

# NOTES

## **Killing Two Myths with One Stone: How the Public Trust Doctrine Can Improve Climate Resiliency by Stopping Gentrification**

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### TABLE OF CONTENTS

Introduction . . . . .	498
I. Zoning, Gentrification, and Climate Change . . . . .	501
II. Gentrification Decreases Community Resiliency . . . . .	505
III. Sunset Park, New York . . . . .	508
A. New York City Climate Goals . . . . .	509
B. Industry City Redevelopment Proposal . . . . .	510
C. Political Context and Community Proposal—Grid . . . . .	512
D. Outcome . . . . .	513
IV. The Public Trust Doctrine . . . . .	513
A. General Principles . . . . .	514
B. Saxion Framework . . . . .	515
C. Expansion of the Saxion Framework . . . . .	517
V. Expanding the Public Trust Doctrine in Discretionary Zoning and Land Use Decisions . . . . .	518
A. Developing a Workable Framework . . . . .	519
1. Incorporation into Zoning Code . . . . .	519
2. Adjudication of the Public Trust Doctrine . . . . .	520
B. Applying the Framework to Sunset Park, New York . . . . .	522
Conclusion . . . . .	524

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## INTRODUCTION

Humanity is waging a “suicidal” war on the natural world, but “[n]ature always strikes back.”<sup>1</sup> Even if greenhouse gas emissions were reduced to zero today, nature will continue to “strike back” for decades to come<sup>2</sup>—with an increased frequency of flooding,<sup>3</sup> extreme weather events,<sup>4</sup> and natural disasters.<sup>5</sup> Sea-level rise alone is expected to destroy billions of dollars in property and displace millions of people.<sup>6</sup> But climate change is not the only threat to frontline communities. Gentrification, through a pattern of what this Note terms “climate-blind development,”<sup>7</sup> has placed the most vulnerable communities at even greater climate risks.<sup>8</sup> Both climate change and gentrification are causing, and will continue to cause, an event of mass displacement<sup>9</sup> that threatens the social cohesion

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1. Justin Rowlett, *Humans Waging ‘Suicidal War’ On Nature – UN Chief Antonio Guterres*, BBC (Dec. 2, 2020), <https://perma.cc/Q745-URPC>.

2. *Id.*; Charles W. Schmidt, *Beyond Mitigation: Planning For Climate Change Adaptation, Spheres Of Influence*, 117 ENVTL HEALTH PERSPECTIVES 306, 307 (2009), <https://perma.cc/T3ME-B83G> (“[E]ven if we blocked all emissions now, the amounts of greenhouse gases already in the atmosphere would raise global temperatures by an additional 2°C by 2100,” says Robert Corell, vice president of the John Heinz III Center for Science, Economics, and Environment, in Washington, DC.); Matthew Collins et al., *Long-term Climate Change: Projections, Commitments and Irreversibility* (Sylvie Joussaume, Abdalah Mokssit, Karl Taylor & Simon Tett, eds.), in INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2013: THE PHYSICAL SCIENCE BASIS, 1029, 1085 (Thomas F. Stocker et al., eds. 2013), <https://perma.cc/KE9P-55B6>.

3. *See, e.g.*, United Nations Environment Programme, *How Climate Change Is Making Record-Breaking Floods The New Normal* (Mar. 3, 2020), <https://perma.cc/UUL5-RCRM>.

4. WORLD ECONOMIC FORUM, *THE GLOBAL RISKS REPORT 2019* 5, 6, 15, 91 (14th ed. 2019), <https://perma.cc/NJ4E-KD2B>.

5. *Id.* at 5, 6, 15, 91.

6. Amy Morsch, *Planning For The Economic Risk Of Climate Change*, CENTER FOR CLIMATE ENERGY SOLUTIONS (Oct. 17, 2019), <https://perma.cc/M6ZC-Z57M>.

7. *See, e.g.*, Christopher Flavelle & John Schwartz, *As Climate Risk Grows, Cities Test A Tough Strategy: Saying ‘No’ To Developers* A1, N.Y. TIMES (Nov. 19, 2019), <https://perma.cc/NG5D-98R6> (“The outcome of [the battle between developers and local governments trying to plan for climate impacts] will shape American’s vulnerability to climate change for generations – and so far, development seems to be prevailing. In many coastal states, homes are going up at the fastest rate in the most flood-prone areas.”); Evelyn Lee, *Deep Dive: Is Private Real Estate Short-Sighted On Climate Risk?*, PERE (Apr. 6, 2020), <https://perma.cc/HUA7-QCX4>; Patrick Sisson, *How Climate Change Creates A ‘New Abnormal’ For The Real Estate Market*, CURBED (Oct. 19, 2019), <https://perma.cc/KRL5-MTBM>.

8. Aparna Nathan, *Climate is the Newest Gentrifying Force, and its Effects are Already Re-Shaping Cities*, SCIENCE IN THE NEWS (Jul. 15, 2019), <https://perma.cc/ZNW9-QWSF>; Jared Brey, *Climate Change Is Already Amplifying the Affordable Housing Crisis*, NEXTCITY (Aug. 20, 2019), <https://perma.cc/LE97-R8FB>.

9. *See* United Nations High Commission on Refugees, *Why UNHCR Is Taking Action On Climate Change Displacement*, United Nations High Commission on Refugees, 2017, <https://perma.cc/L2RR-PWHX>; Oli Brown, *Migration And Climate Change*, 31 INTERNATIONAL ORGANIZATION FOR MIGRATION RESEARCH SERIES, 11, 20, 41, 2008, <https://perma.cc/Z4VX-AEBB>. (“By 2050 one in every 45 people in the world will have been displaced by climate change.”); The Uprooted Project, *Background: Gentrification and Displacement* 3, 5, UNIV. OF TEXAS AT AUSTIN, <https://perma.cc/5MM5-F4N4>; *see also* Alexander Gelfand, *Gentrification: Climate Change’s Latest Threat* 3-5, HOPKINS BLOOMBERG PUB. HEALTH (Oct. 8, 2018), <https://perma.cc/C7K7-6NNZ> (“Hurricane Katrina

of American communities,<sup>10</sup> the national economy,<sup>11</sup> and community climate resilience.<sup>12</sup>

In the face of climate change, real estate development and environmental protection can no longer exist as two separate issues. If our country hopes to survive the inevitable impacts of climate change,<sup>13</sup> climate change adaptation needs to be the primary goal in every new development.<sup>14</sup> And yet, in the context of municipal land use, what actions have American communities taken to adapt to the impacts of our future? How much power do the people most at risk<sup>15</sup> have in

hit Louisiana in August 2005 with windspeeds of 125 miles per hour. Entire neighborhoods in New Orleans, including the predominantly African-American Lower Ninth Ward, were destroyed. Approximately 80 percent of the city was flooded. At least 400,000 residents – most of them low-income people of color – were displaced.”); Global Resistance Institute, *Climate Gentrification: Why We Need To Consider Social Justice In Climate Change Planning*, RESILIENCE NEWS, NORTHEASTERN UNIV., <https://perma.cc/QM5W-HZ2C> (“In Miami . . . [m]inorities have historically lived in these higher elevation areas, as redlining practices kept black people out of the traditionally more valuable waterfront areas. Miami has found that climate gentrification has contributed to an affordable housing problem in Little Haiti and Liberty City.”).

10. Jeremy J. Hess, Josephine N. Malilay & Alan J. Parkinson, *Climate Change: The Importance of Place*, 35 AM. J. OF PREVENTIVE MED. 468, 476 (2008), <https://perma.cc/P9YV-BKVK>; see Tanvi Misra, *What Happens to Community Bonds When a Neighborhood Gentrifies*, BLOOMBERG CITYLAB (Apr. 4, 2019), <https://perma.cc/84QT-2BZR> (“The community connection was lower in gentrifying neighborhoods compared to those that did not, or could not gentrify.”); Eduardo Vega-López, *Climate Change and Local Social Cohesion*, URB-AL III 15, 21, <https://perma.cc/42A8-JMWC> (“It is clear that global climate change is imposing new and enormous challenges on local social cohesion.”).

11. Kristinn sv. Helgason, *The Economic And Political Costs Of Population Displacement And Their Impacts On The Sdgs And Multilateralism*, U.N. DEP’T OF ECON. AND SOCIAL AFFAIRS, 1, 3 (June 2020), <https://perma.cc/3WWB-YVW9>; Tharanga Yakupitiyage, *The Hidden Economic Costs of Displacement*, INTER PRESS SERVICE, <https://perma.cc/D5SG-JPHN>; Walter Kälin, *Displacement Caused by the Effects of Climate Change: Who Will Be Affected and What Are the Gaps in the Normative Framework for Their Protection?* BROOKINGS (2008), <https://perma.cc/QVJ3-38L7>; Renee Cho, *How Climate Change Impacts the Economy*, EARTH INST. OF COLUMBIA UNIV. (June 20, 2019), <https://perma.cc/LKA3-9JWG>; see also S. Nazrul Islam & John Winkel, *Climate Change and Social Inequality*, 152 DESA WORKING PAPER (2017) (discussing social inequities are exacerbated by climate change), <https://perma.cc/9GPS-LJJT>; Josie Garthwaite, *Climate Change Has Worsened Global Economic Inequality*, STANFORD EARTH MATTERS (Apr. 22, 2019) (discussing social inequities are exacerbated by climate change), <https://perma.cc/WT87-UJP9>.

