Award Creation |
| 🕒 | Agency Award Documentation |
| ● | ACCO Approval Award Documentation |
| 🕒 | Vendor Documents Request |
| ● | Vendor Documentation Submission |
| 🕒 | Responsibility Determination |
| ✓ | Vendor Filing Status |
| ✓ | Agency Draft Financial Allocations |
| ✓ | Agency Certification of Funds |
| ● | Agency Contract Drafting |
| ● | Vendor Contract Review |
| ● | LAW Department Contract Review |
| ● | Contract Signature |
| ● | Agency Registration Package Compilation |
| ● | Comptroller Registration |

15 Result(s)

✓ Green check marks indicate the milestone is complete.

🕒 Yellow clocks indicate milestones in progress.

● Gray circles indicate milestones that have not yet been started.

If a contract is still at the contracting agency, you'll know.

If it's being held up at a certain step, you'll know.

And, if it's heading towards registration, you'll know that, too.

The above system should be provided in multiple languages. This access to information, in languages other than English, should be a given as it is explicitly included in the NYC Business Owner's Bill of Rights:

As a business, you have the right to: ...

9. Access information in languages other than English and request language interpretation service for inspection.¹³⁵

To ensure the efficacy of the MIP, the development process should include representatives from all stakeholder groups, including applicable agency departments, venue owners, event producers, and related teams. If all stakeholders work together on building the portal, the greater the chance it will accurately serve both SBO and agency needs. Upon completion of the portal, those in the industry, or those seeking to be in the industry, must be made aware of the system's availability. **Accordingly, informational/public service announcement campaigns should be executed to spread awareness about MIP**, *e.g.*, on social media, via newsletters, town halls, and other modes of communication.

NYC Music Industry Legal Manual Idea Explained

In addition to the MIP solution explained above, venue owners and event producers should have access to a comprehensive NYC Music Industry Legal Manual in both digital and print form. It is important for any New Yorker who aspires to own or operate a music venue or produce an event to have accessible and centralized access to the law in a clear and digestible format. Additionally, the Legal Manual should be updated as regularly as possible in order to reflect the current state of NYC's legal and regulatory landscape. We should strive to be as equal-opportunity as possible.

Easy to follow guides already exist in other aspects of the music industry. For example, longtime music lawyer, Donald Passman, is now up to his 10th edition of his "industry bible"

¹³⁵ Mayor's Office of Operations, *Business Owner Bill of Rights*, NYC.GOV, <https://www1.nyc.gov/site/operations/services/business-owner-bill.page> (last visited Aug. 7, 2020).

All You Need to Know About the Music Business.¹³⁶ Topics include information on putting together a team (personal manager, business manager, agent, etc.), understanding record deals, and merchandising.¹³⁷

A starting point for creating the Legal Manual would be to have the Mayor's Office of Nightlife reach out to all applicable agencies and request that they provide a comprehensive section on venue owner operations and event producer operations. Stakeholders could then review the initial compiled drafts and work together on improving the materials. It would also be helpful to reach out to departments, like the DCP, to learn about how the zoning materials were created (Zoning Handbook, enhanced online Zoning Resolution, and ZoLa).

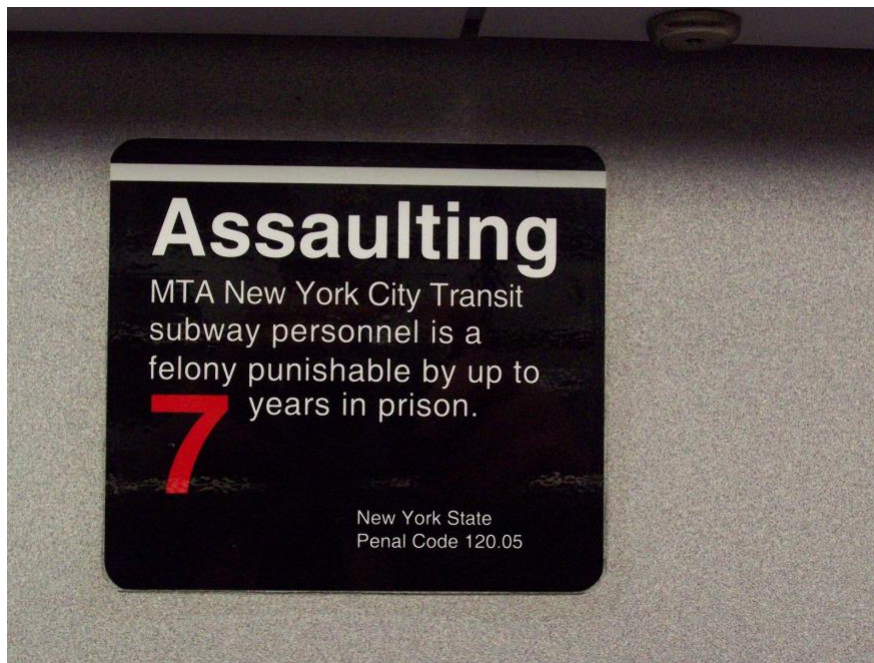
Lastly, the Legal Manual should include citations to the applicable laws, rules, guidances, etc. The information should not only be summarized and bullet-pointed (like it is on the different agency websites). It also needs citations to the relevant provisions so readers can see the legal bases. This is important to include so readers can look at the relevant provisions themselves and not just rely on a city official or employee's summarized interpretation or copy/pasting of the law. In the real world, public signs in city taxis¹³⁸ and on subways¹³⁹ cite to the relevant provisions (see *e.g.*, below).

¹³⁶ *About the Book*, DONPASSMAN.COM, <https://www.donpassman.com/about-all-you-need-to-know-about-the-music-business/> (last visited Aug. 6, 2020).

¹³⁷ DONALD S. PASSMAN, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS* 8 (10TH ED. 2019).

¹³⁸ N.Y. City Taxi & Limousine Commission, *Proposed Administrative Updates* (Jan. 21, 2016), https://www1.nyc.gov/assets/tlc/downloads/pdf/presentation_01_21_16.pdf (see graphic on p. 8).

¹³⁹ *File:New York subway sign assaulting.jpg*, COMMONS.WIKIMEDIA.ORG, https://commons.wikimedia.org/wiki/File:New_York_subway_sign_assaulting.jpg (last visited Aug. 7, 2020).



There is no reason why City website and informational materials for venue owners and event producers should not include these citations. It takes little effort on the part of the applicable agencies and will go a long way in helping SBOs become more acquainted with applicable laws, rules, and guidances.

Rationales for Improvements - Furthering City Laws and Policies

In addition to improving business conditions for SBOs, creating the MIP and the Legal Manual will further the Business Owner's Bill of Rights, the principles of Executive Order 115, as well as City agency goals related to updating technology and improving operations.

Business Owner's Bill of Rights

New York City is committed to providing New Yorkers with excellent Customer Service. This commitment extends to routine Agency inspections, which are necessary to protect the public's health and safety. The Business Owner's Bill of Rights ensures that business owners are provided with prompt, efficient, and easily accessible service.

Business Owners' Rights

As a business owner, you have the right to:

- Courteous and professional treatment by our employees – **Executive Order 115**.
- Inspectors who are polite, professionally dressed and properly identified
- Information about how long inspections will take and the cost of all related fees
- Knowledgeable Inspectors who enforce Agency rules uniformly
- Receive information about Agency rules from Inspectors or other employees – **Industry Code of Conduct**.
- Contest a violation through a hearing, trial or other relevant process – **Resolving Violations** and **Resolving Violations without a Court Hearing**.
- Request a review of inspection results or re-inspection as soon as possible
- Receive explanation from Inspectors (if requested) on violation details and instructions for viewing inspection results
- Access information in languages other than English and request language interpretation services for inspections. - **Language Access**.
- Comment, anonymously and without fear of retribution, on the performance or conduct of our employee¹⁴⁰

Executive Order No. 115 states in pertinent part:

WHEREAS, New York City's residents, businesses, employees and visitors are the customers of City government; and

WHEREAS, the City's customers should expect a consistent high level of service when they interact with City agencies, and deserve meaningful and timely responses to their inquiries, service requests or other applications for governmental action; and

¹⁴⁰ Mayor's Office of Operations, *Business Owner Bill of Rights*, NYC.GOV, <https://www1.nyc.gov/site/operations/services/business-owner-bill.page> (last visited Aug. 7. 2020) (emphasis added in bold).

WHEREAS, the City is committed to serving its customers in a responsive, efficient, transparent and accountable manner; and

WHEREAS, a centralized, strategic approach, through proper cooperation and coordination among City agencies, is required to fulfill this commitment; and

WHEREAS, applying this uniform approach and high-level of customer service to agency operations is essential to fostering confidence in government operations and equal access to City services for all eligible customers....¹⁴¹

City Agency Highlight: The Department of Buildings (DOB) has identified drawbacks to its operational system and is intent on overcoming them.¹⁴² Examples from the Building One City blueprint are provided below. Our goals appear to be aligned.

New Yorkers deserve a DOB that is efficient, effective, transparent, and fair....

This document outlines a vision of change – including long-term targets and immediate action items – focused on identifying areas where reinvestment will strengthen the agency to carry out its core mission of safe and lawful use of buildings, as well as supporting the creation of a thriving, equitable, sustainable, and resilient 21st century New York.

How will we know if we're succeeding? A successful Department of Buildings will be fast

¹⁴¹ N.Y. City Executive Order (Bloomberg) No. 115 of 2005,
https://www1.nyc.gov/assets/buildings/pdf/eo_115.pdf.

¹⁴² The Department of Buildings (DOB) strives to ensure the safe and lawful use of approximately one million buildings and properties in New York City. Our Inspectors enforce the **NYC Building Code** and **NYC Zoning Resolution** to ensure the safety of all New Yorkers. NY City Department of Buildings, *DOB NOW Inspections*, NYC.GOV, <https://www1.nyc.gov/site/buildings/business/dob-now-inspection-for-businesses.page> (last visited Aug. 7, 2020).

and transparent, with exceptional and responsive customer service, streamlined operations, utmost integrity, and an ingrained ethos of ensuring public safety. Together we will: Improve customer service by increasing online offerings...[and] enhanc[e] educational offerings. Streamline operations and reduce processing times, enabling New Yorkers to quickly navigate regulatory processes. Perform with the utmost integrity, creating a foundation of trust between DOB and the public. Reinforce public safety by strengthening proactive enforcement and strategically deploying enforcement resources. Increase transparency by providing clear information about status, process, and requirements without the need for unnecessary intermediaries. Ensure that everyone who interacts with DOB receives an appropriate and equitable level of service.¹⁴³

A 21st Century Department of Buildings

At the end of our effort, New Yorkers will interact with a revolutionized DOB in which:

- 100% of applications, reviews, payments and scheduling can be handled online.
- 100% of projects have a clear and transparent status.
- Integrity is deeply ingrained among all DOB staff and the risk of fraud is reduced through quick, transparent processes.
- 100% of inter-agency inspection and review transfers that are part of the development process are automated....
- More low-risk filings are self-certified, and auditing resources are targeted to self-certified jobs based on risk....¹⁴⁴

¹⁴³ N.Y. CITY DEPARTMENT OF BUILDINGS AND MAYOR'S OFFICE OF OPERATIONS, BUILDING ONE CITY: A BLUEPRINT FOR FUNDAMENTAL TRANSFORMATION AT THE DEPARTMENT OF BUILDINGS 4 (2015), https://www1.nyc.gov/assets/buildings/pdf/building_one_city.pdf.

¹⁴⁴ *Id.* at 5.

CURRENT CHALLENGES...

Many of the challenges faced by the agency have their root in technological limitations. Currently, DOB maintains its data in an outdated legacy mainframe system. As a result, DOB's customers have limited access to and understanding of their status within the DOB process. Too often, New Yorkers need to rely on intermediaries to navigate DOB's processes, unfairly making developers, architects, engineers, and DOB employees reliant on incomplete or second-hand information. Existing technology limitations also reduce the speed at which DOB employees can process applications.

DOB has pursued a number of technological advances to simplify the development process, but there is more to be done....¹⁴⁵

ACTION PLAN...

Processing

Building in New York City is an extraordinarily complex undertaking, often involving numerous City agencies and requiring transactions with outdated systems and incongruent processes. DOB recognizes the importance of minimizing bureaucracy to ensure safe and rapid development. DOB is deepening its investment in plan review and approval, implementing creative strategies to deploy data, technology improvement, and the proven technical expertise of agency staff to speed up approvals. These efforts will transform the development process as well as support the Mayor's goal of accelerating the development of affordable housing. Significant technological enhancements to outdated DOB systems will improve processing times by streamlining the plan exam process; improving decision-making; and reducing the amount of time it takes to conduct transactions with DOB. Interagency coordination efforts will improve the required handoffs between agencies and will result in projects being approved more expeditiously....¹⁴⁶

¹⁴⁵ *Id.* at 6.

¹⁴⁶ *Id.* at 8.

Increase Transparency

Transparency and consistency have been significant challenges to the success of DOB's mission. Understanding the need for clarity in the rules and regulations that govern development in the City, DOB will standardize objections, consolidate codes, and strengthen the ongoing communication with the industry and stakeholders. DOB will:

- Standardize objections to improve transparency, clarity, and consistency of the plan review process.
- Continue to engage and educate the industry to create and share best practices.
- Consolidate Construction Codes, enabling customers to more easily ensure compliance.¹⁴⁷

Customer Service

The Department of Buildings, at its core, is a customer service agency. To that end, DOB will restructure its interface with the public. Including technological advancements noted above, the agency will invest in the physical plant of its Borough Offices and increase availability of DOB staff in order to speed approvals. DOB will: ...

Invest in our staff through additional training and technology, leading to an improved customer experience.¹⁴⁸

The conclusion of Building One City blueprint states the following:

A number of changes require collaboration and coordination with external entities. DOB will work closely with City and state agencies, authorities, utilities, elected officials, and other stakeholders to achieve results.”¹⁴⁹

We could not agree more. To build off the DOB's statement, collaboration and coordination should be narrowly tailored to venue owner and event producer needs. The music industry is

¹⁴⁷ *Id.* at 9.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

unique and, therefore, needs a specific focus. The illustration provided below should support this point.

Illustration: Converting a Factory into a Nightclub or “Cabaret”

In our conversations with industry stakeholders, we have heard that coordinating with the Department of Buildings (DOB) and Fire Department (FDNY) on certain issues, such as application reviews and inspections, can be frustrating and confusing at times. So, we looked to the Building Code, the Fire Code, agency websites, and other sources to see what we could find. Using the following hypothetical, we highlight information and steps an SBO must know (or learn) and take in order to obtain a Certificate of Occupancy (CO) for a nightclub. Once a CO is obtained, the SBO can take other essential steps, such as applying for a liquor license with the State Liquor Authority (SLA).¹⁵⁰

Hypothetical: SBO signs a lease for a vacant factory space with the intent to convert the factory into a nightclub or “cabaret.”

A Certificate of Occupancy (CO) states a building’s legal use and/or type of permitted occupancy. New buildings must have a CO, and existing buildings must have a current or amended CO when there is a change in use, egress or type of occupancy.

No one may legally occupy a building until the Department has issued a Certificate of Occupancy or Temporary Certificate of Occupancy.

The Department issues a final Certificate of Occupancy when the completed work matches the submitted plans for new buildings or major alterations. It issues a Letter of Completion for minor alterations to properties. These documents confirm the work complies with all applicable laws, all paperwork has been completed, all fees owed to the Department have been paid, all relevant violations have been resolved

¹⁵⁰ N.Y. City Department of Small Businesses, *NYC Starter Guide to Opening Your Bar/Nightclub*, NYC.GOV, http://www.nyc.gov/html/nycbe/downloads/pdf/nycstarter_guide_bar/nightclub.pdf (last visited Aug. 7, 2020).

and all necessary approvals have been received from other City Agencies.¹⁵¹

Note: The following materials are not comprehensive. Our intent is merely to illustrate how lack of transparency, coordination, and interoperability can frustrate administrative processes and unduly delay or prevent industry professionals from operating their businesses. Moreover, this illustration demonstrates that, although the DOB's goals align with what we are advocating, improvements that focus on the uniqueness of the live music business seem to be lacking.

Key Information and Steps for SBO

- Use and Occupancy Classifications¹⁵²
 - Factory: Group F¹⁵³
 - Nightclub: Group A-2¹⁵⁴
 - The DOB classifies a nightclub as a “cabaret” or “any room, place or space in which any musical entertainment, singing, dancing or other similar amusement is permitted in connection with an eating and drinking establishment.”¹⁵⁵
- “A New York State licensed Professional Engineer (PE) or Registered Architect (RA) must submit construction plans to obtain a permit. A Department plan examiner will review the plans for any legal/zoning objections. When objections are satisfied, the Department will approve the application.”¹⁵⁶
 - Examples of permits include:

¹⁵¹ N.Y. City Department of Buildings, *Certificate of Occupancy*, NYC.GOV, <https://www1.nyc.gov/site/buildings/homeowner/certificate-of-occupancy.page> (last visited Aug. 7, 2020).

¹⁵² Administrative Code §§ BC 300-312, <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCAadmin/0-0-0-112480> (Use and Occupancy Classification).

¹⁵³ Administrative Code § BC 306, <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCAadmin/0-0-0-70880> (Factory Group F).

¹⁵⁴ Administrative Code § BC 303, <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCAadmin/0-0-0-70786> (Assembly Group A).

¹⁵⁵ Administrative Code of City of N.Y. § BC 202, <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCAadmin/0-0-0-69731> (General Definitions; Cabaret).

¹⁵⁶ N.Y. City Department of Buildings, *How to Obtain a Permit*, NYC.GOV, <https://www1.nyc.gov/site/buildings/business/how-to-obtain-a-permit.page> (last visited Aug. 7, 2020).

- PW1 Plan/Work Application¹⁵⁷
- ALT1: “Major alterations that will change use, egress or occupancy.”¹⁵⁸
 - Once construction concludes, the SBO must schedule inspections with the DOB and FDNY (as well as other agencies) for final approvals.¹⁵⁹
 - The DOB will issue the SBO an amended CO for the building only “after satisfactory completion and inspection and all required filings.”¹⁶⁰

The following information is pulled from the Certificate of Occupancy & Temporary Certificate of Occupancy Code Notes (CO Code Notes).

In order to obtain a CO there cannot be any open applications or violations on the property

The following are the requirements for CO:

Final Construction inspection Sign-off

Final Plumbing inspection Sign-off

Final Elevator Sign-off

Final Electrical Inspection Sign-off

Final Building survey

Final Builders pavement plan

No open applications

No open violations

Owner’s Cost Affidavit (PW3)

A PW3 must be submitted that is signed and notarized by the owner for ALT1 for

¹⁵⁷ N.Y. City Department of Buildings, *Code Notes: Certificate of Occupancy & Temporary Certificate of Occupancy* version 1 (May 2017), https://www1.nyc.gov/assets/buildings/pdf/code_notes_cofo.pdf.

¹⁵⁸ N.Y. City Department of Buildings, *Permits*, NYC.GOV, <https://www1.nyc.gov/site/buildings/homeowner/permits.page> (last visited Aug. 7, 2020).

¹⁵⁹ N.Y. City Department of Buildings, *Building Permits*, NYC.GOV, <https://www1.nyc.gov/site/buildings/business/building-permits.page> (last visited Aug. 7, 2020).

¹⁶⁰ *Id.*

the CO

After receiving the PW7 [(Certificate of Occupancy/ Letter of Completion Folder Review Request)], the Borough Manager's Office will review the document and enter the information into BIS [(Building Information System)].¹⁶¹

We looked to the Administrative Code (among other sources) for more specifics on what requirements needed to be fulfilled to obtain a CO.

- **NY City Administrative Code**
 - Title 28 - Construction Codes
 - Chapter 7 - Building Code (BC)
 - Title 29 - Fire Code
 - Chapter 2 - Fire Code (FC)

Specifically, we looked for DOB x FDNY overlap to see where coordination would be required among the two departments and the SBO. Examples of what we found in Titles 28 and 29 of the Administrative Code are provided below. We have highlighted specific call-outs to the DOB and FDNY in **yellow**.

Our Open Questions:

1. How can we increase transparency so the outcome of the SBO's project meets the necessary requirements set by the DOB and FDNY?
2. How can we improve communication among the SBO, DOB, and FDNY throughout the project timeline?
3. How can we update systems with technology tools and improve interoperability at the interagency level to make reviews and inspections more objective and efficient?

¹⁶¹ N.Y. CITY DEPARTMENT OF BUILDINGS, CODE NOTES: CERTIFICATE OF OCCUPANCY & TEMPORARY CERTIFICATE OF OCCUPANCY (MAY 2017), https://www1.nyc.gov/assets/buildings/pdf/code_notes_cofc.pdf.

Duties and Powers of Commissioner of Buildings

§28-103.1 Jurisdiction. This code shall be enforced by the commissioner of buildings, pursuant to the provisions of section six hundred forty-three of the New York city charter. However, the commissioner of small business services may also enforce all of the provisions of this code with respect to buildings under the jurisdiction of the department of small business services and the fire commissioner may also enforce all the provisions of this code relating to:

1. The approved number of persons in places of assembly (overcrowding);
2. Obstruction of aisles, corridors, and exits;
3. The posting and availability for inspection of certificates of occupancy or other authorization of lawful occupancy, certificates of compliance and place of assembly certificates of operation;
4. The maintenance of fire, smoke and carbon monoxide detection and alarm systems, fire extinguishing systems, refrigerating systems, storage tanks and auxiliary storage tanks for oil burning equipment, exit signs and path markings, and any fire or life safety system, equipment or device intended for use by fire fighting personnel or whose use or operation is subject to the New York city fire code or other law or rule enforced by the New York city fire department, and any related installation and signage; and
5. The installation and testing of fire alarm systems, smoke-detecting and carbon monoxide detecting devices that are interconnected with a fire alarm system or monitored by a central station, and fire extinguishing systems for commercial cooking appliances.

6. Fire fighting equipment, access to and within premises upon or in which construction and demolition work is being conducted, and the conduct of all construction or demolition work affecting fire prevention and fire fighting.

§28-103.1.1 Installation of equipment required by the New York city fire code. Where the installation of exit signs, emergency means of egress illumination, special mechanical ventilation and sprinkler and fire alarm systems is required by the New York city fire code, the fire commissioner shall require such installations to be in accordance with this code...

§28-103.11 Applications and permits. The department shall receive and review applications, construction documents, and other submittal documents and shall issue permits, in accordance with the provisions of this code...

§28-103.16 Inspections of completed buildings, structures, signs, service equipment and construction machinery and equipment. In addition to other required inspections, the commissioner may make or require inspections of completed buildings, structures, signs, service equipment installations and construction machinery and equipment to ascertain compliance with the provisions of this code and other laws that are enforced by the department. Such inspections may be made on behalf of the department by officers and employees of the department and other city departments and governmental agencies; and by approved agencies, special inspectors or other persons when the commissioner is satisfied as to their qualifications and reliability. The commissioner may accept inspection and test reports from persons authorized by this code or by the commissioner to perform such inspections. Such reports shall be filed with the department.¹⁶²

¹⁶² NYC Administrative Code §28-103 *et seq.*,
<https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCAAdmin/0-0-0-63256>
(N.Y. City Construction Codes; Administration; Duties and Powers of Commissioner of Buildings).

Next, we looked to the Fire Code to check for more DOB x FDNY overlap in the steps before obtaining a CO.

NY City Fire Code

104.1.2 Review of design and installation.

The commissioner may authorize the Department of Buildings to review construction documents filed with that agency for compliance with the design and installation requirements of this code for battery systems, fire apparatus access roads, rooftop access and obstructions, and such other design and installation requirements as the commissioner, in consultation with the Commissioner of Buildings, may determine facilitates the design and construction process. The manner and scope of such review and the standards to be applied there to shall be established by the commissioner in consultation with the Commissioner of Buildings, consistent with FC104.2.1....

[Question: Are rules or guidelines available for section 104.1.2?]

104.2 Applications and approvals.

The commissioner shall receive, review and, if satisfactory, approve, applications for permits, certificates and other approvals, and design and installation documents required to be submitted to the commissioner by this code or the construction codes, issue permits, inspect buildings, structures, facilities, premises, marine vessels, watercraft and motor vehicles for the purpose of enforcing compliance with the requirements of this code, and otherwise administer, implement and enforce the provisions of this code....

105.3.9.1 Department of Buildings required approval.

No permit shall be issued when work requires the approval of the Commissioner of Buildings in connection with a material, operation or facility unless proof is submitted to the department that such work has been approved by the Commissioner of Buildings.¹⁶³

¹⁶³ Administrative Code FC 101 *et. seq.*, <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCadmin/0-0-0-99551>.

Additional Findings

Prospective nightclub owners do not have all of the information they need upfront, in an easily digestible format. Although the DOB and FDNY have created helpful documents, information is scattered across multiple locations and is not complete. These documents also run the risk of being outdated or lacking working links. While the DOB has made some improvements to processes, *e.g.*, DOB NOW has moved certain processes online, more work needs to be done.

- DOB NOW allows for, *inter alia*, submitting applications and scheduling appointments online, but not all work types are available. For example, see DOB NOW *Build*:

DOB NOW: Build provides online access to job filings, permits, Post Approval Amendments, Corrections, After Hour Variances, and Letters of Completion. These work types currently can be submitted in DOB NOW: Build: Antenna, Curb Cut, Electrical, Elevator, Emergency Work Notification, Fence, Limited Alteration Application, Mechanical System, Place of Assembly, Plumbing, Sidewalk Shed, Sign, Sprinkler, Standpipe, Structural and Supported Scaffold. **Additional work types will be added throughout 2019.**¹⁶⁴

Further, although the DOB has online features, it appears as though FDNY does not. This lack of interoperability can lead to coordination and communication breakdowns among applicable parties. The following information for inspections is pulled from the FDNY website:

The FDNY conducts inspections that examine buildings, structures, facilities, vehicles and other locations in New York City. The purpose of an inspection is to ensure that code, laws, rules or regulations are being enforced to keep the public safe.

¹⁶⁴ N.Y. City Department of Buildings, *DOB NOW*, NYC.GOV, <https://www1.nyc.gov/site/buildings/industry/dob-now.page> (last visited Aug. 7, 2020) (emphasis added in bold).

The owner shall be responsible, at all times, for the safe maintenance of any building, structure and/or premises and make sure it is kept up to code. Anything that needs to be fixed is the responsibility of the owner. Sometimes, when the tenant of a space in the building causes the hazardous condition in violation of the code or rules, the tenant is responsible to resolve the issues.¹⁶⁵

- **Request an Inspection**

All of these are in PDF form and require the SBO to “FAX or email request” to the Department.¹⁶⁶

- **See e.g., Sprinkler or Standpipe Inspection.**¹⁶⁷

Lastly, although the NYC Department of Small Business Services wizard tool is a helpful start (<https://www1.nyc.gov/nycbusiness/wizard>), more can be done to improve access to information, transparency in agency processes, and communication among applicable parties.

Conclusion

A knowledge gap about administrative processes should not inhibit individuals from pursuing their dreams of opening a venue or producing an event in NYC. Plenty of other obstacles exist that can (and, more often than not, do) prevent people from succeeding in the live music business. For instance, small business owners in nightlife need an authentic vision, access to capital, a dedicated team, creative bookings, an effective marketing plan, and persistence and discipline to operate and succeed. Tackling an unnecessary amount of administrative paperwork should not be added to the list.

¹⁶⁵ N.Y. City Fire Department, *Inspections*, <https://www1.nyc.gov/site/fdny/business/inspections/inspections.page>, NYC.GOV (last visited Aug. 7 2020).

¹⁶⁶ N.Y. City Fire Department, *Request an Inspection*, NYC.GOV, <https://www1.nyc.gov/site/fdny/business/inspections/request-inspection.page> (last visited Aug. 7, 2020).

¹⁶⁷ FDNY, *Suppression Inspection / Test Request*, NYC.GOV, <https://www1.nyc.gov/assets/fdny/downloads/pdf/business/sprinkler-standpipe-web-request.pdf> (last visited Aug. 7, 2020).

Because most New Yorkers lack decades of industry experience and connections in both the music industry and City government, they can feel overwhelmed and even paralyzed by the process of starting up a business in nightlife. As a result, many are deterred from pursuing their business vision before they even attempt to start. This is detrimental to both the vitality of the nightlife scene and the city's finances, because it quashes diversity and artificially restricts the amount of revenue that can be generated by live music and the industries surrounding it.

At present, SBOs do not have all of the information necessary to make comprehensive budgets and business operations plans. As a result, both venue owners and event producers run the risk of hemorrhaging money as they stumble around in the dark trying to get the necessary approvals to legally operate. Even if a small business owner does have deep pockets and can absorb the costs of permitting delays, precious time is wasted on clerical tasks, such as the scheduling of meetings and filling out of agency paperwork, that could otherwise be allocated toward hiring and training staff and getting music spaces up to code. If administrative processes are not improved, New Yorkers will not be adequately incentivized to enter or remain in the music business. The risks will be too high and even the most passionate will not see the sense in operating a business in NYC. Either these individuals will switch professions or take their business elsewhere.

While SBOs tend to be affected disproportionately (and are the focus of our efforts), SBOs are not the only stakeholders who may be frustrated by current administrative processes. Governmental departments, such as the DOB and FDNY, have a lot on their plates and should not have to spend an exorbitant amount of time and resources on scheduling inspections and correcting paperwork that could otherwise be better allocated toward protecting and promoting public health and safety.

After navigating through city government department websites and studying various tools for increasing accessibility and transparency, and reducing regulatory complexity and unnecessary paperwork, we are confident that permitting and inspections processes do not need to be this burdensome, costly, and time consuming. Harnessing technology to streamline administrative processes will help alleviate this issue.

In sum, administrative processes should be straightforward, transparent, and efficient. And SBOs should have centralized access to legal materials in an easily digestible format. The

City has made a concerted effort toward eliminating unnecessary paperwork and moving administrative processes and informational materials online in other sectors. The music industry should not be left behind.

Financing Technology and Administrative Upgrades

It is important to note that by not operating efficiently, the city is wasting resources. At the moment NYC's budget is shrinking. Just from the initial 2020 budget proposal of \$95.3 billion, roughly \$7 billion was cut to \$88.1 billion in the spring budget proposal.¹⁶⁸ If the city were to update front and backend operations, as well as create more efficient systems that eliminate redundancies, operating costs would be reduced and agencies would have the ability to allocate more time, money, and resources toward issues that have long been left unaddressed. While we understand the hesitation to invest in the rebuilding of agency systems, if executed properly, the City will see the payoff in the long-term as agencies will have the ability to operate more efficiently and serve customers effectively on a consistent basis.

To address the question of how these upgrades will be paid for in the short-term, we have gathered some initial ideas in the list below:

- Allocate [*TBD percent*] of agency fees and fines revenue toward updating agency systems;
- Allocate [*TBD percent*] of City real property tax revenue toward updating agency systems;
- Allocate [*TBD percent*] of City vacancy tax revenue toward updating agency systems.
- Allocate [*TBD percent*] of a pied-à-terre tax toward updating agency systems.¹⁶⁹

¹⁶⁸ Alejandra O'Connell-Domenech, *BREAKING: Mayor announces agreement on \$88B budget, including NYPD reductions*, AM N.Y. METRO (June 30, 2020), <https://www.amny.com/news/new-york-city-council-to-vote-on-2021-budget-today/>; see also CITY COUNCIL OF THE CITY OF NEW YORK, Fiscal 2021 Adopted Expense Budget Adjustment Summary / Schedule C (June 30, 2020).

¹⁶⁹ See MOSS *supra* note 8 at 418; see also Libertina Brandt, *NYC could start imposing a tax on second homes valued over \$5 million. Luxury real-estate leaders in the city say it would be an 'irrevocably damaging' move*, BUSINESS INSIDER (Sep. 17, 2019), <https://www.businessinsider.com/pied-a-terre-tax-new-york-city-real-estate-2019-9#:~:text=That's%20because%20New%20York%20State,worth%20%245%20million%20or%20more> (state senator, Brad Hoylman is advocating for the tax: "As long as billionaires are buying apartments in our city, taking

PART II: Reducing Gray Areas and Ambiguities in the Law

City government must ultimately decide how it wants to approach its overall relationship with venue owners and event producers. Based on our research and conversations, it appears that, for the most part, the City is prioritizing short-term revenue gains through punitive fine enforcement over achieving long-term, sustainable economic growth through strategic deregulation and improved agency-SBO communications. Unless we witness the City’s fundamental shift away from this “us versus them” mentality, our music and nightlife culture may very well cease to exist.

Our analysis and recommendations in this section seek to promote uniformity, clarity, and objectivity in applicable laws, rules, and agency guidelines, as well as repeal antiquated laws and eliminate redundancies across agency and interagency regulations.

Generally, vagueness and ambiguity in the law leads to misapplication and abuse of discretion by City agencies, on the one hand, and frustration and lack of compliance on the part of SBOs on the other. The ultimate goal should be to bridge the information gap between agencies and SBOs and achieve a more collaborative approach in both enforcement and compliance. Our topics of discussion are as follows:

- **First**, we provide a general overview of SBO grievances, as well as our analysis, recommendations, and rationales.
- **Second**, we focus specifically on the Department of Environmental Protection (DEP) and discuss how existing laws and rules can be amended to reduce unnecessary stoppages of SBO events and the issuance of avoidable noise pollution fines.
- **Third**, we discuss how the 311 system is structurally adverse to the live music industry, leaving SBOs with little ammunition to defend themselves against disgruntled neighbors with self-serving agendas.

advantage of our infrastructure, and pushing longtime residents out of their neighborhoods so they can have \$238 million mansions in the sky, we’ll need a pied-à-terre tax”).

We have gathered the following industry grievances about agency inspections in general:

- **Inspection processes seem inconsistent and subjective and there are no repercussions for an inspectors' lack of familiarity with the laws and rules they are tasked with enforcing.** As a result, the outcomes of inspections can “depend on the mood of the inspector,” as inspectors have leeway to issue fines to SBOs whom they simply do not care for.
- **Inspection processes lack time caps and, thus, leave room for the so-called lingering inspector problem.** Oftentimes, inspectors will arrive at a venue without a clear-cut agenda, except to issue fines and, thus, will take up an unreasonable amount of a venue owner's time in the hopes of eventually finding an issue that can be used to justify the inspector's underlying intent to issue fines. This very clearly shows how the City, at times, takes an adverse relationship to their dealings with venue owners, not to mention wasting valuable City resources (here, the time of inspectors who are getting paid to linger at a venue long enough to find a problem they were not sent out to inspect).
- **Agency promotions are allegedly tied to issuing fines.** In our conversations with venue owners, we have heard that often inspectors are incentivized to find fineable offenses, because the writing of violations is tied to job promotions. If these issues exist, they must be addressed. Further, agencies should shift punitive enforcement approaches to collaborative ones and not engage in “taxation through citation.”

Our recommendations:

- Each agency should create inspections guidelines that include:
(1) clear steps for each inspection procedure; (2) an expected (and reasonable) time cap for each kind of inspection; and (3) measurable criteria for identifying issues and/or issuing fines. Inspectors should be required to follow these guidelines as closely as possible when conducting on-site inspections.

- For scheduled inspections, agencies should provide SBOs with a comprehensive agenda at least [TBD number] of business days before the date of the scheduled inspection. The comprehensive agenda should include the expected amount of time for each specific inspection as well as applicable tips for maintaining compliance.
 - Inspiration: “What to Expect When You’re Inspected: NYC Open Restaurants Program Checklist for Participating Establishments”
 - <https://www1.nyc.gov/assets/sbs/downloads/pdf/businesses/nycopensteraurants-inspectionchecklist.pdf>.
- The SBO and/or a legal observer should clearly document each inspection visit on a standard form provided by the applicable agency. The SBO should send this report to the applicable agency within [TBD number] of business days after the inspection is completed. The agency should then review the report and respond to the SBO within [TBD number] of business days, confirming that the report has been read and what actions, if any, will be taken. For instance, if the agency has reason to believe that an inspector violated agency guidelines or executed an inspection in an arbitrary or unreasonable manner, appropriate investigatory steps should be taken. At bottom, overzealous inspectors should be restricted by clear administrative procedures and loose cannon inspectors should be reined in by their respective department heads.

Rationales for our initial recommendations:

1. **Our recommendations are aligned with the Business Owner’s Bill of Rights,** which states that business owners are entitled to:

1. Courteous and professional treatment by our employees
2. Inspectors who are polite, professionally dressed, and properly identified

3. Information about how long inspections will take and the cost of all related fees
4. Knowledgeable inspectors who enforce agency rules uniformly
5. Receive information about agency rules from inspectors or other employees
6. Contest a violation through a hearing, trial or other relevant process
7. Request a review of inspection results or re-inspection as soon as possible
8. Receive explanation from inspectors (if requested) on violation details and instructions for viewing inspection results
9. Access information in languages other than English and request language interpretation services for inspections
10. Comment, anonymously and without fear of retribution, on the performance or conduct of our employees¹⁷⁰

2. NY City Charter § 1049(5)(a) (powers of the chief administrative law judge) suggests a more constructive approach toward SBO administrative compliance, rather than a punitive one:

(a) An administrative law judge or hearing officer may dismiss a notice of violation in the interest of justice when, even though there may be no basis for dismissal as a matter of law, such dismissal is appropriate as a matter of discretion due to the existence of one or more compelling factors, considerations, or circumstances clearly demonstrating that finding the respondent in violation of the provision at issue would constitute or result in injustice. In determining whether such compelling factor, consideration, or circumstance exists, the administrative law judge or hearing officer must,

¹⁷⁰ Mayor's Office of Operations, *Business Owner Bill of Rights*, NYC.GOV, <https://www1.nyc.gov/site/operations/services/business-owner-bill.page> (last visited Aug. 7, 2020).

to the extent applicable, examine and consider, individually and collectively, the following:

- (i) the seriousness and circumstances of the violation;
- (ii) the extent of harm caused by the violation;
- (iii) the evidence supporting or refuting the violation charged, whether admissible or inadmissible at a hearing;
- (iv) the history, character, and condition of the respondent;
- (v) the purpose and effect of imposing upon the respondent a civil penalty authorized by one of the provisions listed in this section;
- (vi) the impact of a dismissal on the safety or welfare of the community;
- (vii) the impact of a dismissal upon the confidence of the public in the office of administrative trials and hearings and in the implementation of laws by the city of New York;
- (viii) the position of the relevant city agency regarding the proposed dismissal with reference to the specific circumstances of the respondent and the violation charged; and
- (ix) any other relevant fact indicating that a decision to sustain the alleged violation would or would not serve a useful purpose.¹⁷¹

It would be beneficial to all parties involved if this constructive approach began at the agency enforcement level.

3. The list of possible fineable agency violations is enormous and, thus, makes it nearly impossible for even the most diligent SBO to maintain compliance. The following examples pulled from RCNY Title 24: Department of Mental Health and Hygiene should illustrate: (1) how difficult it can be to comply with all agency requirements, even when checklists are provided upfront (see *e.g.*, APPENDIX 23-A FOOD SERVICE

¹⁷¹ N.Y. City Charter § 1049(5)(a), <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCcharter/0-0-0-2801>.

ESTABLISHMENT INSPECTION WORKSHEET and APPENDIX 23-B FOOD SERVICE
ESTABLISHMENT INSPECTION SCORING PARAMETERS – A GUIDE TO

CONDITIONS); and (2) how difficult it can be to effectively dispute violations, especially for SBOs that lack sufficient time, money, and resources to adequately defend themselves in OATH and other hearings.