12. Danielle Baussan, *Social Cohesion: The Secret Weapon In The Fight For Equitable Climate Resilience*, CTR. FOR AM. PROGRESS, 2, 8, 13-14 (2015) <https://perma.cc/ZV8Y-CS7L>; Amy Kirbyshire, Emily Wilkinson, Virginie Le Masson, & Pandora Batra, *Mass Displacement And The Challenge For Urban Resilience*, OVERSEAS DEVELOPMENT INST. 11 (2017), <https://perma.cc/R7AX-BC6S>.

13. Schmidt, *supra* note 2, at 307 (“Even if amount of green house gas emissions blocked now, global temperatures would still rise an additional 2 degrees Celsius by 2100”).

14. Natalie Ambrosio and Yoon Kim, *Community Resilience and Adaptive Capacity: A Meaningful Investment Across Assets*, FEDERAL RESERVE BANK OF SAN FRANCISCO (Oct. 17, 2019), <https://perma.cc/H57U-5VGA> (“Every investment, from real assets to corporate initiatives, is inextricably connected to the surrounding community.”).

15. Commonly referred to as “frontline communities.” Jonathan Hahn, *Frontline Communities Will Be Front and Center at Peoples Climate March 5–7*, SIERRA CLUB (Apr. 17, 2020), <https://perma.cc/WR59-4WQ3>.

deciding how their community adapts to climate change? The answer to both questions is “not enough.”<sup>16</sup>

Central to this problem is the role that zoning authorities play in land use decisions. If zoning authorities have no obligation or authority to consider the impacts of climate change or gentrification when making discretionary zoning decisions, it is unlikely that new development will adequately prepare American communities to adapt to climate change.<sup>17</sup> Additionally, residents have no meaningful way to propose development goals for their own communities.<sup>18</sup> The Public Trust Doctrine—“a legal principle establishing that the government owns and manages certain natural and cultural resources for public use”<sup>19</sup>—could be used to better regulate municipal zoning authorities, strengthen the judicial check on municipal decision making, and increase citizen participation. This would result in more climate-conscious outcomes in discretionary zoning decision making.

Prior scholarship has described the analytical framework of the Public Trust Doctrine and contemplated the limits of its application. Of particular note is Joseph L. Sax’s *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*.<sup>20</sup> The majority of the Public Trust Doctrine scholarship reflects on how it is used to protect natural resources impacted by government land use decisions.<sup>21</sup> Newer scholarship has begun to advocate for the expansion

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16. Thomas Hoppe, Maya M. van den Berg & Frans MJH Coenen, *Reflections On The Uptake Of Climate Change Policies By Local Governments: Facing The Challenges Of Mitigation And Adaptation*, 4 ENERGY, SUSTAINABILITY AND SOCIETY 8 (2014), <https://perma.cc/C2LM-ZUVK>. (“although it appears that climate change mitigation strategies . . . are being adopted by a large majority of local governments, this cannot be said of climate change adaptation.”); Thomas M. Gremillion, *Setting the Foundation: Climate change adaptation at the local level*, 41 LEWIS & CLARK ENVTL. L. REV. 1221, 1233 (2011) (“While adaptation work remains in its infant stages . . . a focus on adaptation at the national, state, and local level may prove most valuable”).

17. A discretionary zoning decision may be considered arbitrary and capricious if not based on evidence deemed relevant to the applicable ordinance. STEWART E. STERK, EDUARDO M. PEÑALVER, & SARA C. BRONIN, *LAND USE REGULATION* 589 (3rd ed., 2020). Some zoning ordinances may impose specific evaluation criteria even for discretionary zoning decisions. *Id.* at 589. See also, Shelby D. Green, *Zoning Neighborhoods for Resilience: Drivers, Tools, and Impacts*, 28 FORDHAM ENVTL. L. REV. 42, 87 (2016), <https://perma.cc/A5M5-SY2Z> (describing how zoning has required considerations related to the incompatibility or potential for nuisance in land use decisions but does not yet require considerations of climate resiliency).

18. Community participation in land use decisions is usually limited to participation in hearings to express either concerns or support for an existing proposal. See, e.g., LEAGUE OF CALIFORNIA CITIES, PLANNING COMMISSIONER’S HANDBOOK 27, <https://perma.cc/C92D-ZAG2>; Prince George’s County Planning Department, *Creating a World-Class Public Participation Process for Land Use and Zoning Decisions: Executive Summary* 3 (July 2016), <https://perma.cc/B82A-YW5Z>.

19. *Public Trust Doctrine*, BALLOTEDIA, <https://perma.cc/EFV9-U3R6>.

20. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

21. See e.g., Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 Penn. St. Envtl. L. Rev. 1 (2007); John Arnold & Andrew Jacoby, *Examining the Public Trust Doctrine’s Role in Conserving Natural Resources on Louisiana’s Public Lands*, 29 Tul. Envtl. L.J. 149 (2017).

of the Public Trust Doctrine to support climate change *mitigation*,<sup>22</sup> but few articles have explored how the Doctrine could be used to support climate change *adaptation*.

This Note will argue that the Public Trust Doctrine can and must be expanded to increase the climate resiliency of vulnerable communities in the United States by curbing the displacing impacts of climate change and gentrification. Part I will introduce the concepts of zoning, gentrification, and climate change. Part II will aim to explain how gentrification decreases community climate resilience. Part III will describe the Industry City redevelopment proposal in New York City to demonstrate the connection between discretionary zoning decisions, gentrification, and community climate resiliency. Part IV will provide an overview of the Public Trust Doctrine, and Part V will aim to describe a workable framework for the Doctrine's expansion into discretionary zoning decisions. Finally, this Note will provide a conclusion and summary.

### I. ZONING, GENTRIFICATION, AND CLIMATE CHANGE

Municipal authority to regulate land use has been recognized by the Supreme Court since 1926 with its landmark decision in *Village of Euclid v. Ambler Realty Co.*<sup>23</sup> Under *Euclid*, states through their police power have the inherent right to regulate land uses, but municipalities do not. Instead, the state government delegates the power to regulate land use through a state enabling act, which authorizes municipalities to create zoning codes.<sup>24</sup> Known as Euclidian Zoning, most early zoning codes divided land within the municipality into districts and designated one category of use permitted for each district.<sup>25</sup> Euclidian Zoning “has the virtue of certainty and the handicap of rigidity.”<sup>26</sup> Over time, municipalities realized that the archaic nature of strict Euclidian Zoning made it difficult to adapt land uses to meet the needs of a changing world. Modern zoning has developed two tools to improve upon strict Euclidian Zoning—comprehensive plans to guide development over time, and flexibility tools to soften the impact of Euclidian Zoning.

Comprehensive plans are often drafted as a series of goals, objectives, and policies that are used to guide development in the entire municipality.<sup>27</sup> The legal effect of a comprehensive plan varies from state to state.<sup>28</sup> In some states, comprehensive plans are imbued with legal significance and can be used to invalidate

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22. One paper proposed that the concept of “natural resources” should be expanded to include the atmosphere. See Jordan M. Ellis, *The Sky's the Limit: Applying the Public Trust Doctrine to the Atmosphere*, 86 Temp. L. Rev. 807 (2014).

23. 272 U.S. 365 (1926).

24. STERK, *supra* note 17, at 23.

25. *Id.* at 24.

26. *Lutz v. City of Longview*, 83 Wash. 2d 566, 568 (Wash. 1974).

27. STERK, *supra* note 17, at 8.

28. *Id.* at 8, 9.

any zoning decision deemed inconsistent with the plan.<sup>29</sup> However, even in those states, a zoning decision will not usually be invalidated when it conflicts with one portion of the comprehensive plan so long as it is consistent with another portion of the plan.<sup>30</sup> In other states, comprehensive plans have no binding effect and serve only as guides for future zoning decisions.<sup>31</sup>

Flexibility tools are often set forth in the zoning code itself.<sup>32</sup> Some flexibility tools (e.g., accessory uses or special exceptions) permit uses within a zoning district that are explicitly contemplated by the legislature but subject to specific conditions.<sup>33</sup> In residential areas, for example, storage sheds, fences, and satellite dishes are often included as accessory uses.<sup>34</sup> Accordingly, zoning authorities review applications for special exceptions or accessory uses to determine whether the conditions are met – if the conditions are met, the zoning authority must approve the application, and if the conditions are not met, the zoning authority must deny the application.<sup>35</sup>

Other flexibility tools (e.g., zoning amendments, variances, planned unit developments (PUD), and incentive zoning) permit deviations from the zoning code not explicitly contemplated by the legislature. These tools grant a far greater level of deference to the zoning authority. For example, zoning amendments can be made in two ways. A zoning text amendment is a change in the text of a zoning code (e.g., changing the minimum lot size for single family homes from one acre to two acres).<sup>36</sup> A zoning map amendment is a change in the zoning designation of a particular area on the zoning map (e.g., changing the zoning designation of an area from commercial use to industrial use).<sup>37</sup> Most courts treat zoning amendments as a legislative act.<sup>38</sup> Thus, the decision to grant or deny a request for a zoning amendment is often left to the discretion of the zoning authority, and courts will give a high level of deference to decisions to approve map or text amendments.<sup>39</sup>

Unfortunately, in the context of climate change, discretionary flexibility tools have not prevented gentrification and climate-blind development, even in municipalities where comprehensive plans explicitly articulate climate change

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29. *Id.* at 9.

30. *Id.*

31. *Id.*

32. *Id.* at 32.

33. *Id.*

34. *Accessory Uses in Zoning*, COMMUNITY PLANNING AND ZONING (July 25, 2019), <https://perma.cc/LA67-AF6D>.

35. *See, e.g.*, *Petition of Skeen*, 190 W.Va. 649 (W.Va. 1994).

36. ALAN R. ROMERO, *PROPERTY LAW FOR DUMMIES* 109–10 (2013).

37. *Id.*

38. A court will not overturn a zoning amendment unless the municipality has exceeded the authority given to it by its enabling act. STERK, *supra* note 17, at 565. A smaller fraction of states review zoning amendments with a high level of scrutiny under the “Change/Mistake Rule.” *Id.* at 566.

39. *Id.* at 565.

adaptation goals.<sup>40</sup> This outcome may be a result of at least two factors. First, this outcome can be attributed to a failure to fully integrate climate change adaptation goals into zoning codes.<sup>41</sup> For example, municipalities could follow the model of Norfolk, Virginia, which has overhauled its zoning code to better meet its climate change adaptation goals.<sup>42</sup> The changes to the Norfolk zoning code include, among other things, a requirement that new buildings in coastal areas be elevated three feet above the water level projected in a 100-year flood.<sup>43</sup> Further, the criteria upon which zoning authorities base decisions regarding flexibility tools do not usually require zoning authorities to prioritize climate outcomes or equity outcomes over short-term economic benefits. Few zoning codes require any consideration of how an approval of a flexibility tool will impact the municipality's ability to adapt to climate change.

Many recent discretionary zoning decisions have permitted climate-blind development—large-scale developments that fail to meet climate goals and, in some instances, actively impede those goals. For example, in 2019 Governor Cuomo announced the largest offshore wind agreement in the United States and his goal to create jobs in conjunction with that deal.<sup>44</sup> Although New York City has valuable waterfront property that could be used to create the green manufacturing jobs to support Cuomo's wind agreement, New York City's zoning authorities have approved numerous large-scale developments that convert waterfront property from manufacturing uses to residential, commercial, and retail uses.<sup>45</sup> New York zoning authorities are not required to consider how the approval of these zoning changes might limit the City's ability to realize its climate goals,<sup>46</sup> which thus permits climate-blind development.

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40. San Francisco's 2014 general plan stated goals related to affordable housing like: "Foster a housing stock that meets the needs of all residents across lifecycles," "identify and make available for development adequate sites to meet the city's housing needs, especially permanently affordable housing," and "facilitate permanently affordable housing." See SAN FRANCISCO PLANNING DEPARTMENT, SAN FRANCISCO GENERAL PLAN HOUSING ELEMENT 6, 17, 27 (2014), <https://perma.cc/GD9G-5DFM>. Yet, today, San Francisco is one of the most gentrified cities and continues to have an affordable housing crisis. Andrew Chammings, *Study: San Francisco and Oakland are the most gentrified cities in the U.S.*, SFGATE (July 6, 2020), <https://perma.cc/9CUL-7PW6>.

41. EPA, SMART GROWTH FIXES FOR CLIMATE ADAPTATION AND RESILIENCE (Jan. 2017), <https://perma.cc/J9D5-DHFT> (describing how municipalities can better adapt to climate change by integrating adaptation goals into their zoning codes).

42. See Nicholas Kusnetz, *Norfolk Wants to Remake Itself as Sea Level Rises, but Who Will Be Left Behind?*, INSIDE CLIMATE NEWS (May 21, 2018), <https://perma.cc/3E6E-2TPF>.

43. *Id.*

44. COLLECTIVE FOR COMMUNITY, CULTURE, & ENVIRONMENT, SUNSET PARK GREEN RESILIENT INDUSTRIAL DISTRICT 17 (Sept. 9, 2019), <https://perma.cc/G5QB-YUKV>.

45. See, e.g., *A guide to the major megaprojects transforming New York City*, CURBED (Oct. 23, 2019), <https://perma.cc/NCU5-T5RB>. For example, the Riverside Center megaproject is redeveloping eight acres of what used to be an industrial lot into five buildings and a park. See *id.*

46. See, e.g., NEW YORK CITY BAR, DISCUSSION PAPER: FURTHER UTILIZING THE ZONING RESOLUTION TO CREATE A MORE SUSTAINABLE NEW YORK CITY, BETTER PREPARED TO ADAPT TO CLIMATE CHANGE (Sept. 2011), <https://perma.cc/6LKS-S2AM>. (discussing how special permits and

Second, there is little attention given to the ways that zoning authorities actively participate in gentrification when they approve flexibility tools. Gentrification is a process of neighborhood change that shifts the economic and racial demographics in a historically disinvested neighborhood.<sup>47</sup> Gentrification often starts with developers identifying “underutilized” areas and appealing to the zoning authority to have the land upzoned.<sup>48</sup> “Underutilized” areas are often identified in lower-income, majority-minority communities.<sup>49</sup> Upzoning can be accomplished through numerous discretionary flexibility tools like a text or map amendment to the zoning code, a PUD, or incentive zoning. Text and map amendments change what is permitted under the zoning code to allow developers to create more dense and different types of land uses than is permitted under the existing zoning code.<sup>50</sup> Functionally, PUDs are to developers what wild cards are to a player in the game of UNO. When a zoning authority approves a PUD for a given tract of land, the zoning authority follows a regulatory process that allows a developer significant flexibility in the configuration of a development and the type of uses permitted in the development, regardless of what would otherwise be permitted by the existing zoning code.<sup>51</sup> Incentive zoning is a specific type of zoning classification predetermined by a zoning authority and placed over certain areas in the zoning map.<sup>52</sup> It permits developers to create more dense developments if the developer also voluntarily provides certain public benefits within the new development.<sup>53</sup>

Success in upzoning attracts other developers and leads to increases in average rents and a reduction in affordable housing.<sup>54</sup> Accordingly, local governments play a contributing role in gentrification when they approve upzoning requests.<sup>55</sup>

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variances are discretionary decisions and that “the Zoning Resolution could be amended to impose an additional finding” as to how the project contributes to the city’s climate goals).

47. *Gentrification Explained*, URBAN DISPLACEMENT PROJECT, <https://perma.cc/A7LZ-6VLF>.

48. “Upzoning” is understood to mean a change in zoning classification from less intensive to more intensive. Bradley Pough, *Neighborhood Upzoning and Racial Displacement: A Potential Target for Disparate Impact Litigation?*, 21.4 U. PA. J. L. AND SOC. CHANGE 267, 276 (2018). This could be accomplished by a number of discretionary zoning flexibility tools like the approval of Planned Unit Developments, variances, or zoning amendments.

49. *Id.* at 277.

50. Romero, *supra* note 34.

51. Bob Bengford, *Planned Unit Developments – Real World Experiences*, MRSC, Oct. 31, 2012, <https://perma.cc/W39E-8P7Y>.

52. SEATTLE OFFICE OF LANNING AND COMMUNITY DEVELOPMENT, INCENTIVE ZONING UPDATE, <https://perma.cc/WWD8-W4Q4>.

53. *Id.*

54. Pough, *supra* note 46, at 277.

55. *Id.* at 278. Although outside the scope of this Note, it is worth noting that the aforementioned correlation between upzoning and displacement is not universally accepted. Many argue instead that the displacement is caused by an overabundance of demand for a limited housing stock which can only be ameliorated through more upzoning. However, this Note does not find that logic convincing because the high cost of construction makes the development of anything but luxury apartments financially impractical. *See, e.g.*, Will Parker, *Aiming at Wealthy Renters, Developers Build More Luxury Apartments Than They Have in Decades*, THE WALL STREET JOURNAL (Jan. 15, 2020), <https://perma.cc/C2CP-7QCS>. Emma Ockerman,



## II. GENTRIFICATION DECREASES COMMUNITY RESILIENCY

Climate change and gentrification are inextricably linked. Many have documented how climate change acts as a threat multiplier,<sup>56</sup> particularly in relation to gentrification. For instance, in coastal communities that experienced extreme weather events like hurricanes Sandy and Katrina, property owners are incentivized to convert damaged affordable housing properties into higher-priced or luxury apartments.<sup>57</sup> In inland communities like Little Haiti, Miami, sea level rise in wealthy waterfront communities has incentivized investment and luxury development in inland communities—displacing low-income residents who have lived there for generations.<sup>58</sup> As a result, many recognize that climate change amplifies the impacts of gentrification and further exacerbates existing racial and economic inequalities.<sup>59</sup> In the extreme, when decisionmakers fail to adequately consider concerns around equity, justice, and power, climate change adaptation itself has the potential to “create wealthy, ecological enclaves disconnected from the rest of society.”<sup>60</sup>

Little attention is given to the reciprocal nature of the relationship between climate change and gentrification where climate change accelerates gentrification, but gentrification also amplifies the impacts of climate change. This Note argues that gentrification, which often results in the displacement of low- and middle-income residents,<sup>61</sup> makes communities less climate resilient because gentrification forces essential workers out of the communities they serve—making it harder for communities to operate during hazard events and slower to recover. Therefore, gentrification is an imminent threat to the ability of communities to survive the impacts of climate change.

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*Tons of New Apartments Are Being Built That Almost No One Can Afford*, VICE (Jan. 15, 2020), <https://perma.cc/633S-Z2WD>; Daniel Herriges, *Here's why developers seem to only build luxury housing*, GREATER WASHINGTON (July 30, 2018), <https://perma.cc/WCB4-9YWZ>.