§ 7-03 Mandatory fines and penalties

(a) Fixed penalties. When a monetary fine or penalty for a violation enforced by the Department is specified in the Health Code, a rule of the Department, including in Appendix 7-A of this Chapter, or in any other applicable law, a hearing officer must impose that fine or penalty if the hearing officer sustains the violation.

(b) Other Health Code violations. Fines imposed for Health Code violations that are not specified in Appendix 7-A of this Chapter or in another law or rule must be within the range provided in N.Y. City Health Code (24 RCNY) § 3.11 or a successor provision.¹⁷²

Appendix 7-A: Penalty Schedule.

Columns: section of the law; violation description; standard penalty; default penalty.

| | | | |
|-------------------------------|---|----------------|----------------|
| NYCHC § <u>3.05</u> | Failing to comply with Department, Board of Health or Commissioner's order | \$1,000 | \$2,000 |
| NYCHC § <u>3.07</u> | Failing to take reasonable precautions to protect health and safety | \$1,000 | \$2,000 |
| NYCHC § <u>3.09</u> | Failing to abate or remediate nuisance | \$1,000 | \$2,000 |
| NYCHC § <u>3.11(b)</u> | Operating a business or conducting an activity without a currently valid | \$1,000 | \$2,000 |

¹⁷² 24 Rules of Department of Mental Health and Hygiene (24 RCNY) § 7-03, <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCrules/0-0-0-42697> (Health; Department of Mental Health and Hygiene; Mandatory fines and penalties).

| | | | |
|--|---------------|--|--|
| | permit | | |
|--|---------------|--|--|

| | | | |
|------------------------------------|---|--------------|----------------|
| NYCHC § <u>131.07</u>(c)(2) | Commercial premises: insufficient heat; initial | \$300 | \$600 |
| NYCHC § <u>131.07</u>(c)(2) | Commercial premises: insufficient heat; repeat (#2 or more) | \$600 | 41,200 |
| NYCHC § <u>131.09</u> | Commercial premises not properly maintained; initial | \$300 | \$600 |
| NYCHC § <u>131.09</u> | Commercial premises not properly maintained; repeat | \$600 | \$1,200 |
| NYCHC § <u>131.09</u>(a) | Commercial premises: failure to provide, maintain adequate lighting; initial | \$200 | \$400 |
| NYCHC § <u>131.09</u>(a) | Commercial premises: failure to provide, maintain adequate lighting; repeat | \$500 | \$1,000 |
| NYCHC § <u>131.09</u>(b) | Commercial premises: failure to provide, maintain adequate ventilation; initial | \$200 | \$400 |
| NYCHC § <u>131.09</u>(b) | Commercial premises: failure to provide, maintain adequate ventilation; repeat | \$500 | \$1,000 |
| NYCHC § <u>131.09</u>(c) | Commercial premises: failure to maintain plumbing; initial | \$200 | \$400 |
| NYCHC § <u>131.09</u>(c) | Commercial premises: failure to maintain plumbing; repeat | \$400 | \$800 |

| | | | |
|--|--|--------------|----------------|
| NYCHC § <u>131.09</u>(d)(1) | Commercial premises: insufficient potable water; initial | \$250 | \$500 |
| NYCHC § <u>131.09</u>(d)(1) | Commercial premises: insufficient potable water; repeat | \$500 | \$1,000 |
| NYCHC § <u>131.09</u>(d)(2) | Commercial premises: insufficient hand wash sinks, liquid soap, drying devices; initial | \$200 | \$400 |
| NYCHC § <u>131.09</u>(d)(2) | Commercial premises: insufficient hand wash sinks, liquid soap, drying devices; repeat | \$500 | \$1,000 |
| NYCHC § <u>131.09</u>(d)(3) | Commercial premises: insufficient, inadequate utility sinks: initial | \$200 | \$400 |
| NYCHC § <u>131.09</u>(d)(3) | Commercial premises: insufficient, inadequate utility sinks; repeat | \$400 | \$800 |
| NYCHC § <u>131.09</u>(d)(4) | Commercial premises: insufficient, not maintained employee toilets; initial | \$200 | \$400 |
| NYCHC § <u>131.09</u>(d)(4) | Commercial premises: insufficient, not maintained employee toilets; repeat | \$500 | \$1,000 |
| NYCHC § <u>131.09</u>(e) | Commercial premises: floors not in good repair, not clean; initial | \$200 | \$400 |
| NYCHC § <u>131.09</u>(e) | Commercial premises: floors not in good repair, not clean; repeat | \$400 | \$800 |
| NYCHC § <u>131.09</u>(f) | Commercial premises: walls and ceilings not in good repair, not clean; initial | \$200 | \$400 |

| | | | |
|-------------------------------------|--|--------------|------------------------------|
| NYCHC § <u>131.09(f)</u> | Commercial premises: walls and ceilings not in good repair, not clean; repeat | \$400 | \$800 |
| NYCHC § <u>131.09(g)</u> | Commercial premises: premises not in good repair, not clean; initial | \$200 | \$400 |
| NYCHC § <u>131.09(g)</u> | Commercial premises: premises not in good repair, not clean; repeat | \$400 | \$800 |
| NYCHC § <u>131.13(a)</u> | Failure to control unsafe conditions – contaminants; initial | \$300 | \$600 |
| NYCHC § <u>131.13(a)</u> | Failure to control unsafe conditions – contaminants; repeat | \$600 | \$1,200 |
| NYCHC § <u>131.13(b)</u> | Failure to control unsafe conditions – ventilation; initial | \$300 | \$600 |
| NYCHC § <u>131.13(b)</u> | Failure to control unsafe conditions – ventilation; repeat | \$600 | \$1,200¹⁷³ |

§ 7-07 Fines for other repeat violations.

(a) Summons issued to the owner or other person in control of premises. For summonses alleging that the owner or person in control of a premises or regulated business has committed a "repeat violation" other than one provided for in 24 RCNY § 7-05, the hearing officer must impose the fine listed in Appendix 7-A of this Chapter for a repeat violation if, within the previous 12 months, the respondent was found to have violated the same provision of law at the same premises.

....

¹⁷³ 24 RCNY Appendix 7-A, <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCrules/0-0-0-111293> (Health; Department of Mental Health and Hygiene; Penalty Schedule).

(c) *Unproved repeat violation to be considered an initial violation.* If a hearing officer finds that a respondent committed the violation alleged in the summons, but that the violation is not a repeat violation because the same provision of law was not violated within the previous 12 months, the hearing officer must impose the fine listed in Appendix 7-A of this Chapter for an initial violation of that provision.¹⁷⁴

§ 7-08 Defaults.

If a respondent fails to appear to answer a summons and is found in default, the penalty imposed for a violation of the Health Code must be twice the amount set forth in Appendix 7-A of this Chapter or \$2,000, whichever is lower. Fines imposed when a respondent is found in default for violations of other provisions of law may not exceed the amount stated in Appendix 7-A of this Chapter.¹⁷⁵

- **Anecdote on food service-specific health inspections:** We heard from one industry professional that when a health inspector arrives, it is more sensible to throw prepared food away rather than run the risk of being issued a fine.

24 RCNY Appendix 23-A,

<https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCrules/0-0-0-43586>

(Health; Department of Mental Health and Hygiene; Food Service Establishment Inspection Worksheet).

24 RCNY Appendix 23-B,

<https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCrules/0-0-0-43591>

(Health; Department of Mental Health and Hygiene; Food Service Establishment Inspection Scoring Parameters - A Guide to Conditions).

¹⁷⁴ 24 RCNY § 7-07, <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCrules/0-0-0-111287> (Health; Department of Mental Health and Hygiene; Fines for other repeat violations).

¹⁷⁵ *Id.*

24 RCNY Appendix 23-C,

<https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCrules/0-0-0-43593>

(Health; Department of Mental Health and Hygiene; Food Service Establishment and Non-Retail Food Service Establishment Penalty Schedule).

§ 7-09 Other adjudications.

Pursuant to Charter § 1048, the Commissioner delegates to the OATH Trials Division authority to conduct hearings of matters pertaining to the enforcement of State and local law within the jurisdiction of the Department where an OATH administrative law judge shall make and submit recommended findings of fact, decisions, determinations and orders to the Commissioner who shall make final findings, determinations and orders in accordance with 24 RCNY Health Code Article 5 or other applicable law. Such hearings include but are not limited to matters where a respondent must be provided with a hearing or an opportunity to be heard and show cause why the Commissioner should not issue an order or take other action (i) to suspend or revoke a license, permit or registration of a business or activity whose operation or conduct is deemed detrimental to the public health; (ii) to abate nuisances or other detrimental health conditions, including closing, padlocking and sealing premises deemed a public nuisance; (iii) to require an entity to cease and desist from specific acts that endanger public health; or (iv) with respect to Department employee matters pursuant to New York Civil Service Law.¹⁷⁶

¹⁷⁶ 24 RCNY § 7-08, <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCrules/0-0-0-111283> (Health; Department of Mental Health and Hygiene; Other adjudications).

NY City Health Code (24 RCNY)

§ 3.23 Reports of departmental or governmental officials; presumptive evidence of facts.

Written reports or documents in paper, electronic or any other form concerning a matter or subject within the jurisdiction of the Department or regulated by this Code, which are signed or certified by a person employed by any agency of the City, State or Federal government, shall be presumptive evidence of the facts stated therein.¹⁷⁷

Related Research: Search and Seizure Law and Nuisance Abatement.

The City (and State) has the authority to wield a tremendous amount of power when it comes to inspecting real property in the interest of public health and safety. While we appreciate the importance of stringent inspections and understand the dangers that can arise if businesses do not comply with requisite sanitation levels and procedures, we are also aware of the unintended consequences that broad grants of police power to inspectors can, and do, produce. We have included excerpts from *Public Health Law in a Nutshell* and title 17 of the Administrative Code of the City of NY below to demonstrate the importance of balancing agency “power to conduct inspections to ensure the safety, health, and welfare of the public” with protecting individual rights, “particularly related to...privacy or economic interests related to conducting lawful businesses.”¹⁷⁸ Anecdotes of industry professionals are also included.

¹⁷⁷ N.Y. City Health Code (24 RCNY) § 3.23, <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCrules/0-0-0-43942> (Reports of departmental or governmental officials; presumptive evidence of facts).

¹⁷⁸ JAMES G. HODGE, JR., *PUBLIC HEALTH LAW IN A NUTSHELL* 320, 324 (3RD ED. 2018).

***Public Health Law in a Nutshell* notes:**

Search and Seizure Law

- “Public health authorities in many states are explicitly directed to inspect public eating establishments, particularly restaurants, on a regular basis.”¹⁷⁹
- “While many state and local laws grant extensive authority to inspect premises, there are legal limits....Pennsylvania statutes and other states’ laws limit the time in which commercial inspections may be conducted to ‘hours of operation and other reasonable times.’ P.A. Food Code § 46.1101 [(2020)].”¹⁸⁰
- “In *New York v. Burger*, 482 U.S. 692 (1987), the Supreme Court held that “administrative warrantless searches concerning businesses operating in ‘closely regulated industries’ was constitutionally ‘permissible provided there is sufficient statutory authority and oversight.’ *Id.* at 700.”¹⁸¹
- Post-*Burger*, “regulatory schemes allowing inspections of commercial establishments without a warrant may be constitutional so long as (1) government’s interests are substantial; (2) warrantless inspections are ‘necessary to further [that] regulatory scheme;’ and (3) the inspection program has a ‘constitutionally adequate substitute for a warrant.’ *Id.* at 692.”¹⁸²
- “In *Players, Inc. v. City of New York*, 371 F. Supp. 2d 522 (S.D.N.Y. 2005), each of these [three] requirements was considered regarding warrantless public health inspections concerning tobacco use. Player’s, Inc. a private social club, challenged a New York state law allowing warrantless searches of commercial premises to enforce smoking bans. A federal district court upheld New York’s statutory authority because” it passed the three-part test outlined in *Burger* above.¹⁸³

¹⁷⁹ *Id.* at 323, *see also e.g.*, 24 RCNY § 23-03,
<https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCrules/0-0-0-43547> (Letter grading) (“The Department, whenever practicable and subject to 24 RCNY § 23-04 [intervals between inspection cycles], shall conduct an inspection cycle at least annually at each food service establishment...”).

¹⁸⁰ *Id.* at 324.

¹⁸¹ *Id.* at 326.

¹⁸² *Id.*

¹⁸³ *Id.* at 327.

- **Anecdote:** We heard from one industry professional that smoking violations can lead to a downward spiral of fines, because smoking bans are *extremely* hard to enforce. For example, if a venue has a roof and patrons are ignoring NO SMOKING signs and hiding from security, there is only so much a venue can do to control a crowd. In sum, it is nearly impossible to prevent every single patron from violating the rules.
- Limits to warrantless inspections: “[N]ot all warrantless public health inspections pass constitutional muster. In *Gordon v. City of Moreno Valley*, 687 F. Supp. 2d 930 (C.D. Cal. 2009), a federal district court invalidated ‘raid’ style inspections of African-American barber shops by the Moreno Valley (CA) health department and city police. The searches were unreasonable because the officers entered establishments brandishing weapons, explored non-public areas, and directly questioned customers.”¹⁸⁴

Nuisance Abatement

- “Nuisance law arises from the legal adage that ‘every person should use [one’s] property as not to injure the property of another.’ *Pendergrast v. Aiken*, 236 S.E.2d 787, 798 (N.C. 1977).... In its broadest conception, a public nuisance is ‘an unreasonable interference with a right common to the general public.’ Restatement (2nd) of Torts §821B (1979). State and local public health agencies’ long-standing powers to abate public nuisances are often applied in cases where uses of one’s property (*e.g.*, accumulation of trash, creation of noxious smells, operation of industrial equipment in residential areas) produce clear and obvious health risks for others.”¹⁸⁵
- “On Long Island, local officials attempted to use their emergency health and safety laws to require [one] property owner to remove accumulated junk on his property for what he claimed were purely aesthetic reasons. Alan Feuer, *Messy*

¹⁸⁴ *Id.* at 328.

¹⁸⁵ *Id.* at 330.

Yard Pits a Mechanic Against a Town on the Rise, N.Y. TIMES, May 16, 2016, at A13.”¹⁸⁶

- “[S]o long as government follows statutory or regulatory procedures it may abate...acts in the interests of protecting community’s health. Under § 5-11 of the Turning Point [Model State Public Health] Act, state or local public health agencies may immediately and thoroughly investigate any suspect nuisance upon receipt of a complaint or when there is probable cause to believe that a nuisance exists within the agency’s jurisdiction. If confirmed, the agency may issue an order to ‘avoid, correct, or remove, at the owner’s expense’ any property or condition that constitutes a nuisance within a reasonable period of time.”¹⁸⁷
- “Outside traditional uses of nuisance abatement laws to clean up real property or destroy contaminated personal property is the potential to address multiple, other types of offenses. In *City of New York v. Milhelm Attea & Bros., Inc.*, 550 F. Supp. 2d 332 (E.D.N.Y. 2008), NYC brought a public nuisance action against tobacco wholesalers who sold untaxed cigarettes to tribal reservation retailers. It claimed these cigarettes were being resold at prices below market to the detriment of the public’s health. Allowing the City’s claim to proceed, the court broadly conceived public nuisance as ‘conduct or omissions which offend, interfere with or cause damage to the public in the exercise of rights common to all....’ At 349-50 (citing *Copart Indus. Inc. v. Consolidated Edison Co.*, 41 N.Y.2d 564, 568 (N.Y. 1977)). The parties later settled.”¹⁸⁸

Title 17 (Health) of the Administrative Code of the City of NY:

Provisions relevant to search and seizure law and nuisance abatement.

§ 17-113 Repairs of buildings; removal of obstructions;... a. The powers of the department shall include the ordering and enforcing in the same manner as other orders are provided to be enforced, the repairs of buildings, houses and other

¹⁸⁶ *Id.* at 331.

¹⁸⁷ *Id.* at 332.

¹⁸⁸ *Id.* at 332-33.

structures; the regulation and control of all public markets in relation to the cleanliness, ventilation and drainage thereof and the prevention of sale or offering for sale of improper articles; the removal of any obstruction, matter or thing in or upon the public streets, sidewalks or places, which, in the opinion of the department, may lead to conditions dangerous to life or health; the prevention of accidents by which life or health may be endangered; and generally the abatement of all nuisances.¹⁸⁹

§ 17-142 Definition of nuisance.

The word "nuisance", shall be held to embrace public nuisance, as known at common law or in equity jurisprudence; whatever is dangerous to human life or detrimental to health; whatever building or erection, or part or cellar thereof, is overcrowded with occupants, or is not provided with adequate ingress and egress to and from the same or the apartments thereof, or is not sufficiently supported, ventilated, sewerred, drained, cleaned or lighted in reference to its intended or actual use; and whatever renders the air or human food or drink, unwholesome. All such nuisances are hereby declared illegal.¹⁹⁰

§ 17-114 Nuisances; abatement without suit. The department shall have within the city all common law rights to abate any nuisance without suit, which can or does in this state belong to any person.¹⁹¹

§ 17-115 Right of inspection. It is hereby made the duty of all departments, officers, and agents, having the control, charge or custody of any public structure, work, ground, or erection, or of any plan, description, outline, drawing or charts

¹⁸⁹ Administrative Code § 17-113, <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCadmin/0-0-0-27433> (Health; Dep't of Mental Health and Hygiene; Repairs of buildings; removal of obstructions; regulation of public markets).

¹⁹⁰ *Id.* at § 17-142, <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCadmin/0-0-0-27524> (Health; Dep't of Mental Health and Hygiene; Definition of nuisance).

¹⁹¹ *Id.* at § 17-114, <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCadmin/0-0-0-27436> (Health; Dep't of Mental Health and Hygiene; Nuisances; abatement without suit).

thereof, or relating thereto, made, kept or controlled under any public authority, to permit and facilitate the examination and inspection, and the making of copies of the same by any officer or person, authorized to do so by the department of health and mental hygiene.¹⁹²

§ 17-131 Order for examination before justice of supreme court.

a. Any justice of the supreme court of the first or second department, or who is holding court or chambers therein, upon the written application of the commissioner, may issue his or her order by him or her subscribed, for the examination without unreasonable delay by or before such justice of any person or persons, and the production of books or papers or the inspection and taking of copies of the whole or parts thereof, at a time and place within the city, and in such order to be named, provided it shall appear to the satisfaction of such justice or court that any matter or point affecting life or health is involved. It shall be the duty of such justice to take or superintend such examination, which shall be under oath, and shall be signed by the party or parties examined and be certified by the justice, and with any copies of books or papers, to be delivered to the department for the use of the department.

b. Such examination, and any proceeding connected therewith, or under such order, may wholly or in part be had, conducted or continued by or before any other of such justices, as well as that one who made the order; and in and about the same, every such justice shall have as full power and authority to punish for contempt, and enforce obedience to such or other order or direction or that of any other judge respecting the matter as any such justice of the supreme court may now have, or shall possess, to enforce obedience or punish contempt in any case or matter whatsoever. Such application shall name or describe the person or persons whose examination is sought, and so far as possible the books or papers desired to be

¹⁹² *Id.* at § 17-115, <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCAAdmin/0-0-0-27438> (Health; Dep't of Mental Health and Hygiene; Right of inspection).

inspected, and the matter or points affecting life or health as to which the commissioner requests the examination to take place, and the justice shall on the proceedings, decide what questions are pertinent and allowable in respect thereto, and shall require the same to be properly answered; but no answer of any person so examined shall be used in any criminal proceeding. Service of any order of any such justice may be made, and the same proved in the same manner as the service of either an injunction or a subpoena. And it shall be the duty of the justice to facilitate the early determination of the proceedings.¹⁹³

Note: We have a question about whether or not **Administrative Code § 17-131** is relevant to the padlocking of doors for nuisance abatement.

Department of Environmental Protection (DEP)

The DEP, generally, “protects public health and the environment by supplying clean drinking water, collecting and treating wastewater and reducing air, noise and hazardous materials pollution.”¹⁹⁴ However, in the context of nightlife, the DEP is mostly concerned with addressing issues of noise pollution and is the agency tasked with taking noise level readings.¹⁹⁵ As we explain in the section dealing with issues having to do with 311, the DEP gets involved with loud music complaints regarding bars, restaurants, and clubs.¹⁹⁶ This is no small task. In 2019 alone, the DEP received 61,967 noise complaints and closed those complaints, on average, in 4.1 days.¹⁹⁷

This section includes highlights from our conversations with music industry stakeholders about noise pollution issues. In addition, we provide recommendations for reform and our analysis of title 24 of the Administrative Code (Environmental Protection and Utilities)

¹⁹³ *Id.* at § 17-131, <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCAadmin/0-0-0-27493> (Health; Dep’t of Mental Health and Hygiene; Order for examination before justice of supreme court).

¹⁹⁴ N.Y. CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, Preliminary Mayor’s Management Report 1 (2020), <https://www1.nyc.gov/assets/operations/downloads/pdf/pmmr2020/dep.pdf>.

¹⁹⁵ 311.NYC.GOV, <https://portal.311.nyc.gov/article/?kanumber=KA-01085> (last visited Aug. 7, 2020).

¹⁹⁶ *Id.*

¹⁹⁷ N.Y. CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, Preliminary Mayor’s Management Report 4 (2020), <https://www1.nyc.gov/assets/operations/downloads/pdf/pmmr2020/dep.pdf>.

and title 15 (Department of Environmental Protection) of the RCNY. Lastly, we cite title 17 (Health) of the Administrative Code and recommend ways in which certain provisions can be translated to title 24 (Noise Code) to improve noise pollution enforcement efforts in music and nightlife.

Responding to 311 Complaints: Balancing Neighbor Privacy and Venue Owner Business Interests

As mentioned in our discussion of 311 below, out of respect for privacy concerns for the neighbor making a noise complaint against a venue, a venue owner is not provided the specific location of a neighbor's noise pollution complaint. While we understand the importance of respecting a neighbor's privacy, as the system is currently constructed, a venue owner lacks the ability to efficiently address recurring noise problems and the subsequent repeated payment of fines.

When a venue owner does not know where noise pollution issues are occurring, the venue owner has no ability to act independently to analyze and address possible soundproofing issues. This leaves a venue owner trapped in a cycle of admitting liability for violations that may or may not have actually been committed, which is then followed by payments to an Approved Noise Consultant to examine the source(s) of potential issues, which is *then* followed by the substantial investment in attempting to fix the alleged noise pollution issues. This is all to no avail, because shortly thereafter, the same neighbor who made the initial 311 call will call again, and the venue owner will then be slapped with fines for the problems they just spent a substantial amount of time, human resources, and money attempting to fix.

Applicable RCNY and Administrative Code provisions are included in the tables immediately below.

- **RCNY**
 - **Title 15: Department of Environmental Protection**
 - **Chapter 29: Commercial Music Noise Mitigation Rules**

§ 29-100 Definitions.

As used in this Chapter, the following terms shall have the following meanings:

- a. "Board" shall mean the New York City Environmental Control Board.
- b. "Code" shall mean the New York City Administrative Code.
- c. "Commissioner" shall mean the Commissioner of the Department of Environmental Protection.
- d. "Department" shall mean the New York City Department of Environmental Protection.
- e. "Noise Consultant" shall mean any person on the "Approved Noise Consultants" list maintained by DEP whose appearance on such list was obtained in accordance with 15 RCNY § 29-101.¹⁹⁸

§ 29-101 Noise Consultants.

a. DEP shall maintain an "Approved Noise Consultants" list in order to effectively carry out the requirements of § 24-231 and § 24-206 (as amended by Local Law No. 113 of 2005) of the Code and this chapter. The following persons are eligible to appear on such list, provided that they submit in detail their experience, qualifications, and references to DEP and request that their names be included on such list:

(1) A licensed New York State professional engineer possessing at least two years of experience measuring sound levels utilizing the ANSI standards. At least one year of such experience shall have been performed within the City of New York, and such experience shall include developing or proposing sound mitigation measures for buildings and noise-producing equipment.

(2) A person possessing a Bachelor of Science degree or a Bachelor of Engineering

¹⁹⁸ 15 RCNY § 29-100, <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCrules/0-0-0-29275>.

degree from an accredited college or university with at least four years of experience measuring sound levels utilizing the ANSI standards. Two of such four years of experience shall have been performed within the City of New York, and such experience shall include developing or proposing sound mitigation measures for buildings and noise-producing equipment.

(3) A person possessing ten years of experience measuring sound levels utilizing the ANSI standards. Five years of such experience shall have been performed within the City of New York, and such experience shall include developing or proposing sound mitigation measures for buildings and noise-producing equipment.

b. A person may be removed from the "Approved Noise Consultants" list for cause. If it is determined that a Noise Consultant provided false, misleading or materially incorrect information to DEP in the course of providing reports as specified in this chapter, or providing test results under § 24-206 of the Code, as amended by Local Law No. 113 of 2005, such person shall be removed from such list after a hearing before an administrative law judge. The burden of proof in such hearing shall be on DEP to establish a cause for removal from the list based on a preponderance of the evidence.¹⁹⁹

§ 29-102 Certification to the Department.

a. Pursuant to paragraph 1 of subdivision b of § 24-231 of the Code, the Commissioner shall recommend to the Board that there be no civil penalty imposed for a first violation of subdivision a of § 24-231 of such Code provided that, within 30 days after the issuance of such violation or, if applicable, within the time granted by the Commissioner pursuant to paragraph two of such subdivision of the Code, the respondent admits liability for the violation, and files a certification with the Department in the form and manner and containing the information and documentation prescribed in subdivision b of this section.

b. The certification referenced in subdivision a of this section shall be made by a Noise

¹⁹⁹ *Id.* at §29-101, <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCrules/0-0-0-29282>.

Consultant, retained by the owner of the subject commercial music establishment or enterprise and acceptable to the Department. Such Noise Consultant shall certify a written report to the Department that shall include the following information and documentation:

(1) A certification that the commercial music establishment is in compliance with the sound levels set forth in subdivision a of § 24-231 of the Code at the establishment's maximum decibel musical performance level.

(2) A description of all permanent improvements and modifications made at such commercial music establishment to achieve compliance with such sound levels, including but not limited to, the installation of appropriate sound insulation, isolators, suspension mounting and/or sound mitigation devices or materials, and diagrams of such work, together with copies of all bills and receipts for such work, and;

(3) All sound level measurements taken at a location within the two closest receiving properties abutting the establishment and/or in a location specified by the Department. Should there be difficulty gaining entry to any abutting location, DEP shall be informed and DEP will set an alternate location. All such measurements shall be performed by a Noise Consultant. Such measurements shall be in accordance with the ANSI standards in § 24-231 of the Code, and shall be taken using an ANSI meter operating in the A and/or C weighted scales and/or third octave bands.

(4) A description of the method by which the maximum allowable amplified sound level in the A and/or C weighted scales and/or third octave bands shall be permanently set within the commercial music establishment.

c. The report referenced in subdivision b of this section shall be submitted to the Department within six weeks of the date of violation. The respondent may ask DEP to grant an adjournment for an additional 30 days to submit such report upon a showing of substantial hardship due to site conditions or limitations.

d. If the Commissioner accepts the certified report referenced in subdivisions a, b, and c of this section, he or she shall recommend to the Board that no civil penalty be imposed for the

violation. Such violation may nevertheless serve as a predicate for purposes of imposing penalties for subsequent violations of § 24-231 of the Code.²⁰⁰

Section 24-231 of the Administrative Code of the City of NY

§ 24-231 Commercial music. (a) No person shall make or cause or permit to be made or caused any music originating from or in connection with the operation of any commercial establishment or enterprise when the level of sound attributable to such music, as measured inside any receiving property dwelling unit:

(1) is in excess of 42 dB(A) as measured with a sound level meter; or

(2) is in excess of 45 dB in any one-third octave band having a center frequency between 63 hertz and 500 hertz (ANSI bands numbers 18 through 27, Inclusive), in accordance with American National Standards Institute standard S1.6-1984; or

(3) causes a 6 dB(C) or more increase in the total sound level above the ambient sound level as measured in decibels in the "C" weighting network provided that the ambient sound level is in excess of 62 dB(C).

(b)(1) The commissioner may recommend to the board that there shall be no civil penalty imposed for a first violation of this section if, within 30 days after the issuance of such violation or, if applicable, within the time granted by the commissioner pursuant to paragraph two of this subdivision, the respondent admits liability for the violation and files a certification with the department in a form and manner and containing such information and documentation as shall be prescribed in the department's rules that (i) permanent improvements or modifications have been made to the establishment, including but not limited to the installation of appropriate sound insulation, isolators, suspension mounting and/or sound mitigation devices or materials and (ii) appropriate sound measurements taken in accordance with the department's rules substantiate that the establishment is in full

²⁰⁰ *Id.* at § 29-102, <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCrules/0-0-0-29288>.

compliance with the sound levels set forth in this section. If the commissioner accepts such certification of compliance, he or she shall recommend to the board that no civil penalty shall be imposed for the violation. Such violation may nevertheless serve as a predicate for purposes of imposing penalties for subsequent violations of this section.

(2) Where the completion of appropriate permanent improvements or modifications and testing within 30 days after the issuance of the violation would cause the respondent undue hardship, the respondent may apply to the commissioner for additional time to submit an appropriate certification of compliance, but not more than 30 days. Application for such additional time must be submitted to the commissioner within 30 days after the issuance of the violation along with an admission of liability and appropriate documents in support of the claim of undue hardship.

(3) Nothing in this subdivision shall be construed to prohibit enforcement personnel from issuing additional notices of violation, summonses or appearance tickets where sound levels exceed the limits set forth in subdivision a of this section during the periods of time set forth in paragraphs one and two of this subdivision for submission of a certification of compliance for a first violation.

(c) In any proceeding under this section it shall be an affirmative defense that the receiving property dwelling unit was not lawfully occupied at the time of the violation.

(d) The commissioner may grant a variance from strict application of the limits set forth in subdivision (a) of this section for a commercial establishment or enterprise that was in operation at the same site prior to the date of enactment of the local law that added this section if he or she finds that there are practical difficulties or unnecessary hardship in the application of such provisions in the specific case, provided that as a condition to the grant of any such variance, sufficient evidence or data is submitted by an applicant that there are physical conditions or zoning district conditions, including irregularity in lot size characteristics and zoning changes, and that as a result of such physical or zoning district conditions, practical

difficulties or unnecessary hardship arise in complying with such provisions. In granting a variance the commissioner may impose such terms and conditions as he or she deems necessary to carry out the intent of this section to minimize noise emissions from the site. Application for a waiver shall be submitted in such form and manner as shall be provided by rules of the department and shall include in detail proposed measures which the applicant proposes will minimize sound from the site. A variance granted pursuant to this subdivision shall not be transferable but shall expire upon a change in ownership, size or location of the commercial establishment or enterprise in accordance with the rules of the department. Violation of the conditions of any variance shall be deemed to be a violation of this section.²⁰¹

§ 47-02 Noise Code Penalty Schedule.²⁰²

| Section of Law | Violation Description | Compliance | Offense | Penalty | Default Penalty | Stipulation |
|----------------------------|---|---|---------|---------|-----------------|-------------|
| 24-231(a)* | Made/caused/permitted music from commercial establishment in excess of permitted levels | Cease operation of commercial music forthwith | 1st | 3,200 | 8,000 | N |
| | | | 2nd | 6,400 | 16,000 | N |
| | | | 3rd | 9,600 | 24,000 | N |
| 24-231(d) | Violation of variance from limits set forth in 24-231(a) | Cease operation of commercial music forthwith | 1st | 560 | 875 | N |
| | | | 2nd | 1,120 | 1,750 | N |
| | | | 3rd | 1,680 | 2,625 | N |
| 24-232(a) | Excessive noise from sound source @ commercial or business establishment | Stop operation of sound source forthwith | 1st | 560 | 1,400 | N |

The penalty cycle for music noise is unfair and does not adequately address underlying noise pollution issues. Our proposed solutions and rationales are included below.

1. Create a carve-out for music-related 311 complaints.

311 calls should no longer be anonymous for music space related issues. First, the benefits of connecting neighbors with venue owners to work out noise pollution issues should

²⁰¹ NYC Administrative Code § 24-231, <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYAdmin/0-0-0-44340>.

²⁰² 15 RCNY § 47-02, <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCrules/0-0-0-30850>.

outweigh the costs of revealing the identity of a 311 caller to the venue owner that is the target of a complaint. No venue owner to our knowledge has ever retaliated against a complaining neighbor. And if a venue owner does retaliate against a neighbor, there are other laws in place to address this potential issue. Second, the government's interest in protecting the vitality of the music industry (and long-term revenue generation for the City) should outweigh the government's interest in shielding the identity of an individual neighbor placing a 311 complaint. The right to privacy is not absolute.²⁰³ And while the City has the authority to enact

²⁰³ See generally Personal Privacy Protection Law (PPPL) §§ 91-99, <https://www.dos.ny.gov/coog/pppl.html#s93> (applicable to state agencies and entities). § 94 (agency obligations) states each agency that maintains a system of records shall "maintain in its records only such personal information which is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or executive order, or to implement a program specifically authorized by law...." In this case, it would be the 311 caller's information. Based off our initial analysis, §95 likely provides that an SBO has the potential to receive personal information about the 311 caller in order to address or contest a noise issue:

(1)(a) Each agency subject to the provisions of this article, within five business days of the receipt of a written request from a data subject for a record reasonably described pertaining to that data subject, shall make such record available to the data subject, deny such request in whole or in part and provide the reasons therefor in writing, or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied, which date shall not exceed thirty days from the date of the acknowledgement. (b) An agency shall not be required to provide a data subject with access to a record pursuant to this section if: (i) the agency does not have the possession of such record; (ii) such record cannot be retrieved by use of the data subject's description thereof, or by use of the name or other identifier of the data subject, without extraordinary search methods being employed by the agency; or (iii) access to such record is not required to be provided pursuant to subdivision five [law enforcement purposes], six [privacy protections by statute or seven [public safety agency records] of this section.

Id. at §95. The procedure for disclosure of records is located in § 96:

(1) No agency may disclose any record or personal information unless such disclosure is: (a) pursuant to a written request by or the voluntary written consent of the data subject, provided that such request or consent by its terms limits and specifically describes: (i) the personal information which is requested to be disclosed; (ii) the person or entity to whom such personal information is requested to be disclosed; and (iii) the uses which will be made of such personal information by the person or entity receiving it; **or...(k) to any person pursuant to a court ordered subpoena or other compulsory legal process; or...(d) attorney's work product or material prepared for litigation before judicial, quasi-judicial or administrative tribunals,** as described in subdivisions (c) and (d) of section three thousand one hundred one of the civil practice law and rules, except pursuant to statute, subpoena issued in the course of a criminal action or proceeding, court ordered or grand jury subpoena, search warrant or other court ordered disclosure."

Id. at §96 (emphasis added in bold and yellow highlights). **Pursuant to the foregoing, if an SBO were to contest the 311 complaint in an OATH hearing or subsequent Article 78 proceeding, it is likely that personal information of the 311 caller along with other related complaint information would need to be produced.**

In order to avoid this unnecessary amount of time, money, and resources spent on proceedings, it would be more effective for all relevant parties if the 311 caller and the SBO were able to meet, discuss their issues, and, hopefully, find common ground.

laws that build off the constitutional floor,²⁰⁴ venue owners have too much at stake to not be provided with all the information they require to either: (i) prove that the complaint is unfounded; or (ii) to adequately address alleged noise issues and mitigate the risks of them happening again. Moreover, based on our analysis, provisions in the 311 privacy policy should allow for an SBO to have access to the 311 caller's personal information in order to "efficiently address client needs."

The City of New York ("City") is committed to maintaining the confidentiality of the information provided by clients to the 311 Citizen Service Center ("311 Call Center"). This commitment is reflected herein, in the City's 311 Citizen Service Center Client Information Privacy Policy ("311 Privacy Policy"), a formal statement of principles and procedures concerning the protection of client information provided to the 311 Call Center. The objective of the 311 Privacy Policy is the responsible management of 311 client information....

Principle 2 - Limiting the Collection of Personal Information

The 311 Call Center shall limit the collection of personal information to that which is reasonably necessary to address client needs, to conduct City business, to provide emergency assistance, or as otherwise required by law....

2.1 The 311 Call Center collects personal information only for the following purposes:

- a) to efficiently address client needs;
- b) to conduct and improve City business and/or services;
- c) to help provide emergency assistance, if necessary; and
- d) as otherwise required by law....

²⁰⁴ See e.g., *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (discussing the "penumbral right" to privacy or the "zone of privacy created by several fundamental constitutional guarantees").

Principle 3 - Limiting Access and Disclosure of Personal Information

The 311 Call Center shall not use personal information for purposes other than those for which it was provided, except as otherwise disclosed to the client or approved by management.

3.2 Personal information is subject to disclosure, without the knowledge and consent of the client, only for the purposes set forth in 2.1....

Principle 4 - Limiting the Length of Retention of Personal Information

The 311 Call Center shall retain personal information for the fulfillment of the purposes for which it was collected, except as otherwise provided in 4.3.

4.1 Where personal information is reasonably necessary to provide ongoing assistance to a client, the 311 Call Center shall retain that information that is reasonably sufficient to enable the provision of such service until it is determined that retention is no longer necessary.

4.2 The 311 Call Center shall maintain reasonable and systematic controls and practices for information and records retention and destruction which apply to personal information that is no longer necessary or relevant for the identified purposes or required by law to be retained.

4.3 Voice recordings of phone calls are kept for fourteen days then erased.

Definitions

311 Call Center – An entity established by the City of New York, and administered by DoITT for the purpose of providing callers with one point of contact from which to obtain information on all nonemergency City services. All rights and obligations herein pertaining to the 311 Call Center apply to the City of New York and DoITT.

Client – Any individual or individuals legitimately seeking to avail themselves of the services provided by and through the 311 Call Center.

Collection – The act of gathering, acquiring, recording or obtaining personal information by the 311 Call Center from a client.

Disclosure – Making personal information available to a third party....

Individual record – Information about a specific complaint/report/call that is associated with a unique identifiable number.

Personal information – Information about an identifiable individual that is recorded in any form. Personal information includes a client’s name, telephone number, Internet Protocol address, or physical address, as well as the nature of an identifiable client’s inquiry, request, and complaints to the 311 Call Center. Personal information is not information that cannot be associated with a specific individual. Aggregated information that cannot be traced to identifiable individuals is not considered “personal information.”²⁰⁵

Additional analysis regarding the tension between a 311 caller’s privacy and an SBO’s livelihood is located in footnote 149 above (regarding Personal Privacy Protection Law (PPPL), OATH Hearings, and Article 78 proceedings).

2. Venue owners should be eligible for a tax credit if they have their music spaces inspected and Decibel Level Pre-Certified by the DEP. All work/investments related to sound proofing should also be taken into account for tax credit eligibility. Industry professionals and sound engineers should be closely involved in the drafting of this legislation. Here are some initial ideas: (1) The pre-certification process could be similar to the procedure

²⁰⁵ 311 CITIZEN SERVICE CENTER, *Client Information Privacy Policy (311 Privacy Policy)*, <http://qualitapa.gov.it/sitoarcheologico/fileadmin/mirror/qualita/311-privacy-policy.pdf>.

outlined in 15 RCNY § 29-103 (Application for a Variance From the Decibel Limits for Commercial Music Establishments and Enterprises); and/or (2) the procedure for refuse collection facilities in NYC Administrative Code § 24-218(e).

15 RCNY § 29-103 Application for a Variance From the Decibel Limits for Commercial Music Establishments and Enterprises.

a. In accordance with subdivision d of § 24-231 of the Code, the Commissioner may grant a variance from strict compliance with the decibel limits set forth in subdivision a of § 24-231 of the Code to a commercial establishment or enterprise if:

(1) the commercial music establishment or music enterprise was in existence and was operating at the same location prior to the date of enactment of § 24-231 of the Code; and

(2) the owner of the subject commercial music establishment or enterprise submits sufficient evidence or data to the Department showing that strict compliance with such decibel levels would cause practical difficulties or unnecessary hardship due to the physical condition of the premises or zoning district conditions, including irregularity in lot size characteristics and zoning changes. Such evidence or data shall be submitted in accordance with subdivision b of this section.

b. Applications for a variance shall include the following evidence or data and shall be submitted in the following form and manner:

(1) Applications for a variance shall be submitted on forms provided by the Department and shall contain the information required by this section as well as any other documentation requested by the Department to verify the eligibility of the subject commercial music establishment or enterprise for a variance under the law.

(2) An application for a variance must include decibel measurements demonstrating that such establishment or enterprise is currently in compliance with the decibel limits that were previously set forth in § 24-241.1 of the prior Code.

(3) An application for a variance must include a written report to the Department

certified by a Noise Consultant retained by the applicant and acceptable to the Department. Such report shall include, but not necessarily be limited to, the following information and documentation:

i. A certification that strict compliance by the subject commercial music establishment or enterprise with the decibel levels in subdivision a of § 24-231 of the Code will result in a substantial hardship due to site conditions or limitations.

ii. A description of all proposed permanent improvements and modifications to be performed upon the subject commercial music establishment or enterprise to meet the intent of § 24-231 of the Code to practically minimize noise emanating from the location. Such description shall include an estimate of the cost of such improvements and a timetable for their completion.

iii. All sound level measurements taken at locations within the two closest receiving properties abutting the establishment and/or in alternative locations specified by the Department. All reported measurements shall be performed in accordance with ANSI standards as indicated in § 24-231 of the Code and using an ANSI compliant meter operating in the A and/or C weighted scales and/or third octave bands.

iv. A description of the method by which the maximum allowable amplified sound level shall be permanently set within the subject commercial music establishment or enterprise. The sound levels shall be measured in the A and/or C weighted scales and/or third octave bands....

c. The Department shall afford all documents submitted such confidentiality as may be provided by applicable law....²⁰⁶

²⁰⁶ 15 RCNY § 29-103, <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCrules/0-0-0-29297> (Commercial Music Noise Mitigation Rules; Application for a Variance From the Decibel Limits for Commercial Music Establishments and Enterprises).

Administrative Code § 24-218 General prohibitions.

(e) Where the commissioner finds that sound from any refuse collection facility regulated by the department of sanitation exceeds the decibel level limits set forth in this section, the commissioner shall order the operator of such facility to submit a certification by a professional engineer as to whether or not the facility is in compliance with the noise standards required by the department of sanitation rules (16 RCNY Ch. 4) and if not in compliance, the mitigation measures that will be undertaken to bring such facility into compliance. The testing and certification must be submitted to the department and to the department of sanitation within forty-five days after the issuance of such order. A facility that complies with an order issued pursuant to this section and with any required mitigation measures shall be deemed to be in compliance with the decibel limits of this section. With respect to any refuse collection facility owned or operated by the department of sanitation such facility shall be deemed to be in compliance with the decibel level limits of this section if it is in compliance with a best management practices plan developed in conjunction with the department. A notice of violation may only be issued for a refuse collection facility pursuant to this section where the operator of such facility fails to comply with an order of the commissioner issued pursuant to this subdivision or the mitigation measures set forth in a certification.²⁰⁷

This way, venue owners would be incentivized to preemptively address noise pollution problems and the DEP would have the opportunity to nip avoidable sound complaints in the bud. Moreover, community members who live close to the venue in question could work collaboratively with the venue owner and the DEP to identify gaps in soundproofing and general noise mitigation plans before the venue opens for business.

²⁰⁷ Administrative Code § 24-218, <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCAadmin/0-0-0-44210> (Environmental Protection and Utilities; Noise Control; General prohibitions).

3. Adjudications: The DEP should explicitly state in 15 RCNY §320 (Conduct of Adjudicatory Hearings by the Department of Environmental Protection)²⁰⁸ that music noise pollution adjudications are to be overseen by the DEP. In addition, the DEP should add the following commercial-music specific hearing procedures to 15 RCNY § 32-02 (Hearing Procedures):²⁰⁹ (1) a presumption of compliance should be created for venue owners that have decibel level pre-certification certificates; and (2) the burden should be on the DEP or the 311 complaint to prove that a noise violation was committed by the venue owner.

4. Additional Redlining of Title 24 of the Administrative Code.

The following sections are pulled from Title 24 of the Administrative Code. Our markups in the text are highlighted in yellow and comments are *[in brackets]*.

§ 24-207 Inspection. (a) The department may inspect at any reasonable time and in a reasonable manner any device which creates or may create unreasonable or prohibited noise including but not limited to the premises where the device is used.

[Reasonableness should be more narrowly defined, either in Title 24 of the NYC Administrative Code or in Title 15 of the RCNY.]

(b) The department may inspect at any reasonable time and in a reasonable manner any record relating to a use of a device which creates or may create unreasonable or prohibited noise.

(c) No person shall refuse entry or access into the public areas of a multiple dwelling or a place of business to an authorized employee of the department or other authorized city employee who presents appropriate credentials, nor shall any person refuse entry or access into any other portion of a premises to an authorized employee of the department or other authorized city

²⁰⁸ 15 RCNY §3201, <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCrules/0-0-0-29666> (Department of Environmental Protection; Adjudications; Conduct of Adjudicatory Hearings by the Department of Environmental Protection).

²⁰⁹ 15 RCNY <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCrules/0-0-0-29677> (Department of Environmental Protection; Adjudications; Hearing Procedures).

employee who presents appropriate credentials and a warrant for such inspection.

(d) No person shall refuse to allow an authorized employee of the department or other authorized city employee who presents appropriate credentials to perform reasonable sound testing on any device or devices, including but not limited to requiring the temporary shutting down of said device or devices for the purposes of such testing **except that upon a showing that the inspection would produce a noticeable interruption of services that would cause discomfort to employees or customers or require a building engineer or other professional to work with the equipment, such authorized employee shall reschedule the inspection for a more convenient time.**²¹⁰ *[This statement is too vague and the right of the SBO to refuse sound testing lacks real bite.]*

§ 24-212 Enforcement of code by other than compulsory means. Nothing in this code shall prevent the commissioner from making efforts to obtain voluntary compliance by way of warning, notice or educational means. **However, such noncompulsory methods need not be used before proceeding by way of compulsory enforcement.**²¹¹

[In the context of music spaces / music noise pollution, it should be required that noncompulsory methods be used before proceeding by way of compulsory enforcement.]

5. **Borrowing from Title 17 (Health) of the Administrative Code.**

While we have highlighted issues related to health inspections above, we have also noticed that City Council and the Department of Mental Health and Hygiene are making concerted efforts to improve City-SBO relations and create a more collaborative compliance atmosphere. Relevant provisions are provided below, which include:

²¹⁰ Administrative Code § 24-207, <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCadmin/0-0-0-44149> (Environmental Protection and Utilities; Noise Control; General Provisions).

²¹¹ *Id.* at § 24-212, <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCadmin/0-0-0-44179> (Environmental Protection and Utilities; Noise Control; Enforcement of code by other compulsory means).

- § 17-1502 Food Service Establishment Inspection Code of Conduct²¹²
- § 17-1503 Food Service Establishment Advisory Board²¹³
- § 17-1504 Food Service Establishment Consultative Inspection Program²¹⁴
- § 17-1505. a. Food service establishment inspections ombuds office²¹⁵

Our open questions:

1. How can principles and procedures in these provisions be adapted to improve DEP - SBO relations and overall enforcement of commercial music related noise pollution provisions?
2. If new rules and procedures are created, how can we ensure that they are effective in improving relations and mitigating violations?

§ 17-1502 Food Service Establishment Inspection Code of Conduct.

a. The commissioner shall develop a code of conduct pertaining to sanitary inspections. The inspection code of conduct shall inform owners and operators of food service establishments of their rights as they relate to sanitary inspections.

b. The inspection code of conduct shall be in the form of a written document, drafted in plain language. The department shall distribute the inspection code of conduct to all food service establishment inspectors and food service establishments. Food service establishment inspectors shall also distribute the inspection code of conduct to food service establishment owners or operators prior to the beginning of an initial inspection. The department shall make the inspection code of conduct available on the department's website in the covered languages.

²¹² Administrative Code § 17-1502, <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCAAdmin/0-0-0-29647> (Health; Dep't of Mental Health and Hygiene; Food Service Establishment Inspection Code of Conduct).

²¹³ Administrative Code § 17-1503, <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCAAdmin/0-0-0-29664> (Health; Dep't of Mental Health and Hygiene; Food Service Establishment Advisory Board).

²¹⁴ Administrative Code § 17-1504, <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCAAdmin/0-0-0-29682> (Health; Dep't of Mental Health and Hygiene; Food Service Establishment Consultative Inspection Program).

²¹⁵ Administrative Code § 17-1505, <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCAAdmin/0-0-0-29690> (Health; Dep't of Mental Health and Hygiene; Food Service Establishment Inspection Ombuds Office).

- c. The code of conduct shall include, but not be limited to, the following requirements:
- (1) the food service establishment inspector shall behave in a professional and courteous manner;
 - (2) upon arriving at the food service establishment to perform a sanitary inspection, the food service establishment inspector shall immediately identify himself or herself to the staff of the food service establishment, and note the type of inspection, in a manner that does not unreasonably interfere with the dining experience of patrons;
 - (3) the food service establishment inspector shall be as unobtrusive as possible during the inspection while conducting the inspection;
 - (4) the food service establishment inspector shall return any equipment he or she moved back to its original location, and reassemble any equipment he or she disassembled, during the course of the inspection;
 - (5) the food service establishment inspector shall have a sound knowledge of all relevant health code provisions and any other applicable laws and regulations.
 - (6) the food service establishment inspector shall meaningfully communicate with the food service establishment owner or operator, and if necessary, utilize language assistance services to facilitate meaningful communication;
 - (7) the food service establishment inspector shall answer reasonable questions relating to the inspection;
 - (8) the food service establishment inspector shall enforce agency rules in a fair and impartial manner;
 - (9) the food service establishment inspector shall, upon finding a violation, explain to the food service establishment owner or operator how to remedy such violation.

(10) the food service establishment inspector must provide information informing the food services establishment owner or operator how such owner or operator may contest a notice of violation before the relevant local tribunal; and

(11) the food service establishment inspector shall provide information on how the food service establishment owner or operator may file a comment, compliment, or complaint about an inspector.

d. The commissioner shall regularly, but no less frequently than every two years, review and update the inspection code of conduct, as necessary.

e. Nothing in this section or in the inspection code of conduct shall be construed to create a cause of action or constitute a defense in any legal, administrative, or other proceeding.²¹⁶

§ 17-1503 Food Service Establishment Advisory Board.

a. There shall be an advisory board to advise the commissioner concerning matters related to the food service establishment sanitary inspection program and its effect on the restaurant industry, food safety and public health.

b. Such advisory board shall consist of twenty members as follows:

i. Ten members shall be appointed by the mayor, provided that two such members shall represent food service industry associations, two such members shall have advanced specialized training in food safety, two such members shall have advanced specialized training in nutrition, and four such members shall operate food service establishments;

ii. Nine members shall be appointed by the speaker of the council, provided that two such

²¹⁶ Administrative Code § 17-1502, <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCAadmin/0-0-0-29647>.

members shall represent food service industry associations, two such members shall have advanced specialized training in food safety, two such members shall have advanced specialized training in nutrition, and three such members shall operate a food service establishment;

iii. The commissioner of the department of health and mental hygiene shall serve ex officio.

c. At the invitation of the department, other individuals may participate in the discussions of the board.

d. Each member, other than the member serving in an ex officio capacity, shall serve for a term of two years, to commence upon the first meeting of the advisory board. Any vacancies in the membership of the advisory board shall be filled in the same manner as the original appointment. A person filling such vacancy shall serve for the unexpired portion of the term of the succeeded member.

e. No member of the advisory board shall be removed except for cause and upon notice and hearing by the appropriate appointing official.

f. Members of the advisory board shall serve without compensation and shall meet no less often than [sic] every three months.

g. The agendas for the first four meetings of the advisory board shall include, but not be limited to:

1. a review of current health code violations for which points are assigned, including those violations that do not bear directly on food safety and public health;

2. a review of the current food safety inspector training curriculum;

3. a review of the effect of letter grading on public health and food safety, including information on the top ten most commonly cited violations in the previous year and any change in the

incidences of illness from food borne pathogens; and

4. a review of the relationship between the food service industry and the department.

h. On January 1, 2015, and every year thereafter on January first, the advisory board shall submit a report to the mayor, the commissioner, and the speaker of the council. Such report shall include, but not be limited to:

1. an assessment of the restaurant inspection program and its effect on the restaurant industry, public health and food safety, including information on the top ten most commonly cited violations in the previous year and any change in the incidences of illness from food borne pathogens; and

2. specific recommendations for changes and/or improvements to the restaurant inspection program and actions, if any, taken by the department in response to such recommendations.²¹⁷

§ 17-1504 Food Service Establishment Consultative Inspection Program.

a. The department shall implement a consultative inspection program for food service establishments.

b. Such consultative inspections shall be optional, and performed for educational and informational purposes only. A consultative inspection shall not result in a notice of violation being issued for general violations, critical violations, imminent health hazards or public health hazards. A consultative inspection shall not impact a food service establishment's inspection cycle.

c. Upon completion of a consultative inspection, the inspector shall review the results with the

²¹⁷ Administrative Code § 17-1503, <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCAadmin/0-0-0-29664>.

owner or operator of the food service establishment, and advise the owner or operator of potential violations and how to remedy such violations.

d. Nothing in this section shall prohibit the department from taking appropriate action if a food service establishment fails to remedy a public health hazard at the time of the consultative inspection.

e. The department may charge a fee which shall be set by rule promulgated by the commissioner.

f. The department may schedule the consultative inspection based on factors, set by rule promulgated by the commissioner, including but not limited to demand, prioritization according to inspection history, and the inspection cycle of the food service establishment.

g. Within the consultative inspection program for food service establishments, the department shall develop a system for newly licensed food service establishments whereby such establishments may schedule the consultative inspection prior to their first initial inspections for a nominal fee which shall be set by rule promulgated by the commissioner.²¹⁸

§ 17-1505.

a. Food service establishment inspections ombuds office; office established.

There is hereby established within the food safety program of the department a food service establishment inspections ombuds office.

b. Food service establishment inspections ombuds office; duties and responsibilities. The food service establishment inspections ombuds office shall have, but not be limited by, the

²¹⁸ Administrative Code § 17-1504, <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCAAdmin/0-0-0-29682>.

following duties and responsibilities:

1. establishing a system to receive questions, comments, complaints, and compliments with respect to any food service establishment inspection, including but not limited to, the establishment, operation, and dissemination of a central telephone hotline and website to receive such questions, comments, complaints, and compliments;
 2. investigating complaints received pursuant to paragraph one of this subdivision and taking any action it deems appropriate regarding such complaints, including but not limited to, withdrawing violations that concern the physical layout and/or major fixtures within a food service establishment where the department finds that such physical layout or fixture existed at the time of a prior inspection but was not the subject of a violation and the condition has not been altered since the time of such prior inspection, and identifying egregious inspection errors that out to be rectified by the department in lieu of submission to the administrative tribunal;
 3. issuing guidance letters providing informal advisory opinions on matters pertaining to food service establishment inspections, including but not limited to appropriate inspection methods and food handling techniques, either upon request or the department's own initiative. Any such guidance letter issued by the ombuds office shall be posted on the department's website upon issuance and, to the greatest extent practicable, distributed to all food service establishment operators;
 4. monitoring inspection results for trends and inconsistencies, including but not limited to, via the compilation and analysis on a quarterly basis of the type and number of violations issued by each inspector; and
 5. making recommendations to the commissioner regarding improvements to the food service establishment inspection process.
- c. Food service establishment inspections ombuds office; annual report. No later than July 1, 2014, and every July 1 thereafter, the ombuds office shall submit to the commissioner an annual

report regarding its activities during the previous twelve months. The ombuds office shall forward a copy of such report to the mayor and the speaker of the council. Such report shall include but not be limited to:

1. the number, nature, and resolution of questions, comments, complaints, and compliments received by the ombuds office;
2. the number and nature of guidance letter requested;
3. a copy of each guidance letter issued;
4. an analysis of trends and inconsistencies across inspection results; and
5. recommendations for improvements to the food service establishment inspection process in accordance with paragraph five of subdivision b of this section.²¹⁹

311

In this section, we provide an overview of 311, include anecdotes of how 311 is used to harass those working in the music and nightlife industry, and provide recommendations for addressing these issues.

Overview of 311

The 311 Customer Service Center functionally exists as an alternative to 911, providing “the public with quick, easy access to non-emergency government services and information.”²²⁰ Citizens can contact the 311 service in multiple ways including by phone, the 311 Mobile App, and the 311 Facebook or Twitter pages.²²¹ These services are “available 24 hours a day, seven

²¹⁹ Administrative Code § 17-1505, <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCAAdmin/0-0-0-29690> (Health; Dep’t of Mental Health and Hygiene; Food Service Establishment Inspection Ombuds Office).

²²⁰ 311 Customer Service Center, *Preliminary Mayor’s Management Report 1* (2020), <https://www1.nyc.gov/assets/operations/downloads/pdf/pmmr2020/311.pdf>.

²²¹ *Id.*

days a week in more than 180 languages.”²²² In theory, increasing “public access to non-emergency government services”²²³ is a positive for a city whose emergency services would be better served not fielding thousands of calls a day regarding noise complaints and residents lacking heat or hot water. In other words, it is a benefit to the average New Yorker to have an option, besides 911, to interface directly with their local government.

In 2016, NYC set a record for most 311 contacts in a calendar year, with “35,982,514 customer requests for services or information.”²²⁴ This is no small number of contacts. According to the city’s statistics, in 2016 the population of NYC was 8,550,405, which means that the average number of contacts with 311 per New Yorker was 4.2 contacts per resident.²²⁵ Of these “service requests,” noise was most commonly the subject of a 311 contact, with 370,645 noise complaints in 2016 alone.²²⁶ Rounding out the rest of the top five reasons citizens contacted 311 in 2016 were apartment maintenance, no heat/hot water, illegal parking, and blocked driveways.²²⁷ More recently, “311 received nearly 9.8 million inquiries during the first four months of Fiscal 2020.”²²⁸ It bears mentioning that anyone can go online and look at the 311 dashboard to see where, when, and why New Yorkers are contacting 311.²²⁹

How the City Currently Responds to 311 Noise Complaints Against Nightlife

When a 311 noise complaint is made against a bar, restaurant, or club, “officers from the New York Police Department (NYPD) will respond within 8 hours when they are not handling emergencies.”²³⁰ The music spaces which are the subject of our paper fall within the “bar, restaurant, or club” category. The DEP gets involved if the person contacting 311 is making a

²²² *Id.*

²²³ *Id.*

²²⁴ *311 Sets New Record with Nearly 36 Million Interactions in 2016*, NYC.GOV (Jan. 19, 2017), <https://www1.nyc.gov/office-of-the-mayor/news/033-17/311-sets-new-record-nearly-36-million-interactions-2016>.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ 311 Customer Service Center, *supra* note 220.

²²⁹ Open Data Team, Mayor’s Office of Data Analytics Department of Information Technology and Telecommunications, *311 Service Requests from 2010 to Present*, DATA.CITYOFNEWYORK.US, <https://data.cityofnewyork.us/Social-Services/311-Service-Requests-from-2010-to-Present/erm2-nwe9> (last visited Aug. 7, 2020).

²³⁰ 311.NYC.GOV, *supra* note 195.

“loud music” complaint and includes their name and address in the report.²³¹ If the 311 survey reports a chronic issue, “depending” on the request, “City officials will either schedule an appointment to take noise level readings in your home or conduct an inspection from the public street.”²³²

311 is Used to Harass Venue Owners and Event Producers

Despite its benefits to the average New Yorker, 311 noise complaints can disproportionately affect SBOs in the nightlife industry. While we understand that music venues have the potential to violate noise ordinances, neighbors also have free reign to use the power of anonymity to harass owners and operators of music spaces, as well as shut down events attended by crowds they apparently do not care for. For example, we have heard in our conversations with industry stakeholders that neighbors call in false noise complaints on nights that nearby venues are closed, in addition to targeting music spaces that are owned, operated, or patronized by people of color. This type of alleged behavior is both alarming and unlawful and should be investigated by the City.

NYC Should Audit Its 311 Customer Service System

In order to better understand how 311 affects nightlife, there are two studies/audits the City should undertake, incorporating the already publicly available 311 data.²³³

1. The City should ascertain whether 311 noise complaints disproportionately target nightlife establishments that are owned, operated, or patronized by people of color. First, this audit should compare 311 noise complaints against minority-owned nightlife establishments versus white-owned nightlife establishments. Relatedly, the City should work with nightlife establishments to track how many noise complaints are received for Afro-centric or Latin-centric events versus other events.

²³¹ *Id.*

²³² *Id.*

²³³ Open Data Team, *supra* note 229.

2. An audit should also be conducted to determine whether gentrification increases 311 noise complaints against music venues. For instance, the audit could calculate whether 311 noise complaints are submitted from developments and/or residents that are newer to the neighborhood than the operating music venues in question. Additionally, this study could justify the “agent of change principle,” which we discuss later in this paper.

Removing 311 Anonymity for Commercial-Music Related Complaints

Building off our points highlighted in the DEP section above, by removing anonymity from 311 calls, a greater amount of accountability will be created in the overall noise complaint system. Moreover, community members will less likely make false or exaggerated complaints if they know their names are attached to submissions.

The issues with 311 anonymity and false claims have not gone unnoticed by the New York City government. A bill targeting these issues has been proposed in the last year by New York City Council Minority Leader Steven Matteo.²³⁴ The bill proposes an audit that would require the City to produce a report on following points:

1. The number and types of unsubstantiated complaints made against private properties;
2. The number and types of notices of violation issued to a property that was previously visited and resulted in an unsubstantiated complaint in the prior 12 months;
3. The number of, and reasons for, visits by the responding agency or department to any property or dwelling that received more than one visit from an enforcement official in the previous 12 months;
4. The number, types and dispositions of violations unrelated to the underlying complaint that prompted a visit from an enforcement official to the property; and

²³⁴ Joseph Ostapiuk, *How official wants to crack down on bogus 311 complaints*, SILIVE (Jan. 17, 2020), <https://www.silive.com/news/2020/01/how-official-wants-to-crack-down-on-bogus-311-complaints.html>.

5. Whether any reported complaints were made anonymously or in the name of the complainant.

....

c. All the information reported pursuant to subdivision b of this local law shall be disaggregated by borough, council district and community district.²³⁵

The City should pass this bill as it would help alleviate the issues small businesses currently face with anonymous 311 calls. In support of the bill, Minority Leader Matteo said, “[p]eople who target their neighbors by abusing the 311 system are not just wasting valuable taxpayer resources, they are committing harassment, plain and simple.”²³⁶ We agree.

Working Idea: Utilizing Technology to Contest Unsubstantiated 311 Noise Complaints

The City should create a platform that would allow nightlife SBOs to flag false 311 noise complaints. The platform should incorporate the live feed of 311 complaints and allow venue owners and operators to log on and mark false complaints as false.

However, this solution would be ineffective if there were not also legal consequences attached to making clearly false noise complaints. In reality, we understand that citizens might make a mistake once or twice. So, these legal consequences should be saved for those who repeatedly make false noise complaints against small business owners. It is important to note that when a citizen repeatedly abuses the system, that person is wasting the City’s resources and is thus making it more difficult for government officials and employees to investigate and ameliorate legitimate complaints.

While there have been some New Yorkers who have faced charges for making false 311 complaints, these cases have largely been extreme and involving other charges. For example, in 2018 an ex-NYPD officer was arrested on numerous charges, including “third-degree falsely reporting an incident, aggravated harassment, fourth-degree stalking, second-degree menacing

²³⁵ Council of City of NY Intro No. 1420-2019, proposing a Local Law in relation to requiring a study and report on unsubstantiated 311 complaints (Feb. 13, 2019), <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3860323&GUID=7A26172C-DEF0-459C-B897-245A38E6A729&Options=ID%7CText%7C&Search=1420-B>.

²³⁶ Ostapiuk, *supra* note 234.

and criminal impersonation.”²³⁷ Regarding the charges relating to false 311 complaints, the ex-officer allegedly “made multiple 311 complaints via email while using the personal information of his neighbors, including their names, e-mail addresses, phone numbers and other contact information.”²³⁸ Additionally, he allegedly impersonated “Joseph Reznick, the deputy commissioner of the Internal Affairs Bureau in the NYPD” in order to make “311 requests intended for de Blasio, urging him to strip specific officers of their badges because they purportedly spread ‘false rumors’ about the high-ranking NYPD official, according to the criminal complaint.”²³⁹ The applicable law the former officer was charged under, for the false 311 complaints, is PEN § 240.50 (Falsely reporting an incident in the third degree).²⁴⁰ As most people are aware, there are legal consequences for making false 911 calls. However, this penal law does not say that the false complaints need to be made through 911 specifically. Instead the law reads,

A person is guilty of falsely reporting an incident in the third degree when, knowing the information reported, conveyed or circulated to be false or baseless, he or she:

1. Initiates or circulates a false report or warning of an alleged occurrence or impending occurrence of a crime, catastrophe or emergency under circumstances in which it is not unlikely that public alarm or inconvenience will result; or
2. Reports, by word or action, to an official or quasi-official agency or organization having the function of dealing with emergencies involving danger to life or property, an alleged occurrence or impending occurrence of a catastrophe or emergency which did not in fact occur or does not in fact exist; or

²³⁷ Staten Island Advance, *New charges for ex-NYPD detective: Stalking, harassment, false 311 reports*, SILIVE (Jan. 15, 2020), <https://www.silive.com/news/2020/01/new-charges-for-ex-nypd-detective-stalking-harassment-false-311-reports.html>.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*; see also Penal Law § 240.50, <https://codes.findlaw.com/ny/penal-law/pen-sect-240-50.html> (Falsely reporting an incident in the third degree).

3. Gratuitously reports to a law enforcement officer or agency (a) the alleged occurrence of an offense or incident which did not in fact occur; or (b) an allegedly impending occurrence of an offense or incident which in fact is not about to occur; or (c) false information relating to an actual offense or incident or to the alleged implication of some person therein;²⁴¹

This law, which is a class A misdemeanor,²⁴² needs to be enforced more against those who make multiple 311 complaints with the sole purpose of harassing venue owners, working in conjunction with the platform for nightlife owners to flag false complaints.

PART III - Policy Recommendations for NYC and NYS

Music, Drugs, and Public Health²⁴³

Although public health concerns can be found in many areas of the law related to music and nightlife, such as liquor licensing, noise pollution, and zoning regulations, in this section we focus specifically on the nexus between the government's approach to curtailing drug abuse among young adults and the common misconception that venue owners and event producers, particularly in the dance music industry, are "unscrupulous"²⁴⁴ rave promoters who do not care about patron safety.

Defining Public Health

In *Public Health Law in a Nutshell*, Professor of Public Health Law and Ethics at Arizona State University, James G. Hodge, Jr. writes that "[o]ne of the dominant themes emanating from modern conceptions of the field is how law is used as an affirmative tool for public health improvements."²⁴⁵ The contemporary conception of public health law seeks to

²⁴¹ Penal Law § 240.50.

²⁴² *Id.*

²⁴³ Parts of this section have been pulled from the following paper: Taylor Collins, *Electronic Dance Music, MDMA, and the Illicit Drug Anti-Proliferation Act* (Dec. 11, 2018) (unpublished paper for the Phil Cowan Memorial/BMI Scholarship Competition) (on file with author).

²⁴⁴ DEPARTMENT OF JUSTICE, DRUG ENFORCEMENT ADMINISTRATION, *New Drug Law Protects Children: Unscrupulous Event Promoters Targeted* (June 20, 2003), 2003 WL 24232303.

²⁴⁵ HODGE, JR., *supra* note 178 at 17.

strike a balance “between the (1) powers of government to act ‘to ensure the conditions to be healthy’ and (2) constraints on these powers to promote or protect individual rights.”²⁴⁶

Authorized by Article II of the Constitution, our federal government has the authority to protect and promote the public’s health through Congress’ powers to “regulate interstate commerce, tax, and set conditions on federal spending.”²⁴⁷ The States derive their broad range of police powers, such as protecting and promoting the public’s health, from the sovereign powers reserved to the States under the 10th Amendment.²⁴⁸ With these powers, New York and, in turn the City of NY (pursuant to Home Rule),²⁴⁹ have made concerted efforts to control behavioral habits through regulation, enforcement, and other measures. “While the efficacy” of regulations, such as “vaccination laws is firmly established, many other public health laws lack a sufficient nexus with public health improvements.”²⁵⁰ Professor Hodge describes this condition as [r]eflecting a patchwork approach,” with levels of government “[p]assing or implement[ing] public health laws over decades that are thought to be functional, but largely unproven.”²⁵¹ He concludes, “[t]hough well-intended, these laws may be supported more so by political guesswork or anecdotes than actual scientific efficacy.”²⁵² President Nixon’s²⁵³ War on Drugs policy (and the demand reduction supply reduction strategies that flow from it) falls within this arbitrary patchwork approach, and electronic dance music is one of the convenient scapegoats for the policy’s failure.

By way of background, electronic dance music is ubiquitous in global pop culture, with the industry valued at around \$7.3 billion.²⁵⁴ A significant amount of revenue is generated by mass gathering events (music festivals) that either showcase a substantial number of electronic

²⁴⁶ *Id.* at 13 (summarizing Professor Lawrence O. Gostin’s definition of public health).

²⁴⁷ *Id.* at 54.

²⁴⁸ *Id.* at 56.; *see also Id.* at 57 (quoting ERNST FREUND, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* 3-4 1904) (“Historically, police powers have been defined ‘as the inherent authority of the state to enact laws and promulgate regulations to protect, preserve and promote the health, safety, morals, and general welfare of the people’”).

²⁴⁹ N.Y. CONST. art. IX.

²⁵⁰ HODGE, JR., *supra* note 178 at 18.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ Drug Policy Alliance, *A Brief History of the Drug War*, <https://www.drugpolicy.org/issues/brief-history-drug-war>.

²⁵⁴ *See* KEVIN WATSON, *IMS BUSINESS REPORT 2018: AN ANNUAL STUDY OF THE ELECTRONIC MUSIC INDUSTRY*, INTERNATIONAL MUSIC SUMMIT 27 (2018), <https://www.internationalmusicsummit.com/wp-content/uploads/2018/05/IMS-Business-Report-2018-vFinal2.pdf>.

dance music artists (in a multi-genre lineup), or market themselves as electronic dance music-centric.²⁵⁵ In the United States, millions of people attend music festivals annually, and event safety has become a primary concern both in the music industry and in American society as a whole. Since the 1960s, illicit drug use has been associated with music festival attendance, and specific substances have paired off with distinct music genres. For instance, what LSD was to rock ‘n’ roll in the 1960s, MDMA²⁵⁶ is to electronic dance music today. Generalizations aside, music festival patrons are in desperate need of adequate harm reduction education, especially when it comes to MDMA use. However, rather than providing education about drug use, the law forbids it. In passing the Illicit Drug Anti-Proliferation Act of 2003, Congress amended the Maintaining Drug-Involved Premises (Crack House Statute), 21 U.S.C. § 856 “to prohibit an individual from knowingly opening, maintaining, managing, controlling, renting, leasing, making available for use, or profiting from any place for the purpose of manufacturing, distributing, or using any controlled substance, and for other purposes.”²⁵⁷ The penalties for violating the IDAPA include:

(b) Criminal penalties. Any person who violates subsection (a) of this section shall be sentenced to a term of imprisonment of not more than 20 years or a fine of not more than \$500,000, or both, or a fine of \$2,000,000 for a person other than an individual.

...

²⁵⁵ *Id.*

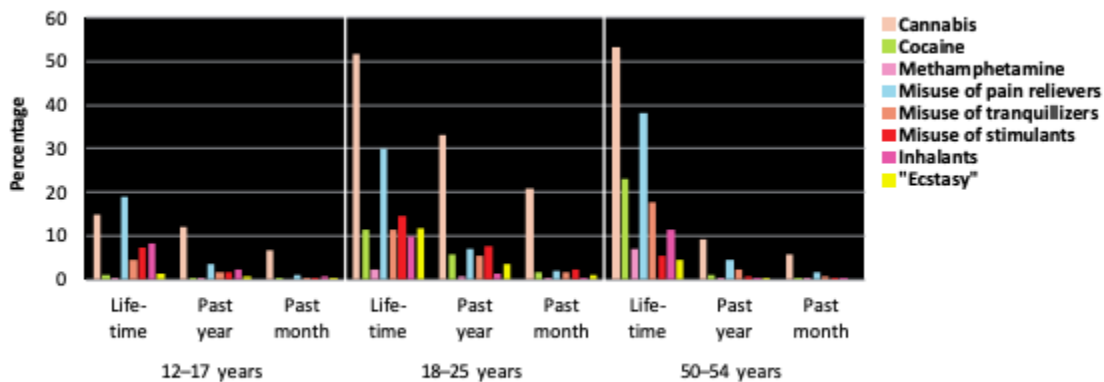
²⁵⁶ “3,4-methylenedioxy-methamphetamine (MDMA) is a synthetic drug that alters mood and perception (awareness of surrounding objects and conditions). It is chemically similar to both stimulants and hallucinogens, producing feelings of increased energy, pleasure, emotional warmth, and distorted sensory and time perception. MDMA was initially popular in the nightclub scene and at all-night dance parties (“raves”), but the drug now affects a broader range of people who more commonly call the drug [e]cstasy or [m]olly.” *MDMA (Ecstasy/Molly)*, NATIONAL INSTITUTE ON DRUG ABUSE (last updated June 2018), <https://www.drugabuse.gov/publications/drugfacts/mdma-ecstasy-molly>.

²⁵⁷ See 21 U.S.C. § 856(a) (2012) (listing the unlawful acts as: knowingly open, lease, rent, use, or maintain any place, whether permanently or temporarily, for the purpose of manufacturing, distributing, or using any controlled substance; manage or control any place, whether permanently or temporarily, either as an owner, lessee, agent, employee, occupant, or mortgagee, and knowingly and intentionally rent, lease, profit from, or make available for use, with or without compensation, the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance).

(d) Civil penalties. Any person who violates subsection (a) shall be subject to a civil penalty of not more than the greater of \$250,000; or two times the gross receipts, either known or estimated, that were derived from each violation that is attributable to the person....²⁵⁸

The IDAPA may have deterred promoters from throwing dance music events for several years throughout America,²⁵⁹ but the Act did not deter drug use among Americans.²⁶⁰ The following information from the WHO 2018 Drugs and Age Report demonstrates that drug abuse is an issue across all age groups, and that punitive strategies, namely the War on Drugs²⁶¹ and its progeny, have consistently failed to protect and promote the public's health and safety.

FIG. 6 | Prevalence of drug use in the United States of America, by age group, 2017



Source: United States, Substance Abuse and Mental Health Services Administration, Center for Behavioural Health Statistics and Quality, *Results from the 2016 National Survey on Drug Use and Health: Detailed Tables* (Rockville, Maryland, 2017).

*WORLD DRUG REPORT 2018 INFOGRAPHIC.*²⁶²

²⁵⁸ 21 U.S.C. § 856(a) (2012).

²⁵⁹ See MICHAELANGELO MATOS, *THE UNDERGROUND IS MASSIVE: HOW ELECTRONIC DANCE MUSIC CONQUERED AMERICA* 313-14 (2015).

²⁶⁰ See UNITED NATIONS OFFICE ON DRUGS AND CRIME, *WORLD DRUG REPORT 2018: DRUGS AND AGE*, at 14-15, U.N. SALES NO. E.18.XI.9 (2018) [hereinafter "WORLD DRUG REPORT 2018: DRUGS AND AGE"].

²⁶¹ See e.g., MOSS, *supra* note 8, at 74 ("The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people, John Ehrlichman, former chief of domestic affairs told journalist Dan Baum in 1994. 'We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.' The strategy worked to further poison the hearts and minds of America against the city, and to target urban spaces for policing") (citing) (Dan Baum, *Legalize it All*, *HARPERS* (Apr. 2016), <https://harpers.org/archive/2016/04/legalize-it-all/>).

²⁶² *WORLD DRUG REPORT 2018: DRUGS AND AGE*, *supra* note 260 at 14.

Data on drug use among the general population in the United States from 2017 show differences in the lifetime, past-year and past-month use of people aged 18–25 years compared with that of people aged 50–54. These differences are partly explained by the cohort effect. The cohort effect is visible in the lifetime prevalence of those who were young in the late 1960s and in the 1990s, which were times when an increase occurred in the use of numerous drugs by young people [ages 15-24]. Lifetime use of substances that have an established use over decades, such as cannabis, opioid painkillers, tranquilizers and inhalants, is comparable among those aged 50–54 and those aged 18–25. For example, almost half of people in both age groups have used cannabis at least once in their lifetime. This pattern is different for cocaine and stimulants. The lifetime prevalence of cocaine among those aged 18–25 years is half of that among those aged 50–54 years. This is probably the result of a combination of factors, including the declining trends in cocaine use that were observed in the United States at the beginning of 2000 and the sharp decline in such use that was observed in 2006. Conversely, the lifetime non-medical use of stimulants and “ecstasy” among 18–25 year-olds is nearly three times that of the older cohort, reflecting the more recent appearance of these substances in the market. The extent of past-month use of most drugs remains up to three times higher and that of stimulants up to seven times higher among those aged 18–25 than among those aged 50–54....²⁶³

In 2006, dance music started to make a comeback in America, and the concept of transforming elements of underground rave culture into a marketable, mainstream “EDM” product, started to brew among industry heavyweights.²⁶⁴ The rise in music festival attendance in the United States coincided with an increase in MDMA use.²⁶⁵ Research has demonstrated that a lack of proper drug education contributes to music festival patrons: (1) abusing MDMA

²⁶³ *Id.*

²⁶⁴ See MATOS, *supra* note 259 at 304-05.

²⁶⁵ See Matt S. Friedman et al., *A Prospective Analysis of Patients Presenting for Medical Attention at a Large Electronic Dance Music Festival*, 32 PREHOSPITAL AND DISASTER MEDICINE 78, 78-80 (2016).

(e.g., taking too much within too short of a time period); (2) ingesting MDMA in pill or powder form that is laced with extremely toxic substances (e.g., PMA, bath salts, fentanyl); (3) and/or engaging in heavy polysubstance abuse (e.g., mixing MDMA with alcohol, prescription drugs, and/or other illicit substances).²⁶⁶ Unfortunately, instead of deterring MDMA use and protecting young people from “unscrupulous” rave promoters, the IDAPA has increased the risks associated with recreational drug use at licensed music festivals.