56. Joe Bryan, *Climate Change as a Threat Multiplier*, ATLANTIC COUNCIL (Nov. 16, 2017), <https://perma.cc/7WHT-L3QY>.

57. Brey, *supra* note 8.

58. The low-income communities being displaced are disproportionately communities of color. Elizabeth Santiago, *Weathering the Storm: Climate Gentrification in Miami's Little Haiti*, UNIV. OF MICHIGAN SCHOOL OF PUB. HEALTH (Feb. 10, 2020), <https://perma.cc/585C-U7N7>.

59. Johanna Bozuwa & Thomas Hanna, *Community Development Innovation Review: Building Community Wealth Through Community Resilience*, FEDERAL RESERVE BANK OF SAN FRANCISCO (Oct. 17, 2019), <https://perma.cc/BK53-4B4N> (describing how recent climate-related events “demonstrate[] how black and LatinX communities are often the most immediately impacted” and how climate adaptation without equity considerations have the potential to “further segregate U.S. cities; contribute to widening economic, social, and health inequality”).

60. *Id.*

61. MIRIAM ZUK ET. AL., COMTY. DEV. INV. CTR., GENTRIFICATION, DISPLACEMENT AND THE ROLE OF PUBLIC INVESTMENT: A LITERATURE REVIEW 11 (Aug. 2015), <https://perma.cc/9D7D-U6FK>; *Gentrification and Neighborhood Revitalization: What's the Difference?*, NAT'L LOW INCOME HOUS. COAL. (Apr. 5, 2019), <https://perma.cc/2NME-W2W4>.

Communities are made of complex interrelated systems connected within a built environment.<sup>62</sup> Community climate resilience is measured by a community's "ability . . . to anticipate, absorb and adapt to shocks and stresses, and to respond in ways that preserve, restore or improve its essential functions, structures and identity, while also maintaining the capacity for adaptation and transformation."<sup>63</sup> Accordingly, a focus only on climate-resilient buildings will not be enough to create community resilience.<sup>64</sup>

For example, during Hurricane Sandy, Goldman Sachs was both lauded and criticized as an "island of resilience" when it was able to keep floodwaters out of the building and the lights on while the New York subways were flooded and the local hospital had to evacuate patients after losing power.<sup>65</sup> Critics recognized that communities will not be climate-resilient just because they have the most resilient buildings, if the people who work in those buildings cannot get to work.<sup>66</sup> Consequently, community resilience also requires a climate resilient economy.<sup>67</sup>

Economic resilience is measured by an economy's ability to recover quickly from shocks, withstand shocks, and in some instances, avoid shocks altogether.<sup>68</sup> In the past year, the COVID-19 pandemic has made clear that economic resilience is not possible without low-income and working-class employees (our "essential workers").<sup>69</sup> For example, the poultry supply chain received national attention in March after a COVID-19 outbreak among working-class and

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62. See AMY KIRBYSHIRE, EMILY WILKINSON, VIRGINIE LE MASSON & PANDORA BATRA, OVERSEAS DEV. INST., MASS DISPLACEMENT AND THE CHALLENGE FOR URBAN RESILIENCE 11 (2017), <https://perma.cc/CV29-JGU5>.

63. *Id.* (internal citations omitted); see also IPCC, CLIMATE CHANGE 2014: IMPACTS, ADAPTATION, AND VULNERABILITY, ANNEX II: GLOSSARY 1772 (John Agard & E. Lisa F. Schipper et al. eds., 2014), <https://perma.cc/3M6Y-NJT8>; DINA IONESCO, DARIA MOKHNACHEVA & FRANÇOIS GEMENNE, THE ATLAS OF ENVIRONMENTAL MIGRATION, p. IX (1st ed. 2016) (ebook). See generally ADITYA V. BAHADUR, KATIE PETERS, EMILY WILKINSON, FLORENCE PICHON, KIRSTY GRAY & THOMAS TANNER, OVERSEAS DEVELOPMENT INSTITUTE, THE 3AS: TRACKING RESILIENCE ACROSS BRACED (2015), <https://perma.cc/U79D-G4TH>.

64. For background on resilient buildings, see generally LARISSA LARSEN ET. AL., GREEN BUILDING AND CLIMATE RESILIENCE: UNDERSTANDING IMPACTS AND PREPARING FOR CHANGING CONDITIONS, UNIV. OF MICHIGAN & U.S. GREEN BUILDING COUNCIL (2011), <https://perma.cc/6UBE-H952>.

65. NATALIE AMBROSIO & YOON KIM, FEDERAL RESERVE BANK OF SAN FRANCISCO, COMMUNITY RESILIENCE AND ADAPTIVE CAPACITY: A MEANINGFUL INVESTMENT ACROSS ASSETS (Oct. 17, 2019), <https://perma.cc/BC87-D928>.

66. *Id.*

67. GEORGETOWN CLIMATE CENTER EQUITABLE ADAPTATION LEGAL & POLICY TOOLKIT: ECONOMIC RESILIENCE [hereinafter GEORGETOWN CLIMATE CENTER TOOLKIT], <https://perma.cc/5LM6-7WV8>.

68. *Id.*

69. See generally Hannah Van Drie & Richard V. Reeves, *Many essential workers are in "low-prestige" jobs. Time to change our attitudes – and policies?*, BROOKINGS (May 28, 2020), <https://perma.cc/23JG-3J2N>; *Essential Workers – Definition, History, and Importance*, WSHU PUBLIC RADIO (Sep. 25, 2020, 10:02 AM), <https://perma.cc/W7YM-S6DJ>; Emily Stewart, *Essential Workers are taking care of America. Are we taking care of them?*, VOX (Apr. 23, 2020, 10:30 AM), <https://perma.cc/YC48-ZWTS>.

minimum-wage Perdue employees created a shortage of chicken in grocery stores across the country.<sup>70</sup> It is not a far leap to imagine how our economy and our communities will suffer when essential workers face barriers to getting to work during or after climate-related disasters. The COVID-19 pandemic has provided a timely reminder that a resilient economy needs a robust, localized economy where the workforce can get back to work quickly.<sup>71</sup>

Gentrification is one of the biggest barriers to that end. When gentrification displaces low-income and working class people, it also pushes essential workers further away from where they work.<sup>72</sup> Longer commute times will increase the likelihood that an essential worker will not be able to get to work during an emergency.<sup>73</sup> This is exacerbated by many low-income and essential workers' reliance on public transportation,<sup>74</sup> which can be subject to significant interruptions, delays, and closures in the event of a climate-related disaster.<sup>75</sup> The displacement of low-income communities through gentrification will ultimately have negative impacts on newly created, higher-income communities as well. A recent article described this issue as follows:

Both acute and chronic climate hazards can have impacts on local transportation, energy communications and water infrastructure, and disrupt business by making facilities inaccessible for staff and customers. These impacts in turn contribute to longer staff commutes or inability to get to work; damage or destroy facilities; and hinder the movement of people and goods . . . . After devastating fires in Sonoma County, California in October 2017, many vineyards, restaurants, and hotels still stood with minimal damage, but their workers lost homes and often had to leave the area, leading to significant challenges for businesses during recovery efforts.<sup>76</sup>

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70. Lucas Gonzalez, *Purdue Farms CEO Randy Day says grocery store chicken shortage will be short-term*, SALISBURY DAILY TIMES (Mar. 18, 2020, 4:33 PM), <https://perma.cc/QT2C-F85F>.

71. GEORGETOWN CLIMATE CENTER TOOLKIT, *supra* note 65.

72. *Commute time: All workers should have reasonable commutes.*, NAT'L EQUITY ATLAS, <https://perma.cc/5YFN-ARYZ> ("As urban housing prices skyrocket, people of color are increasingly pushed out of urban areas and away from their employers. As most cities in the United States lack quality public transportation, people of color increasingly face longer commute times.").

73. Matt Alderton, *Why climate change is about to make your bad commute worse*, WASH. POST (Aug. 8, 2020) <https://perma.cc/UP4A-E865> (noting that "chronic and acute changes in weather impact America's roads, bridges, tunnels and transit"). It is important to note that climate change creates more issues for low-income workers than just a difficult commute. Property damage, injury, health effects, and other factors caused by climate change can be barriers for essential workers getting to work. Longer commutes further decrease the likelihood that low-income workers can make it to work.

74. Leila Fadel, *Many Essential Employees Still Rely on Buses for Daily Commute*, NPR: WAMU (May 21, 2020, 9:31 AM), <https://perma.cc/CF6S-WQGE>.

75. *See, e.g.*, Jodi Godfrey, Gennaro Saliceto & Roberta Yegidis, *Role of Public Transportation in a Natural disaster State of Emergency Declaration*, 2673 J. TRANSP. RSCH. BOARD ISSUE 5, 230, 230 (May 2019); *Reducing climate change impacts on mass transit*, C40 CITIES CLIMATE LEADERSHIP GROUP (Jun. 2019).

76. Abrosio, *supra* note 63.

As established in Part I, municipal zoning authorities can play an active role in gentrification when they approve discretionary flexibility tools to “upzone” property in disinvested communities.<sup>77</sup> Accordingly, it is important for municipalities to re-evaluate how discretionary flexibility tools get approved because every land use decision impacts community climate resilience.<sup>78</sup> Without action, discretionary flexibility tools will continue to facilitate unabated gentrification—leading to decreased opportunities for effective climate adaptation and decreased community resilience.