There is a common misconception that venue owners and event producers do not take public health and safety seriously. This could not be further from the truth. In fact, risk planning, prevention, mitigation, and response are core functions of event operations of any size. The government does not congratulate music industry professionals every time they produce an event without incident. And neither are industry professionals expecting such praise. What they do *not* need, however, are government policies that prohibit them from adequately training their staff and educating their patrons on harm reduction safety.

Since 2006, mainstream media has reported at least 40 drug-related deaths associated with mass gathering events.²⁶⁷ When an overdose and/or death occurs, there is inevitably a knee-jerk reaction from government officials, law enforcement, and media outlets that pin blame on event promoters for overdose incidents that are largely beyond their control. Current music festival security operations include stringent checks at entrances, drug-sniffing dogs, bag searches, and body pat downs. Inside venues, patrons are monitored (with surveillance technology) and observed (on-the-ground) under the watchful eyes of event security and undercover personnel. Drugs are usually confiscated, but it is impossible to intercept all drugs or prevent patrons from consuming drugs before they enter. Moreover, with the IDAPA looming over their heads, promoters refrain from incorporating anticipatory harm reduction measures (e.g., responsible drug use education and medical stations that test for contaminants and adulterants in MDMA) into their risk management strategies.²⁶⁸ Instead of initiating another vicious cycle of finger pointing, after a string of overdoses or another tragic death, the

²⁶⁶ See *id.* at 78-79; see also WORLD DRUG REPORT 2018: DRUGS AND AGE, *supra* note 260 at 22.

²⁶⁷ See Adam Lund, et al., *Mass-Gathering Medicine: Risks and Patient Presentations at a 2-Day Electronic Dance Music Event*, PREHOSPITAL AND DISASTER MEDICINE 273, 272-73 (2015).

²⁶⁸ See Friedman, *supra* note 265 at 80.

government and the music festival industry need to rationally discuss the underlying issues of why Americans are abusing MDMA in the first place.

Drugs affect young people in every part of the world....There are many factors at the personal, micro (family, schools and peers) and macro (socioeconomic and physical environment) levels, the interplay of which may render young people more vulnerable to substance use. Most research suggests that early (12–14 years old) to late (15–17 years old) adolescence is a critical risk period for the initiation of substance use. Many young people use drugs to cope with the social and psychological challenges that they may experience during different phases of their development from adolescence to young adulthood (ranging from the need to feel good or simply to socialize, to personal and social maladjustments)

The misconception that all young people are equally vulnerable to substance use and harmful use of substances ignores the scientific evidence, which has consistently shown that individuals differ in their susceptibility to use drugs. While specific influential factors vary between individuals, and no factor alone is sufficient to lead to harmful use of substances, a critical combination of risk factors that are present and protective factors that are absent makes the difference between a young person's brain that is primed for substance use and one that is not.

....

The co-occurrence of mental health and substance use disorders afflicts millions of people...Specifically, internalizing systems such as post-traumatic stress disorder, depression and anxiety, along with externalizing behaviors such as conduct disorder [and] attention-deficit hyperactivity disorder...are strongly and consistently related to the risk of harmful use of substances. Individuals with these disorders are in general more likely to use substances and to do so at an earlier age than those without. Mood and anxiety disorders, for example, double the risk of

an individual developing substance use disorders....Individuals with internalizing disorders tend to have higher levels of arousal in the brain systems that are responsible for stress responses, which may lead to a tendency to self-medicate the symptoms of anxiety and depression. Those with externalizing disorders tend to have a lower level of arousal in these systems, which has been associated with a relative lack of regard for consequences and a need for additional stimulation.²⁶⁹

It is well-settled that alcohol, tobacco, and licit marijuana come with inherent risks, and they are regulated accordingly. Credible research from the United Kingdom has shown that MDMA is less harmful than these substances, when used responsibly, and the Food and Drug Administration (FDA) is one clinical trial away from approving MDMA for medical use.²⁷⁰ But due to stigma or the fear of legal repercussions, the possibility of moving toward a harm reduction model that includes decriminalization and/or legalization and regulation of MDMA is rarely, if ever, openly discussed.

In 2014, Vice Media documented the following Reddit conversation exchange among CEO of Insomniac,²⁷¹ Pasquale Rotella, who in 2012, sold a 50% stake in his company to Live Nation, Insomniac fans, and harm reduction non-profit, DanceSafe.²⁷²

²⁶⁹ WORLD DRUG REPORT 2018: Drugs and Age, *supra* note 260 at 15 & 26.

²⁷⁰ See David Nutt et al., *Development of a Rational Scale to Assess the Harm of Drugs*, 369 LANCET 1047, 1047 - 53 (2007); see also Brad Burge, *Press Release: Colorado Study Shows Lasting Benefits of MDMA-Assisted Psychotherapy for Treating Chronic PTSD*, Multidisciplinary Association for Psychedelic Studies (Oct. 29, 2018), <https://maps.org/news/media/7466-press-release-colorado-study-shows-lasting-benefits-of-mdma-assisted-psychotherapy-for-treating-chronic-ptsd>.

²⁷¹ “Insomniac produces some of the most innovative, immersive music festivals and events in the world. Enhanced by state-of-the-art lighting, pyrotechnics and sound design, large-scale art installations, theatrical performers and next-generation special effects, these events captivate the senses and inspire a unique level of fan interaction. The quality of the experience is the company’s top priority. Throughout its 20-year history, Insomniac has produced more than 250 festivals, concerts and club nights for nearly 4 million attendees in California, Colorado, Florida, Mexico, Michigan, Nevada, New York, Texas, Puerto Rico, and the United Kingdom. The company’s premier annual event, Electric Daisy Carnival Las Vegas, is the largest multi-day music festival in North America, attracting 400,000 fans over three days in June 2014.”

Insomniac Events, FACEBOOK, https://www.facebook.com/pg/insomniacevents/about/?ref=page_internal (last visited Aug. 6, 2020).

²⁷² “DanceSafe is a 501(c)(3) public health organization promoting health and safety within the nightlife and electronic music community. Founded in the San Francisco Bay Area in 1998 by Emanuel Sferios, DanceSafe quickly grew into a national organization with chapters in cities across North America.” *About Us*, DANCESAFE.ORG, <https://dancesafe.org/about-us/> (last visited Aug. 6, 2020).

By stepping onto an open, public floor, Rotella opened himself (and us) to conversations that would normally happen behind closed doors—if at all. This was best exemplified when Rotella was forced to answer a question about one of the biggest thorns in his side—the issue of dance music and drug culture. Hundreds of users demanded to know why he won't allow harm-reduction non-profits like DanceSafe to attend his events.²⁷³

In the Reddit reply, Mr. Rotella stated:

“I’ve actually had DanceSafe at our events a while back, but when the venue, the local authorities, and the insurers are opposed to it, you won’t have that city or location as an option. It’s already hard enough to find venues where I can organize events. Unfortunately some people view partnering with DanceSafe as endorsing drug use rather than keeping people safe, and that can prevent producers from getting locations and organizing events.”²⁷⁴

Unlike the government-promoter relationship in the U.S., dance music promoters in the Netherlands have shared a pragmatic relationship with the Dutch government since the early 1990s. Because Dutch society incorporates harm reduction measures into nightlife and music festival risk management strategies, MDMA-related overdoses in the Netherlands are greatly reduced.²⁷⁵

Like the United States, The Netherlands adopted a deterrent policy for preventing drug use, but the Dutch do not consider harm reduction measures to be in direct conflict with this policy. Under the Dutch Opium Act, MDMA is classified as a Schedule I “hard drug,” but the

²⁷³ VICE Thump, *EDM’s Most Powerful Man, Pasquale Rotella, Got Grilled on His Reddit AMA*, VICE (June 20, 2014, 2:19 PM), https://www.vice.com/en_ca/article/kbyddm/edms-most-powerful-man-pasquale-rotella-got-grilled-on-his-reddit-ama.

²⁷⁴ *Id.*

²⁷⁵ Tibor Brunt, *Drug Checking as a Harm Reduction Tool for Recreational Users: Opportunities and Challenges*, EUROPEAN MONITORING CENTRE FOR DRUGS AND DRUG ADDICTION 13 (2017), http://www.emcdda.europa.eu/system/files/attachments/6339/EuropeanResponsesGuide2017_BackgroundPaper-Drug-checking-harm-reduction_0.pdf.

government advises that small amounts for personal use are not to be prosecuted.²⁷⁶ In the early 1990s, instead of cracking down on rave promoters, the government worked together with different sectors in Dutch society to implement harm reduction measures that would protect rave attendees.²⁷⁷ Since credible research on MDMA was lacking in the Netherlands, the government, health services, and promoters, asked researchers to gather reliable data on foreseeable health risks involving substance use at raves.²⁷⁸

In *Mass Gathering Medicine at Raves: Incidents and Substance-Related Emergencies*, Dr. Jan Krul reported that short term health risks at raves were low.²⁷⁹ The data to support this conclusion was gathered between 1997-2011 at hundreds of raves, with over four million total attendees, and more than 30,000 documented first aid station visitors.²⁸⁰ Over the course of the 15-year study, one death was observed.²⁸¹ From 1997-2009, lifetime prevalence (LTP) of ecstasy [increased] from 2.3% in 1997 to 6.2% in 2009; however, ecstasy-related incidents decreased.²⁸² Dutch promoters have continuously developed health and safety policies to provide adequate care for patrons, and the Ministry of Health funded the creation of the Drugs Information and Monitoring System (DIMS) to keep watch on the illicit drug market.²⁸³ Municipal health organizations, health education agencies, mental health, and drug-addiction institutes offered harm reduction education programs and distributed materials to citizens on responsible use practices.²⁸⁴

²⁷⁶ Jenny Gesley, *Decriminalization of Narcotics: Netherlands*, LAW LIBRARY OF CONGRESS (last updated July 28, 2016), www.loc.gov/law/help/decriminalization-of-narcotics/netherlands.php; *see also* Government of the Netherlands, <https://wetten.overheid.nl/BWBR0001941/2018-10-24#BijlageI> (last visited Nov. 27, 2018) (3,4-methylenedioxy-methamphetamine (MDMA) is listed under Schedule I).

²⁷⁷ *See* JAN KRUL, *MASS GATHERING MEDICINE AT RAVES: INCIDENTS AND SUBSTANCE-RELATED EMERGENCIES* 116 (2013).

²⁷⁸ *See id.* at 114.

²⁷⁹ *Id.* at 59, 116.

²⁸⁰ *Id.* at 114.

²⁸¹ *Id.* at 59.

²⁸² *See* KRUL, *supra* note 277 at 115.

²⁸³ DIMS is designed to monitor new and existing drug markets with respect to dose, composition, adulterants, and availability. When the centers test an extremely toxic drug supply (*e.g.*, laced ecstasy pills), the government is notified, and a national mass media warning is disseminated. As a result, drug users are made aware of the danger; toxic pills are removed from the market; and dealers are deterred from selling the product. *See* Brunt, *supra* note 275 at 4-5, 7, 9-10.

²⁸⁴ *See* Krul *supra* note 277 at 116.

The United States would do well to learn from the Netherlands. If we adopt a similar harm reduction approach at the state and local levels, doctors can conduct research studies that analyze whether harm reduction education and monitoring the illicit MDMA market reduces substance-related incidents at music festivals and within social environments in general.

Harm Reduction and Music Events in New York City: Moving Toward a New Approach

In the last 15 years, America has made tremendous strides in providing mass gathering medical care at music festivals; however, more work needs to be done.²⁸⁵ NYC has the opportunity to lead the nation in harm reduction at music events. The pilot program proposal below, defined as the New Approach, would place a strong emphasis on drug education and monitoring the illicit MDMA market for contaminants and adulterants.

Why New York City?

The Mayor's Office understands the importance of harm reduction in protecting the public's health²⁸⁶ as well as the importance of nightlife in promoting creativity and generating revenue for the City.²⁸⁷ The New Approach would borrow from these two initiatives in an effort to protect patron safety at music-centric events throughout the City. The ultimate goal of the New Approach would be for the City to provide a blueprint for creating safe event

²⁸⁵ See Jesse Roman, *Life of the Party*, NATIONAL FIRE PROTECTION ASSOCIATION (July 1, 2016), <https://www.nfpa.org/news-and-research/publications/nfpa-journal/2016/july-august-2016/features/festival-medicine>.

²⁸⁶ N.Y. City Charter § 20-c, <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCcharter/0-0-0-276> (Drug strategy); see also *Mayor de Blasio Launches Series of Initiatives to Reduce Drug Overdose*, NYC.GOV (Apr. 21, 2016), <https://www1.nyc.gov/office-of-the-mayor/news/383-16/mayor-de-blasio-launches-series-initiatives-reduce-drug-overdose>. (“Mayor Bill de Blasio today announced broad efforts to further prevent and address opioid overdoses, building on the administration’s Thrive NYC initiative, which included the expansion of naloxone availability and training, increased training for physicians on buprenorphine, and the creation of the Mayor’s Heroin and Prescription Opioid Public Awareness Task Force. ‘The City is building on concerted efforts to train doctors and counselors treating substance abuse, increase testing for synthetic opioid, and provide greater public awareness around drug use prevention and treatment,’ said Mayor Bill de Blasio. ‘Ending stigmatization and providing a path to recovery is vital to keeping New Yorkers healthy and safe.’ ‘Substance misuse is an illness, not a failure of character. Yet too often those who suffer from addiction are pushed into shadows instead of connected with a path to recovery,’ said First Lady Chirlane McCray, who spearheads ThriveNYC. ‘With this new investment we reaffirm that those struggling with substance misuse deserve treatment, not scorn, and that New York City is committed to making sure they get it. By breaking down stigma and shame, and increasing prevention efforts, we can stem the flood of opioid addiction in our city’”).

²⁸⁷ *Id.*; see also Alan Feuer, *New York City Appoints Its First Nightlife Mayor*, N.Y. TIMES (Mar. 7, 2018) <https://www.nytimes.com/2018/03/07/nyregion/nyc-nightlife-mayor.html>; see also N.Y. City Charter § 20-d, <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCcharter/0-0-0-293> (Office of Nightlife).

environments (that stimulate local economies) across the U.S., where patrons can further celebrate individualism, support the arts, and engage in cross-cultural exchanges.²⁸⁸

A. Pre-Event

1. Drug Education

Regarding drug education, promoters should be permitted to freely engage in conversation with patrons about potential substance use risks and harm reduction sources via social media platforms, e-mail, event websites, etc., without fear of facing legal repercussions. Moreover, instead of arresting individuals for drug possession and, thus, exacerbating their underlying conditions, more cost-effective approaches should be implemented. For example, in New York City, television and radio stations can invite members from both sides of the MDMA issue to engage in rational discussions about risk. Music publications, like Billboard and Rolling Stone, can also amplify the conversation. College campuses throughout the city can invite government officials, law enforcement, scientists, doctors, promoters, etc., to engage in panel discussions that involve participation from the young adult audience. Improving communication is just the first step, however. If meaningful social change is to occur, drug testing centers must be incorporated as the nerve center to overall harm reduction policy.

2. Testing

In New York City, the centers should be set up throughout the five boroughs. One possible way to finance the program would be to have federal budget allocations approved under the IDAPA for demand reduction coordinators to be redistributed to fund the procurement of laboratory equipment and specialized staff. In addition to providing drug education and lab testing for New Yorkers, addressing mental health issues in the community should be a primary focus. Lastly, in order for the New Approach to properly function in the City, possession of personal amounts of MDMA needs to be decriminalized. This is the only way that MDMA

²⁸⁸ If the City were to adopt a more supportive approach toward music festivals, the City's economy would also benefit. In the Netherlands, electronic dance music is an "\$8 billion dollar industry employing around 100,000 people." Thomas Erdbrink, *In the Netherlands, the Dance Festivals Have Gone Dark*, N.Y. TIMES (Apr. 21, 2020), <https://www.nytimes.com/2020/04/21/world/europe/netherlands-dance-festivals-coronavirus.html>. Before the COVID-19 shutdown, the industry generated "\$1 billion in advance tickets" for the summer season. *Id.*

testing centers can be organized in the five boroughs and on-site at music festivals, without people fearing arrest.

B. On-site

In addition to existing harm reduction measures, promoters should be permitted to have MDMA testing stations in onsite medical zones to eliminate the risk of contaminants and adulterants. Cultural programming (*e.g.*, dining experiences, art installations, stand-up comedy, and dance performances) should also include panels on harm reduction. Like the college campus proposition, promoters can invite people from both sides of the MDMA issue to rationally discuss the topic and engage with patrons in productive discussions on safety.

Conclusion

The electronic dance music business is in a very different place than it was when the IDAPA was passed in 2003. Promoters who used to throw underground raves across the country are now responsible for producing multi-million-dollar festivals worldwide. Although the public has accepted dance music as a mainstream phenomenon, the government has generally refused to change its policy toward addressing MDMA use at dance music events. We hope this discussion contributes to the conversation about harm reduction in nightlife and the need to repeal draconian laws, such as the IDAPA, that target promoters and put the public's health at risk.

Startup Costs and Access to Capital

The Current Startup & Funding Structure for Venue Ownership and Event Production is Inaccessible to the Vast Majority of New Yorkers

Startup costs in the nightlife business are extraordinary. For instance, among many other expenses, and before making a single dollar, a venue owner must secure a space and start paying rent while undertaking the process of receiving alteration plans and permitting approvals from agencies, commencing construction, navigating the SLA and community boards to receive a liquor license, as well as hiring and training staff. These steps are all taken without the

guarantee that all licenses and approvals will be secured within a reasonable time or that a venue will ever open for business.

The 2017 MOME Music Report includes “estimates from an experienced entrepreneur behind several venues in the city” who explained that “it costs upwards of \$1 million to open a 100- to 300-person venue in New York City and as much as \$5 million to open a 500- to 1,000-person venue, due to construction costs, license complexity, regulatory scrutiny, and the resources required to pass inspections.”²⁸⁹ These are costs that are generally prohibitive for the average small business owner to open up a small to medium sized venue.

Due to these financial hurdles, a daunting barrier to entry has been erected that is unscalable for most that want to independently own or operate music spaces. This has very obvious effects on the diversity of venues, as more avant garde and DIY spaces are often priced out, while at the same time only venues that cater to more mainstream tastes have a realistic chance of staying open for a reasonable period of time. As we have discussed before in this paper, a lack of independent venues is harmful to both the live and recording sides of the music industry. Without risk-taking and new ideas bubbling up from the underground, we will lack the fuel necessary to continue innovating at the top.

A quick note on the funding process as it currently stands: Lacking sufficient access to capital is not a problem unique to venue owners as it also affects creative collectives and independent promoters who produce small to medium-sized events. We have included some research findings, brainstorming ideas, and jump-off points below.

Access to Capital Initial Research, Brainstorm Ideas, and Jump-Off Points

For-profit venue owners and event producers do not qualify for Department of Cultural Affairs (DCLA) grants or capital funding. And developers are only incentivized to create music, culture, and arts spaces within new developments for non-profit organizations.

²⁸⁹ THE BOSTON CONSULTING GROUP, MAYOR’S OFFICE OF MEDIA AND ENTERTAINMENT, ECONOMIC IMPACT, TRENDS, AND OPPORTUNITIES: MUSIC IN NEW YORK CITY 17 (2017), https://www1.nyc.gov/assets/mome/pdf/MOME_Music_Report_2017_DIGITAL.pdf.

DCLA Cultural Development Fund

The Program Services Unit of the Department of Cultural Affairs is charged with the administration of the Cultural Development Fund, an annual grant-making process for New York City's nonprofit arts and cultural organizations. Through the CDF process, the agency awards support for a vast array of programs provided by many of the City's largest cultural organizations as well as neighborhood-based groups that represent New York's extraordinary cultural breadth. CDF Applications are submitted online each year through this website, and reviewed by panels made up of experts in the field and representatives of the City's elected officials.²⁹⁰

DCLA Capital Funding

Capital Funding

The Department of Cultural Affairs (DCLA), through its Capital Projects Unit, supports design and construction projects and major equipment purchases at the 34 City-owned cultural institutions and approximately 200 other cultural facilities throughout the five boroughs.

The goals of the capital program are to assist the nonprofit cultural community in providing increased public service, provide greater access for the disabled, enhance exhibition or performing space, better maintain and preserve of historic buildings and increase protection of botanical, zoological and fine art collections.²⁹¹

²⁹⁰ N.Y. City Department of Cultural Affairs, *Cultural Development Fund*, nyc.gov, <https://www1.nyc.gov/site/dcla/cultural-funding/programs-funding.page> (last visited Aug. 7, 2020).

²⁹¹ *Id.*

Incentive Zoning

Incentive zoning provides a bonus, usually in the form of additional floor area, in exchange for the provision of a public amenity or affordable housing. There are incentive bonuses for the provision of public plazas (privately owned public spaces), visual or performing arts spaces, subway improvements, theater preservation, FRESH food stores and affordable housing (Inclusionary Housing Program).²⁹²

Incentive Zoning example:

97-423. Certification for floor area bonus for visual or performing arts uses

The minimum non-residential floor area or equivalent floor space provisions of paragraph (a)(2) of Section 97-412 (Maximum floor area ratio in the Park Avenue Hub Subdistrict) or the floor area bonus provisions of Section 97-422 shall apply only upon certification by the Chairperson of the City Planning Commission to the Commissioner of Buildings that the following conditions have been met:...

b) Drawings also have been provided that clearly designate all floor area or below grade floor space for any new visual or performing arts uses provided for the purposes of satisfying the provisions of paragraph (a)(2) of Section 97-412, or for which a bonus is to be received pursuant to Section 97-422.

Such drawings shall be of sufficient detail to show that such designated space shall be designed, arranged and used for the new visual arts or performing arts uses, and shall also show that:

(1) all such visual or performing arts uses are located at or above the ground floor level of the building, except that performance space meeting the requirements of paragraph (b)(4) of

²⁹² N.Y. City Department of City Planning, *Glossary of Planning Terms*, nyc.gov, https://www1.nyc.gov/site/planning/zoning/glossary.page#incentive_zoning (last visited Aug. 7, 2020).

this Section may be located below grade, and accessory uses may be located below grade, subject to the requirements of paragraph (b)(5) of this Section;

(2) all bonused floor area or below-grade space occupied by visual or performing arts uses is primarily accessed from 125th Street, except where such visual or performing arts floor area or floor space is provided pursuant to paragraphs (a)(2) of Section 97-412 or (b)(2) of Section 97-422. However, all bonused floor area or below-grade floor space occupied by visual or performing arts uses within a development may be primarily accessed from Fifth Avenue, provided the following conditions are met:...

(c) A letter from the Department of Cultural Affairs has been submitted to the Chairperson of the City Planning Commission, certifying that:

(1) a signed lease has been provided from the prospective operator of the visual or performing arts space, or a written commitment from the owner of such space in a form acceptable to the City, if such owner is also the operator, for occupancy of such space, and its operation as a visual or performing arts space for a period of not less than 15 years, with two five-year renewal options, pursuant to an operating plan and program therefor;

(2) the proposed operator of the visual or performing arts space is a non-profit organization;

(3) the proposed operator of the visual or performing arts space has the fiscal and managerial capacity to successfully operate such space;

....

(6) a written commitment has been provided ensuring that there are financial resources available for the timely completion of the identified scope of work; and

(7) the proposed operator of the visual or performing arts space has a Community Engagement Plan that will effectively encourage public access and use of the visual or performing arts space, provide educational opportunities to the local community, and address new, undeveloped and/or underserved audience or participant groups. The Department of Cultural Affairs shall make its determination concerning the sufficiency of the Community Engagement Plan based upon consideration of the written recommendation of the Bonused Space Local Arts Advisory Council with respect thereto....²⁹³

While the DCLA is structured to only support not-for-profits, perhaps there could be a way for the City (and State) to provide for-profit venue owners and event producers with access to capital through other means.

- **Spin-off of incentive zoning for visual and performing arts spaces.**

Developers should not need an additional floor area incentive to build visual or performing arts spaces in luxury developments. They should create these spaces voluntarily. Instead, the City should incentivize developers to issue grants and low interest rate loans directly to both nonprofit *and* for-profit music, culture, and arts businesses in the communities in which they are entering.

- **State-Owned Music, Culture, and Arts Banks**

Inspired by the Bank of North Dakota (BND). Excerpt of Vox article below.

How it worked:

The Bank of North Dakota, or BND, is the nation's only public bank: a government-owned and -operated entity that prioritizes public access over profit, and offers fair banking services to North Dakotans when private banks can't or won't. "It is potentially insulating you from loans, lenders, from out-of-state interests who won't or don't listen to the concerns of the

²⁹³ ZR § 97-423, <https://zr.planning.nyc.gov/article-ix/chapter-7/97-423> (Special 125th Street District; Certification for floor area bonus for visual or performing arts uses).

local economy,” [David] Flynn] the economics and finance department chair at the University of North Dakota] said.

At the time of its creation, BND’s purpose was to protect the state’s farmer class by offering low-interest agriculture loans. A century later, the bank is still an active force in the state, although its function has shifted, Flynn said, “from an insulator to more of an incubator.”

With \$8 billion in assets, BND now offers business and student loans along with commercial services. Its purpose, however, continues to distinguish it from modern private banks. “When a US bank isn’t interested in going into that type of loan or startup, or thinks it’s too risky, BND would get engaged,” Flynn said. “They could point to this mission and say, ‘We’re helping growth, the growth helps the state.’”

That mantra also applies to the local banking ecosystem. Student loans are facilitated directly with BND, but other loans, called participation loans, go through a local financial institution — often with BND support. For example, if someone wants to take out a business loan for \$20,000 with a local bank, BND would lend half of the money, \$10,000, and minimize the risk for that bank. The result: The individual and local bank or credit union are supported by BND through a single transaction.

According to a study on public banks, BND had some \$2 billion in active participation loans in 2014. BND can grant larger loans at a lower risk, which fosters a healthy financial ecosystem populated by a cluster of small North Dakota banks. The benefits of these loans are kept local, and the banks are protected from risk with BND support.

Last July, the bank celebrated its 100th birthday. To naysayers, the bank points to its solvency, with net earnings of \$159 million in 2018. “The bank has largely been profitable in the time I’ve been in the state; that’s coming up on 20 years now,” Flynn said. “So, there’s a hesitation of, ‘Why get rid of it when it’s working so well?’”²⁹⁴

²⁹⁴ Will Peischel, *How a brief socialist takeover in North Dakota gave residents a public bank: North Dakota’s government-owned bank has been a celebrated institution for a century. Now California might get one, too*, Vox

Additional Financing Solutions (Private and Public-Private)

- **Crowdfunding**
 - Product Crowdfunding
 - Equity Crowdfunding (e.g., AngelList)

Our open questions for crowdfunding:

1. Success stories?
2. Pros / cons?
3. How can these crowdfunding strategies be narrowly tailored to NYC venue owner and event producer needs?

- **Debt Raising**
 - The following excerpt is pulled from *Venture Deals: Be Smarter Than Your Lawyer and Venture Capitalist* by Brad Feld and Jason Mendelson.

The first rule of venture debt is that it follows equity; it doesn't replace it. Venture lenders use venture capital to support as a source of validation and the primary yardstick for underwriting a loan. Raising debt for an early stage company is more efficient when you can precisely describe the performance objectives associated with the last round of equity, the intended timing and strategy for raising the next round, and how the loan you are asking for will support or supplement those plans. Venture debt availability and terms are always contextual. Loan types and sizes vary significantly based on the scale of your business, the quality and quantity of equity raised to date, and the objective for which the debt is being raised. The amount of venture debt available is calibrated between 25% - 50% of the amount raised in the most recent equity round. Early stage loans to prerevenue or product validation companies are much smaller than loans available to later stage companies in expansion mode. And companies without VC investors face significant difficulties in attracting any venture debt.

(Oct. 1, 2019, 9:51 AM), <https://www.vox.com/the-highlight/2019/9/24/20872558/california-north-dakota-public-bank>.

The Players

Silicon Valley Bank (SVB) was one of the first banks to create loan products for startups. It happened because SVB is based in Silicon Valley and evolved from the ground up to serve the innovation economy that surrounds it, which raises an important distinction as you explore loan options to fund your company. There are few banks that truly understand venture debt and many that don't. Many players come and go in the venture debt market, so make sure that whomever you are talking to is a long-term player. When a bank decides one day that it is no longer interested in lending venture debt, it can wreak havoc on your business.

There are a number of potential benefits when you identify the right banking partner. Banks with a focus on the innovation economy can provide start-up centric financial advice, investment and payment solutions, sector insights, and networking assistance to complement the support provided by your investors....

There are nonbank providers (referred to as venture debt funds) which raise capital from a variety of sources, worth considering for venture debt. Most raise private equity in a fund much like VCs do but with a lending charter....Small Business Investment Companies [are] organized to leverage equity commitments from the private market with capital from the Small Business Administration.

A few specialize in specific sectors, but most debt funds define their lending focus by loan size and company stage.²⁹⁵

Our open questions for debt raising:

1. Success stories?
2. Pros / cons?

²⁹⁵ Brad Feld & Jason Mendelson, *Venture Deals: Be Smarter Than Your Lawyer and Venture Capitalist* 146-48 (4th edition 2019) (emphasis added in italics).

3. How can these debt strategies be narrowly tailored to NYC venue owner and event producer needs?

Leases

We tried to gain a better understanding of the landlord-tenant dynamic in the context of music space leases. The following issues are sourced from our own research and anecdotes gathered from nightlife tenants.

Landlords are not forthright about the status of their building's CO.

A CO is issued for the entire building. This can create problems for SBOs in mixed use buildings that have a venue space on the bottom floor and residences above it. If the landlord's CO is not in order, this affects the tenant's business operations. For example, we are under the impression that before a tenant can apply for a liquor license, they need to produce a CO.

Landlord does not allow SBO to sign a contract committing SBO to a full lease unless the local Community Board votes in favor of the SBO's liquor license application.²⁹⁶

Our initial thoughts: First, community boards do not have binding authority (see SLA section below) and, therefore, should not be wielding power in a contract negotiation between the landlord and the prospective tenant. Second, this contract term is disconcerting because it assumes that a Community Board will not vote in favor of the SBOs liquor license. If a landlord is not acting in good faith, the landlord could go to the Community Board and spread misinformation about the SBO to deter them from voting in favor of the SBO's liquor license. Without adequate real estate knowledge or legal representation, an SBO could sign a temporary lease agreement without putting any contingencies in place (*e.g.*, refund on deposit; rent forgiveness for the remainder of lease). This could lead to thousands of dollars in lost money on a lease deposit and subsequent months of rent payments on an unused space. To make matters worse, landlords hold most, if not all, the bargaining power. Due to high demand, there are so many prospective tenants in NYC that a landlord has no incentive to bargain with a tough negotiating party. Instead, they can simply wait until another potential SBO inquires about the

²⁹⁶ NYC Starter Guide to Opening Your Bar/Nightclub, *supra* note 150.

space, thereby ensuring a lease with extremely favorable terms. This serves no one except for the landlord taking advantage of an overly landlord-friendly market.

Lease Terms are Too Short / No Return on SBO's Investment in the Space

We have heard that lease agreements generally contain terms detrimental to the interests of tenants, and that this imbalance in terms heavily favors the interests of landlords. First, landlords do not generally offer sufficiently long leases to nightlife businesses. We have gleaned from our conversations that the average lease is one to two years, and very rarely over five years. With such a short lease term, any long-term investments an SBO puts into the space are all potentially for naught. In turn, an SBO will either be deterred from making investments in safety (*e.g.*, because the investments are financially prohibitive), or the SBO will spend thousands of dollars on improving a space the business owner will have little time to occupy. The only parties that stand to benefit are the landlord and potentially the next tenant assuming the refurbished space.

Proposed Solutions

- A law should be enacted that states: **“all leases offered to tenants in a [*music establishment*] must contain a notice, conspicuously set forth therein, which advises tenants of the obligation of the owner, lessee, agent or other persons who manages or controls a [*music establishment*] to fully disclose the status of the building’s CO or TCO, and where further information regarding the status of such CO or TCO is available.”** The foregoing text is modified from § 17-123 of the Administrative Code, which states in pertinent part:

| |
|--|
| <p>a. All leases offered to tenants in multiple dwellings must contain a notice, conspicuously set forth therein, which advises tenants of the obligation of the owner, lessee, agent or other person who manages or controls a multiple dwelling to install</p> |
|--|

window guards, and where further information regarding the procurement of such window guards is available....²⁹⁷

- **Information about COs should be complete and prominently placed on applicable agency websites.** For example, the following information is on the DOB website at the bottom of the “Homeowner” → “Permits” → “Certificate of Occupancy” page:

Owners Tips

The Department strongly recommends that you negotiate a closing based on a final Certificate of Occupancy, not a Temporary Certificate of Occupancy. If you purchase a co-op, condo or house that has a TCO, consult with a New York State licensed Professional Engineer or Registered Architect to determine what work has to be done, and any outstanding issues in order for the building to receive a final CO. **Once you purchase a property, you, as the owner, have the legal obligation to make sure that the building obtains a final CO documenting its compliance with the Building Code and the Zoning Resolution.** Because this is your responsibility, you should ask your attorney to obtain written assurance and sufficient escrow from the seller/developer to ensure that the developer actually finishes any outstanding work and obtains the final CO in a timely manner. **Note:** *When a TCO expires and is not renewed, it may be difficult or impossible to buy insurance or sell or refinance the property.*²⁹⁸

- **Lease Fact-Sheet / Model Lease Agreement**
 - In order to better educate SBOs about the landlord-tenant dynamic, there should be a list of terms that are important to be included or avoided in a nightlife venue lease, as well as possibly a model lease for nightlife

²⁹⁷ Administrative Code § 17-123.

²⁹⁸ N.Y. City Department of Buildings, *Certificate of Occupancy*, NYC.GOV, <https://www1.nyc.gov/site/buildings/homeowner/certificate-of-occupancy.page> (last visited Aug. 7, 2020) (emphasis added).

venues. Such documents should be written and prepared for SBOs by the Office of Nightlife.

- **NY State Vacancy Tax**

- Our recommendation is that the State of New York adopt a vacancy tax. In other words, commercial landlords should be subjected to a tax after a certain period of time that their spaces remain empty.
- Mayor de Blasio has expressed his support for this plan: “I am very interested in fighting for a vacancy fee or a vacancy tax that would penalize landlords who leave their storefronts vacant for long periods of time in neighborhoods because they are looking for some top-dollar rent but they blight neighborhoods by doing it.”²⁹⁹
- There are currently two bills (at the state level), that would function as a vacancy tax:
 - 1) “Assembly member Linda Rosenthal last year introduced a measure that would tax a vacant storefront based off 1 percent of a commercial building’s assessed value.”³⁰⁰
 - 2) “The other measure comes from state Sen. Brad Hoylman and Assemblymember Deborah Glick.”³⁰¹ This bill “[i]mposes an additional tax surcharge on certain non-primary residence class one and class two properties in N.Y. city.”³⁰² In practicality the “bill ...

²⁹⁹ Staff, *De Blasio to retail landlords: Fill the space or prepare to pay the tax*, THE REAL DEAL (Apr. 2, 2018, 2:30 PM), <https://therealdeal.com/2018/04/02/de-blasio-to-retail-landlords-fill-the-space-or-prepare-to-pay-the-tax/>.

³⁰⁰ Mary Diduch, *San Francisco passed a tax on vacant storefronts. What does that mean for NYC?*, THE REAL DEAL (Mar. 16, 2020, 7 AM), <https://therealdeal.com/2020/03/16/san-francisco-passed-a-tax-on-vacant-storefronts-what-does-that-mean-for-nyc/>; *see also* 2019 NY Assembly Bill A08231, <https://www.billtrack50.com/BillDetail/1132103> (would “impose[] a commercial vacancy tax on vacant or abandoned commercial storefronts located in a city with a population of one million or more of one percent of the assessed value of the property”).

³⁰¹ *Id.*

³⁰² 2019 NY Senate Bill S44A, <https://www.nysenate.gov/legislation/bills/2019/s44> (would “impose[] an additional tax surcharge on certain non-primary residence class one and class two properties in N.Y. city”).

would tax property owners who leave storefronts vacant for six months or more” and “[t]he city would set that rate.”³⁰³

- There has been some pushback, however:
 - ““We are not trying to say that there aren't going to be one or two bad actors who double rents unnecessarily. However, I don't know what's going on in those relationships, but those are the outliers. That's not the standard. And a lot of the vacant spaces are not vacant because someone tried to double rent,’ said Assemblywoman Tremaine Wright of Brooklyn.”³⁰⁴
 - ““I'm just concerned about your proposal that landlords would pay an additional tax if they keep their spaces empty, when in fact they don't want to keep them empty. They are trying to find ways to encourage small businesses to come in, but local costs are becoming exorbitant on small businesses, and we are defeating the purpose,’ said state Senator Diane Savino of Staten Island.”³⁰⁵
 - ““Critics of the tax also point out that more and more people are doing their shopping online, and are going to brick-and-mortar retail [sic] stores much less. And that trend is only likely to increase.”³⁰⁶

Rent

Commercial Rent Control in New York City

Even if landlord-tenant negotiations were to improve, the fact remains that rent, and especially commercial rent in New York City, remains tremendously high. In mixed use buildings, for example, an added burden is placed on commercial tenants if residential tenants in the same building reside in rent-controlled apartments. While, in theory, it might make sense

³⁰³ Zack Fink, *Mayor Gets Pushback on Proposed Vacancy Tax*, NY1 (Feb. 13, 2020, 8:39 PM), <https://www.nyl.com/nyc/all-boroughs/news/2020/02/14/mayor-gets-pushback-on-proposed-vacancy-tax>.

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.*

that commercial tenants bear the brunt of rent payments in any given building, in reality, this framework prices out small business owners in favor of national chains that can afford to pay astronomical rents. As a result of this issue, discussions have taken place about the adoption of commercial rent control in New York City. In his 2020 State of the City Mayor de Blasio address the Mayor spoke about his plan to pursue commercial rent control:

And this last one, I am going to be scrupulously honest. For years and years, I've heard different proposals around commercial rent control and I have not for one day been able to find one that I thought was legal. That's the truth. As appealing as the idea is, I couldn't find one that's legal. But I think the time has come to settle this once and for all because we - at this point in our history - we may need this to be able to save our small businesses. So, I will name a commission. Just like Speaker Johnson and I named a fantastic Commission on Property Tax with extraordinarily talented people, I'm going to name a commission of people of different viewpoints and different expertise to come back to us once and for all this year with an answer, is there a legal way we can have commercial rent control in New York City? That is the answer we need, and, if it's a yes, we should go to Albany and get it done in 2021.³⁰⁷

While commercial rent control has already existed in NYC from 1945-1963,³⁰⁸ there have also been recent proposals to bring the rent control scheme back to the city. First, “City Councilmember Ydanis Rodriguez (D) introduced the Small Business Survival Act, which would have required landlords to renew a commercial tenant's lease for 10 years, and mandated the two parties submit to forced arbitration if they weren't able to negotiate new lease terms, including rent,” in 2018.³⁰⁹ Secondly, “[i]n November 2019, Councilmembers Stephen Levin

³⁰⁷ Transcript: Mayor de Blasio Presents 2020 State of the City, NYC.GOV (Feb. 6, 2020), <https://www1.nyc.gov/office-of-the-mayor/news/065-20/transcript-mayor-de-blasio-presents-2020-state-the-city>.

³⁰⁸ W. Dennis Keating, *The Elmwood Experiment: The Use of Commercial Rent Stabilization to Preserve a Diverse Neighborhood Shopping District*, Vol. 28 Urban L. Annual; J. of Urb. & Contemp. L. 20 (1985), https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1395&context=law_urbanlaw.

³⁰⁹ Christian Britschgi, *NYC Mayor Bill de Blasio Wants to Use Commercial Rent Control to Save Small Businesses*, REASON (Feb. 11, 2020, 5:10 PM), <https://reason.com/2020/02/11/nyc-mayor-bill-de-blasio-wants-to-use-commercial-rent-control-to-save-small-businesses/>.

and Brad Lander, both Democrats, introduced the Commercial Rent Stabilization Act, which would create a city panel that would set allowable rent increases for small retail, manufacturing, and office locations.”³¹⁰ These proposals, however, have faced significant opposition. For instance, Mayor de Blasio’s administration opposed the Small Business Survival Act.³¹¹ The commissioner of the Department of Small Business Services, Gregg Bishop explained, that they were “concerned about potential unintended policy consequences of the proposed legislation that could make it harder for all commercial tenants — existing and new.”³¹² Additionally, he communicated:

Though this legislation attempts to create a system to provide fair lease renewal terms, it is important to note it does not guarantee favorable terms for the tenant. The party that makes the strongest case – often the party with the best [monetary] resources – is likely to have a more favorable outcome.³¹³

These concerns mirror those of other city politicians who also worry about the proposed bill’s unintended consequences and broad scope, including City Council Speaker Corey Johnson who explained,

What I am trying to understand this today and certain advocates won’t like hearing this but I do think this bill needs to see some changes. I do not think this is a perfect bill ... I don’t think this bill should treat a WeWork in the same way it treats a bodega. And that is what this bill currently does. I am not here today to help Goldman Sachs.³¹⁴

³¹⁰ *Id.*

³¹¹ Rich Calder, *De Blasio administration opposes commercial rent control bill*, N.Y. POST (Oct. 22, 2018, 4:35 PM), <https://nypost.com/2018/10/22/de-blasio-administration-opposes-commercial-rent-control-bill/>.

³¹² *Id.*

³¹³ *Id.*

³¹⁴ Sadeef Ali Kully, *Doubts About Breadth of Small Business Rent Bill Emerge at Council Hearing*, CityLimits (Oct. 24, 2018), <https://citylimits.org/2018/10/24/doubts-about-breadth-of-small-business-rent-bill-emerge-at-council-hearing/>.

Additionally, commercial rent control has faced questions as to its legality. The Small Business Survival Act, for example, was the subject of a New York City Bar report on its legality. The City Bar concluded that, “[g]iven the uniformity of case law, the generally narrow construction of local government powers in the area of its ‘property, affairs or government’ and ‘health and welfare,’ it is clear that the enactment of commercial rent control is not presently within the powers of the City of New York.”³¹⁵ In other words, the bill would fail legally because the Bill “would impose substantial and important restrictions on substantive rights of commercial landlords established by State law and create inconsistencies with State laws.”³¹⁶

We included the commercial rent control discussion above to show how potentially divisive this issue can be. Although parties disagree on the legality of commercial rent control and whether or not it would be harmful to the real estate market, most if not all parties agree that lease terms, including monthly rent rates, for small business owners are generally egregious.

Agent of Change Principle & Soundproofing

Music Venues & Gentrification

It is well-known that artists, creatives, and the venues in which they work and perform are “front-line gentrifiers” for NYC real estate development.³¹⁷ “Victims of their own success,” these communities and small businesses fall “casualt[y] to rising rents and demographic shifts that come with a neighborhood's heightened profile.”³¹⁸ At present, for example, a “six-story mixed-use property taking over half a block in Bushwick” sits on a site once occupied by DIY venue, Above the Auto Parts Store. Another DIY venue, Silent Barn, which operated across the street from Auto Parts Store, is also closed.³¹⁹ We heard anecdotally that, on a regular basis, developments even use music venues in their advertising, hoping to draw in prospective tenants.

³¹⁵ Jason T. Polevoy, *Report on Legislation by the Committee on Real Property Law*, N.Y. CITY BAR, 1, 14 (2018), <https://s3.amazonaws.com/documents.nycbar.org/files/2018422-CommercialRentControl.pdf>.

³¹⁶ *Id.*

³¹⁷ Max Pearl, *Real estate, gentrification and nightlife in New York*, RESIDENT ADVISOR (June 6, 2016), <https://www.residentadvisor.net/features/2748>; MOSS, *supra* note 8 at 321.

³¹⁸ Pearl, *supra* note 317.

³¹⁹ Craig Hubert, *Six-Story, Garage-Replacing Residential Building Inches Toward Completion in Bushwick*, BROWNSTOWNER (July 9, 2019, 10 AM), <https://www.brownstoner.com/development/brooklyn-development-600-bushwick-avenue-bushwick-hustvedt-cutler-architects/>.

Once tenants move in, however, bothered by the noise, they proceed to call 311 and make noise complaints, eventually driving the preexisting venue out of business. This cycle of creative exploitation, rapid real estate development, and subsequent dissension between old neighbors and new must end. One way of tackling this issue is to adopt the agent of change principle, discussed below.

New York City Should Adopt the Agent of Change Principle

One solution other cities have adopted to deal with the issue of music spaces being “victims of their own success” is the “agent of change” principle. As the London Grassroots Rescue Plan for Music Venues (produced by the city in 2015 in order to address a shrinking music venue scene) explains: **The “Agent of Change principle puts the responsibility for noise management measures on the ‘agent of change’ i.e. the incoming individual or business.”**³²⁰ The agent of change principle originated in Melbourne, Australia³²¹ and has been adopted in cities such as San Francisco³²² and, of course, London.³²³

In New York City, “[w]hen residents buy or rent a property there is no obligation on estate agents or solicitors to tell them about nearby venues that could create sound at night.”³²⁴ In turn, new residents make noise complaints against music venues, even though “[i]n most cases the volume levels have remained the same for many years.”³²⁵ We find this situation to be unfair, yet fixable. **In practice, the agent of change principle works as follows:**

³²⁰ *Id.* at 18.

³²¹ Music Victoria, *How to: Agent of Change*, <https://www.musicvictoria.com.au/resources/agent-of-change-explained>; *See also* Live Music and Entertainment Noise, PLANNING.VIC.GOV.AU, https://www.planning.vic.gov.au/_data/assets/pdf_file/0024/13479/PPN81-Live-Music-and-Entertainment-Noise_September-2015.pdf (last visited Aug. 7, 2020); *see also* *Victoria Planning Provisions 2014* (Vic.) cl. 52.43 (Austl.).

³²² San Francisco Administrative Code Ch. 116, <https://sfgov.org/entertainment/sites/default/files/FileCenter/Documents/2790-Chapter116.pdf> (Compatibility and Protection for Residential Uses and Places of Entertainment).

³²³ MAYOR OF LONDON’S MUSIC VENUES TASKFORCE, GREATER LONDON AUTHORITY, LONDON’S GRASSROOTS MUSIC VENUES: A REPORT FOR THE MAYOR, MUSIC INDUSTRY, LOCAL AUTHORITIES, GOVERNMENT, PLANNERS, DEVELOPERS, LICENSERS, POLICE, ECONOMISTS, TOURISM AGENCIES, MUSICIANS, CULTURE FUNDERS, 25 (OCT. 2015), https://www.london.gov.uk/sites/default/files/londons_grassroots_music_venues_-_rescue_plan_-_october_20152.pdf.

³²⁴ *Id.* at 17

³²⁵ *Id.*

[I]f a cultural venue is in place before a residential development, the residential development is responsible for militating against potential residents' complaints. This could be by paying for soundproofing. Equally, if a cultural venue opens in a residential area, the venue is responsible for these works.³²⁶

New York City should adopt the agent of change principle, not just as policy, but statutorily. The State of Victoria, Australia (which most prominently includes the City of Melbourne) has done just this by adopting Planning Scheme Amendment VC120 and Clause 52.43.³²⁷ Our proposed bill package, **Support Live Music**, advocates for NYC's adoption of the agent of change principle, among other reforms.

NYPD

NYPD's Relationship with Nightlife

The 2018 Best Practices for Nightlife Establishments, created by the NYPD and NYC Hospitality Alliance, provides an illustration for how working together can benefit agencies, SBOs, and the people of NYC. We have included a few recommendations below to further the goal of "working collaboratively to improve the safety and security of New York City's famous nightlife."³²⁸

Recommendation 1. Create standard criteria for "Special restrictions" on sound permits. Verbiage in Administrative Code § 10-108(g)(2) and (3) should be clarified to include specific criteria for denying an SBO's sound permit application. This could be an ideal opportunity for the NYPD to work in collaboration with the DEP and applicable nightlife stakeholders to create clear department rules or guidelines for sound permits so there are no surprises or delays on days of show. As a note, we are interested in learning more about the criteria and procedures for determining whether a sound device/apparatus constitutes a threat to

³²⁶ *Id.* at 25.

³²⁷ Music Victoria, *supra* note 321; *see also* *Victoria Planning Provisions 2014* (Vic) cl. 52.43 (Austl.).

³²⁸ NYPD and NYC Hospitality Alliance, *Best Practices for Nightlife Establishments* 3rd ed. (2018), NYC.GOV, <https://www1.nyc.gov/assets/nypd/downloads/pdf/publications/best-practices-for-nightlife-establishments-en-2018.pdf> (last visited Aug. 7, 2020).

public safety. If this information is located in the Administrative Code or the NYPD's rules or policies, we would like to be pointed to it.

Recommendation 2. Eliminate jail time for violation(s) of § 10-108. Punishment lacks proportionality. Jail time should be removed and replaced with community service hours. SBOs should not live under the fear of being sent to jail for 30 days for allegedly committing a sound violation.

Relevant sections of Administrative Code § 10-108 (Public Safety; Regulation of sound devices or apparatus) (emphasis in yellow): ³²⁹

b. *Definitions.* As used in this section:...

2. The term "sound device or apparatus" shall mean any radio device or apparatus, or any device or apparatus for the amplification of any sounds from any radio, phonograph, or other sound-making or sound-producing device, or any device or apparatus for the reproduction or amplification of the human voice or other sounds;...

c. *Use and operation of the sound devices and apparatus for commercial and business advertising purposes.* It shall be unlawful for any person to use or operate any sound device or apparatus in, on, near or adjacent to any public street, park or place, for commercial and business advertising purpose.

d. *Use and operation of sound devices and apparatus for other than commercial and business advertising purposes; permit required.* It shall be unlawful for any person to use or operate any sound device or apparatus, in, on, near or adjacent to any public street, park or place, unless such person shall have first obtained a permit to be issued by the police commissioner in the manner hereinafter prescribed and unless the police commissioner shall comply with the provisions of this section and the terms and conditions prescribed in such

³²⁹ See Administrative Code § 10-108, <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCAAdmin/0-0-0-6027>.

permit.

e. *Applications.* Each applicant for a permit to use or operate a sound device or apparatus in, on, near or adjacent to any public street, park or place shall file a written application with the police commissioner, at the police precinct covering the area in which such sound device or apparatus is to be used or operated, at least five days prior to the date upon which such sound device or apparatus is to be used or operated. Such application shall describe the specific location in which such sound device or apparatus is proposed to be used or operated, the day and the hour or hours during which it is proposed to be used or operated, the volume of sound which is proposed to be used measured by decibels or by any other efficient method of measuring sound, and such other pertinent information as the police commissioner may deem necessary to enable the police commissioner to carry out the provisions of this section.

f. *Issuance of permit; terms.* The police commissioner shall not deny a permit for any specific time, location or use, to any applicant who complies with the provisions of this section, except for one or more of the reasons specified in subdivision g hereof or for non-payment of the fee prescribed in subdivision h hereof, or to prevent overlapping in the granting of permits, provided, however, that a permit issued for multiple days shall be issued only for multiple days within a period of five consecutive calendar days and only at the same location. Each permit issued pursuant to this section shall describe the specific location in which such sound device or apparatus may be used or operated thereunder, the exact period of time for which such apparatus or device may be operated in such location, the maximum volume of sound which may be employed in such use or operation and such other terms and conditions as may be necessary, for the purpose of securing the health, safety, comfort, convenience and peaceful enjoyment by the people of their right to use the public streets, parks or places for street, park or other public purposes, protecting the health, welfare and safety of the inhabitants of the city, and securing the peace, quiet and comfort of the neighboring inhabitants.

g. *Special restrictions.* The police commissioner shall not issue any permit for the use of a

sound device or apparatus:

1. In any location within five hundred feet of a school, courthouse or church, during the hours of school, court or worship, respectively, or within five hundred feet of any hospital or similar institution;

2. In any location where the commissioner, upon investigation, shall determine that the conditions of vehicular or pedestrian traffic or both are such that the use of such a device or apparatus will constitute a threat to the safety of pedestrians or vehicular operators;

3. In any location where the commissioner, upon investigation, shall determine that conditions of overcrowding or of street repair or other physical conditions are such that the use of a sound device or apparatus will deprive the public of the right to the safe, comfortable, convenient and peaceful enjoyment of any public street, park or place for street, park or other public purposes, or will constitute a threat to the safety of pedestrians or vehicle operators;

4. In or on any vehicle or other device while it is in transit;

5. Between the hours of ten p.m. and nine a.m.; or

6. Between the hours of eight p.m. or sunset, whichever is later, and nine a.m. on weekdays and between the hours of eight p.m. or sunset, whichever is later, and ten a.m. on weekends and public holidays, in any location within fifty feet of any building that is lawfully occupied for residential use. The distance of fifty feet shall be measured in a straight line from the point on the exterior wall of such building nearest to any point in the location for which the permit is sought.

h. *Fees.* Each applicant for a single-day permit issued under the provisions of this section shall pay a fee of forty-five dollars for the use of each such sound device or apparatus and each applicant for a multiple-day permit issued under the provisions of this section shall pay a fee of forty-five dollars for the use of each such sound device or apparatus for the first day and a fee of five dollars for the use of each such sound device or apparatus for each additional day up to a maximum of four additional days, provided, however, that permits for the use of such sound devices or apparatus shall be issued to any bureau, commission, board or department of the United States government, the state of New York, and the city of New

York, without fee.

i. *Exceptions.* The provisions of this section shall not apply to the use or operation of any sound device or apparatus by any church or synagogue on or within its own premises, in connection with the religious rites or ceremonies of such church or synagogue.

j. *Violations.*

1. Any person who shall violate any provision of this section, upon conviction thereof, shall be punished by a fine of not more than one hundred dollars or imprisonment for thirty days, or both.

2. Any person who shall violate any provision of this section, any rule promulgated pursuant thereto or the terms of a permit issued pursuant to subdivision f of this section, shall be liable for a civil penalty recoverable in a civil action brought in the name of the police commissioner or the commissioner of environmental protection or in a proceeding before the environmental control board in an amount of two hundred fifty dollars for the first violation, five hundred dollars for the second violation and seven hundred fifty dollars for the third and each subsequent violation. However, any person who commits a fourth and any subsequent violation within a period of six months shall be classified as a persistent violator and shall be liable for a civil penalty of one thousand dollars for each such violation.

k. *Rules.* The police commissioner shall have the power to make such rules as may be necessary to carry out the provisions of this section.

l. The police department and the department of environmental protection shall have the authority to enforce the provisions of this section.

Recommendation 3. Change the Culture of Confrontation toward Music Spaces into a Culture of Collaboration. While we mentioned earlier in our paper how the City and its agencies, such as the DEP and DOB, should generally foster a culture of working with and

supporting nightlife, rather than punishing these small businesses, the NYPD should also issue this as a directive. As mentioned above, the Best Practices for Nightlife guide is a positive start, but the relationship between the NYPD and SBOs needs work.

First, the NYPD has latitude and discretion to shut down venues. One example is the NYPD's closure of a beloved DIY venue³³⁰ Palisades in Bed-Stuy/Bushwick.³³¹ This shutdown was the result of a M.A.R.C.H. program action and the venue was cited by the DOB for "GROUND FL OPERATED AS A CABARET WITHOUT A SPRINKLER SYSTEM CELLAR WORK W/O PERMITS & FAILURE TO MAINTAIN PREMISES."³³² The venue did not reopen after this NYPD enforced shutdown.³³³ As this example demonstrates, just one police action that shuts down a nightlife business, for any amount of time, can be deadly to the survival of that small business, no matter how beloved or successful. Margins are already tight in nightlife and even just one night of losses is severely detrimental to any music venue. A prolonged shutdown, in reality, is usually a death blow.

Landmarks Preservation Commission (LPC)

About The LPC

The LPC "is responsible for protecting New York City's architecturally, historically, and culturally significant buildings and sites by granting them landmark or historic district status, and regulating them after designation."³³⁴ Across the city, there are "37,000 landmark properties," "most of which are located in 149 historic districts and historic district extensions in all five boroughs."³³⁵ Additionally, there are also "1,439 individual landmarks, 120 interior landmarks, and 11 scenic landmarks" located in New York City.³³⁶

³³⁰ John Ambrosio, *RIP Palisades, Long Live the Palisades Replacement*, N.Y. MAG.: BEDFORD & BOWERY (Aug. 10, 2016), <https://bedfordandbowery.com/2016/08/rip-palisades-long-live-palisades-replacement/>.

³³¹ Scott Heins, *Brooklyn Venue Palisades Shut Down For Building Code Violations*, GOTHAMIST (June 15, 2016, 4:10 PM), <https://gothamist.com/arts-entertainment/brooklyn-venue-palisades-shut-down-for-building-code-violations>.

³³² BUILDINGS INFORMATION SYSTEM (BIS), <http://a810-bisweb.nyc.gov/bisweb/OverviewForComplaintServlet?requestid=2&vlcompdetlkey=0001993772> (Overview for Complaint #:3562018 = RESOLVED).

³³³ Ambrosio, *supra* note 330.

³³⁴ NY Landmarks Preservation Commission, *About LPC*, NYC.GOV, <https://www1.nyc.gov/site/lpc/about/about-lpc.page> (last visited Feb. 14, 2021).

³³⁵ *Id.*

³³⁶ *Id.*

New York City Should Have an Easy-to-Use Portal to Make Non-Defacing Changes to Historic Landmark Buildings.

From our conversations, we have heard that New York City currently makes it unduly difficult for business owners to make any adjustment to a Historic Landmark building, no matter how minor. This can cause Historic Landmark buildings to fall into disrepair, as well as making them unattractive to potential tenants. If we allow tenants to make minor, non-defacing adjustments in an easier fashion the City will actually help protect the continued existence of these buildings.

Illustration: Philadelphia

Philadelphia has taken this approach, after losing 941 older buildings in 2019 alone.³³⁷ The Philadelphia city government adopted a “package of reforms” that aim “to encourage rehabilitation over demolition for historic structures by reducing developers’ regulatory burdens associated with projects that preserve older buildings.”³³⁸ Further, a Philadelphia Historic Preservation Task force, appointed by the Philadelphia mayor,³³⁹ produced a report outlining ways in which the city could modify processes within its Historic Commission to make them more efficient for “properties that require less review.”³⁴⁰ Additionally, the report sought to “clarify the Philadelphia Historical Commission Rules and Regulation’s staff review process (Section 6.10.c) to make the process more transparent and easier to understand for applicants and the public,” among other recommendations.³⁴¹ Philadelphia’s plan and general ideas can and should be used as a guide and adapted to fit New York's needs.

³³⁷ Emily Galik, *Procedure to Protect Philadelphia*, THE REGULATORY REVIEW (June 23, 2020), <https://www.theregreview.org/2020/06/23/galik-procedure-protect-philadelphia/>.

³³⁸ *Id.*

³³⁹ PHILADELPHIA HISTORIC PRESERVATION TASK FORCE, CITY OF PHILADELPHIA MAYOR’S OFFICE, EXECUTIVE SUMMARY: KEY RECOMMENDATIONS OF THE PHILADELPHIA HISTORIC PRESERVATION TASK FORCE 2 (MARCH 2019), https://d54eda26-8f5e-47ee-9acc-49e0a8a92415.filesusr.com/ugd/c0d485_23ce8394473a4737b3bad4d8c1a0cc88.pdf.

³⁴⁰ *Id.* at 13; *see also* PHILADELPHIA HISTORIC PRESERVATION TASK FORCE, CITY OF PHILADELPHIA MAYOR’S OFFICE, KEY RECOMMENDATIONS OF THE PHILADELPHIA HISTORIC PRESERVATION TASK FORCE (March 2019), https://d54eda26-8f5e-47ee-9acc-49e0a8a92415.filesusr.com/ugd/c0d485_4b1083963b1344c9aa60986bb0acf2d4.pdf.

³⁴¹ *Id.*

Our Recommendation

To improve the review process for making minor changes to a historic landmark building (i.e. a change that does not deface the building), the Landmark Preservation Commission (LPC) should provide an easy-to-use portal where SBOs can have their applications reviewed and either accepted or rejected in a timely manner. Minor changes are defined in the New York City Administrative code:

q. "Minor work." Any change in, addition to or removal from the parts, elements or materials comprising an improvement, including, but not limited to, the exterior architectural features or interior architectural features thereof and, subject to and as prescribed by regulations of the commission if and when promulgated pursuant to section 25-319 of this chapter, the surfacing, resurfacing, painting, renovating, restoring or rehabilitating of the exterior architectural features or interior architectural features or the treating of the same in any manner that materially alters their appearance, where such change, addition or removal does not constitute ordinary repairs and maintenance and is of such nature that it may be lawfully effected without a permit from the department of buildings.³⁴²

While these changes do not require a DOB permit, they do require a permit from the LPC:

§ 25-310 Regulation of minor work.

a. (1) Except as otherwise provided in section 25-312 of this chapter, it shall be unlawful for any person in charge of an improvement located on a landmark site or in an historic district or containing an interior landmark to perform any minor work thereon, or to cause or permit such work to be performed, and for any other person to perform any such work thereon or cause same to be performed, unless the commission has issued a permit, pursuant to this section, authorizing such work. (2) It shall be unlawful for any person in charge of any such improvement to maintain same or cause

³⁴² Administrative Code § 25-302(q), <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCAAdmin/0-0-0-45840> (Land Use; Landmarks Preservation and Historic Districts; Definitions).

or permit same to be maintained in the condition created by any work done in violation of the provisions of paragraph one of this subdivision a.

b. The owner of an improvement desiring to obtain such a permit, or any person authorized by the owner to perform such work, may file with the commission an application for such permit, which shall include such description of the proposed work, as the commission may prescribe. The applicant shall submit such other information with respect to the proposed work as the commission may from time to time require. The commission shall promptly transmit such application to the department of buildings, which shall, as promptly as is practicable, certify to the commission whether a permit for such proposed work, issued by such department, is required by law. If such department certifies that such a permit is required, the commission shall deny such application, and shall promptly give notice of such determination to the applicant. If such department certifies that no such permit is required, the commission shall determine such application as hereinafter provided.

c. (1) The commission shall determine:

(a) Whether the proposed work would change, destroy or affect any exterior architectural feature of an improvement located on a landmark site or in an historic district or interior architectural feature of an improvement containing an interior landmark; and

(b) If such work would have such effect, whether judged by the standards set forth in subdivisions b, c, d and e of section 25-307 of this chapter with respect to an improvement of similar classification hereunder, such work would be appropriate for and consistent with the effectuation of the purposes of this chapter.

(2) If the commission determines the question set forth in subparagraph (a) of paragraph one of this subdivision c in the negative, or determines the question set forth in subparagraph (b) of such paragraph in the affirmative, it shall grant such permit, and it shall deny

such permit if it determines such question set forth in subparagraph (a) in the affirmative and determines such question set forth in subparagraph (b) in the negative.

- d. The procedure of the commission in making its determination with respect to any such application shall be as prescribed in subparagraph two of subdivision a of section 25-306 of this chapter, except that any period of thirty days referred to in such subparagraph shall, for the purposes of this subdivision d, be deemed to be twenty days.
- e. The provisions of this section shall be inapplicable to any improvement mentioned in subdivision a of section 25-318 of this chapter and to any city-aided project.³⁴³

At a minimum, this portal should provide a space to send pictures of the particular location in the Historic Landmark building that is the subject of a potential improvement, and a set of questions that allow a small business owner to describe the work they will be doing. From this information, the LPC can get the necessary sign-off from the DOB (as required by § 25-310(b)), as well as quickly and easily determine (according to § 25-310(c)) if a permit should be granted. With this portal, venue owners (and many other New Yorkers) can then upgrade and maintain Historic Landmark buildings for future generations, rather than allowing these buildings to fall into disrepair.

Working Idea: Affordable Lease Renewal for Socially or Culturally Significant Music Establishments³⁴⁴

³⁴³ Administrative Code § 25-310, <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCAadmin/0-0-0-46000> (Land Use; Landmarks Preservation and Historic Districts; Regulation of minor work).

³⁴⁴ This working idea (and relevant portion of our proposed bill package, **Support Live Music**, has been adapted from fellow Brooklyn Law School student, Kyle Campion's, note on preserving "culturally or communally significant" small businesses. See generally *Living Landmarks: Equipping Landmark Protection for Today's Challenges*, 28 J. L. & Pol'y 679 (2020), <https://brooklynworks.brooklaw.edu/jlp/vol28/iss2/6/>. Mr. Campion argues: "As the fight for comprehensive commercial rent regulation moves forward, the city must establish a legal mechanism for identifying and evaluating culturally or communally significant local establishments that are of such value to the surrounding community that they should be provided a legal right to an affordable lease renewal." *Id.* at 712.

As part of our **Support Live Music** proposed bill package, we establish a 12-person Qualified Music Establishments Board (QMEB) within the LPC. The purpose of this board is to identify and designate socially or culturally significant music establishments as “Qualified Music Establishments,” which, in turn, will grant the operators of such establishments a right to enter into affordable lease renewal agreements with their respective landlords. In exchange, the landlords of these qualified music establishments will receive abatements in real property taxes. When determining if a music establishment qualifies as a “Qualified Music Establishment,” the board shall determine if such music establishment has at least one of the following characteristics:

- (a) contributes to a community’s sense of place;
- (b) demonstrates the capacity to bridge cultural or socio-economic divides; or
- (c) embodies or represents a significant moment or movement in the history of the city, state or nation.³⁴⁵

While the QMEB “shall have full independence from the landmarks preservation commission in making determinations concerning qualified music establishments or affordable lease renewal guidelines,” the function of this new board will further the LPC’s mission to preserve the history and character of NYC.³⁴⁶

³⁴⁵ See *id.* at 712-14 (“Unlike physical structures, businesses do not lend themselves to easily definable criteria for evaluating their landmark worthiness. The less tangible qualities of businesses relative to buildings and other physical structures present a challenge to preservationists seeking to create a set of criteria that provides necessary leeway to protect a variety of establishments while also furnishing standards that must be met before a business can be designated. Nevertheless, a few guiding principles should be considered—ones which seem capable of providing evaluators with the ability to identify truly noteworthy businesses. Examples of considerations that should be used include: (a) the extent to which the business contributes to a community’s sense of place; (b) the extent to which the business embodies or has contributed to a significant moment or movement in the history of the city or surrounding neighborhood; (c) the longevity of the business’s operation within the neighborhood; and (d) the extent to which a business has a demonstrated capacity to bridge cultural or socio-economic divides within the neighborhood”) (internal citations omitted).

³⁴⁶ N.Y. Landmarks Preservation Commission, *About LPC*, NYC.GOV, <https://www1.nyc.gov/site/lpc/about/about-lpc.page> (last visited Aug. 7, 2020).

Community Boards

Community Board Roadmap

We begin this section outlining how community boards are populated, how they function, and their duties that are relevant to nightlife. We also highlight the role of community boards in the liquor license approval process. Our recommendations for reform include, *inter alia*, more stringent term limits, higher evidentiary standards, and clarifications to the role of the district manager.

Appointments and Qualifications

Across New York City there are 59 community boards,³⁴⁷ each of which consists of “not more than fifty persons.”³⁴⁸ These community board members are “appointed by the borough president, at least one-half of whom shall be appointed from nominees of the council members elected from council districts which include any part of the community district.”³⁴⁹ Additionally, “[t]he number of members appointed on the nomination of each such council member shall be proportional to the share of the district population represented by such council member.”³⁵⁰ Members of the community board, “shall be appointed to serve staggered terms of two years.”³⁵¹ These terms are staggered so that one half of the community board is potentially turned over every two years.³⁵² Starting on April 1, 2019, “no person shall be eligible to be appointed as a community board member if that person has previously held such appointment for four or more consecutive full terms ... unless one full term or more has elapsed since that person last held such office.”³⁵³ In other words, a community board member can serve four consecutive terms, take one two-year term off, then be re-appointed.

³⁴⁷ Mayor’s Community Affairs Unit, *About Community Boards*, NYC.GOV, <https://www1.nyc.gov/site/cau/community-boards/about-community-boards.page#:~:text=back%20to%20top%5D-.Board%20Composition%20%26%20Membership.their%20district's%20City%20Council%20members> (last visited Aug. 7, 2020).

³⁴⁸ N.Y. City Charter. ch. 70, §2800(a), <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCcharter/0-0-0-4249> (City Government in the Community; Community Boards).

³⁴⁹ *Id.*

³⁵⁰ N.Y. City Charter. ch. 70, §2800(a).

³⁵¹ *Id.*

³⁵² *Id.*

³⁵³ *Id.*

There are few qualifications, outside of the term limits explained above, as to who can serve on a community board. First, “[n]ot more than twenty-five percent of the appointed members shall be city employees.”³⁵⁴ Next, “[n]o more than two members shall be less than eighteen years of age.”³⁵⁵ Lastly, “no person shall be appointed to or remain as a member of the board who does not have a residence, business, professional or other significant interest in the district.”³⁵⁶ Of the members, “[o]ne ... shall be elected by the other members to serve as chairperson.”³⁵⁷ Members of the community board serve “without compensation but shall be reimbursed for actual and necessary out-of-pocket expenses in connection with attendance at regularly scheduled meetings of the community board.”³⁵⁸

The law also provides two guidelines for the borough president when making appointments to the community board. First, the borough president “shall assure adequate representation from the different geographic sections and neighborhoods within the community district.”³⁵⁹ Secondly, “the borough president shall consider whether the aggregate of appointments fairly represents all segments of the community.”³⁶⁰ This includes “seek[ing] out persons of diverse backgrounds, including with regard to race, ethnicity, gender, age, disability status, sexual orientation, language, and other characteristics the borough president deems relevant to promoting diversity and inclusion of under-represented groups and communities within community boards, to apply for appointment.”³⁶¹ Additionally, outside groups may make recommendations for appointments, as “[c]ommunity boards, civic groups and other community groups and neighborhood associations may submit nominations to the borough president and to council members.”³⁶²

³⁵⁴ *Id.*

³⁵⁵ *Id.*

³⁵⁶ *Id.*

³⁵⁷ N.Y. City Charter § 2800(f), <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCcharter/0-0-0-4249> (City Government in the Community; Community Boards).

³⁵⁸ N.Y. City Charter § 2800(c), <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCcharter/0-0-0-4249> (City Government in the Community; Community Boards).

³⁵⁹ *Id.*

³⁶⁰ *Id.*

³⁶¹ *Id.*

³⁶² *Id.*

Meetings and Committees

Each community board “shall meet at least once each month within the community district and conduct at least one public hearing each month,” with the exception of July and August.³⁶³ Community board members “may be removed from a community board for cause, which shall include substantial nonattendance at board or committee meetings over a period of six months.”³⁶⁴ The community board also “shall give adequate public notice of its meetings and hearings and shall make such meetings and hearings available for broadcasting and cablecasting” and “shall set aside time to hear from the public.”³⁶⁵ There are a couple of items that a community board must meet to discuss. First, “a community board shall be required to meet for purposes of reviewing the scope or design of a capital project located within such community board's district when such scope or design is presented to the community board.”³⁶⁶ This “review shall be completed within thirty days after receipt of such scope or design.”³⁶⁷

The community boards may also “create committees on matters relating to its duties and responsibilities.”³⁶⁸ The members of these committees do not actually have to be a board member, as long as they have “a residence or significant interest in the community,” although “each such committee shall have a member of the board as its chairperson.”³⁶⁹ The “meetings of such committees shall be open to the public,” “[e]xcept as otherwise provided by law.”³⁷⁰

Duties Relevant to Nightlife

Community boards serve an important role in the neighborhoods they represent. Some duties that also might and do affect the nightlife business are:

- (1) Consider the needs of the district which it serves;

³⁶³ N.Y. City Charter § 2800(h), <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCcharter/0-0-0-4249> (City Government in the Community; Community Boards).

³⁶⁴ N.Y. City Charter § 2800(b), <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCcharter/0-0-0-4249> (City Government in the Community; Community Boards).

³⁶⁵ N.Y. City Charter § 2800(h).

³⁶⁶ *Id.*

³⁶⁷ *Id.*

³⁶⁸ N.Y. City Charter § 2800(i), <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCcharter/0-0-0-4249> (City Government in the Community; Community Boards).

³⁶⁹ *Id.*

³⁷⁰ *Id.*

- (2) Cooperate with, consult, assist and advise any public officer, agency, local administrators of agencies, legislative body, or the borough president with respect to any matter relating to the welfare of the district and its residents;...
- (14) Assist in the planning of individual capital projects funded in the capital budget to be located in the community district and review scopes of projects and designs for each capital project provided, however, that such review shall be completed within thirty days after receipt of such scopes or designs;
- (15) Evaluate the progress of capital projects within the community district based on status reports to be furnished to the board;...
- (17) Exercise the initial review of applications and proposals of public agencies and private entities for the use, development or improvement of land located in the community district, including the conduct of a public hearing and the preparation and submission to the city planning commission of a written recommendation;...
- (21) Conduct substantial public outreach, including identifying the organizations active in the community district, maintaining a list of the names and mailing addresses of such community organizations, and making such names and, with the consent of the organization, mailing addresses available to the public upon request; and
- (22) With assistance and support from the department of information technology and telecommunications, maintain a website that provides adequate public notice of upcoming meetings, minutes from past meetings for the past twelve months, and contact information for the board.³⁷¹

Community Boards and the SLA

The ability to sell liquor to patrons is essential to the survival of independent music spaces and the NYC music, culture, and art scene in general.³⁷² Aside from covering overhead costs, such as rent, “the sale of liquor at [independent] events ... afford[s] more money for art

³⁷¹ N.Y. City Charter § 2800(d)(1)-(22), <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCcharter/0-0-0-4249> (City Government in the Community; Community Boards).

³⁷² “[A] club setting allows for immediacy, informality, and a diverse audience.” Tim Lawrence, *Life and Death on the New York Dance Floor* 468 (2016).

and music than any other source apart from institutions....”³⁷³ It follows that community board influence over the liquor licensing process is one of the more influential powers that members possess.

This community board influence is written into New York’s Alcohol Beverage Control (ABC) law (particularly relevant sections are highlighted in yellow):

1. Not less than thirty nor more than two hundred and seventy days before filing any of the following applications, an applicant shall notify the municipality in which the premises is located of such applicant's intent to file such an application:
 - (a) for a license issued pursuant to section fifty-five, fifty-five-a, sixty-four, sixty-four-a, sixty-four-b, sixty-four-c, sixty-four-d, eighty-one or eighty-one-a of this chapter;
 - (b) for a renewal under section one hundred nine of this chapter of a license issued pursuant to section fifty-five, fifty-five-a, sixty-four, sixty-four-a, sixty-four-c, sixty-four-d, eighty-one or eighty-one-a of this chapter if the premises is located within the city of New York;
 - (c) for approval of an alteration under section ninety-nine-d of this chapter if the premises is located within the city of New York and licensed pursuant to section fifty-five, fifty-five-a, sixty-four, sixty-four-a, sixty-four-c, sixty-four-d, eighty-one or eighty-one-a of this chapter; or
 - (d) for approval of a substantial corporate change under section ninety-nine-d of this chapter if the premises is located within the city of New York and licensed pursuant to section fifty-five, fifty-five-a, sixty-four, sixty-four-a, sixty-four-c, sixty-four-d, eighty-one or eighty-one-a of this chapter.

³⁷³ *Id.*

2. Such notification shall be made to the clerk of the village, town or city, as the case may be, wherein the premises is located. For purposes of this section:

(a) notification need only be given to the clerk of a village when the premises is located within the boundaries of the village; and

(b) in the city of New York, the community board established pursuant to section twenty-eight hundred of the New York city charter with jurisdiction over the area in which the premises is located shall be considered the appropriate public body to which notification shall be given.

3. For purposes of this section, "substantial corporate change" shall mean:

(a) for a corporation, a change of eighty percent or more of the officers and/or directors, or a transfer of eighty percent or more of stock of such corporation, or an existing stockholder obtaining eighty percent or more of the stock of such corporation; and

(b) for a limited liability company, a change of eighty percent or more of the managing members of the company, or a transfer of eighty percent or more of ownership interest in said company, or an existing member obtaining a cumulative of eighty percent or more of the ownership interest in said company.

4. Such notification shall be made in such form as shall be prescribed by the rules of the liquor authority.

5. A municipality may express an opinion for or against the granting of such application. Any such opinion shall be deemed part of the record

upon which the liquor authority makes its determination to grant or deny the application.

6. Such notification shall be made by: certified mail, return receipt requested; overnight delivery service with proof of mailing; or personal service upon the offices of the clerk or community board....³⁷⁴

Put simply, when making an application for any kind of new liquor license, renewal, or alteration in New York City, the community board must be notified. Thereafter, the board “may express an opinion for or against the granting of such application,” which the SLA then considers in their “determination to grant or deny the application.”³⁷⁵ This allows the community to have some say over the nightlife establishments who are allowed to operate in their area. In theory, this is a good thing, but we have heard repeatedly the SLA places too much weight on the submission of community board opinions.

Community board opinions can often make or break an SBO’s liquor license application. This should not be the case. Instead, these opinions should be just one of many factors the SLA considers in making their final determination (if at all). We also noticed that the liquor licensing procedure in New York City is different from the rest of the state, as the city is the only jurisdiction where community board opinions are taken into account.³⁷⁶ We would like to learn why this is the case.

Stipulations

Further, community boards and liquor license applicants can agree to stipulations “with respect to the operation of the establishment,” which “the SLA can ... incorporate ... into the license.”³⁷⁷ “In cases where the SLA incorporates stipulations into the license, failure to comply with these conditions subjects the licensee to disciplinary action.”³⁷⁸ We have heard

³⁷⁴ N.Y. Alcohol Beverage Control Law § 110-B (Consol. 2020), <https://www.nysenate.gov/legislation/laws/ABC/110-B>.

³⁷⁵ *Id.*

³⁷⁶ N.Y. Alcohol Beverage Control Law § 110-B(2)(b)

³⁷⁷ *Community Input*, SLA.NY.GOV, <https://sla.ny.gov/community-input> (last visited Aug. 7, 2020).

³⁷⁸ *Id.*

this system creates a power imbalance heavily tilted towards community boards and that SBOs are pressured into agreeing to stipulations that are harmful to their businesses. The stipulation process, as currently constructed, should be reviewed and either amended or done away with altogether.

Recommendations: Reforming the Community Board-SLA Relationship

Below are some recommendations regarding the interaction between the SLA and community boards.