### III. SUNSET PARK, NEW YORK

A recently proposed development in Sunset Park, New York City poignantly demonstrates how discretionary zoning decisions can lead to climate-blind development, displacement of low-income and working-class communities, and ultimately frustration of the City’s climate goals.

Sunset Park is a strong, working-class neighborhood in Brooklyn, New York<sup>79</sup> that has provided affordable housing options and work opportunities to first-generation immigrants for almost a century.<sup>80</sup> Today, the residents of Sunset Park are primarily people of color, with the LatinX and Asian communities making up roughly 40–45 percent and 30–40 percent of the population, respectively.<sup>81</sup> In recent years, rising property values threaten the affordability of the neighborhood for current residents and businesses.<sup>82</sup>

Many residents of Sunset Park work in the neighborhood or surrounding areas.<sup>83</sup> Bound by 17th street to the North, 61st street to the South, 8th avenue to the East, and New York Bay to the West,<sup>84</sup> Sunset Park is home to New York City’s largest Significant Maritime and Industrial Area, as well as an Industrial Business Zone.<sup>85</sup> Sunset Park’s industrial zone is dominated by construction, manufacturing, warehousing, transportation, and waste uses<sup>86</sup> and creates more

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77. Pough, *supra* note 46, at 278.

78. See e.g., *Planning and Land Use*, U.S. Climate Resilience Toolkit, available at <https://toolkit.climate.gov/topics/built-environment/planning-and-land-use>.

79. *Sunset Park Green Resilient Industrial District*, COLLECTIVE FOR COMMUNITY, CULTURE, & ENVIRONMENT, 1, 6 (Sept. 9, 2019) <https://perma.cc/AG92-LNVH>.

80. 1-10 BUSH TERMINAL OWNER LP AND 19-20 BUSH TERMINAL OWNER LP, PROJECT DESCRIPTION, INDUSTRY CITY, 1-1, I-2, <https://perma.cc/G37W-5LSM>.

81. *Race and Ethnicity in Sunset Park, New York, New York*, STATISTICAL ATLAS, <https://perma.cc/PWD4-NXXJ>; *Brooklyn Community District: Sunset Park*, NYC HEALTH, 1, 2 (2015), <https://perma.cc/2CP4-FJ7X>; *NYC-Brooklyn Community District 7 – Sunset Park & Windsor Terrace PUMA, NY*, CENSUS REPORTER (2019), <https://perma.cc/4D59-W2ZJ>.

82. *Sunset Park Green Resilient Industrial District*, COLLECTIVE FOR COMMUNITY, CULTURE, & ENV’T, 1, 6 (Sept. 9, 2019), <https://perma.cc/AG92-LNVH>.

83. *Id.*

84. Joseph Burger, *The Peopling of New York*, CUNY, <https://perma.cc/8FJX-S4Y5>.

85. *Sunset Park Green Resilient Industrial District*, *supra* note 80.

86. *Id.* at 14–15.

than 12,000 jobs.<sup>87</sup> The industrial waterfront is mostly publicly owned with vacant land and rail access.<sup>88</sup> Accordingly, the Sunset Park waterfront has the potential to be developed as a multi-modal hub.<sup>89</sup>

However, market pressure has attracted an influx of high tech, design, entertainment, and retail uses that threaten the character and affordability of the neighborhood.<sup>90</sup> Developers have eyed Sunset Park's industrial waterfront as an opportunity for commercial spaces that would neither support Sunset Park's working-class community nor prepare the waterfront for the impacts of climate change.<sup>91</sup>

Climate change is an imminent threat to Sunset Park. Sunset Park is located in a flood, storm surge and a sea level rise zone.<sup>92</sup> Due to the industrial waterfront properties, extreme weather can lead to the release of contaminants into the floodwaters – threatening workers, residents, and relief workers and potentially creating new sites contaminated by toxic chemicals (called Brownfield and/or Superfund sites).<sup>93</sup> The limited sewer system in Sunset Park will become overwhelmed by the combination of rising sea levels caused by climate change and the increased water volume from denser development resulting from gentrification—and yet the proposed development in industry city lacked any plan to prevent this outcome.<sup>94</sup>

#### A. NEW YORK CITY CLIMATE GOALS

In the past few years, New York has enacted and proposed statewide and city-level policies that demonstrate a desire to address the climate crisis and create good paying “green” jobs.<sup>95</sup> In 2019 alone, New York City enacted the Climate Mobilization Act to reduce the greenhouse gas emissions on medium and large buildings and New York State enacted the Climate Leadership and Community Protection Act (CLCPA), which aims to reduce statewide greenhouse gas emissions and requires prevailing wages in projects resulting from CLCPA.<sup>96</sup> Governor Cuomo also announced the largest offshore wind agreement in the United States, making Sunset Park a logical location for offshore wind staging training.<sup>97</sup>

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87. *Id.* at 6.

88. *Id.*

89. *Id.*

90. *Id.* at 6.

91. *Id.*

92. *Id.* at 42.

93. *Id.*

94. *Id.* at 15.

95. *Id.* at 17.

96. *Id.* at 18.

97. *Id.* at 18.

## B. INDUSTRY CITY REDEVELOPMENT PROPOSAL

What is now the Sunset Park waterfront was, for several decades in the early 1900s, a successful intermodal manufacturing, warehousing, and distribution center referred to as Industry City (formally named Bush Terminal).<sup>98</sup> Over time, portions of Industry City were demolished or converted into other uses, and in 2013 a group of investors purchased what remained.<sup>99</sup> In 2015, the investment group announced a \$1 billion renovation plan.<sup>100</sup> By 2017, the Industry City investors proposed an expansion plan that would rezone the campus and add 3,300,000 square feet of commercial space.<sup>101</sup>

The proposed redevelopment would be composed of 6,571,205 square feet of mixed-use space dubbed an “Innovation Economy Hub.”<sup>102</sup> Rezoning, as proposed by Industry City, would expand the range of uses allowed in the campus to include retail, academic, and hotel uses and increase the allowable density of the area.<sup>103</sup> The new development has the potential to attract mostly minimum-wage retail and entertainment jobs or highly paid, high-skill technology jobs.<sup>104</sup> If approved, the rezoning would likely result in the gentrification of Sunset Park and the displacement of its existing community as commercial development replaces manufacturing jobs.<sup>105</sup> The proposed development does not put forward any solutions to address Sunset’s Park’s climate threats.<sup>106</sup>

Specifically, Industry City proposes four land use actions – to create a special district modifying use and bulk regulations to allow the developer to create a pedestrian-friendly, mixed-use development within the existing buildings; to rezone the area from light manufacturing to a medium manufacturing zone for large-scale retail and hotel uses; to get a special permit to modify bulk, use, and other requirements in the new buildings proposed; and to “de-map” 40th Street to create more floor area for the new buildings.<sup>107</sup> Their proposal also requires the acquisition of several privately owned properties within the campus and a portion of City-owned property adjacent to the campus.<sup>108</sup>

In New York City, rezoning applications like that of Industry City are subject to the Uniform Land Use Review Procedure (ULURP).<sup>109</sup> This process can be

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98. *Id.* at 19.

99. *Id.*

100. *Id.* at 17.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 20.

105. *Id.*

106. *Id.*

107. *Public Hearing on Contested Industry City Expansion*, CITY LAND – NYC, (Feb. 25, 2020) <https://perma.cc/RFH7-FY9L> (describing the Industry City proposal and land use actions).

108. *Sunset Park Green Resilient Industrial District*, *supra* note 80, at 1, 19.

109. *Step5: Uniform Land Use Review Procedure (ULURP)*, NYC DEPARTMENT OF PLANNING, <https://perma.cc/SKE8-D6PH>.

summarized in nine steps, including application submission, community board review, borough president review, City Planning Commission vote, and City Council vote.<sup>110</sup> Although not a required part of the ULURP, the City Council almost always defers to the decision of the Council Member who represents the community where the property at issue is located.<sup>111</sup>

Industry City submitted its land use application to initiate the ULURP process in March of 2019.<sup>112</sup> On September 17, 2019, Council Member Menchaca requested modifications to the proposal, including the negotiation of a Community Benefits Agreement,<sup>113</sup> and on September 19, 2019, Industry City agreed to the Council Member's terms.<sup>114</sup> However, Industry City resubmitted its application on October 28, 2019 without finalizing any Community Benefits Agreement, explaining that

... we are confident that the range of issues identified over several months of pre-ULURP discussions and Community Board meetings can, and will, be addressed during the legally-mandated 7½ month land use review period . . . . We also confirmed that we are fully prepared to negotiate and execute a legally binding Community Benefits Agreement with a community-based organization with support of the appropriate City agencies . . . .<sup>115</sup>

Following the submission of Industry City's application, Council Member Menchaca publicly announced that he would vote against the Industry City proposal in July 2020,<sup>116</sup> and in September 2020, ten elected officials, including Congressman Jerrold Nadler and Congresswoman Yvette Clarke, wrote to the City Council urging a vote against the proposal.<sup>117</sup>

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110. *Id.*; *ULURP Explained*, CITY LIMITS, <https://perma.cc/UU7U-VS5R>.

111. *See, e.g.*, Ross Barkan, *Councilmember Opposes Massive Sunset Park Rezoning In His District – And Finds Himself Outnumbered*, GOTHAMIST (Aug. 13, 2020, 4:05 PM), <https://perma.cc/39HZ-AVUQ>.

112. *Industry City Land Use Actions*, NYC DEPARTMENT OF PLANNING, <https://perma.cc/RSB9-6ZCB>.

113. Letter from Carlos Menchaca, N.Y.C. Council Member, District 38 to Andrew Kimball, CEO, Industry City (Sep. 17, 2019), <https://perma.cc/A3JB-AF6Z>. A Community Benefits Agreement is an agreement made between a developer and a zoning authority or neighborhood representatives where the developer agrees to provide negotiated benefits to the community in exchange for zoning benefits or approval. These agreements often include lump sum payments to the local organizations but can also include a promise by the developer to use certain design practices like green building practices. *See, e.g.*, David Alpert, *Helping communities win better benefits agreements*, GREATER GREATER WASHINGTON (Mar. 19, 2009), <https://perma.cc/3676-3K5S>.

114. Letter from Andrew H. Kimball, CEO, Industry City, to Carlos Menchaca, N.Y.C. Council Member, District 38, (Sept. 19, 2019), <https://perma.cc/N2ZR-HAYA>.

115. Letter from Andrew H. Kimball, CEO, Industry City, to Carlos Menchaca, N.Y.C. Council Member, District 38, (Oct. 28, 2019), <https://perma.cc/L92E-LXFC>.

116. *See, e.g.*, Ross Barkan, *Menchaca Puts Kibosh on Controversial Sunset Park Waterfront Rezoning Proposal*, GOTHAMIST (July 30, 2020, 5:48 PM), <https://perma.cc/YG3J-N5MU>.

117. Nadia M. Velazquez et. al, *Letter to New York City Council Members*, BROOKLYN PAPER, (Sept. 22, 2020), <https://perma.cc/Y9PJ-5ERW>.

## C. POLITICAL CONTEXT AND COMMUNITY PROPOSAL—GRID

From the start, the Industry City proposal was controversial. Although proponents of the project argued that the rezoning would create 20,000 new jobs and millions in tax revenue,<sup>118</sup> community members feared that the rezoning proposal would “super charge the gentrification” that would ultimately lead to their displacement.<sup>119</sup> As early as 2018, community members began organizing and actively participating in community meetings.<sup>120</sup> Community concern about the project only grew over time, with some concluding that the Industry City proposal is “a stunning example of economic exploitation and segregation that characterize gentrifying New York.”<sup>121</sup>

One of the most influential opponents to the Industry City proposal is UPROSE – the community’s oldest Latino community-based organization.<sup>122</sup> UPROSE not only organized the community to protest the proposed development—<sup>123</sup> UPROSE also created its own proposal.<sup>124</sup> In September of 2019, UPROSE, in partnership with the Collective for Community Culture and Environment, published an 88-page report proposing a “Green Resilient Industrial District” (or GRID) in Sunset Park.<sup>125</sup>

UPROSE’s GRID plan proposes a comprehensive rezoning of the entire Sunset Park neighborhood to attract tens of thousands of clean energy jobs that are well-paying and an active part of the solution to climate change.<sup>126</sup> The GRID plan divides Sunset Park into four sub-areas – a green waterfront and industrial core; a green transportation and sustainable light industrial area; a green manufacturing and design area; and a residential sustainability pilot area.<sup>127</sup> The 88-page report provides detailed proposals for each sub-area as well as recommendations for the implementation of the GRID plan.<sup>128</sup>

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118. See, Andrew Kimball, *EQUAL TIME: Industry City Rezoning Will Help Sunset Park*, CITY, STREETS BLOG NYC (Aug. 21, 2020), <https://perma.cc/EJG8-HWAA>.

119. Nathan Kensinger, *As Industry City gears up for rezoning, locals question who will benefit*, CURBED NEW YORK (Nov. 8, 2018, 12:47 PM), <https://perma.cc/94SN-6W9L>.

120. *Id.*

121. Marcela Mitaynes, *Opinion: The Industry City Rezoning is Bad for Brooklyn*, STREETS BLOG NYC (Aug. 21, 2020), <https://perma.cc/5ML6-7LE2>.

122. Nathan Kensinger, *As Industry City gears up for rezoning, locals question who will benefit*, CURBED NEW YORK (Nov. 8, 2018, 12:47 PM), <https://perma.cc/94SN-6W9L>.

123. Rose Adams, *Protestors Rally Outside Speaker’s Home Ahead of Industry City Hearing*, BROOKLYN PAPER, (Sept. 9, 2020), <https://perma.cc/9NAM-8RCF>.

124. *The Green Resilient Industrial District (G.R.I.D.)*, UPROSE, <https://perma.cc/4DSK-QD9M>.

125. See generally, *Sunset Park Green Resilient Industrial District*, COLLECTIVE FOR COMMUNITY, CULTURE, & ENVIRONMENT, (Sept. 9, 2019) <https://perma.cc/AG92-LNVH>.

126. Rose Adams, *What’s the Future of the Sunset Park Waterfront Now That the Industry City Rezoning is Dead?*, BROWNSTONER, (Sept. 29, 2020, 11:07 AM), <https://perma.cc/HZ4T-D6G9>.

127. *Sunset Park Green Resilient Industrial District*, COLLECTIVE FOR COMMUNITY, CULTURE, & ENVIRONMENT, 1, 7 (Sept. 9, 2019) <https://perma.cc/AG92-LNVH>.

128. COLLECTIVE FOR COMMUNITY, CULTURE, & ENVIRONMENT, *SUNSET PARK GREEN RESILIENT INDUSTRIAL DISTRICT* 8–12, 65–82 (Sept. 9, 2019), [https://static1.squarespace.com/static/581b72c32e69cfaa445932df/t/5f2c6078ba9433089eaa9ef0/1596743813334/GRID\\_UPROSE%2BEDITS.pdf](https://static1.squarespace.com/static/581b72c32e69cfaa445932df/t/5f2c6078ba9433089eaa9ef0/1596743813334/GRID_UPROSE%2BEDITS.pdf).



## D. OUTCOME

Despite Council Member Menchaca's announcement that he would vote against the Industry City proposal, several city council members indicated that they still supported the project.<sup>129</sup> After continued community pressure and opposition from high-profile elected officials, however, the Industry City developers announced on September 22, 2020 that they withdrew their rezoning applications.<sup>130</sup>

Historically speaking, the outcome in Sunset Park is extraordinary—most communities, despite organizing and public pressure, have not been successful in their attempts to stop redevelopment proposals like Industry City's.<sup>131</sup> And yet, even after the best possible outcome under the existing system, the Sunset Park community still has neither protection from future redevelopment proposals nor a means to implement the GRID.<sup>132</sup> Sunset Park and many previous examples of large-scale gentrification demonstrate how, under the current system, discretionary zoning decisions continue to decrease community climate resiliency by permitting gentrification and climate-blind development. Change is needed to protect not just communities like Sunset Park but every American community from the future impacts of climate change.

## IV. THE PUBLIC TRUST DOCTRINE

The Public Trust Doctrine can be used to mitigate the impact of discretionary flexibility tools that can facilitate gentrification. Since Joseph L. Sax's foundational law review article in 1970, the Public Trust Doctrine has developed into an effective legal framework that imposes additional duties on local governments in the context of land use decisions. Newer scholarship has begun to advocate for the expansion of the Public Trust Doctrine to support climate change *mitigation*,<sup>133</sup> as

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129. Ross Barkan, *Councilmember Opposes Massive Sunset Park Rezoning In His District – And Finds Himself Outnumbered*, GOTHAMIST (Aug. 13, 2020, 4:05 PM), <https://perma.cc/39HZ-AVUQ>.

130. *Industry City Rezoning Plan Scrapped After Opposition*, SPECTRUM NEWS (Sept. 22, 2020, 11:21 PM), <https://perma.cc/64ZD-49C2>; Janaki Chadha, *Industry City Developers Pull the Plug on Yearslong Rezoning Project*, POLITICO (Sept. 22, 2020), <https://perma.cc/Y7AJ-5QM8>.

131. See, e.g., THE BATTLE FOR BROOKLYN (RUMER Inc. 2011), <https://rumur.wistia.com/medias/79f4f6x1z6>.

132. Pough, *supra* note 46, at 276 (noting that within the ULURP system “when zoning changes do occur, they are disproportionately beneficial to the parties with the most access and capital”); Letter from Andrew H. Kimball, CEO, Industry City, to Carlos Menchaca, New York City Council Member (Oct. 28, 2019) (commenting on Council Member Menchaca's belief that “ULURP as structured doesn't best serve communities” and is “structurally flawed”), <https://council.nyc.gov/carlos-menchaca/wp-content/uploads/sites/39/2019/11/IC-letter-following-Certification-10.28.19.pdf>.

133. One paper proposed that the concept of “natural resources” should be expanded to include the atmosphere. See Jordan M. Ellis, *The Sky's the Limit: Applying the Public Trust Doctrine to the Atmosphere*, 86 Temp. L. Rev. 807 (2014).

discussed in Section C *infra*, but the Doctrine could also be used to support climate change *adaptation*. The Public Trust Doctrine could increase the climate resiliency of vulnerable communities in the United States by curbing the displacing impacts of climate change and gentrification.