- Community board opinions should be afforded less weight by the SLA (if at all).
- If community board opinions are taken into account by the SLA, they should constitute one factor in a “totality of the circumstances test.” For instance, the SLA should:
 - only place weight on opinions that have merit and are based on factual inquiry; and
 - place less importance on opinions from community boards that oppose most, if not all, liquor license applications in their community (or certain categories of business applications).
- The SLA should make publicly available the most commonly recommended stipulations by community boards, organized by community.
- The SLA should reject and remove stipulations that are unreasonable and/or were agreed to by a liquor license applicant due to undue pressure or influence.
- ABC Law Section 110-B(1) should be amended to read “Not less than fifteen” days rather than “thirty.”

Community Boards and Nightlife Should Work Collaboratively

In our conversations with venue owners and other industry stakeholders, we heard a variety of horror stories about interactions with local community boards, ranging from

descriptions of neighbors turning out to accuse them (falsely) of all manner of illegal conduct, to dismissing their concerns completely, to not understanding the very basics of the nightlife industry. Despite these contentious interactions, we are hopeful that a general atmosphere of communication and collaboration can be fostered between community boards and nightlife.

Community boards serve a real and important function in making their neighborhoods a place people want to live, work, and open businesses. As a result, community boards and music venue owners can and should work together to bring small cultural businesses to neighborhoods in a way that is both safe and respectful to the area's residents. One way music venue owners can achieve this is by doing more to educate patrons on respecting neighbors, and in proactively mitigating potential issues that would disrupt the everyday lives of those in the community.

Community Boards Should Meet Every Month

That being said, there are specific revisions that could be made to the NY City Charter in order to make community boards operate more efficiently and function more in favor of small business owners, including music venue owners and operators. First, while community boards are obligated to hold meetings every month, except July and August, we have heard from industry professionals that monthly meetings do not always take place.³⁷⁹ There should be repercussions for community boards that do not hold meetings each of the 10 months they are legally obligated to do so.

Perhaps the most effective way to encourage regular meetings is to mandate the removal of the chairperson if the community board fails to convene. This could occur in a couple of ways, of varying degrees of severity.

- The chairperson could be removed from their position of the chairman of the board but remain on the board.
- The chairperson could be removed from the board entirely.
 - Either for a specified term period; or
 - In perpetuity.

A repercussion of this nature will incentive a community board chairperson to make absolutely sure the board meets each and every month.

³⁷⁹ N.Y. City Charter § 2800(h).

We would also like to learn if there is a compelling reason why community boards are not obligated to meet in the months of July and August. This is a two-month period where business continues on in NYC and can severely affect the fates of small business owners in nightlife. If there is no truly compelling reason why boards should not meet during these months, boards should be mandated to meet once, each of the 12 months of the year.

Community Board Members Should Receive “Basic Training” on the Small Businesses in their Community, Including in Nightlife

For our purposes, we propose that board members be trained and educated to understand the operations and needs of small businesses in their communities. Upon nomination, new and re-appointed board members should hear presentations and host roundtable discussions with small businesses (including in nightlife) to better understand local challenges and, hopefully, use this knowledge to make decisions to improve conditions for the community.

Community Boards Should Proactively Reach out to Small Businesses in their Communities

Additionally, NY City Charter § 2800(d)(21)³⁸⁰ should be amended to further include the concerns of small businesses in community board processes. This code section says that the board shall “[c]onduct substantial public outreach, including identifying the organizations active in the community district, maintaining a list of the names and mailing addresses of such community organizations, and making such names and, with the consent of the organization, mailing addresses available to the public upon request.”³⁸¹ Simply, “small businesses” should be included as part of the public outreach, besides just “organizations.” The section should be amended to read “... organizations and small businesses active in the community district.” This amendment would help to foster meaningful interactions between small businesses (of all kinds, not just in nightlife) in a community and the community board which represents them.

³⁸⁰ N.Y. City Charter § 2800(d)(21).

³⁸¹ *Id.*

Community Boards Should Have More Stringent Term Limits

Community boards should not function as fiefdoms for long-serving members. The Charter was recently amended to include “term limits,”³⁸² *i.e.*, mandating a one-term break after serving four consecutive terms. But we believe this amendment did not go far enough, as there is no actual cap on the total number of terms a board member can serve. Four terms total (consecutive or otherwise) seems to be a reasonable amount for a community board member to serve, although we are open to hearing other proposals.

Term limits would also help change the age imbalance on community boards, as Councilmember Rafael Espinal, explained (following the adoption of the current term limit rules),

Councilmember Rafael Espinal, who was elected to the State Assembly at the age of 27, believes that one of the reasons community boards tend to lack younger representation is due to a now-overturned policy: unlimited term limits. Before this year, board members could serve indefinitely. “I hope moving forward with term limits that we start seeing a shift in this demographics and seeing young people wanting to get involved,” said Espinal, who represents Community Boards 4 and 5. “And term limits will make space for that.”³⁸³

In sum, the City must do more to further limit community board terms. A higher turnover rate will lead to new ideas, different perspectives, and fresh enthusiasm.

Community Boards Should Hold their Public Meetings Online

The Charter requires the community board to give “adequate public notice of its meetings and hearings” and also to make these “meetings and hearings available for broadcasting and cablecasting.”³⁸⁴ Additionally, a period of time shall be “shall set aside time

³⁸² Noah Manskar, *NYC Charter Amendments Win Approval From Voters*, Patch (Nov. 7, 2018, 9:10 AM), <https://patch.com/new-york/new-york-city/nyc-charter-amendments-win-approval-voters>.

³⁸³ Kelly Mena & Meaghan McGoldrick, *How well does your community board represent the district? Not very.*, Brooklyn Eagle (Nov. 26, 2019), <https://brooklyneagle.com/articles/2019/11/26/community-board-diversity/>.

³⁸⁴ N.Y. City Charter § 2800(h).

to hear from the public.”³⁸⁵ Especially when considering the COVID-19 crisis, community boards should be required going forward to both make public community board meetings accessible online and require that they shall “hear from the public” who have gathered on the livestream. This would make community boards more accessible to the general community, not all of whom have the capacity to make it to the place of assembly for the community board meeting, and thus would be more equitable. In terms of nightlife, it would allow industry stakeholders to attend their monthly community board meetings much more easily, despite having busy schedules running their businesses.

Community Boards Meetings Should Have Higher Evidentiary Standards

There should be consequences (such as suspension or removal for board members) for those who blatantly misrepresent the facts about venue owners (and individuals and entities in general) at community board meetings. Problems are not solved by propagating gossip, half-truths, and outright lies. Higher evidentiary standards should also be applied to those who present their business plans in front of community boards. The end result would be that the community board decisions are based on facts, not biased opinions or undue influence.

Community Boards Should Better Represent their Communities (in Terms of Diversity)

Looking to the Charter, borough presidents are advised to consider how their appointments reflect the diversity of their community, including such factors as “race, ethnicity, gender, age, disability status, sexual orientation, language and other characteristics the borough president deems relevant to promoting diversity and inclusion of under-represented groups and communities within community boards, to apply for appointment.”³⁸⁶ However, one consistent complaint we have heard is that community boards do not accurately reflect the communities they represent. There are also worries that community boards do not consistently represent the best interests of the people they serve.

While we are sure there are plenty of community board members who genuinely take their roles seriously and support small businesses, it is important to analyze whether or not

³⁸⁵ *Id.*

³⁸⁶ N.Y.C. Charter. ch. 70, §2800(a).

community boards reflect their communities in a range of different categories, including age, race, and gender.

Starting first with gender, 43% of board members across the city are female, despite the fact that women make up roughly half of the city's population.³⁸⁷ We should strive to make gender representation equal.

With regard to race, although, as a whole, the "ratio of non-white to white members roughly matches the city's demographics,"³⁸⁸ it is clear that specific community boards must improve in matters of diversity and inclusion. An example of a community board that seems to be making such efforts is Community Board 11 in the Bronx. In 2018, "64% of board members [were] white in a district that is just 22% white."³⁸⁹ One Hispanic resident of this particular community said the Board was "set in their ways" and that the Board "[didn't] understand that you have to accept the new residents and the changes in demographics."³⁹⁰ In a 2019 update on the Board's website, it shows that Bronx Community Board 11 is now 50% white.³⁹¹ While the statistics above suggest an effort toward inclusion is being made, it is imperative that these efforts remain robust and produce equitable results.³⁹² In sum, community boards, such as Community Board 11, should continue to work toward reflecting the diverse communities they serve.

Lastly, there is an imbalance in community boards when it comes to age. "According to the 2010 Census, the borough's [Brooklyn] median age is about 35 years old — but community board membership is in the 45 to 64 age group."³⁹³ It is imperative that younger people become more active and invested in the communities in which they reside. Promoting involvement in community boards would be a step in the right direction.

³⁸⁷ Rachel Holliday Smith, Ann Choi, & Clifford Michel, *Does Your Community Board Reflect You and Your Neighbors? Find Out.*, THE CITY (Jan. 29, 2020, 4:05 AM), <https://www.thecity.nyc/government/2020/1/29/21210566/does-your-community-board-reflect-you-and-your-neighbors-find-out>.

³⁸⁸ *Id.*

³⁸⁹ *Id.*

³⁹⁰ *Id.*

³⁹¹ N.Y.C. Bronx Community Board 11, nyc.gov, <https://www1.nyc.gov/site/bronxcb11/about/demographics.page> (last visited Aug. 7, 2020).

³⁹² *Id.*

³⁹³ Kelly Mena & Meaghan McGoldrick, *How well does your community board represent the district? Not very.*, BROOKLYN EAGLE (Nov. 26, 2019), <https://brooklyneagle.com/articles/2019/11/26/community-board-diversity/>.

To conclude, the City should start a legitimate campaign to spread awareness and encourage people to become involved with or seek positions on their community boards. The campaigns should specifically seek to include younger New Yorkers, as community boards typically are stereotyped as being made up of only older residents (see our statistics above). Having increased young New Yorkers serving on the board would bring a more well-rounded perspective to their community's representation, not to mention a better understanding of the nightlife industry.

Nightlife Specific Reforms for Community Boards

Specific nightlife-related reforms can be included in an amendment to the community board section of the Charter. Under NY City Charter § 2800(i), community boards are empowered to “create committees on matters relating to its duties and responsibilities.”³⁹⁴ Each community board should create a committee that addresses and considers the particular challenges posed to the nightlife industry, in the context of the nightlife establishments located within their communities. Because these committees can contain members that are not actually community board members, they can include music venue owners and other industry stakeholders, as long as they have “a residence or significant interest in the community.”³⁹⁵ Owning a small business within a community would certainly qualify as having an “interest” in that community. A committee on nightlife in each community board would go a long way to addressing industry concerns that the small business owners we have spoken to have about the way the boards operate. It is important to note that venue owners and other industry stakeholders would need to maintain an active presence in order for this solution to work as intended.

We also wholeheartedly encourage venues owners, event producers, and others in the nightlife industry to apply for consideration for appointment. Reforms can go only so far without effort from nightlife stakeholders. Additionally, nightlife stakeholders should organize to make recommendations to their borough president for appointments as § 2800(i) gives this power to outside groups. These outside groups are loosely defined as “civic groups and other

³⁹⁴ N.Y. City Charter § 2800(i).

³⁹⁵ *Id.*

community groups and neighborhood associations,” so it is certainly feasible for a loose organization of music venues to “submit nominations to the borough president and to council members.”³⁹⁶ Again, this would only help to make sure the interests of the nightlife industry are represented on community boards across the City.

The Description of the District Manager Position in NY City Charter § 2800(f) Should Be Revised

Lastly, we take a look at the district manager position. The district manager is supposed to function as “complaint takers, municipal managers, information sources, community organizers, mediators, advocates, and much more.”³⁹⁷ According to § 2800(f),

[e]ach community board, within the budgetary appropriations therefor, shall appoint a district manager and shall be authorized to utilize the services of such other professional staff and consultants, including planners and other experts, as it may deem appropriate, all of whom shall serve at the pleasure of the community board and shall provide the board with the staff support and technical assistance it requires to fulfill the duties assigned to it by this charter or other law.

The district manager shall (1) have responsibility for processing service complaints, (2) preside at meetings of the district service cabinet and (3) perform such other duties as are assigned by the community board in accordance with the statement of duties required by paragraph seven of subdivision d of this section.³⁹⁸

Further, community boards shall “make available for reasonable public inspection, by-laws and statements of the duties assigned by the board to its district manager”³⁹⁹

³⁹⁶ *Id.*

³⁹⁷ *District Manager*, COMMUNITY BOARD NO. 1 QUEENS, N.Y. CITY, http://www.nyc.gov/html/qnscb1/html/explained/explained_manager.shtml (last visited Aug. 7, 2020).

³⁹⁸ N.Y. City Charter § 2800(f).

³⁹⁹ N.Y. City Charter § 2800(d)(7).

According to the statute, the district manager is supposed to “serve at the pleasure of the community board.”⁴⁰⁰ Very clearly the intent of the position, by the authors of the Charter, is that this position be one that takes on a secretarial role for the community board. The city website also places the district manager in what is supposed to be a more subservient role to the community board when they describe the position:

The main responsibility of the District office is to receive and resolve complaints from community residents. They also process permits for block parties, street fairs, etc. In addition, the office handles special projects such as [sic] organizing tenants and merchants associations, coordinating neighborhood cleanup programs, publicizing special events, and more, depending on community needs.⁴⁰¹

In reality, this is not how this position functions, as the district manager can often be even more powerful and hold more political capital than even the chairman of the community board. Some anecdotes from venue owners are below:

- District managers can and will target specific nightlife owners in an attempt to have their liquor licenses revoked, which is functionally a death knell in the industry.
- Some district managers overtly seek to influence the decisions community boards make regarding businesses in their neighborhood.
- Because district managers have a wealth of contacts in city government, they use these contacts to influence community board decisions. Relatedly, they wield this power to serve as the “voice of the community board,” particularly in the press.

In sum, district managers should not have the ability to wield a tremendous amount of political power or single handedly crush small businesses they are not fond of. It is imperative

⁴⁰⁰ N.Y. City Charter § 2800(f).

⁴⁰¹ District Manager, *supra* note 397.

that this position be overhauled and clarified to reflect its original intent.

Our Proposed Reforms to the District Manager Position

First, the district manager's role in the Charter should be clarified as “a supporting role” to the community board. The charter’s listing of the district manager’s responsibilities should also be more clearly defined and tailored to this effect.

Second, the district manager should not be allowed to function as a quasi-51st member of the community board. It should be enshrined in the Charter that a district manager must remain neutral and impartial to any proposals and issues before the community board. This change would eliminate the ability for a district manager to purposely target any small businesses they take issue with. As an addendum to the proposed neutral and impartial position, district managers should be removed for cause for any such violation.

Third, the district manager should not be allowed to simultaneously serve as a community board member, as this constitutes a conflict of interest and undoubtedly affects the performance of a district manager’s duties.

Office of Nightlife

Office of Nightlife Roadmap

In this section, we analyze the purpose of Mayor de Blasio’s establishment of the Office of Nightlife and the positions established under its umbrella. Next, we propose the creation of a new project manager position, whose role is to help guide small nightlife businesses in their dealings with the City.

About the Office of Nightlife

The creation of the Office of Nightlife was signed into law in September of 2017 by Mayor de Blasio.⁴⁰² As the Mayor explained:

⁴⁰² *Mayor de Blasio Signs Bill Establishing "Nightlife Mayor,"* NYC.GOV (Sep. 19, 2017), <https://www1.nyc.gov/site/mome/news/091917-nightlife-office.page>.

Nightlife is part of the soul of our city. The musicians, artists and entrepreneurs that make up this community are crucial not only to our culture, but our economy ... I am thrilled to launch our new Office of Nightlife which will help coordinate the businesses, communities and City agencies to help New York City's nightlife industry prosper safely and ensure it works for all New Yorkers.⁴⁰³

The bill included the creation of a position of a “Nightlife Mayor” for NYC, which was filled by Ariel Palitz in March of 2018.⁴⁰⁴ The Office itself is meant to serve as a “liaison for New York City's nightlife industry and community to all City agencies.”⁴⁰⁵ Additionally, the “purpose [of the Office] is to help establish and coordinate systemic solutions to support the nighttime economy, culture, and quality of life.”⁴⁰⁶ There are three other members of staff in the Office of Nightlife, other than the “Nightlife Mayor,” whose official title is Senior Executive Director.⁴⁰⁷ These positions are: 1) Deputy Director; 2) Nightlife Industry and Community Relations, Associate Director; and 3) Strategic Planning Associate.⁴⁰⁸

Create a “Project Manager” Position in the Mayor’s Office of Nightlife

There is room under the Office of Nightlife for a more direct and collaborative relationship with venue owners and event producers, which would require the creation of two Nightlife Project Manager positions to assist with agency compliance matters.

Venue owners and event producers would have the opportunity to book project managers to review plans and permit applications as well as execute on-site “issue spotting” walk-throughs to prevent potential violations from occurring. This would have two practical benefits. First, the likelihood of receiving plan and permit approvals as well as passing agency inspections would increase. Second, venue owners and event producers would have additional support in creating safe environments for their patrons and avoiding potential risks.

⁴⁰³ Mayor’s Office of Media and Entertainment, *Mayor de Blasio Signs Bill Establishing “Nightlife Mayor,”* nyc.gov (Sep. 19, 2017), <https://www1.nyc.gov/site/mome/news/091917-nightlife-office.page>.

⁴⁰⁴ Feuer, *supra* note 287.

⁴⁰⁵ Mayor’s Office of Media and Entertainment, *About the Office of Nightlife*, CITY.GOV, <https://www1.nyc.gov/site/mome/nightlife/about-office-of-nightlife.page> (last visited Aug. 7, 2020).

⁴⁰⁶ *Id.*

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.*

Internships underneath the Project Manager positions. College, trade school, and other interns could be trained to perform supporting roles to project managers. In addition to providing support to the two full-time employees, young and career changing New Yorkers would have the opportunity to take advantage of valuable, hands-on learning experiences.

City Planning

Strengthening Communities Through the Celebration of Music, Culture, and Art

While the focus of our project is on supporting the small business owners that operate music venues and produce live events in NYC, creative expression, racial equality, and social justice are interrelated and, therefore, should be concurrently discussed. At the beginning of this section, we first identify and discuss issues tied to race, class, and NYC politics. Next, we transition our focus to the music community and identify ways in which the promulgation and enforcement of certain quality of life regulations, such as the Cabaret Law, have suppressed cultural expression and economic development throughout the City. Finally, we propose ways in which music culture and the law can be utilized to deconstruct racist and classist systems, strengthen NYC communities, and promote long-term and sustainable economic growth in the City and State of NY.

Race, Class, and Real Estate in NYC

Although NYC is generally celebrated for its cultural diversity, industrious work ethic, and progressive values, our past is not free of moral corruption, crony capitalism, and bureaucratic bloat. Since the early 1900s, bigoted individuals and compromised institutions have either planned or acquiesced in racist and classist tactics, such as forced deindustrialization, redlining, blockbusting, and rapid rezoning to accumulate absolute wealth, power, and control. Traces of these abhorrent tactics live on today through regulatory and political capture, particularly in the areas of city planning and real estate development.⁴⁰⁹

⁴⁰⁹ Will Kenton, *Regulatory Capture*, INVESTOPEDIA (Oct. 23, 2019), <https://www.investopedia.com/terms/r/regulatory-capture.asp>; Shanta Devarajan, *Three reasons why industrial policy fails*, BROOKINGS (Jan. 14, 2016), <https://www.brookings.edu/blog/future-development/2016/01/14/three-reasons-why-industrial-policy-fails/>.

Throughout the City's neighborhoods, the ever-widening income gap has grown increasingly visceral due to unbridled real estate development and hyper-gentrification. In "long-gentrified" Chelsea, for example, residents of Elliot, Fulton, and Chelsea Houses live next to "luxury apartment towers, renovated storefronts and offices," while their apartment buildings lack sufficient maintenance services and are underserved by the NYC Housing Authority.⁴¹⁰

Although public housing residents may enjoy the benefits of "spectacular public spaces, like the High Line"⁴¹¹ and Hudson River Park,⁴¹² these outdoor improvements have come with an unpalatable trade-off. In the 2015 article, *In Chelsea, A Great Wealth Divide*, the *New York Times* reported on the shuttering of small, locally owned businesses and the erasure of community hangouts. All of the "old mom-and-pop stores, the bodegas, the low-rise buildings and the gathering spots" had been "replaced with higher-end substitutes."⁴¹³ And "[o]ld standbys like lunch counters and delis, inexpensive fishmongers and butchers, laundromats and convenience stores ha[d] grown scarcer, or disappeared altogether..."⁴¹⁴ As a result, young, elderly, and working class residents were priced out of nearly all of their local markets, with community members like Ms. Darlene Waters, a retired assistant nursery school teacher in her 70s, traveling as far as Secaucus, NJ to purchase reasonably priced goods.⁴¹⁵

As financial anxiety looms over Elliot, Fulton, and Chelsea Houses, "[t]he struggle with affordability"⁴¹⁶ threatens to displace the community's residents:

⁴¹⁰ Mireya Navarra, *In Chelsea, a Great Wealth Divide*, N.Y. TIMES (Oct. 23, 2015), <https://www.nytimes.com/2015/10/25/nyregion/in-chelsea-a-great-wealth-divide.html>; see also Caron Atlas, Emily Ahn Levy, Claudie Mabry, Tom Oesau and Sharon Polli, *Naturally Occurring Cultural Districts NY, Creative Transformations: Stories, Learnings, and Recommendations to Support Arts, Culture, and Public Housing Communities* (May 31, 2019), https://static1.squarespace.com/static/56a13fbbbe7b9646c1decb1f/t/5d8a8da6bd10412a4bad6ae0/1569361332289/nocdny.creativetransformations.final_5.31.19-1.pdf (last visited Aug. 7, 2020) ("The many problems related to public housing in New York City are well known. A history of disinvestment. Decline of federal funding. Isolation and physical neglect. During the building of public housing super blocks, communities were broken apart and a diverse range of cultural spaces were lost, leaving behind a multi-generational trauma that extends far beyond inadequate facilities").

⁴¹¹ *Id.*

⁴¹² HUDSON RIVER PARK, <https://hudsonriverpark.org/visit/plan-your-visit/> (last visited Aug. 6, 2020).

⁴¹³ Navarra, *supra* note 410.

⁴¹⁴ *Id.*

⁴¹⁵ *Id.*

⁴¹⁶ *Id.*

Ms. Waters's grandson, Justin Waters, 27, a computer systems analyst for the Hudson Guild, a community agency, said he did not see himself staying in Chelsea despite the advantages of the location. "Every single year, prices increase.... You shouldn't constantly struggle to live somewhere. At that point you're not even enjoying it."⁴¹⁷

While the defenders of gentrification rationalize unbridled real estate development with the reduced presence of violent crime⁴¹⁸ and the creation of "spectacular public spaces, like the High Line," these arguments are unfounded.⁴¹⁹ Having access to safe city streets and well-serviced outdoor spaces are rights all New Yorkers should enjoy. Moreover, the public trust doctrine, which directs the government to cultivate and preserve City parkland, "is ancient and firmly established in our precedent."⁴²⁰ Therefore, it should not take private real estate interests to spur City investment in community safety and scenic outdoor spaces.⁴²¹

It is important to note that hyper-gentrification is not due to "market forces" or a natural "trend of the times."⁴²² This divisive tactic of ownership and control goes hand-in-hand with forced deindustrialization and is a product of the racist and classist ideologies the so-called Elites of New York have perpetuated since the early 20th century. In *Vanishing NY*, Jeremiah Moss explains:

In the first decade of the 1900s, nearly half of New York's workforce worked in manufacturing, and through progressive politics, the city had become, in the words of labor leader Samuel Gompers, 'the cradle of the American labor movement.' As the working class rose, so did the counterculture, and the two continued to coexist, despite their differences...The black population of New York was also

⁴¹⁷ Navarra, *supra* note 410.

⁴¹⁸ Dara Lind, *Gentrification reduces crime — tearing down public housing doesn't*, VOX (May 7, 2014, 10:40 AM), <https://www.vox.com/2014/5/7/5687676/coffee-shop-gentrification-reduces-crime-tearing-down-public-housing>; see also Emily Badger, *How to Predict Gentrification: Look for Falling Crime*, N.Y. Times (Jan. 5, 2017), <https://www.nytimes.com/2017/01/05/upshot/how-to-predict-gentrification-look-for-falling-crime.html>.

⁴¹⁹ Navarra, *supra* note 410.

⁴²⁰ *Matter of Avella v. City of NY*, 29 N.Y.3d 429, 431 (1st Dep't 2017).

⁴²¹ Navarra, *supra* note 410.

⁴²² MOSS, *supra* note 8, at 61-63.

growing rapidly due to the Great Migration....Neighborhoods became more mixed, and while New York was hardly a non-racist utopia, it offered more opportunities for diversity than the American Heartland. This would not do.

Interracial, lower-class mixing has always been a threat to power elites. For centuries, they've used the same strategy to stop it.... In what has become known as the 'racial bribe,' poor whites were given special privileges over enslaved blacks. For example, as Michelle Alexander points out in the *New Jim Crow*, white servants could police slaves and their labor was protected from black competition. So began institutional racism in America. With that, the colonial elites not only succeeded in splitting black and white workers; they also intertwined race and class in a perpetually confounding confusion that continues to thwart progress today.

In the early twentieth century, the Elites of New York reinforced their ancestors' system. They squeezed the working class, reducing the number of industrial jobs, and pitted immigrants and blacks against each other for dwindling resources.... Too often, when people talk about the deindustrialization of NY, they talk about it like it happened naturally, a trend of the times, nothing more than market forces. Journalist Robert Fitch offered an alternative explanation in his 1996 book, *The Assassination of New York*. Poring over the 1929 Regional Plan of New York and Its Environs, Fitch discovered something startling. The death of industrial New York was planned by a privately organized group of bankers and real estate developers. They didn't like having all those blue-collar, multiethnic people taking up space on valuable Manhattan land, so they appointed themselves the Regional Plan Association (RPA) and, starting in 1922, schemed to destroy working-class New York by zoning away industrial areas and claiming those territories for finance, insurance, and real estate (FIRE), upper-class fields ruled at the time by Anglo-Saxon Americans....

You don't have to be a conspiracy theorist to see that the financial rulers wanted sociological failure, to disrupt the progressive working class of New York, dividing whites from blacks, to protect and expand their own power.⁴²³

The deindustrialization and rezoning policies described above are not the only poisonous tactics power elites have deployed to accumulate power and divide the city along racial, ethnic, and socioeconomic lines. In the section below, we turn to music and nightlife culture and discuss how quality of life regulations, such as the Cabaret Law, enacted in 1926, have been weaponized to quash diversity and creativity and target music spaces that are owned, operated, or patronized by progressive groups and people of color.

Policing Through Red Tape: A History of the Cabaret Law

Enacted in the Prohibition Era with the intent to “patrol speakeasies,”⁴²⁴ the Cabaret Law was utilized by law enforcement to raid music spaces and track and control musicians who wished to legally perform in jazz clubs, cabarets, nightclubs, and other locales throughout NYC. Between the 1940s and 1970s, the law was deployed “to target racially mixed jazz clubs in Harlem,”⁴²⁵ prevent artists with police records, such as Billie Holiday and Ray Charles, from legally performing in NYC, as well as fining underground coffee houses in Greenwich Village for hosting musicians without cabaret licenses.

In the 1990s, at the peak of the rave era in NYC, the Giuliani administration dusted off the Cabaret Law to “shut down dance clubs as part of its quality-of-life initiatives.”⁴²⁶ While “rave culture bloomed around the world, New Yorkers learned their city had a no-dancing law, sometimes only when a task force — known as [M.A.R.C.H.], for Multi Agency Response to Community Hotspots — swooped in.”⁴²⁷ This policy of raiding music venues that booked DJs

⁴²³ MOSS, *supra* note 8 at 60-62.

⁴²⁴ Annie Correal, *After 91 Years, New York Will Let Its People Boogie*, N.Y. TIMES (Oct. 30, 2017), <https://www.nytimes.com/2017/10/30/nyregion/new-york-cabaret-law-repeal.html#:~:text=A%20nearly%20century%20old%20law,set%20to%20be%20struck%20down>.

⁴²⁵ *Id.*

⁴²⁶ *Id.*

⁴²⁷ *Id.*

and artists with danceable setlists proceeded, and increased, under the Bloomberg administration.

In a 2003 article, the *New York Times* interviewed a clubgoer outside the now defunct meatpacking nightclub, Cielo, who lamented the loss of downtown Manhattan's clubs due to the endless barrage of cabaret fines.⁴²⁸ Although the Department of Consumer Affairs had acknowledged the Cabaret Law was inefficient in tackling "the more serious problems surrounding nightclubs, like noise, security or loitering," with the law still firmly in place, the [M.A.R.C.H.] task force continued to "crack down on unlicensed cabarets."⁴²⁹

In the early de Blasio years, enforcement lessened, but the Cabaret Law still loomed over the heads of small business owners. For instance, in 2013, "Andrew Muchmore, a lawyer and bar owner, filed a...lawsuit against the city after his bar, Muchmore's, in Williamsburg, Brooklyn, was slapped with a cabaret violation...by a police officer who spotted people 'swaying' at a rock show while investigating a noise complaint...."⁴³⁰

In late 2017, although the "repeal" of the Cabaret Law was welcomed with great fanfare, it was largely symbolic. In the section below, we place legal text and plain English side by side to explain (1) why the ban on dancing is still alive and well; (2) how to check and/or get a space approved for dancing; and (3) why zoning regulations restricting ticketed music events and patron dancing should be changed.

The Cabaret Law is Alive and Well.

The revised Cabaret Law, which eliminates the Department of Consumer and Worker Protection f/k/a Department of Consumer Affairs license requirement, states the following:

Title: A Local Law to amend the administrative code of the city of New York, in relation to security cameras and security guards at certain eating or drinking establishments and repealing subchapter 20 of title 20 of such code, relating to licensing public dance halls, cabarets and catering establishments.

⁴²⁸ Patrick Healy, *Ways to Flout Cabaret Law As Varied as Dance Steps*, N.Y. TIMES (June 28, 2003), <https://www.nytimes.com/2003/06/28/nyregion/ways-to-flout-cabaret-law-as-varied-as-dance-steps.html>.

⁴²⁹ *Id.*

⁴³⁰ Correal, *supra* note 424.

Summary: This bill repeals the requirement in the Administrative Code for public dance halls, cabarets, and catering establishments to obtain a license, but retains various security measures in the law. Establishments previously required to obtain a cabaret license must continue to abide by requirements 1) to install and maintain security cameras and, 2) if they employ security guards, to ensure such security guards are licensed pursuant to state law and to maintain a roster of such security guards.⁴³¹

The Cabaret Law Explained: Fact Sheet from the Office of Nightlife.

Enacted in 1926, the New York City Cabaret Law regulated patron dancing at commercial establishments. Dancing would be allowed once an establishment could show that it was in compliance with all pertinent City codes, including zoning, building, health, safety, and fire. The license was issued by the Department of Consumer Affairs, now known as Department of Consumer and Worker Protection, who no longer require or issue the Cabaret license.

What are the current regulations for dancing at nightlife venues?

Though the requirement to obtain a cabaret license for all venues to allow patron dancing has been eliminated, there are still regulations that govern dancing, including the following:

- Zoning (NYC Dept. of City Planning)
- Fire Code (NYC Fire Department)
- Building Code (NYC Dept. of Buildings)
- Community Board (Community Affairs Unit)

⁴³¹ Council of City of NY Intro No. 1652-2017, § 1, proposing amendment to Administrative Code § 7703 (n) (Nuisance Abatement Law; Public nuisance; in relation to security cameras and security guards at certain eating or drinking establishments) and repealing §§20-359-20-370.20 (Consumer Affairs; Licenses; Public Dance Halls; Cabarets; and Catering Establishments),
<https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3086319&GUID=6FDA3305-06B3-47B3-9DF6-21B605C5A8EE&Options=&Search=>.

- Method of Operation (NY State Liquor Authority)
- Certificate of Occupancy (NYC Dept. of Buildings)

In addition, if the venue has a license from the State Liquor Authority and did not originally apply for patron dancing, the venue will need to file a Change Method of Operation Application with the SLA to make patron dancing an approved part of their liquor license.⁴³²

While the requirement to obtain a Cabaret license has been repealed, the underlying requirements that allow for patron dancing were not eliminated. Only the last item in the process, the cabaret license itself, was eliminated. If the nightlife venue was not permitted to have dancing before the cabaret license was repealed, it is likely that it is still not allowed.⁴³³

Overview of the Zoning Resolution (ZR)

The ban on dancing appears to be primarily due to zoning use restrictions. In the next several pages, we highlight key information on the Zoning Resolution (ZR) as it pertains to music spaces. We also include a brief analysis and our open questions on ZR issues.

Law: Zoning Resolution

Department: City Planning

The Zoning Resolution consists of 14 Articles and 10 Appendices, plus 126 Zoning Maps, that establish the zoning districts for the City and the regulations governing land use and development. Articles I through VII contain the use,

⁴³² See also *Cabaret License Repeal*, NYC HOSPITALITY ALLIANCE, <https://www.thencyalliance.org/information/cabaret-license-repeal> (last visited Aug. 6, 2020). (“[The] repeal does not mean that people are now allowed to dance in every restaurant, bar, club or venue. To allow dancing a business must still meet the proper zoning requirements, have the proper public assembly permit, have video cameras and fire safety systems. And, if they employ security guards they must meet additional standards. When they meet all of those requirements, the business will need to amend their liquor license to permit dancing in their licensed establishment”).

⁴³³ Mayor’s Office of Nightlife, *Understanding the Cabaret Law Repeal* (Sep. 2019), <https://www1.nyc.gov/assets/mome/pdf/understanding-the-cabaret-law-repeal.pdf>.

bulk, parking and other applicable regulations for each zoning district. The three major articles are Article II, with regulations for residence districts, Article III for commercial districts, and Article IV for manufacturing districts. Articles VIII through XIV set forth the purpose and regulations for each Special Purpose District.⁴³⁴

Some information on Use Groups from the Zoning Handbook.

In the Zoning Resolution, all permissible uses have been categorized into four broad use categories: *residential*, *community facility*, *commercial* and *manufacturing*. An apartment building contains residential uses, a hospital or school is a community facility use, an office tower or a shopping mall are commercial uses and a concrete plant is a manufacturing use.

A building in a Commercial District that contains residences along with either a commercial use, such as a ground floor restaurant, or a community facility use, like a doctor's office, is a *mixed building*.

All of the permitted types of uses in the Zoning Resolution are further divided into 18 Use Groups, which are clustered into these four broad categories:

- Residential – Use Groups 1 and 2
- Community facility – Use Groups 3 and 4
- Commercial – Use Groups 5 through 16
- Manufacturing – Use Groups 17 and 18

In general, the higher the use group, the more commercial or industrial the character of the activity is. Use Group 1 is limited to single-family detached homes, while Use Group 18 includes heavy industrial activities such as those that involve hazardous materials or have significant emissions.

⁴³⁴ N.Y. City Zoning Resolution, <https://zr.planning.nyc.gov/>.

All zoning districts permit some combination of these use groups, and more than just the categories denoted by the district name. Residence Districts permit community facility uses in addition to residential uses; most Commercial Districts also permit residential and community facility uses; and Manufacturing Districts also permit many commercial uses and some community facility uses.

Uses considered to be in conflict with the purpose of the district are prohibited or restricted. Commercial and manufacturing use groups are not permitted use groups in Residence Districts, and residential use groups are generally not permitted in Manufacturing Districts. Use regulations are set forth in Chapter 2 of Articles II, III and IV of the Zoning Resolution, and as a convenience, are summarized in a list in Appendix A at the back of the Resolution.⁴³⁵

Article I

Chapter 1 - Title, Establishment of Control and Interpretations of Regulations

11-121 - District Names

Each zoning district is designated by a letter indicating the general land use classification – R for Residence, C for Commercial and M for Manufacturing – followed by one or two numbers and, sometimes, a letter suffix.

In residence districts, generally, the higher the first number, the greater the density permitted and the larger the building. Parking requirements usually decrease as density increases. A second number, following a hyphen (such as R3-1 or R3-2), denotes variations in use, bulk or parking regulations among districts within a common density category.

⁴³⁵ N.Y. CITY DEPARTMENT OF CITY PLANNING, ZONING HANDBOOK 16 (2018),
<https://www1.nyc.gov/assets/planning/download/pdf/about/publications/zoning-handbook/zoning-handbook.pdf>.

In commercial and manufacturing districts, the first number denotes the intensity of permitted uses; the higher the first number, generally, the broader the scope of uses that are permitted and the more significant the land use impact of such uses. The second number, following a hyphen, denotes differences in bulk or parking regulations within a common use category. The higher the second number, generally, the larger the building permitted and/or the lower the parking requirements.

Letter suffixes have been added to the designations of certain districts (such as R10A) to indicate contextual counterparts that seek to maintain, enhance or establish new neighborhood characteristics or building scale.⁴³⁶

APPENDIX A-INDEX OF USES

The following is a listing in alphabetical order of *uses* allowed in this Resolution either as *uses* permitted as-of-right, or as *uses* permitted by special permit, together with the Use Group in which each is listed, the parking requirement category of *commercial uses*, if applicable, and the district or districts in which it is permitted.

When a district associated with a given *use* is designated in the Index with an asterisk (*), the *use* is permitted in such district only by special permit of the Board of Standards and Appeals, as set forth in the applicable portions of this Resolution. When a district associated with a given *use* is designated in the Index with a double asterisk (**), the *use* is permitted in such district only by special permit of the City Planning Commission, as set forth in the applicable portions of this Resolution.

Uses listed in Use Group 11A, 16, 17, or 18 as permitted *uses* in C8 or *Manufacturing Districts* must also meet the applicable performance standards for these districts.

Uses listed in Use Group 18 are permitted in M1 or M2 Districts if they can comply with the applicable performance standards for those districts.

⁴³⁶ N.Y. City Zoning Resolution § 11-121, <https://zr.planning.nyc.gov/article-i/chapter-1#11-121> (District Names).

This Index is established as a reference guide to this Resolution but is not an integral part thereof. Whenever there is any difference in meaning or implication between the provisions of this Resolution as set forth in Articles I through VII and the text of this Index, the text of the Resolution shall prevail.

Use regulations governing the several classes of districts are set forth in the following Chapters of this Resolution:

Residence Districts Article II, Chapter 2

Commercial Districts Article III, Chapter 2

Manufacturing Districts Article IV, Chapter 2⁴³⁷

ZR § 11-122, <https://zr.planning.nyc.gov/article-i/chapter-1/11-122> (Districts established).

DISTRICTS IN WHICH DANCING IS LEGALLY PERMITTED⁴³⁸
(ALBEIT WITH CONDITIONS)

| <i>ROW *</i> | <i>USE</i> | <i>USE GROUP</i> | <i>DISTRICTS IN WHICH PERMITTED</i> |
|--------------|--|------------------|-------------------------------------|
| | Clubs: Nightclubs (See Eating or drinking places) Eating or drinking establishments: | | |

⁴³⁷ ZR Appendix-A, <https://zr.planning.nyc.gov/appendix-index-uses> (Index of Uses).