#### A. GENERAL PRINCIPLES

The Public Trust Doctrine, a concept dating back to Roman Law,<sup>134</sup> recognizes the public right to certain resources<sup>135</sup>—primarily natural resources.<sup>136</sup> To protect the public right to those resources, the Public Trust Doctrine imposes upon the government, the trustee, a set of fiduciary duties regarding the government's management of the trust property for the benefit of the citizens, the beneficiaries.<sup>137</sup> In other words, the Public Trust Doctrine recognizes that some resources are so important that they cannot be fairly managed by individuals and instead require some form of governmental management of their consumptive use on behalf of present and future citizens.<sup>138</sup>

To varying degrees of success, the Public Trust Doctrine has been integrated into constitutions, statutory systems, and common law principles in a diverse set of countries, including the United States, India, South Africa, Pakistan, Kenya, Brazil, and Canada.<sup>139</sup> In the United States, the Public Trust Doctrine exists primarily on two levels—federal and state.<sup>140</sup> The federal Public Trust Doctrine was created by the Supreme Court in 1892 in *Illinois Central Railroad Co. v. Illinois*.<sup>141</sup> Although some states can trace their Public Trust Doctrines directly to English common law, it was not until the 1892 Supreme Court case that the Public Trust Doctrine was reified in United States law—providing a federal law basis upon which states later pronounced their own public trust doctrines.<sup>142</sup> Although the broad contours of state-level Public Trust Doctrines have a federal law basis, how the doctrine is applied varies considerably between states—

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134. WILLIAM H. RODGERS, JR. & ELIZABETH BURLESON, *ROGERS ENVIRONMENTAL LAW* § 4:44 (2d ed. 2021).

135. *BALLOT*PEDIA, *supra* note 19.

136. *See, e.g.*, Richard M. Frank, *The Public Trust Doctrine: Assessing Its Recent Past & Charting Its Future*, 45 U. C. DAVIS L. REV. 665, 671 (2012).

137. *See* DOUGLAS QUIRKE, *THE PUBLIC TRUST DOCTRINE: A PRIMER 2* (2016), <https://perma.cc/A3FL-YZNH>; MARY CHRISTINA WOOD, *NATURE'S TRUST: ENVIRONMENTAL LAW FOR A NEW ECOLOGICAL AGE* 279–80 (2013); HARRY M. PHILO, 3 *LAWYERS DESK REFERENCE* § 14:11 (10th ed. 2021).

138. *See* Raphael D. Sagarin & Mary Turnipseed, *The Public Trust Doctrine: Where Ecology Meets Natural Resource Management*, 37 ANN. REV. ENV'T & RES. 473, 473 (2012).

139. *See* Frank, *supra* note 134, at 686.

140. *See* Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of State Property Rights, and State Summaries*, 16 PENN. ST. ENV'T L. REV. 1, 4–5 (2007).

141. *Id.* at 5–6; 146 U.S. 387, 452–53 (1892).

142. Craig, *supra* note 138, at 5–6.

making the application of Public Trust Doctrine “very much a species of state common law.”<sup>143</sup>

Accordingly, the scope of the Public Trust Doctrine is often also a species of state common law.<sup>144</sup> According to the *Illinois Central Railroad* case, waterways and their associated lands automatically fall under state Public Trust Doctrines, creating a limitation on the state’s power to sell or relinquish control over them.<sup>145</sup> This Note will refer to the *Illinois Central Railroad* reasoning as the inherent public trust doctrine—imposing minimum duties on state governments that they may not reduce.<sup>146</sup>

## B. SAXION FRAMEWORK

Although the scope of the Public Trust Doctrine varies from state to state, its analytical framework has remained relatively consistent over time. As much of the literature around the Public Trust Doctrine notes, Joseph L. Sax’s groundbreaking 1970 law review article articulated the foundational framework for this doctrine.<sup>147</sup> There are three types of restrictions imposed on governmental authority to take action on land placed under trust:<sup>148</sup>

1. Property subject to the trust must be used for the identified purpose.
2. Property subject to the trust cannot be used for unidentified purposes unless the government has express permission.
3. Property subject to the trust must be maintained for the identified purpose.

Sax’s article has continued to receive attention because it expanded the trust restrictions on government action to a new category of resource—natural resources that “are so intrinsically important to every citizen that their free availability tends to mark the society as one of citizens rather than serfs.”<sup>149</sup> Before Sax’s article, navigable waters were the only natural resource subject to the inherent Public

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143. Robin Kundis Craig, *A Comparative Guide to the Western States’ Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 *ECOLOGY L. Q.* 53, 53 (2010).

144. Alexandra B. Klass, Response, *Fracking and the Public Trust Doctrine: A Response to Spence*, 93 *TEX. L. REV.* 47, 51 (2015) (“Although many states have limited their common law doctrine to water-based resources, others such as California and New York have extended the doctrine to protect wildlife, scenic, and other land-based public trust values. Moreover, states with constitutional or statutory public trust provisions have included a broad scope of resources within the doctrine’s protection.”).

145. Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 *NOTRE DAME L. REV.* 699, 703 (2006) (“Significantly, no state court has attempted to do away entirely with the public trust doctrine within its borders, the Supreme Court has never indicated that a state would have a right to do so”); KENNETH A. MANASTER & DANIEL P. SELMI, *STATE ENVIRONMENTAL LAW* 1 § 4:10 (2022).

146. See Klass, *supra* note 143, at 703.

147. See generally Sax, *supra* note 20.

148. <sup>147</sup> *Id.* at 477.

149. *Id.* at 484.

Trust Doctrine. Although other natural resources could be placed under the Public Trust Doctrine through legislative actions, legislatures were not required to create that protection. Sax's proposal was groundbreaking because he argued that there is more than one type of natural resource so important to the public welfare that restrictive commitments can be imposed on state governments for the benefit of the public.<sup>150</sup>

Sax also explained how the Public Trust Doctrine framework could regulate government action on natural resources that have been placed into the Public Trust through legislative action.<sup>151</sup> When a natural resource is dedicated to certain public purposes through a statute, like the creation of public parks,<sup>152</sup> government authority can be restricted in the following manner:<sup>153</sup>

1. Property subject to the trust must both be used for public purposes and be made available to the public.
2. Property subject to the trust cannot be sold even for a fair cash equivalent.
3. Property subject to the trust must be maintained for the particular type of uses.

For these restrictions to be effective, Sax explains that there must be an identified concept of a legal right in the general public, the restrictions must be enforceable against the government by the public, and the restrictions must be "capable of an interpretation consistent with contemporary concerns for environmental quality."<sup>154</sup> Although the imposed restrictions of the Public Trust Doctrine cannot be irreversible, it has long been understood that governments can certainly be held accountable to "binding commitments which discourage certain reallocations" of natural resources subject to the public trust.<sup>155</sup> Courts have, for example, discouraged the reallocation of navigable waters from the state to private parties as early as 1842.<sup>156</sup>

The Public Trust Doctrine can be implemented through state constitutions or statutes, but it operates mostly as a tool for judicial intervention.<sup>157</sup> The fundamental function of courts is to be skeptical of the democratic validity of public trust decisions by evaluating whether the deciding entity has adequately represented "all the significant interests that ought to be heard."<sup>158</sup> For example, the Massachusetts judiciary developed a rule that a change in the use of public lands

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150. *See id.* at 556.

151. *Id.* at 483.

152. *Id.*

153. *Id.* at 477.

154. *Id.* at 474.

155. *Id.* at 482–83.

156. *Martin v. Waddell*, 41 U.S. 367, 413–14 (1842) (holding that a person could not claim private property interest in the navigable waters of the United States).

157. *See Sax, supra* note 20, at 491.

158. *Id.* at 561.

is impermissible without express legislative authorization,<sup>159</sup> whereas the Wisconsin judiciary outlined five factors to determine whether an agency has acted to infringe the public interest.<sup>160</sup> The intensity and scope of judicial scrutiny varies among states, but where the doctrine is applied, private citizens have the right to challenge discretionary administrative actions, and administrative agencies have the burden of establishing an affirmative case.<sup>161</sup>

### C. EXPANSION OF THE SAXION FRAMEWORK

Perhaps the most outstanding part of Sax's article is his foresight. Sax concludes his paper in part by stating, "certainly the principle of the public trust is broader than its traditional application indicates . . . . Only time will reveal the appropriate limits of the public trust doctrine as a useful judicial instrument."<sup>162</sup> Among other things, Sax predicted that the Public Trust Doctrine could be equally applicable and appropriate in controversies involving air pollution, dissemination of pesticides, determination of utility rights of way, and the issuance of strip-mining permits.<sup>163</sup>

Since 1970, Sax's predictions have largely come to fruition.<sup>164</sup> In 1971, the California supreme court recognized the preservation of "ecological units" as an essential public trust use.<sup>165</sup> One year later, the Wisconsin supreme court held that the Public Trust Doctrine imposed a duty on the state to "eradicate the present pollution and to prevent further pollution in its navigable waters,"<sup>166</sup> and the New York state court declared wetlands-related ecosystem services to be protected by the Public Trust Doctrine.<sup>167</sup> By 2000, the Supreme Court of Hawaii recognized ecosystems as a resource protected by the Public Trust Doctrine and expressly rejected the idea that private commercial uses were protected by the trust.<sup>168</sup>

Scholars have explored a diverse range of applications for the Public Trust Doctrine.<sup>169</sup> Of particular focus in recent years has been the application of the

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159. *Id.* at 492.

160. *Id.* at 517.

161. *Id.* at 499.

162. *Id.* at 557.

163. *Id.* at 456–57.

164. Patrick J. Connolly, *Saving Fish to Save the Bay: Public Trust Doctrine Protection for Menhaden's Foundational Ecosystem Services in the Chesapeake Bay*, B.C. ENV'T AFF. L. REV. 135, 152 (2009).

165. *See, e.g.,* Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971).