⁴³⁸ *Id.*

| | | | |
|-----|--|----|---|
| [1] | Including those which provide outdoor table service or have music for which there is no cover charge and no specified showtime [PRC–B] | 6 | C1 C2 C3* C4 C5 C6 C8 M1 ⁹ M2 M3 |
| [2] | With accessory drive-through facilities [PRC–B] | 6 | C1 ⁸ C2 C4 C6 C8 M1 ⁹ M2 M3 |
| [3] | With musical entertainment but not dancing, with a capacity of 200 persons or less [PRC–B] | 6 | C1 C2 C3* C4 C5 C6 C8 M1 M2 M3 |
| [4] | With entertainment but not dancing, with a capacity of 200 persons or less [PRC–B] | 6 | C1 ¹⁰ C2 ¹⁰ C3* C4 C5* C6 C8 M1 ⁹ M2 M3 |
| [5] | With entertainment and a capacity of more than 200 persons or establishments of any capacity with dancing [PRC–D] | 12 | C2* C3* C4 ^{11*} C6 ¹² C7 C8 M1 ¹³ M2 M3 |
| [6] | Without restrictions on entertainment or dancing but limited to location in hotels [PRC–D] | 10 | C4 C5 C6 C8 |

*Note: We created this column with row [numbers] for organizational purposes.

ZoLa (Zoning and Land Use Map) can be used to identify the underlying zone of the existing or intended music space.⁴³⁹

⁴³⁹ ZoLa: NYC’s Zoning & Land Use Map, ZOLA.PLANNING.NYC.GOV, <https://zola.planning.nyc.gov/about/#9.72/40.7125/-73.733> (last visited Aug. 7, 2020).

Open Questions and Analysis:

Do the foregoing use restrictions on dancing exist for rational public health and safety reasons? Do officials find these restrictions to be effective? If so, why? We are interested in learning about the regulatory intent behind zoning restrictions and requirements outlined above. Our initial analysis of the issues is provided below.

- The use categories seem arbitrary, outdated, and irrational.
 - Why is it that row [1] cannot have “a cover charge” or a “specified show time”?
 - Why does row [2] allow "musical entertainment but not dancing"?
 - What is the rationale for row [6] not having any “restrictions on entertainment or dancing” but limiting this as-of-right solely to “location[s] in hotels”?
- The presence of inconsistent terms (or lack thereof) related to music and dancing in the *USE* column creates unnecessary confusion for the reader and likely leads to actual confusion on both the compliance and enforcement sides of the ZR.
 - What is the original meaning of the ZR terms, “music,” “musical entertainment,” “entertainment” and “with dancing”?
 - What is the regulatory purpose for including (or not including) “with dancing” next to the terms “music,” “musical entertainment,” and “entertainment”?
- At present, hotel dance floors and nightclub dance floors are not regulated equally. Why is this the case?
- According to the ZR, if a luxury hotel with a dance floor is located next to a well-soundproofed 150-person capacity underground dance music club, and if both locations host nights with DJs and dancing, the hotel will be in compliance and

the underground club will run the risk of being slapped with fines. How is this rational?

- Hotels in districts C4 C5 C6 C8 have no restrictions on dancing, while “establishments of any capacity with dancing” (e.g., nightclubs) are limited as-of-right to districts C6¹² C7 C8 M1¹³ M2 M3.
- If establishments with dancing want to legally operate outside of the listed districts, a special permit from the Board of Standards of Appeals must first be obtained pursuant to the standard set forth in **Article VII, Chapter 3 of the ZR**.

In C2, C3, C4*, C6-4**, M1-5A, M1-5B, M1-5M and M1-6M Districts, the Special Hudson Square District and the *Special Tribeca Mixed Use District*, the Board of Standards and Appeals may permit eating or drinking establishments with entertainment and a capacity of more than 200 persons **or establishments of any capacity with dancing**, for a term not to exceed three years, provided that the following findings are made:

- (a) that a minimum of four square feet of waiting area within the *zoning lot* shall be provided for each person permitted under the occupant capacity as determined by the New York City Building Code. The required waiting area shall be in an enclosed lobby and shall not include space occupied by stairs, corridors or restrooms. A plan shall be provided to the Board to ensure that the operation of the establishment will not result in the gathering of crowds or the formation of lines on the *street*;
- (b) that the entrance to such *use* shall be a minimum of 100 feet from the nearest *Residence District* boundary;
- (c) that such *use* will not cause undue vehicular or pedestrian congestion

in local *streets*;

- (d) that such *use* will not impair the character or the future use or development of the surrounding residential or mixed use neighborhoods;
- (e) that such *use* will not cause the sound level in any affected conforming *residential use, joint living-work quarters for artists* or *loft dwelling* to exceed the limits set forth in any applicable provision of the New York City Noise Control Code; and
- (f) that the application is made jointly by the owner of the *building* and the operators of such eating or drinking establishment.

The Board shall prescribe appropriate controls to minimize adverse effects on the character of the surrounding area, including, but not limited to, location of entrances and operable windows, provision of sound-lock vestibules, specification of acoustical insulation, maximum size of establishment, kinds of amplification of musical instruments or voices, shielding of flood lights, adequate screening, curb cuts or parking.

Any violation of the terms of a special permit may be grounds for its revocation.

* In C4 Districts where such *use* is within 100 feet from a *Residence District* boundary

** In C6-4 Districts mapped within that portion of Community District 5, Manhattan, bounded by West 22nd Street, a line 100 feet west of Fifth Avenue, a line midway between West 16th Street and West 17th Street, and a line 100 feet east of Sixth Avenue.⁴⁴⁰

⁴⁴⁰ ZR §§ 73-00-73-70, <https://zr.planning.nyc.gov/article-vii/chapter-3> (Art. VII ch.3 - Special Permits by the Board of Standards and Appeals).

- The preferential treatment afforded to hotels produces a classist and divisive impact within NYC nightlife patterns. Regulations unduly restrict individuals without moneyed interests from owning or operating music-centric venues and exclude those living on a reasonable budget from entering into spaces where dancing is legally permitted.
- The special carve-out for hotels is most likely due to a combination of the city's promotion of the tourism industry and the hotel industry's well-organized lobbying efforts. If the City wants to practice what it preaches about "building a strong and fair city,"⁴⁴¹ the arbitrary and unreasonable zoning restrictions on music spaces and dancing must be lifted.
- In sum, the ZR should be amended so that zoning regulations are more flexible toward all kinds of music spaces that foster creativity and celebrate the freedom to dance.

PRC: We would like more information on parking and whether existing requirements are actually necessary. Our initial research is provided below.

Glossary of Planning Terms

Link: <https://www1.nyc.gov/site/planning/zoning/glossary.page>

This glossary provides brief explanations of planning and zoning terminology, including terms highlighted in the Zoning Handbook. Words and phrases followed by an asterisk (*) in the Glossary are legally defined terms in the Zoning Resolution of the City of New York, and can be found primarily in Section 12-10 of the Resolution for the complete legal definitions.

E.g., Parking Requirement Category (PRC): Parking requirements for commercial

⁴⁴¹ OneNYC 2050, *Building a Strong and Fair City*, ONENYC.CITYOFNEWYORK.US, <https://onenyc.cityofnewyork.us/> (last visited Aug. 7, 2020).

uses are grouped into nine parking requirement categories based on the compatibility of the uses and the amount of traffic generated.

| PRC | Types of Uses |
|-----|---|
| A | Food stores (larger than 2,000 sf) - high traffic volume |
| B | Local retail or service uses (bakeries, restaurants, department and appliance stores) - high traffic volume |
| B1 | Offices and stores that sell large items (furniture, carpets, appliances) - low traffic volume |
| C | Miscellaneous (court houses, auto showrooms) - low traffic volume |
| D | Places of assembly (theater, bowling alleys, stadiums) - high traffic volume |
| E | Outdoor amusement areas - high traffic volume |
| F | Light manufacturing (ceramics, dental products, commercial laundries) - moderate traffic volume |
| G | Storage uses (warehouses, trucking terminals) - low traffic volume |
| H | Other uses (hotels, funeral parlors, post offices, boat rentals) with unique traffic characteristics |

Overview of the NY City Construction Codes

Here we focus primarily on the Building Code (within the Construction Codes) and its relation to the Zoning Resolution.

Certificate of Occupancy & Temporary Certificate of Occupancy⁴⁴²

New York City Administrative and Construction Codes

The NYC Administrative Code (AC) outlines the requirements for work applications, including alterations and new buildings, and requirements for CO's are outlined in Section AC §28-118. The NYC Building Code (BC) regulates structural design, fire protection, means of egress, and accessibility. Building systems such as HVAC and plumbing are further regulated by the NYC Mechanical Code, NYC Plumbing Code

⁴⁴² N.Y. City Department of Buildings, Code Notes: Certificate of Occupancy & Temporary Certificate of Occupancy (May 2017), https://www1.nyc.gov/assets/buildings/pdf/code_notes_cofc.pdf.

and NYC Fuel Gas Code. Applications for CO's shall include a statement of compliance from the registered design professional confirming that the work completed complies with the construction codes and all other applicable laws And Rules.

New York City Zoning Resolution

The Zoning Resolution (ZR) governs use and bulk of buildings and structures, and its regulations vary according to zoning districts. In addition to permitted uses, these regulations govern floor area, open space, density, yards, height, setbacks and parking. The CO includes zoning information for the building such as the zoning district and zoning use group.

New York City Energy Conservation Code

The NYC Energy Conservation Code (NYCECC) mandates minimum required thermal ratings for building envelopes and minimum efficiency ratings for mechanical equipment and lighting.

NY City Building Code (BC)

301.1 Scope. The provisions of this chapter shall control the classification of all buildings and structures, and spaces therein, as to use and occupancy.⁴⁴³

NY City Building Code (BC)

302.1 General. Structures or portions of structures shall be classified with respect to occupancy in one or more of the groups listed below. A room or space that is intended to be occupied at different times for different purposes shall comply with all of the requirements

⁴⁴³ Administrative Code BC § 301.1, <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCAadmin/0-0-0-70771>.

that are applicable to each of the purposes for which the room or space will be occupied. Structures with multiple occupancies or uses shall comply with **Section 508 (Mixed Use and Occupancy)**. Where a structure, or portion thereof, is proposed for a purpose which is not specifically provided for in this code, such structure, or portion thereof, shall be classified in the group which the occupancy most nearly resembles, according to the fire safety and relative hazard involved, and as approved by the commissioner.⁴⁴⁴

NY City Building Code (BC)

303.1 Assembly Group A.

Assembly Group A occupancy includes, among others, the use of a building or structure or a portion thereof, excluding a dwelling unit, for the gathering of any number of persons for purposes such as civic, social or religious functions, recreation, food or drink consumption, awaiting transportation, or similar group activities; or when occupied by 75 persons or more for educational or instructional purposes.

Exceptions:

1. A building or nonaccessory tenant space used for assembly purposes with an occupant load of fewer than 75 persons shall be classified as a Group B occupancy, except that the number of plumbing fixtures for such a building or space is permitted to be calculated in accordance with the requirements for assembly occupancies.

2. A room or space used for assembly purposes with an occupant load of fewer than 75 persons and accessory to another occupancy shall be classified as a Group B occupancy or as part of that occupancy, except that the number of plumbing fixtures for such a room or space is permitted to be calculated in accordance with the requirements for assembly occupancies.

Assembly occupancies shall include the following:...

A-2 Assembly uses intended for food and/or drink consumption including, but not limited to:

Banquet halls

⁴⁴⁴ *Id.* at § 302.1, <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCadmin/0-0-0-70774>.

Cabarets
Cafeterias, except as provided for in A-3
Dance halls
Night clubs
Restaurants
Taverns and bars⁴⁴⁵

NY City Building Code (BC)

Chapter 2: Definitions⁴⁴⁶

BUILDING. Any structure used or intended for supporting or sheltering any use or occupancy. The term shall be construed as if followed by the phrase "structure, premises, lot or part thereof" unless otherwise indicated by the text. See Section 28-101.5 of the Administrative Code.

OCCUPANCY. The purpose or activity for which a building or space is used or is designed, arranged or intended to be used.

CABARET. Any room, place or space in which any musical entertainment, singing, dancing or other similar amusement is permitted in connection with an eating and drinking establishment.

Note: Because the BC and ZR both regulate music spaces, relevant terms in both the BC and ZR should be harmonized and more clearly defined. Our proposed bill package, **Support Live Music**, addresses these issues with amendments to the Administrative Code as it pertains to music spaces. Of course, separate amendments would need to be made to the ZR.

⁴⁴⁵ Administrative Code BC 303.1, <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCadmin/0-0-0-112480>.

⁴⁴⁶ Administrative Code BC 202, <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCadmin/0-0-0-69731> (General definitions) (note: no definition is provided for “Dance halls” or “Night clubs”).

City Planning: Recommendations for Reform

Under the OneNYC 2050 strategy, the City seeks to, *inter alia*, promote a “vibrant democracy,” grow a diverse and “inclusive economy,” foster “thriving neighborhoods,” ensure “healthy lives,” and “promote equity and excellence in education.”⁴⁴⁷ Our ethos is that music and nightlife culture can be harnessed to achieve the OneNYC goals. Accordingly, we are proposing amendments to the Administrative Code, the Zoning Resolution, the Alcohol Beverage Control (ABC) Law, and the Excelsior Jobs Program. We address these proposed reforms in turn below.

Administrative Code Amendments. See our **Support Live Music** proposed bill package (available on our website: <https://www.nycnightlifereform.com/>). A few excerpts are included below to provide context to the proposed ZR amendments.

Note: The following excerpts are taken from our proposal for a new **title 34** (Music Code) and our amendments to **title 28** (Construction Codes).

TITLE 34

MUSIC

CHAPTER 1

POLICY, DEFINITIONS AND APPLICABILITY

....

Music space. The term “music space” means a premises, whether owned or operated on a for-profit or non-profit basis, in which artists or musicians gather for the primary purpose of performing, rehearsing or recording music, or in which the public or patrons gather for the primary purpose of listening or dancing to musical programming. Other services or programming, if any, are secondary to or contingent upon the music operation. Such term includes, but is not limited to, music establishments, music studios, temporary music establishments and outdoor music venues.

⁴⁴⁷ *Id.*

As used in this definition:

1. Music establishment. The term “music establishment” means a premises that frequently features advertised or ticketed musical programming and serves food or beverage with or without alcohol. Such term includes, but is not limited to, nightclubs, performance venues, event spaces and concert halls. The term does not include adult establishments, arenas, auditoriums or stadiums.
2. Music studio. The term “music studio” means a rehearsal studio or recording studio.
3. Outdoor music venue. The term “outdoor music venue” means a public space in which an event producer holds a one or multi-day event or concert series that features advertised or ticketed musical programming and serves food or beverage with or without alcohol. Such term includes, but is not limited to, public parks, streets, plazas and sidewalks, as well as publicly owned or leased land, piers and open-air stadiums.
4. Temporary music establishment. The term “temporary music establishment” means a premises that does not primarily function as a music establishment, but operates as such pursuant to a written agreement or lease term of equal to or less than one year. Such term includes, but is not limited to, a vacant storefront or warehouse in which an event producer holds a one or multi-day event, concert series or seasonal pop-up.

TITLE 28 CONSTRUCTION CODES

Section 303 of the New York city building code is amended by removing “cabarets,” “dance halls” and “nightclubs” from assembly group A-2 and adding “music establishment” to assembly group A-3.

Section 202 of the New York city building code is amended by adding new definitions of “MSTPACO,” “music space,” “outdoor music venue” and “temporary music establishment” in alphabetical order to read as follows:

MSTPACO. The term “MSTPACO” means a music space temporary place of assembly certificate of operation.

....

§ 28-117.6. Music space temporary place of assembly certificate of operation. At the commissioner's discretion, a MSTPACO may be issued upon request by the applicant in accordance with this code provided that public safety is not jeopardized thereby. The applicant shall notify the fire department when a MSTPACO is issued.

Zoning Resolution Amendments. The rationale is to align the ZR with our proposed amendments to the Administrative Code. We have included a few areas below that would require review.

ZR APPENDIX A.⁴⁴⁸

- **“Clubs/Nightclubs” should be changed to “Music Spaces.”** “Music Spaces” would be a standalone use category (*i.e.*, not within “Eating or drinking establishments”) and would include the following subuses: “music establishments,” “music studios,” “outdoor music venues,” and “temporary music establishments.”
- **Capacity restrictions:** *E.g.*, “with a capacity of 200 persons or less” should be revisited. If the numbers in ZR Appendix A are arbitrary or do not serve a proper purpose, they should either be altered or eliminated altogether. Relatedly, we would like to learn if there is any relationship between the ZR capacities and (Temporary) Place of Assembly Certificate of Operation permits issued by the DOB.

NYC Building Code 2014

Chapter 3: Use and Occupancy Classifications

Section 303.2

Certificate of Operation: A Certificate of Operation shall be required, as per Section 28-117.1 (Places of Assembly),⁴⁴⁹ for the following places of assembly:

⁴⁴⁸ ZR Appendix-A, <https://zr.planning.nyc.gov/appendix-index-uses> (Index of Uses).

⁴⁴⁹ <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCAAdmin/0-0-0-64254> (“§ 28-117.1 Place of assembly certificate of operation. It shall be unlawful to use or occupy any building or space as a place of assembly without a certificate of operation issued by the commissioner. An application for a certificate of operation shall be made to the department in such form and containing such information as the commissioner shall provide. The department shall inspect every place of assembly space prior to the issuance of a certificate of operation. The commissioner shall not issue a certificate of operation unless the department determines that the space conforms

Indoor places of assembly used or intended for use by 75 persons or more, including open spaces at 20 feet (6096 mm) or more above or below grade, such as roofs or roof terraces.

Outdoor places of assembly used and intended for use by 200 persons or more.⁴⁵⁰

- **Advertised or ticketed events; patron dancing.** It is imperative that all music spaces are permitted to have these offerings. This will create uniformity and certainty in the ZR and promote the following policy rationales: (1) SBOs would have more flexibility in running their business operations, such as ticket sale strategies (*e.g.*, advance, door sales, or no cover); (2) SBOs, artists, and patrons would not have to worry about being targeted for promoting, playing, or dancing to music; and (3) all music spaces would be on equal business opportunity footing with hotels.
- **Outdoor areas.** The ZR should be updated to explicitly state that *temporary music establishments* and *outdoor music venues* are permitted (albeit with restrictions) in *publicly accessible open areas*, such as parks, streets, and plazas. Although zoning

substantially to the approved construction documents and to the provisions of this code and that the certificate of occupancy authorizes such use. A certificate of operation shall not be issued to a place of assembly providing seating or other moveable furnishings unless the commissioner approves a plan conforming to this code and the rules of the department. Seating and other moveable furnishings shall be maintained at all times during occupancy in accordance with the approved plan. Any amendment of such plan shall be subject to the prior approval of the commissioner"); *see also* Administrative Code § 28-117.1.1, <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCadmin/0-0-0-64256> ("The place of assembly certificate of operation shall contain the place of assembly certificate number, the number of persons who may legally occupy the space and any other information that the commissioner may determine. Such place of assembly certificate of operation shall be framed and mounted in a location that is conspicuously visible to a person entering the space. For the purposes of this article a department issued place of assembly permit or place of assembly certificate of operation shall be valid until its expiration, at which time a new place of assembly certificate of operation shall be required in accordance with the provisions of this article and with the filing requirements of the department...").

⁴⁵⁰ Administrative Code § BC 303.2, <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCadmin/0-0-0-112480> (Certificate of Operation).

generally “does not apply to *public streets* (which typically include both the road and the sidewalk) or *public parks*, the ZR still regulates these spaces through the creation of Special Purpose Districts, such as the Special Governors Island District (R3-2) and the use of incentives, such as granting “additional floor area in exchange for the provision of *public plazas*....”⁴⁵¹ Amendments to Appendix-A should eliminate unnecessary confusion that may be caused by the gaps between the legal text, city operations, and SBO business practices.

Note: The following ZR provisions were included in the DOB TPA Code notes and may be applicable to districts in which temporary music establishments and outdoor music venues would be permitted.

- ZR §37-726 - Permitted obstructions
 - <https://zr.planning.nyc.gov/article-iii/chapter-7/37-726>
- ZR §37-73 - Kiosks and Open Air Cafes
 - <https://zr.planning.nyc.gov/article-iii/chapter-7/37-73>
- ZR §91-81 - Events with Public Access
 - <https://zr.planning.nyc.gov/article-ix/chapter-1/91-81>.

Further analysis: Administrative Code, ZR, and applicable agency rules and policies.

Below, we have pulled text and included screenshots of information from (1) the DOB Temporary Place of Assembly (TPA) Code Notes; (2) the Comprehensive Event Permitting Guide for the City of New York (CECM Permitting Guide), prepared by the Mayor’s Office of Citywide Event Coordination and Management; and (3) ZR §37-726 and §91-81. The purpose of including this information is to illustrate the need for textual precision and interagency consistency in the regulation of temporary music establishment and outdoor music venue operations. Markups are in yellow.

⁴⁵¹ N.Y. CITY DEPARTMENT OF CITY PLANNING, ZONING HANDBOOK 12 (2018), <https://www1.nyc.gov/assets/planning/download/pdf/about/publications/zoning-handbook/zoning-handbook.pdf>.

| DOB Code Notes: TPA ⁴⁵² | |
|--|---|
| <p>TEMPORARY PLACE OF ASSEMBLY</p> <p>Structures and/or Uses</p> | <p>Temporary events such as trade shows or outdoor concerts may be held in places that do not have an assembly occupancy or in temporary structures erected for such events. A Temporary Place of Assembly Certificate of Operation (TPA) is required to ensure the health, safety and welfare of large crowds attending these events. A TPA may be issued as part of the temporary structure used for assembly or for a space that will not be permanently used as a place of assembly. Temporary structures include, but are not limited to, tents, grandstands, and bleachers.</p> |
| <p>New York City Department of Buildings (BC)</p> | <p>The Department of Buildings enforces adherence to the Zoning Regulations and Building Code and conducts all reviews and inspections for the initial issuance of a Place of Assembly Certificate of Operation (PA) and may issue a TPA for temporary events. A TPA is issued where there are 75 or more people within an indoor space or 200 or more in an exterior open space. It permits the event space to be used as a Place of Assembly for a limited duration and/or</p> |

⁴⁵² N.Y. CITY DEPARTMENT OF BUILDINGS, CODE NOTES: TEMPORARY PLACE OF ASSEMBLY: STRUCTURES AND/OR USES (DEC. 2016), https://www1.nyc.gov/assets/buildings/pdf/code_notes_temp_place-of-assembly.pdf.

| | |
|--|--|
| | <p>correlatively limits the sizes and duration of structures used for the event, <i>e.g.</i> platform/stages, reviewing/band stands, bleachers, tents, artwork, and support structures. TPAs are used for regularly scheduled events with limited durations, such as annual indoor exhibitions or farmers markets, as well as one-of-a-kind events, such as political rallies.</p> <p>However, events using publicly accessible open space for the promotion of products or services do not qualify for a TPA. Temporary structures and uses shall conform to zoning regulations as well as the structural strength, fire safety, means of egress, accessibility, lighting, ventilation and sanitary requirements of the Building Code as necessary to ensure the public health, safety and general welfare are met.</p> |
|--|--|

Note: The statement, “events using publicly accessible open space for the promotion of products or services do not qualify for a TPA,” is confusing and conflicts with the CECM Permitting Guide. For instance, the CECM Permitting Guide states that “revenue generating activities”⁴⁵³ are allowed in parks and “commercial/promotional”⁴⁵⁴ events are on streets, sidewalks, and pedestrian plazas (see screenshots below).

⁴⁵³ See MAYOR’S OFFICE OF CITYWIDE EVENT COORDINATION MANAGEMENT, COMPREHENSIVE EVENT PERMITTING GUIDE FOR THE CITY OF NEW YORK, 10-15 (FEB. 2018), https://www1.nyc.gov/assets/cecm/downloads/pdf/NYC_CECM_Comprehensive_Event_Permitting_Guide_2018_%20FINAL.pdf.

⁴⁵⁴ *Id.*, at 43-52.

DEPARTMENT OF PARKS AND RECREATION

NYC Parks is the steward of nearly 30,000 acres of land — 14 percent of New York City — including more than 5,000 individual properties ranging from Coney Island Beach and Central Park to community gardens and Greenstreets. We operate more than 800 athletic fields and nearly 1,000 playgrounds, 1,800 basketball courts, 550 tennis courts, 67 public pools, 51 recreational facilities, 15 nature centers, 14 golf courses, and 14 miles of beaches. We care for 1,200 monuments and 23 historic house museums. We look after 600,000 street trees, plus two million more in parks. We are New York City’s principal providers of recreational and athletic facilities and programs. We are home to free concerts, world-class sports events, and cultural festivals. Our vision is to create and sustain thriving parks and public spaces for New Yorkers. Our mission is to plan resilient and sustainable parks, public spaces, and recreational amenities; build a park system for present and future generations; and care for parks and public spaces.

Overview of Permits:

| PERMIT | DESCRIPTION | DEADLINES | FEE |
|------------------------|---|--|--|
| Special Event | Group activity including, but not limited to, a performance, meeting, assembly, contest, exhibit, ceremony, parade, athletic competition, reading, or picnic involving 20+ people or a group activity for which specific space is requested to be reserved. | At Least 21-30 Business Days Prior to Event Date <i>*No permits issued for major holiday weekends – spaces for public use on a first-come, first-served basis</i> | \$25 Application Fee + Variable Site Fee |
| Temporary Use Approval | Authorization for revenue-generating activities on Park land associated with a Special Event Permit. | At Least 14 Days Prior to Event Date | No Fee to Apply |

STREET ACTIVITY PERMIT OFFICE

New York City is the backdrop for many iconic events. From special events like the visit of Pope Francis and New Year’s Eve in Times Square to local community events like block parties, the Mayor’s Office of Citywide Event Coordination and Management (CECM) supports all applicants as they plan their upcoming events. CECM provides oversight on all event permitting activities; advises and assists the Mayor in the coordination of policies, procedures, and operations in relation to permitting; and reviews the coordination of street activities and pedestrian plaza events. We also work directly with other permitting agencies to ensure active communication with residents, community boards, and business improvement districts, so events in our City are both safe and enjoyable for all. The function of the Street Activity Permit Office (SAPO) is to issue permits for street festivals, block parties, *farmer’s* markets, commercial or promotional events, and other events on the City’s streets, sidewalks, and pedestrian plazas while protecting the interests of the City, the community, and the general public. These permit applications are available to the public online by visiting E-Apply, our electronic application system.

....

| | | | |
|---------------|---|--|------------------------------------|
| Street Events | <p>An activity held on a public street, curb lane, or sidewalk but shall not include activities conducted pursuant to a valid film, parade, or construction permit. Street events are charged and categorized by the size of the event.</p> <ul style="list-style-type: none"> • X-Large Commercial/ Promotional event (or a Charitable event) that has an extensive impact on the surrounding community and vehicular and/or pedestrian traffic, uses multiple locations or a combination of Pedestrian plazas or full street closure. • Large Commercial/Promotional event or a charitable event that has an extensive impact on the surrounding community and vehicular and/or pedestrian traffic; includes the full street closure of 1 city block. | X-Large Applications: 60 Days Prior to Event Date | X-Large up to \$66,000/location |
| | | Large Applications: 45 Days Prior to Event Date. | Large – \$25,000 |
| | | Medium Applications: 30 Days Prior to Event Date. | Medium – \$11,000 |
| | | Small Applications: 14 Days Prior to Event Date. | Small – \$3,100 |

Note: The classification issues become even more complex due to ZR §91-81, which appears to state that ticketed or sponsored events are not allowed in *publicly accessible open areas*.

ZR § 91-81

Events Within Public Access Areas

The provisions of Article III, Chapter 7 restricting the temporary placement or storage of event-related amenities or equipment within a publicly accessible open area or arcade shall be modified by the provisions of this Section. The temporary placement or storage of event-related equipment or amenities in accordance with the provisions of this Section shall not constitute a design change pursuant to the provisions of Sections 37-625 or 91-837.

Events including, but not limited to, farmers' markets, holiday markets, concerts and performances, art and cultural exhibitions and festivals are permitted within all publicly accessible open areas and arcades. The utilization of a publicly accessible open area or arcade for the promotion of products or services shall not itself qualify as an event permitted under this Section.

Events shall be open to the public, provide free and unticketed admission and only be permitted to use amplified sound between the hours of 9:00 a.m. and 10:00 p.m. All publicly accessible open areas and arcades shall continue to be publicly accessible at all times. Event-related amenities and equipment shall be considered temporary permitted obstructions provided that sufficient circulation space connecting all streets and building entrances exists. All publicly accessible open areas and arcades shall be restored to their approved condition within 24 hours of the conclusion of an event.

The storage of equipment or materials outside of an event's scheduled hours, excluding time required for set up and clean up, shall not be permitted within a publicly accessible open area or arcade. However, for events taking place over multiple days or weeks, large temporary equipment that requires assembly and will be actively used during the event, such as stages, kiosks and sound and video entertainment systems, may remain in the publicly accessible open area or arcade outside of the event's scheduled hours.

At least 30 days prior to the scheduled date of an event, notification shall be given to the local Community Board, local Council Member and Borough President of the nature, size and duration of the event.⁴⁵⁵

⁴⁵⁵ ZR § 91-81, <https://zr.planning.nyc.gov/article-ix/chapter-1/91-81>.

AMEND THE ZR TO CREATE A NEW CITYWIDE SPECIAL PURPOSE DISTRICT: THE SPECIAL MUSIC CULTURE DISTRICT (MC)

The establishment and maintenance of MCs throughout the five boroughs would preserve our shared cultural heritage, promote the development of progressive music scenes, and stimulate the economy in the process. But achieving this goal would be no simple task. The creation of special purpose districts requires “a significant amount of research, analysis, and discussion,” as well as preliminary outreach, environmental review, a formal application, and a Uniform Land Use Review Procedure (ULURP).⁴⁵⁶ In sum, without collaboration and cooperation from a diverse range of parties, this proposal for reform will be dead in the water.

Like-Minded Ideas: The Creative Footprint NYC Report

In the Creative Footprint NYC | Music (CFP NYC) report, “the Creative Footprint (VibeLab consultancy and experts and data scientists at Harvard University) as well as “a team from the University of Pennsylvania, led by Michael Fichman,” concluded that protecting and promoting music spaces (or what they refer to as “affordable spaces”) is essential to the City’s vitality:

The CFP NYC report takes the term “affordable space” to mean local musical spaces in a city center that can - due to low rents and proactive legislation - take creative risks and carry out socio-cultural initiatives in their programming. Affordable, maintainable cultural spaces that can afford to take such risks with programming (those delivering high creative scores in the CFP report, for example) can have tangible beneficial knock-on effects in a wider, communal sense. They can help strengthen a sense of local community and prevent cultural

⁴⁵⁶ N.Y. CITY DEPARTMENT OF CITY PLANNING, ZONING HANDBOOK 196-197 (2018), <https://www1.nyc.gov/assets/planning/download/pdf/about/publications/zoning-handbook/zoning-handbook.pdf>; see also N.Y. City Department of City Planning, *Step 5 Uniform Land Use Procedure (ULURP)*, NYC.GOV, <https://www1.nyc.gov/site/planning/applicants/applicant-portal/step5-ulurp-process.page> (last visited Aug. 7, 2020). (“ULURP is a standardized procedure whereby applications affecting the land use of the city would be publicly reviewed. The Charter also established mandated time frames within which application review must take place. Key participants in the ULURP process are now the Department of City Planning (DCP) and the City Planning Commission (CPC), Community Boards, the Borough Presidents, the Borough Boards, the City Council and the Mayor”).

or local erasure, provide recreation, bridge social divides, define neighborhoods and benefit the city’s cultural health at large. The report recommends therefore that affordable working creative spaces should be a vital component of all the boroughs throughout the city. They are enriching agents and sources of local empowerment that bring incalculable value to city center communities and are hard to replace once removed.⁴⁵⁷

The Report included the following “Key Takeaways”:

- Continual, flexible, affordable, “ground-level” creativity is vital for NYC’s socio-cultural health.
- Affordable spaces are sources of local empowerment that bring incalculable value to city center communities and are hard to replace once removed.
- Venues are, however, paying more for their public and their presence.
- Legislation needed to protect and nurture “young” and marginal venues.
- Nightlife Mayors / nighttime advocates are key allies and proactive legislation is needed.⁴⁵⁸

We are aligned with the Key Takeaways of the CFP NYC and, therefore, are advocating for an amendment to the ZR and the creation of a new Citywide Special Purpose District:

The **Special Music Culture District (MC)**. Before we further make our case for the MC, key information on Special Purpose Districts is required. The following information is pulled from the NYC Department of City Planning (DCP) website and the Zoning Handbook (2018).

⁴⁵⁷ Creative Footprint, *supra* note 6 at 4.

⁴⁵⁸ Creative Footprint, *supra* note 6 at 5.

About Special Purpose Districts

The City Planning Commission has been designating special zoning districts since 1969 to achieve specific planning and urban design objectives in defined areas with unique characteristics. Special districts respond to specific conditions; each special district designated by the Commission stipulates zoning requirements and/or zoning incentives tailored to distinctive qualities that may not lend themselves to generalized zoning and standard development.⁴⁵⁹

Special purpose districts are generally one of two types. The more common type addresses related planning issues within a single area that can range in size from a few blocks to a much larger area, depending on the district's goals and needs. The second type is more specific to a set of planning issues than to a single geography, and can be mapped in multiple areas of the city that have similar needs.

These special purpose districts are always found in the zoning text and on the *zoning maps*. On the zoning maps, they are shaded in grey with a specific letter designation (*e.g.*, the Special Ocean Parkway District is “OP”). The special purpose district provisions are located in Article VIII through XIV in the Zoning Resolution with each district having its own chapter.

Special purpose districts are generally created where area-wide conditions warrant modification of some generally applicable zoning provisions.... [S]pecial purpose districts either modify or replace the *use*, *bulk*, *parking* and *streetscape* regulations of the underlying zoning districts mapped in the area.⁴⁶⁰

⁴⁵⁹ N.Y. City Department of City Planning, *Special Purpose Districts*, nyc.gov, <https://www1.nyc.gov/site/planning/zoning/districts-tools/special-purpose-districts.page> (last visited Aug. 7, 2020).

⁴⁶⁰ N.Y. City Department of City Planning, Zoning Handbook 175 (2018), <https://www1.nyc.gov/assets/planning/download/pdf/about/publications/zoning-handbook/zoning-handbook.pdf>.

Some examples of Citywide Special Purpose Districts and Special Purpose Districts by borough are provided below. Special Music Culture Districts would fit into the first category, *i.e.*, Citywide Special Purpose Districts.

Citywide Special Purposes Districts (examples):

- The Enhanced Commercial District (EC)
 - ZR § 132-00
- The Special Limited Commercial District (LC)
 - ZR § 83-00
- The Special Mixed Use District (MX)
 - ZR § 123-00

By Borough (examples):

- Bronx Special Purpose Districts
 - The Special City Island District (CD)
 - ZR § 112-00
- Brooklyn Special Purpose Districts
 - The Special Bay Ridge District (BR)
 - ZR § 114-00
- Manhattan Special Purpose Districts
 - The Special Midtown District (MiD), which includes the Theater Subdistrict
 - ZR § 81-00
- Queens Special Purpose Districts
 - The Special Long Island City Mixed Use District (LIC)
 - ZR § 117-00
- Staten Island Special Purpose Districts
 - The Special Stapleton Waterfront District (SW)
 - ZR § 116-00⁴⁶¹

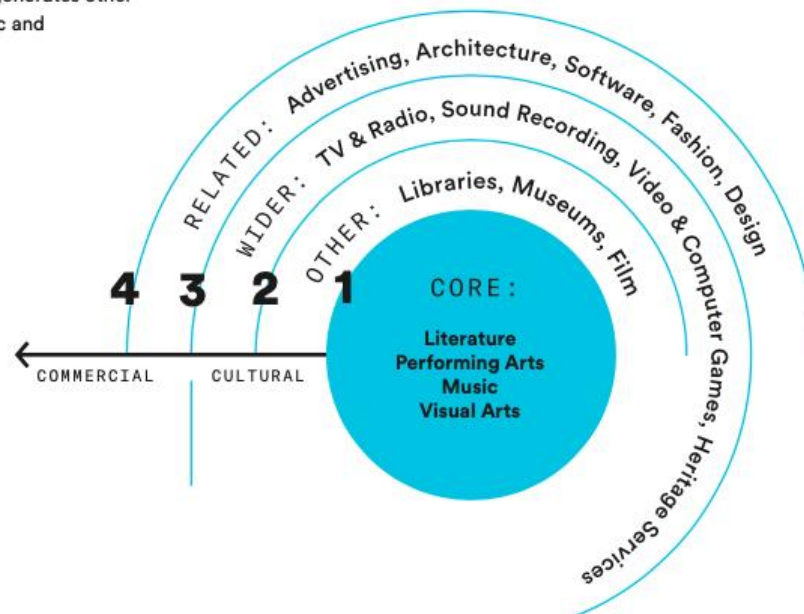
⁴⁶¹ *Id.* at 176-189.

Why the ZR should include the Special Music Culture District (MC).

As we stated above, the creation of MCs across the five boroughs would preserve our shared cultural heritage, promote the development of progressive music scenes, and stimulate the economy in the process. The graphic on the following page is pulled from the CFP NYC report.⁴⁶²

- WHY IS MUSIC CHOSEN AS THE SUBJECT OF CFP'S METHODOLOGY?

The Creative Footprint sees music as a core creative activity that drives, and / or generates other related economic and social activities.



We agree with the claim that music is “a core creativity activity that drives and/or generates other related economies and social activities.”⁴⁶³ In addition to stimulating the sectors

⁴⁶² The Creative Footprint, Creative Footprint NYC | Music 11 (2018) <https://www.24hourdallas.org/pdfs/NYC-Creative-Footprint-2018.pdf>.

⁴⁶³ *Id.*

mentioned above, the promotion of music spaces would also increase job opportunities and overall growth in manufacturing, operations, and construction/production.

Manufacturing Jobs

- Festival tents
- Production trailers
- Deco
- Apparel (*e.g.*, venue and event merchandise)
- Sustainable paper products
 - Plates and utensils
 - Promotional materials (*e.g.*, flyers)
- Reusable Hardcups⁴⁶⁴ (in lieu of throwaway plastic)
- DJ Hardware
- Sound Systems

Operations Jobs

- Security
- On-Site Medical / Mass Gathering Medical
- Food & Beverage Catering
- Ticketing
- Customer Service

Technical Production Jobs

- Sound engineering
- Lighting engineering

⁴⁶⁴ See *e.g.*, *Sustainability*, DGTL.NL, <https://dgtl.nl/sustainability> (last visited Aug. 7, 2020) (summary of DGTL Festival’s sustainability plan including, *inter alia* hardcups: “One of the most visible components of the Sustainability plan was the introduction of the hardcup-system. Visitors no longer got drinks served in traditional disposable softcups, but in a reusable hardcup. This not only saves a huge amount of plastic waste, but also makes visitors reflect on their current ‘linear’ behavior (take-make-waste) and it presents a new perspective on reusing precious resources”).

Construction Jobs

- Indoor builds, additions, and renovations
- Temporary music establishment and outdoor music venue builds and breakdowns

The list above is not exhaustive. A long-term goal would be for the City and State of New York to become the nation's leader in independent live event productions. In addition to creating thousands of jobs for New Yorkers, the development and implementation of a music-focused economic development strategy would promote the preservation of our shared cultural history and further the essential development of diverse sounds and cutting-edge scenes.

#LegalizeDIY: Converting Vacant Storefronts into Pop-Up Music, Culture, and Art Spaces

To supplement the proposed ZR amendments, the City should launch an official #LegalizeDIY campaign to repurpose vacant retail storefronts into daytime and early evening⁴⁶⁵ music, culture, and arts spaces. Events could be delineated as 21+, teen, and all ages (which would also promote SBO-neighbor relations). While there is no definite demarcation of what makes a venue a DIY space, a few common characteristics exist. The MOME's Nightlife Economic Impact Report defines DIY venues as "informal cultural and performance spaces."⁴⁶⁶ Further, we would add that DIY venues tend to be smaller, operated with less access to large amounts of capital, and focus on booking up-and-coming, independent, and more "niche" genre artists. The #LegalizeDIY campaign would encourage the offering of short-term "temporary music establishment" leases (*e.g.*, ranging from less than one month; to a few months; to one year) to independent promoters and creative collectives that would otherwise lack affordable access to pop-up event spaces.

It is no secret that the economic model of physical retail spaces is currently under threat. While there are multiple factors at play, this development is due in large part to the consumer shift toward e-commerce. In 2019, "[t]he total market share of 'non-store,' or online U.S. retail sales was higher than general merchandise sales for the first time in history, according to a

⁴⁶⁵ *E.g.*, events would conclude no later than 10:00PM ET in resident-dense areas.

⁴⁶⁶ NYC NIGHTLIFE ECONOMY: IMPACT, ASSETS AND OPPORTUNITIES, *supra* note 5 at 4.

report from the Commerce Department.”⁴⁶⁷ Companies that rely heavily on physical storefronts like Forever 21,⁴⁶⁸ J.Crew,⁴⁶⁹ and Neiman Marcus⁴⁷⁰ have all filed for bankruptcy, while Microsoft⁴⁷¹ and Modell’s Sporting Goods⁴⁷² have both announced they will be permanently closing all physical retail stores.

The COVID-19 crisis is speeding up this process.⁴⁷³ In July 2020, CNN reported that “[b]ig chains,” including Brooks Brothers, Sur La Table, and Ascena Retail Group (owner of Anne Taylor and LOFT), “filed for bankruptcy and closed stores every week” that month.⁴⁷⁴ As an increased number of companies file for bankruptcy or eliminate brick and mortar from their business models, an increased number of commercial retail landlords will struggle to fill their storefronts. The asking rent prices demonstrate this.

In the second quarter of 2020, the “average asking rents along 16 major retail corridors in Manhattan declined for the eleventh consecutive quarter, falling to \$688 per square foot,”

⁴⁶⁷ Kate Rooney, *Online shopping overtakes a major part of retail for the first time ever*, CNBC (Apr. 2, 2019, 2:34 PM), <https://www.cnbc.com/2019/04/02/online-shopping-officially-overtakes-brick-and-mortar-retail-for-the-first-time-ever.html>; see also, U.S. CENSUS BUREAU, DEPARTMENT OF COMMERCE, Advance Monthly Sales for Retail and Food Services, CB20-102 (July 16, 2020), https://www.census.gov/retail/marts/www/marts_current.pdf; see also U.S. CENSUS BUREAU, DEPARTMENT OF COMMERCE, Quarterly Retail E-Commerce Sales 1st Quarter 2020, CB20-71 (May 19, 2020), https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf.

⁴⁶⁸ Nathan Bomey, *Forever 21 files for Chapter 11 bankruptcy protection, may close up to 178 US stores*, USA TODAY (Sep. 29, 2019, 9:47 AM), <https://www.usatoday.com/story/money/2019/09/29/forever-21-chapter-11-bankruptcy/3816101002/>.

⁴⁶⁹ Nathan Bomey & Brett Molina, *J. Crew store closings possible as retailer files for Chapter 11 bankruptcy protection*, USA TODAY (May 4, 2020, 3:19 PM), <https://www.usatoday.com/story/money/2020/05/04/j-crew-files-ch-11-bankruptcy-coronavirus-hammers-retailers/3076549001/>.

⁴⁷⁰ Nathan Bomey, *Neiman Marcus files for Chapter 11 bankruptcy protection amid temporary store closings during coronavirus*, USA TODAY (May 7, 2020, 11:42 AM), <https://www.usatoday.com/story/money/2020/05/07/neiman-marcus-filing-chapter-11-bankruptcy-coronavirus-store-closings/3087533001/>.

⁴⁷¹ Chris Welch, *Microsoft to permanently close all of its retail stores*, THE VERGE (June 26, 2020, 9:21 AM), <https://www.theverge.com/2020/6/26/21297400/microsoft-retail-stores-closing-cities-open>.

⁴⁷² Anne D’Innocenio, *Sporting goods chain Modell’s to close its remaining stores*, USA TODAY (Mar. 11, 2020, 6:44 PM), <https://www.usatoday.com/story/money/2020/03/11/sporting-goods-chain-modells-close-its-remaining-stores/5026263002/>.

⁴⁷³ Nathan Bomey & Kelly Tyko, *Can shopping malls survive the coronavirus pandemic and a new slate of permanent store closings?*, USA TODAY (June 14, 2020, 4AM), <https://www.usatoday.com/story/money/2020/07/14/coronavirus-closings-retail-mall-closures-shopping-changes/5400200002/>.

⁴⁷⁴ Jordan Valinsky, *Big chains filed for bankruptcy and closed stores every week in July. Here are 9 of them*, CNN BUS. (July 27, 2020, 9:00 AM), <https://www.cnn.com/2020/07/25/business/july-bankruptcies-coronavirus/index.html>.

reported CNBC.⁴⁷⁵ This decrease in price per square foot “marked the first time since 2011 that prices dropped below \$700....”⁴⁷⁶ In addition to supporting the DIY music culture scene, the City’s launching of an official #LegalizeDIY initiative will help alleviate the financial stress commercial retail landlords are currently burdened with.

State of New York: Support Live Music in NYC Through Law and Policy Reform.

The Alcohol Beverage Control (ABC) Law and State Liquor Authority (SLA) rules, as well as the Excelsior Jobs Program should be amended to support the City’s live music industry.

ABC Law and SLA Rules:

The ABC Law and SLA rules are generally incompatible with music space operations and should be reviewed and amended to promote consistency and fairness in regulatory enforcement. Two main issues are noted below.

For venue owners, the On Premises (OP 252) license for a tavern (see ABC Law section 64-a) and the Cabaret Liquor (CR 256) license for a “premises specializing in musical entertainment” (see ABC law sections 64-d and 106) seem the closest to what a venue owner would want to apply for. But there are issues with both, namely the food requirements in OP 252 and capacity threshold in CR 256:

On Premises (OP 252): Allows a person to serve beer, wine, liquor and cider in a restaurant or tavern for on premises consumption.... If applying for a tavern you must at least have a food preparation area and menu satisfying the Authority’s minimum food requirement.

Cabaret Liquor (CR 256): Allows a person to serve beer, wine, liquor and cider upon a premises specializing in musical entertainment. Must have a capacity for

⁴⁷⁵ Lauren Thomas, *Retail rents plummet across New York City, as America’s glitzy shopping districts turn into ghost town*, CNBC (Aug. 2, 2020, 9 AM), <https://www.cnbc.com/2020/08/02/retail-rents-plummet-across-new-york-city-a-warning-for-other-areas.html>.

⁴⁷⁶ *Id.*

at least 600 persons. The sale of unopened beer to go is allowed. ABC Law Sections 64-d and 106.⁴⁷⁷

For event producers, no clear-cut permits exist for alcohol sales at events. To eliminate gray areas and potential abuses of discretion in the approval process, existing permits, such as the One-Day Beer and Wine Permit and the Catering Permit should be amended; or, alternatively new ones should be added that are narrowly tailored for events that take place in temporary music establishments and outdoor music venues.

Create A 24-Hour Liquor License

Music spaces in the new MCs we are proposing should have access to a 24-hour liquor license. At present, the ABC law only has one permit that allows 24-hour alcohol sales. This permit is very narrowly constructed and only “authorizes current on-premises licensees to remain open to sell alcoholic beverages between the closing hour prescribed by statute [sic] or by the county government and 8AM on New Year's Eve.”⁴⁷⁸ This permit should be improved upon.

There are other cities around the world that have experimented with 24-hour liquor licenses and we can learn from their findings. For example, Amsterdam has had success in issuing 24-hour liquor licenses to a limited amount of venues, with the underlying intent of becoming a “24-hour city.”⁴⁷⁹ So far, Amsterdam’s licenses have only been available for “existing and empty spaces outside of the city center ... to ensure that clubs and all-night destinations would be more spread out over the city.”⁴⁸⁰

⁴⁷⁷ *Alcohol Beverage On Premises Licenses*, [businessexpress.ny.gov, https://www.businessexpress.ny.gov/app/answers/cms/a_id/3737/kw/on%20premises](https://www.businessexpress.ny.gov/app/answers/cms/a_id/3737/kw/on%20premises) (last visited Aug. 7, 2020).

⁴⁷⁸ *Catering Permit*, SLA.NY.GOV, <https://sla.ny.gov/permits-available-online#catering-permit> (last visited Aug. 7, 2020).

⁴⁷⁹ Aaron Coultate, *Amsterdam's Trouw given 24-hour license*, RESIDENT ADVISOR (Jan. 10, 2013, 12:55 PM), <https://www.residentadvisor.net/news/18586>; see also Harrison Williams, *Two Amsterdam Venue Have Been Awarded 24-Hour Licenses*, MIXMAG (Nov. 21, 2016), <https://mixmag.net/read/two-new-venues-awarded-24-hour-licenses-in-amsterdam-news#:~:text=As%20part%20of%20the%20Night.and%20De%20Koning%20Party%20Events.>

⁴⁸⁰ Timo Koren, *24-Hour Clubs Can Totally Transform a City, Both For Better and For Worse*, VICE (Feb. 12, 2018, 11:31 AM), https://www.vice.com/en_us/article/a3ndkp/amsterdam-nightlife-mayor-feature.

In Amsterdam, the push for 24-hour liquor licenses has come largely from those involved in the city's nightlife scene. Olaf Boswijk, "[o]wner and creative director" of an Amsterdam venue which received a 24-hour liquor licence in 2013, explained that industry stakeholders spent years explaining to the Amsterdam city council "that when every club closes at 5:00 AM and the streets flood with people, it creates problems."⁴⁸¹ Additionally, Mirik Milan, the former Amsterdam night mayor, added, "[i]f you want to create behavioural change, you have to look at how you make the biggest impact, and that's not by closing down bars and nightclubs."⁴⁸² The initial results in Amsterdam have been positive, "according to an official report put together by the city."⁴⁸³

Further, since 2005, the UK's licensing act has "allowed more flexibility in pub, bar and nightclub opening times and allowed for the possibility of '24 hour drinking.'"⁴⁸⁴ A 2015 study on the results of this decision shows largely positive results, which are summarized (by the report's author) below:

- It was widely predicted that the relaxation of licensing laws would lead to higher rates of alcohol consumption, more binge-drinking, more violent crime and more alcohol-related attendances to Accident and Emergency departments. In the event, none of this occurred.
- Per capita alcohol consumption had been rising for many years, but peaked in 2004 and has fallen by 17 per cent since the Licensing Act was introduced. This is the largest reduction in UK drinking rates since the 1930s.
- Rates of 'binge-drinking' have declined amongst all age groups since 2005, with the biggest fall occurring amongst the 16-24 age group.

⁴⁸¹ Coultate, *supra* note 479.

⁴⁸² Jared Richards, *Amsterdam's Night Mayor On How to Save Sydney's Nightlife*, Broadsheet (Nov. 17, 2016), <https://www.broadsheet.com.au/sydney/city-file/article/amsterdams-night-mayor-how-save-sydneys-nightlife>.

⁴⁸³ Koren, *supra* note 480; *see also* Onderzoek, Informatie en Statistiek, Gemeente Amsterdam, Evaluatie 24-uurshoreca, Report (July 2017), <https://amsterdam.raadsinformatie.nl/document/5938280/1/09012f978220d97d>.

⁴⁸⁴ Christopher Snowden, *Drinking, Fast and Slow: Ten Years of the Licensing Act*, Inst. of Econ. Affairs, (2015), 6, https://iea.org.uk/themencode-pdf-viewer-sc/?file=/wp-content/uploads/2016/07/Briefing_1505_Drinking%20fast%20and%20slow_web.pdf&settings=111111011&lang=en-GB#page=&zoom=75&pagemode=; *see also* Licensing Act 2003, c.17 (Eng.).

- Violent crime declined in the first year of the new licensing regime and has fallen in most years since. Since 2004/05, the rate of violent crime has fallen by 40 per cent, public order offences have fallen by 9 percent, homicide has fallen by 44 per cent, domestic violence has fallen by 28 per cent and the number of incidents of criminal damage has fallen by 48 per cent. There has been a rise in violent crime between 3am and 6am, but this has been offset by a larger decline at the old closing times(11pm-midnight and 2am to 3am).
- The weight of evidence from Accident and Emergency departments suggests that there was either no change or a slight decline in alcohol-related admissions after the Licensing Act was introduced. Alcohol-related hospital admissions have continued to rise, albeit at a slower pace than before the Act was introduced, but there has been no rise in the rate of alcohol-related mortality. There was also a statistically significant decline in late-night traffic accidents following the enactment of the Act.
- The evidence from England and Wales contradicts the ‘availability theory’ of alcohol, which dictates that longer opening hours lead to more drinking, more drunkenness and more alcohol-related harm. The British experience since 2005 shows that longer opening hours do not necessarily create greater demand.
- There is little evidence that the Licensing Act led to the creation of a continental café culture, as some proponents of liberalisation had hoped, but the primary objectives of diversifying the night-time economy, allowing greater freedom of choice and improving public order have largely been met. By relaxing the licensing laws, the government allowed consumers to pursue their preferences more effectively. In practice, this resulted in relatively modest extensions in opening hours, not ‘24 hour drinking’. By allowing a greater degree of self-regulation, the Licensing

Act benefited consumers without creating the disastrous consequences that were widely predicted.⁴⁸⁵

Making 24-hour liquor licenses work in NYC

The 24-hour liquor license could be narrowly tailored to work in the current NYC nightlife environment, allowing venue owners to conduct more business, while also not compromising public health and safety. SBOs would be more than willing to promote safe and responsible drinking environments under a 24-hour liquor license scheme. Overly intoxicated patrons are generally bad for business and further increase liability risks.

It is feasible for the City to experiment with 24-hour liquor licenses in different areas of the City that are removed from residential areas. Further, such licenses would be compatible with the new MCs we are proposing. NYC is already a “city that never sleeps.” Our subway system (generally) runs 24 hours. We now have a wealth of options to get home safely, like Uber, Lyft, and other ride-sharing apps. If the licenses are similarly successful to efforts in places like London and Amsterdam, New York City can improve foot traffic patterns, attenuate noise, and reduce binge drinking.

State Liquor Authority (SLA) and Liquor Licenses

SLA Roadmap

This section includes a brief overview of the SLA, an introduction to the SLA commissioner positions, and conversation starters for ABC Law and SLA reform.

SLA brief overview

The process of acquiring a liquor license differs from other processes we have discussed as it is done at the State level, as opposed to the City level. The SLA Handbook provides a summation of the SLA’s purpose:

⁴⁸⁵ Christopher Snowden, *Drinking, Fast and Slow: Ten Years of the Licensing Act*, INST. OF ECON. AFFAIRS, 6-7, https://iea.org.uk/themencode-pdf-viewer-sc/?file=/wp-content/uploads/2016/07/Briefing_1505_Drinking%20fast%20and%20slow_web.pdf&settings=111111011&lang=en-GB#page=&zoom=75&pagemode=.

The SLA is responsible for issuing licenses and permits to eligible applicants to allow them to manufacture, sell (at wholesale or retail), store and/or transport alcoholic beverages in this state. It is also responsible for ensuring that licensees and permittees comply with the ABCL. In addition, the SLA promulgates regulations and issues advisories to provide licensees and permittees with further guidance regarding their duties and responsibilities under the ABCL.⁴⁸⁶

Goals of the SLA

According to SLA's handbook, the department's "goal is to maintain a positive working relationship with those in the alcoholic beverage industry."⁴⁸⁷ The SLA wants to see NY's alcoholic beverage industry operating at its fullest capacity, generating as much revenue as possible for the state. On the other hand, the SLA must balance this goal with protecting public health and safety as well as curbing irresponsible drinking habits. We understand the tension that exists between these two goals and the problems that may arise when drinking establishments are not operating in compliance with health and safety regulations. Having said that, the burden of ensuring responsible drinking habits among the City's population should not be disproportionately carried by SBOs operating in the nightlife industry.

In sum, there should be more education, harm reduction, and less punishing of SBOs who are operating in good faith and actively promoting a safe drinking environment for their patrons. One constant we heard from venue owners is that those operating in the industry live in mortal fear of losing their liquor licenses, as this would constitute an immediate end to their respective businesses. It follows that the vast majority of venue owners are trying to follow the rules. Accordingly, the SLA and venue owners should develop stronger lines of communication and work more collaboratively on creating and maintaining safe environments that generate revenue for the industry, the City, and the State of NY.

⁴⁸⁶ Division of Alcoholic Beverage Control, State Liquor Authority, *State Liquor Authority Handbook for Retail Licenses* 6 (Sep. 6, 2013), https://sla.ny.gov/system/files/documents/2019/09/State%20Liquor%20Authority-RetailLicensees%20Handbook_2019_forweb.pdf.

⁴⁸⁷ *Id.*

About the SLA Commissioner Positions

“The SLA consists of three Commissioners, or Members, each appointed by the Governor for three year terms.”⁴⁸⁸ Additionally, “[o]ne of the Commissioners is designated by the Governor to serve as the Chairman.”⁴⁸⁹ The two non-Chairman commissioners, “when performing the work of the authority” are “compensated at a rate of two hundred sixty dollars per day, together with an allowance for actual and necessary expenses incurred in the discharge of their duties.”⁴⁹⁰ On the other hand, “the chairman shall receive an annual salary established in section one hundred sixty-nine of the executive law.”⁴⁹¹ This annual salary is \$120,800.⁴⁹²

ABC Law and SLA Reform: Conversation Starters

1. Ways in which the overall structure of the SLA could be improved;
2. Functions of departments within the SLA, especially enforcement;
3. The 500 foot rule and the burden shifting process;
4. Limitations on dancing in Methods of Operation; and
5. Liquor license application processes in general.

Excelsior Jobs Program: Revise the NYCRR to acknowledge and promote live music.

The Excelsior Jobs Program definitions section located in 5 NYCRR ch XIX part 190.2 should be amended to specifically include “Independent music venues” and “Independent promoters” in the “Entertainment company” definition.

About the Excelsior Jobs Program

The Excelsior Jobs Program falls within the jurisdiction of the Department of Economic Development and is the sequel to the Empire Zones Program,⁴⁹³ which was described in a 2007

⁴⁸⁸ *Id.*

⁴⁸⁹ *Id.*

⁴⁹⁰ N.Y. Alcohol Beverage Control Law § 11 (Consol. 2020), <https://www.nysenate.gov/legislation/laws/ABC/11>.

⁴⁹¹ *Id.*

⁴⁹² N.Y. Consolidated Laws, Executive Law - EXC § 169(1)(c) & (2)(a).

⁴⁹³ *See generally* N.Y. General Municipal Law §§ 955-969 (Consol. 2020), <https://www.nysenate.gov/legislation/laws/GMU/A18-B> (Article 18-B New York State Empire Zones).

AT Kearney report as “perhaps the best example of good economic intentions gone wrong.”⁴⁹⁴ The management consulting firm concluded that the Empire Zones Program’s **“original mission ha[d] been morphed by political patronage, legislative revision and commercial manipulation, effectively repositioning it from a program primarily helping distressed communities to one routinely offering tax relief for ongoing Businesses....”**⁴⁹⁵ In 2008, the Citizens Budget Commission⁴⁹⁶ reported on the failures of the program, arguing for its termination:

Access to public information about the program has been so tightly held that the *Syracuse Post-Standard* had to sue New York State in 2006 to get ESD, which oversees the program, to release basic information about how the public’s money is being spent. Using the power of his office to review program records the State Comptroller has completed numerous audits, which have repeatedly documented the program’s serious flaws. An audit in 2004 found poor financial management by the Zone Administration Boards (ZABs). The Comptroller made recommendations including a series of procedures for collecting and using more accurate data, particularly with regard to the application of cost benefit analyses, and more stringent enforcement of performance targets....

Two additional audits released in 2004 focused on the effectiveness of the Empire Zones. The first covered eight Zones around the State—Binghamton, Buffalo, Friendship (Allegheny County), Islip, Rochester, Syracuse, Tonawanda, and Yonkers—and found widespread failure. Fully 70 percent of the businesses receiving tax breaks in these Zones failed to meet the job creation targets they set

⁴⁹⁴ ELIZABETH LYNAM AND TAMMY PELS, BUDGET POLICY COMMITTEE, CITIZENS BUDGET COMMISSION, IT’S TIME TO END NEW YORK STATE’S EMPIRE ZONES PROGRAM (DEC. 2008), http://cbcny.org/sites/default/files/report_ez_12012009.pdf.

⁴⁹⁵ *Id.* (emphasis added).

⁴⁹⁶ CITIZENS BUDGET COMMISSION, <https://cbcny.org/about-us> (last visited Aug. 7, 2020). (“The Citizens Budget Commission (CBC) is a nonpartisan, nonprofit civic organization whose mission is to achieve constructive change in the finances and services of New York City and New York State government. Our mission is rooted in serving the citizenry at large, rather than narrow special interests; preserving public resources, whether financial or human; and focusing on the well-being of future New Yorkers, the most underrepresented group in city and state government”).

when they were certified to join the program. The second, launched at the same time, examined three Zones in New York City—South Jamaica, Queens; East Harlem, Manhattan; and North Shore, Staten Island.

The New York City audit showed more significant failures in these Zones than were found upstate. Both audits found that the local boards were failing to satisfactorily oversee the program.

The evidence of the program’s serious flaws has led to criticism from newspaper editorial boards. For example, in 2006 the New York Times called the Empire Zone program “yet another pork-barrel scam.” The Albany Times Union in 2007 concluded that the program had produced a “dismal return on billions of taxpayer dollars,” and in 2008 called the program an “utter farce.” The Syracuse PostStandard, which has published a series of special reports on the program, labeled it “a free-for-all trough of abuse” and “a \$550 million juggernaut, with enough loopholes to allow companies to maneuver around its main mission: creating jobs....”⁴⁹⁷

The ESD website states the Empire Zone Program is now “closed to new entrants,”⁴⁹⁸ but interested applicants can “[a]lternatively, “learn more about the open Excelsior Jobs Program.”⁴⁹⁹

Section 351 of the Excelsior Jobs Program Act states the following:

⁴⁹⁷ ELIZABETH LYNAM AND TAMMY PELS, BUDGET POLICY COMMITTEE, CITIZENS BUDGET COMMISSION, IT’S TIME TO END NEW YORK STATE’S EMPIRE ZONES PROGRAM (DEC. 2008), http://cbcny.org/sites/default/files/report_ez_12012009.pdf (internal citations omitted).

⁴⁹⁸ Empire State Development, Overview: *The Empire Zone program is now closed to new entrants*, esd.ny.gov, <https://esd.ny.gov/empire-zones-program> (last visited Aug. 7, 2020).

⁴⁹⁹ Empire State Development, *Excelsior Jobs Program*, esd.ny.gov, <https://esd.ny.gov/excelsior-jobs-program> (last visited Aug. 7, 2020).

It is hereby found and declared that New York state needs, as a matter of public policy, to create competitive financial incentives for businesses to create jobs and invest in the new economy. The excelsior jobs program act is created to support the growth of the state's traditional economic pillars including the manufacturing and financial industries and to ensure that New York emerges as the leader in the knowledge, technology and innovation based economy. The program will encourage the expansion in and relocation to New York of businesses in growth industries such as clean-tech, broadband, information systems, renewable energy and biotechnology.

This legislation creates the excelsior jobs program, which has four components: the excelsior jobs tax credit, the excelsior investment tax credit, the excelsior research and development tax credit and the excelsior real property tax credit. These credits are designed to promote business expansion in New York state and increase jobs in the new economy. At the same time, the program protects state taxpayers' dollars by ensuring that New York provides tax benefits only to businesses that have created the promised jobs and made the promised investments.⁵⁰⁰

The following summary of the four credits is provided on the ESD's Excelsior Jobs Program webpage:

- **Excelsior Jobs Tax Credit:**
 - A credit of up to 6.85% of wages per net new job.
 - For a qualified green project a credit of up to 7.5% of wages per net new job.
- **Excelsior Investment Tax Credit:**
 - A credit valued at 2% of qualified investments.
 - For a qualified green project a credit valued at 5% of qualified investments.

⁵⁰⁰ N.Y. Economic Development Law § 351 (Consol. 2020), <https://www.nysenate.gov/legislation/laws/COM/351>.

- **Excelsior Research and Development Tax Credit:**

- A credit of 50% of the portion of the Federal Research and Development tax credit that relates to expenditures in NYS up to credit up to 6% of research expenditures attributable to activities conducted in NYS.
- For a qualified green project a credit of 50% of the portion of the Federal Research and Development tax credit that relates to expenditures in NYS up to 8% of research expenditures attributable to activities conducted in NYS.

- **Excelsior Real Property Tax Credit:**

- Available to firms locating in certain distressed areas and to firms in targeted industries that meet higher employment and investment thresholds (Regionally Significant Project).⁵⁰¹

Firms must meet the following Program Eligibility requirements to qualify:

Applicants must operate predominately [sic] in the following strategic industries and create the minimum new jobs for the strategic industry or retain jobs and make significant capital investments.

- Scientific Research and Development firms creating at least 5 net new jobs*
- Software Development firms creating at least 5 net new jobs*
- Financial services (customer service) back office operations creating at least 25 net new jobs
- Agriculture firms creating at least 5 net new jobs*
- Manufacturing firms creating at least 5 net new jobs*
- Back office firms creating at least 25 net new jobs
- Distribution firms creating at least 50 net new jobs
- Music Production firms creating at least 5 net new jobs
- Entertainment Companies creating at least 100 net new jobs

⁵⁰¹ Empire State Development, Excelsior Jobs Program, esd.ny.gov, <https://esd.ny.gov/excelsior-jobs-program> (last visited Aug. 7, 2020).

- Life Sciences Companies creating at least 5 net new jobs
- Other firms creating at least 150 net new jobs and investing at least \$3 million
- Firms in strategic industries that make significant capital investment that have at least 25 employees; manufacturing firms who retain at least 5 employees are also eligible to apply for participation in the Program

* Eligible strategic industry for enhanced green project tax credits⁵⁰²

The Excelsior Jobs Program Act authorizes the Commissioner of the Department of Economic Development⁵⁰³ to, *inter alia*, “promulgate regulations establishing an application process and eligibility criteria,”⁵⁰⁴ for the Excelsior Jobs Program. *See* 5 NYCRR ch XIX. Investments zones are defined subsection q of part 190.2.

(q) *Investment zone* shall mean an area within the State that had been designated under section 958(a)(i) and (d) of the General Municipal Law that was wholly contained within up to four distinct and separate contiguous areas as of the date immediately preceding the date the designation of such area expired pursuant to section 969 of the General Municipal Law. Investment zones are the designated distinct and separate contiguous areas of the municipality

⁵⁰² Empire State Development, *Excelsior Jobs Program*, esd.ny.gov, <https://esd.ny.gov/excelsior-jobs-program> (last visited Aug. 7, 2020).; N.Y. Economic Development Law § 353 (Consol. 2020), <https://www.nysenate.gov/legislation/laws/COM/353> (Eligibility Criteria).

⁵⁰³ N.Y. Economic Development Law § 10 (Consol. 2020), <https://www.nysenate.gov/legislation/laws/COM/10> (“There shall be in the state government a department of economic development. The head of the department shall be the commissioner of economic development who shall be appointed by the governor, by and with the advice and consent of the senate, and hold office until the end of the term of the governor by whom he was appointed and until his successor is appointed and has qualified. The principal office of the department shall be in the city of Albany. Regional offices may be established and maintained by the department in such places as the commissioner may determine and for which appropriations are made by the legislature...”).

⁵⁰⁴ N.Y. Economic Development Law (Consol. 2020), § 356 <https://www.nysenate.gov/legislation/laws/COM/356> (powers and duties of the commissioner).

that qualified for investment zone status as those areas existed on June 29, 2010.⁵⁰⁵

General Municipal Law - Article 18-B - New York State Empire Zones
Section 958
Criteria for empire zone designation

(a) To be eligible for designation as an empire zone, an area must be characterized by pervasive poverty, high unemployment and general economic distress, must correspond to traditional neighborhood or community boundaries, and where appropriate, be bounded by major natural or man-made physical boundaries, such as bodies of water, railroad lines, or limited access highways; and must meet the following requirements:

(i) the area shall include a United States census tract or tracts or block numbering area or areas, or portions thereof, each full census tract or portion of a block numbering area of which, according to the most recent census data available, has:

(A) a poverty rate of at least twenty percent for the year to which the data relate;

(B) an unemployment rate of at least 1.25 times the statewide unemployment rate for the year to which the data relate; and

(C) a population of at least two thousand.

(ii) lands nearby or contiguous to census tracts or block numbering areas described in paragraph (i) of this subdivision may be eligible to be included within an empire zone if, upon the request of the applicant, the commissioner finds, in accordance with regulations promulgated pursuant to this article, that such additional lands have significant potential for business development and job creation, which will enhance economic revitalization of the

⁵⁰⁵ 5 NYCRR ch. XIX pt. 190.2 (q).

[https://govt.westlaw.com/nycrr/Document/I9894e6e1ece711df9775d0e0e9813695?viewType=FullText&originatio nContext=documenttoc&transitionType=CategoryPageItem&contextData=\(sc.Default\)](https://govt.westlaw.com/nycrr/Document/I9894e6e1ece711df9775d0e0e9813695?viewType=FullText&originatio nContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default)).

zone and benefit zone residents; provided, however, that lands nearby shall not be included in a zone until the commissioner, in consultation with the director of the budget, promulgates regulations governing the inclusion of such lands;

(iii) the area proposed as an empire zone shall not exceed:

two square miles for any zone, such area shall be defined by one or more borders, which borders shall be determined by the applicant and need not be entirely coterminous with the borders of census tracts or block numbering areas provided, however, that such zone shall be located entirely within traditional neighborhood or community boundaries, and where appropriate, be bounded by major natural or man-made physical boundaries, such as bodies of water, railroad lines, or limited access highways, and the zones created pursuant to paragraph (viii) of subdivision (b) of section nine hundred sixty of this article should be limited to one square mile; provided however, empire zones designated under subdivision (b) of section nine hundred sixty of this article may apply to increase their distinct and separate contiguous areas to two square miles; provided further, regionally significant projects are not included within such two square mile limitation;

(iv) if such area is governed by zoning laws or other laws or regulations governing land use, such laws or regulations must allow at least twenty-five percent of such area to be used for commercial or industrial activity;

(v) at least twenty-five percent of the total land within such area must be vacant, abandoned or otherwise available for industrial or commercial development or redevelopment; and

(vi) such other requirements as may be established in regulations promulgated by the commissioner with the approval of the director of the budget and after consultation with the commissioner of labor, including but not limited to:

(A) a comprehensive demonstration of chronic and severe economic distress and the reasons

therefor as evidenced by population and employment decline, increase in unemployment and public assistance recipients, decline in real property values, relative decline in per capita income, the extent of abandoned property and deteriorated industrial, commercial and residential properties, a decline in the number of business establishments, obsolescence in plant capacity, loss of markets to foreign competition, the unavailability of expansion financing, poor access to markets, the retirement of local owners of companies;

(B) a demonstration of the potential of the area to attract private investment that will provide employment to persons in the area who are unemployed or economically disadvantaged;

(C) a demonstration of substantial public and private commitments to a long-term economic revitalization program for the area and the local capacity to manage such a program;

(D) a demonstration of the manner in which the overall economic development plan enunciates the needs of the area and sets forth proposals to solve them; and

(E) a demonstration of the manner in which progress in implementing the zone development plan will be routinely evaluated on the local level and how information essential for periodic evaluations will be compiled.

Such regulations may require a demonstration of a decline in population, a decline in employment, an increase in unemployment, a decline in real property values, a relative decline in per capita income, the extent of abandoned property and deteriorated industrial, commercial and residential property, a decline in the number of business establishments, and other indicators of severe economic distress....

(d) Notwithstanding the provisions of paragraph (i) of subdivision (a) of this section, any municipality may apply for designation as an empire zone for an area which shall include a United States census tract or tracts or block numbering area or areas or portions thereof, each full census tract or portion of a block numbering area of which according to the most recent

census data available has:

- (i) at the time of application, an unemployment rate equal to or exceeding the unemployment rate of the state of New York;
- (ii) a rate of poverty for individuals of at least twenty percent;
- (iii) a number of households receiving public assistance of fourteen percent or more;
- (iv) the municipality is considered a non-metropolitan area; and
- (v) there is no other empire zone in the county in which designation is sought....⁵⁰⁶

The following list of Investment Zones is pulled from the Excelsior Jobs Program fact sheet:⁵⁰⁷

NEW YORK CITY REGION

- EAST NY
- PORT MORRIS
- SOUTH JAMAICA
- EAST HARLEM
- HUNTS POINT
- SOUTHWEST BROOKLYN
- FAR ROCKAWAY
- NORTH BROOKLYN
- WEST SHORE STATEN ISLAND
- CHINATOWN/LOWER EAST SIDE
- STATEN ISLAND (NORTH SHORE)

And the following entertainment-specific definitions are set forth in subsections m and u of chapter XIX of 5 NYCRR. Emphasis is in **yellow**, with commentary provided below.

⁵⁰⁶ N.Y. General Municipal Law § 958 (Consol. 2020), <https://www.nysenate.gov/legislation/laws/GMU/958> (Criteria for empire zone designation).

⁵⁰⁷ Empire State Development, Excelsior Jobs Program Overview (May 2020), <https://esd.ny.gov/sites/default/files/Excelsior-Jobs-Program-Overview-MAY2020.pdf>.

(m) Entertainment company means a corporation, partnership, limited partnership, or other entity principally engaged in the production or post production of:

- (1) motion pictures, which shall include feature-length films and television films;
- (2) instructional videos;
- (3) televised commercial advertisements;
- (4) animated films or cartoons;
- (5) music videos;
- (6) television programs, which shall include but not be limited to, television series, television pilots, and single television episodes; or
- (7) programs primarily intended for radio broadcast.

Entertainment company shall not include:

- (1) principally engaged in the live performance of events, including but not limited to, theatrical productions, concerts, circuses, and sporting events....

(u) Music production means the process of creating sound recordings of at least eight minutes, recorded in professional sound studios, intended for commercial release. Music production does not include recording of live concerts, or recordings that are primarily spoken word or wildlife or nature sounds, or produced for instructional use or advertising or promotional purposes....⁵⁰⁸

“Entertainment company” amendment:

The definition “Entertainment company” should be amended to include “Independent music venues” and “Independent promoters.” A diverse range of industry stakeholders should be included in the rulemaking process to ensure that amendments to this definition (and sub-definitions) reflect industry terminology and practices.

At present, the “Entertainment company” definition explicitly favors the film, television, and recording industries over the live music industry. This is problematic and echoes the so-

⁵⁰⁸ 5 NYCRR ch. XIX pt. 190.2 (m),(u),
[https://govt.westlaw.com/nycrr/Document/I9894e6e1ece711df9775d0e0e9813695?viewType=FullText&originatio nContext=documenttoc&transitionType=CategoryPageItem&contextData=\(sc.Default\)](https://govt.westlaw.com/nycrr/Document/I9894e6e1ece711df9775d0e0e9813695?viewType=FullText&originatio nContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default))

called “playing favorites” issue of the Empire Zones Program. As we discussed in the background section of our paper, recording and live are interrelated. Accordingly, the Department’s decision to include “Music production” and not live (*i.e.*, music venues and promoters) is arbitrary and misguided. Lastly, including live in the Excelsior Jobs Program would complement the initiatives we are advocating for at the local level, as well as the federal initiatives set forth by NIVA, the RESTART Act (S. 3814), the Entertainment New Credit Opportunity for Relief & Economic Sustainability (ENCORES) Act (S. 4344), and the Save Our Stages Act (S. 4258).

“Music production” amendment: The definition of “Music production” is poorly drafted and should be fixed. Most sound recordings that are commercially released are not eight minutes in length / no record label to our knowledge requires sound recordings to be a minimum of eight minutes in length. The following statement from Donald S. Passman on p. 118 of *All You Need to Know About the Music Business* supports our argument: “The other requirements for your recordings (regardless of your level) are that they must be...songs of a minimum playing time (usually two minutes).”⁵⁰⁹

Excelsior Jobs Program, final thoughts: While an overall cost-benefit analysis of the Excelsior Jobs Program is not within the scope of this paper, advocating for the inclusion of independent music venues and promoters in the Program’s eligibility requirements falls well within it. Incorporating live into the Excelsior Jobs Program would spur job growth in the Program’s targeted industries and offer those who work in this sector of entertainment an equal opportunity to earn a living and pursue their dreams.

CONCLUSION

In January 2021, Fran Lebowitz and Martin Scorsese delivered a love letter to New York with the release of the documentary series, *Pretend It’s a City*. As we follow Lebowitz through the City streets, avoiding subway surfaces, scowling at aloof walkers, and sidestepping texting passersby, she dishes her thoughts on all things New York: culture, sports, restaurants, nightlife, and, of course, music:

⁵⁰⁹ PASSMAN, *supra* note 137 at 118.

No one is loved like musicians. Musicians are loved by people, you know really loved, because they give them the ability to express their emotions and their memories. There's no other form that does that. I really think that musicians, probably musicians and cooks, are responsible for the most pleasure in human life....⁵¹⁰

There is no doubt in our minds that music provides the soundtrack to the “City That Never Sleeps.” Although we cannot personally imagine living in an NYC devoid of dance floors and stages, due to high rent costs, regulatory red tape, and the COVID-19 crisis, this alarming dystopia could very well become a reality. Concerned about the future of our City’s music industry, we launched the **NYC Nightlife & Live Events Reform Initiative** in May 2020 to focus on the following objectives:

- (1) identify key issues faced by those in the nightlife and live events industry;
- (2) analyze existing laws and regulations; and
- (3) set forth realistic and impactful proposals for reform.

In addition to this paper, we have produced a proposed bill package, **Support Live Music**, which is available on our website: <https://www.nycnightlifereform.com/>.

This proposed legislation amends the Administrative Code of the City of New York by adding a new title 34 (Music Code), as well as amending title 28 (Construction Codes), title 10 (Public Safety), and title 24 (Noise Code). We hope these documents contribute to ongoing conversations, subsequent action steps, and, ultimately, effective reforms.

See you on the dance floor.

⁵¹⁰ Martin Scorsese, *Cultural Affairs, Pretend It's a City*, Netflix (Jan. 8, 2021), <https://www.netflix.com/title/81078137?source=35>. (Lebowitz’s quote begins at 17:50).