166. Just v. Marinette Cnty., 201 N.W. 2d 761, 768 (Wis. 1972).

167. People v. Poveromo, 71 Misc. 2d 524, 532–33 (N.Y. Dist. Ct. 1972).

168. *In re* Water Use Permit Applications, 9 P.3d 409, 448–50 (Haw. 2000).

169. *See, e.g.,* Mary Turnipseed et al., *The Silver Anniversary of the United States' Exclusive Economic Zone: Twenty-Five Years of Ocean Use and Abuse, and the Possibility of a Blue Water Public Trust Doctrine*, 36 ECOLOGY L. Q. 1 (2009); Connolly, *supra* note 162 at 136; Michael C. Blumm & Rachel D. Guthrie, *Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision*, 45 U.C. DAVIS L. REV. 741 (2012); Alexandra B.

Public Trust Doctrine to address climate change.<sup>170</sup> Specifically, scholars have proposed applying the Public Trust Doctrine to increase agency authority to combat rising sea tides,<sup>171</sup> reduce carbon emissions,<sup>172</sup> and protect the atmosphere.<sup>173</sup> However, few authors have considered how the Public Trust Doctrine can be used to protect the public's interest in a habitable planet specifically in the context of local land use zoning and planning.

In one article, Megan M. Herzog argues that the Public Trust Doctrine could be used to defend local government attempts to incorporate climate adaptation measures into planning and land use requirements.<sup>174</sup> In another article, Mary W. Blackford argues that the Public Trust Doctrine would permit local governments to place vacant land in trust in order to combat the detrimental impacts of urban sprawl.<sup>175</sup> Notably, Blackford recognizes that the piecemeal nature of zoning flexibility tools that have created inconsistent and ineffective land use patterns could be ameliorated by the incorporation of the Public Trust Doctrine into zoning decisions.<sup>176</sup> Although Blackford proposes using the Public Trust Doctrine to combat urban sprawl,<sup>177</sup> the Public Trust Doctrine could just as easily be used to combat gentrification.

#### V. EXPANDING THE PUBLIC TRUST DOCTRINE IN DISCRETIONARY ZONING AND LAND USE DECISIONS

The following sections will build off the ideas of Sax, Herzog, and Blackford to outline how the Public Trust Doctrine could be incorporated into discretionary zoning decisions to combat gentrification—creating not just climate-resilient buildings but also climate-resilient communities. Section V.A. contemplates the methods available to communities that want to incorporate the Public Trust Doctrine into discretionary zoning decisions. Section V.B. then explores how the

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Klass, *The Public Trust Doctrine in the Shadow of State Environmental Rights Laws: A Case Study*, 45 ENV'T L. 431 (2015).

170. See, e.g., Robin Kundis Craig, *Adapting to Climate Change: The Potential Role of State Common Law Public Trust Doctrines*, 34 VT. L. REV. 781 (2010).

171. Tim Eichenberg, et al. *Climate Change and the Public Trust Doctrine: Using an Ancient Doctrine to Adapt to Rising Sea Levels in San Francisco Bay*, GOLDEN GATE U. ENV'T L.J. 243, 245 (2010).

172. Patrick C. McGinley, *Climate Change and the Public Trust Doctrine*, 65 PLAN. & ENV'T L. 7 (2013).

173. Jordan M. Ellis, *The Sky's the Limit: Applying the Public Trust Doctrine to the Atmosphere*, 86 TEMP. L. REV. 807, 810 (2014).

174. See generally Megan M. Herzog & Sean B. Hecht, *Combatting Sea Level Rise in Southern California: How Local Governments Can Seize Adaptation Opportunities While Minimizing Legal Risk*, 19 HASTINGS W.-NW. J. ENV'T L. & POL'Y 463 (2013).

175. See Mary W. Blackford, *Putting the Public's Trust Back in Zoning: How the Implementation of the Public Trust Doctrine Will Benefit Land Use Regulation*, 43 HOUS. L. REV. 1211 (2006).

176. *Id.* at 1239–40.

177. *Id.* at 1239.

integration of the Public Trust Doctrine could have produced a more climate-conscious and equitable outcome in Sunset Park.

#### A. DEVELOPING A WORKABLE FRAMEWORK

The most effective approach to ensuring that new development actively contributes to climate adaptation and not to gentrification is to explicitly incorporate the Public Trust Doctrine into the zoning code. However, even if the legislature fails to do so, the courts can intervene to impose the Public Trust Doctrine, and litigants can try to bring claims under it. Accordingly, this section will outline how the Public Trust Doctrine could be used to address climate change and gentrification during the legislative process and through judicial review including private citizen litigation.

##### 1. Incorporation into Zoning Code

A local government or state that decides to incorporate the Public Trust Doctrine through the legislative process has the opportunity to create the most expansive version of the Public Trust Doctrine. In her article, *Putting the Public's Trust Back in Zoning*, Mary Blackford proposed a framework that would be effective to this end.<sup>178</sup> Inspired by the *Illinois Central Railroad* reasoning and Sax's 1970 article, Blackford proposed a three-part framework:

1. The government designates a particular parcel of land for the public trust.
2. Zoning authorities must balance the benefits and detriments of terminating the trust if they are considering doing so.
3. Zoning authorities are prohibited from terminating the trust if doing so substantially deprives the public of use of the property regardless of the balance of interests from step 2.<sup>179</sup>

This framework could be used to designate particular parcels of land to be held in a public trust for the purpose of climate change adaptation. What this Note will term the "Public Climate Trust" framework is particularly promising because designation fits well into the zoning scheme<sup>180</sup> and would not require a change in zoning. Instead, the trust designation could act as overlay zoning<sup>181</sup>—circumscribing the trust designation over land already subject to Euclidean regulation

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178. See Blackford, *supra* note 173.

179. *Id.* at 1238–39.

180. *Id.* at 1238 ("Requiring designation fits well into the zoning scheme because the process of designating property dictates the consideration of surrounding properties. Additionally, the designation puts the public on notice as to what land is available for development.").

181. Overlay zoning is used commonly to protect the environment. See Robert J. Blackwell, *Overlay Zoning, Performance Standards, and Environmental Protection after Nollan*, 16 B.C. ENV'T AFF. L. REV. 615, 629–634 (1989).

and imposing additional requirements thereon.<sup>182</sup> Overlay zoning is a well-vetted tool used in a diverse range of circumstances<sup>183</sup> to provide local government the flexibility to protect specific uses in specific areas.<sup>184</sup>

Eligibility for designation to the Public Climate Trust overlay could be determined by statute and, in theory, could range from publicly owned land to all land within a municipality. However, where a municipality is more inclined to limit eligibility, experts could create criteria for eligibility to identify land that is either most vulnerable to the type of upzoning that will lead to gentrification and displacement<sup>185</sup> and/or is most valuable in efforts to combat the impacts of climate change.<sup>186</sup>

The enabling statute could also outline specific criteria that the zoning authority must evaluate in making any decisions to terminate the trust. Accordingly, local governments can require zoning authorities to consider how termination of a trust property may spur gentrification or how it would actively combat the impacts of climate change. The statute or ordinance could identify specific circumstances under which termination of the trust would so substantially deprive the public's use of the property that termination is prohibited regardless of the balance in interests. Local governments would have the flexibility to craft a Public Climate Trust overlay statute or ordinance to address the specific needs and climate threats of their community.<sup>187</sup>

## 2. Adjudication of the Public Trust Doctrine

The creation of a Public Climate Trust overlay would also allow the judiciary to act as a check on local government discretion, as envisioned by Sax,<sup>188</sup> and mitigate inconsistencies that come from piecemeal zoning decisions, as envisioned by Blackford.<sup>189</sup> However, even if a municipality fails to create a Public Climate Trust overlay, the Public Trust Doctrine can still be incorporated into zoning decisions through the judicial process. Where a zoning authority makes a quasi-judicial decision (a ruling on a specific issue like the approval of an application for a zoning flexibility tool, for example), the decision often can be appealed for review by a state court.<sup>190</sup> The procedure for an appeal of a zoning decision

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182. *Id.* at 616.

183. Including environmental conservation, historic preservation, noise regulation, highway corridor regulation, agricultural regulations, and planned unit development regulations. *See id.* at 632.

184. *See id.* at 631–32.

185. For example, lots held vacant by developers for the speculative market or housing still affordable to low-income residents.

186. For example, waterfront industrial zones that could be used to create green manufacturing jobs or act as a green transportation hub.

187. *See* Blackwell, *supra* note 179, at 632.

188. *See* Sax, *supra* note 20.

189. Blackford, *supra* note 173, at 1240.

190. *See, e.g.,* Jeffery Johnson, *Appealing a Zoning Decision*, FREE ADVICE (July 16, 2021), <https://perma.cc/Y8X4-BSAP>.



varies among municipalities, but many municipalities grant standing to appeal a zoning decision to impacted citizens in addition to the property owner.<sup>191</sup> As a result, the Public Trust Doctrine could be applied to a discretionary zoning decision either by a court reviewing an appealed zoning decision or by a citizen litigant requesting an appeal.

If a judiciary considered a habitable planet to be a natural resource “so intrinsically important to every citizen that [its] free availability tends to mark the society as one of citizens rather than serfs,”<sup>192</sup> the judiciary could expand its application of the inherent Public Trust Doctrine to include protection against the impacts of climate change. Specifically, in the context of discretionary zoning decisions, a climate-conscious judiciary could reasonably use the inherent Public Trust Doctrine to impose additional duties on zoning authorities – especially when a discretionary zoning decision involves the transfer of publicly owned land to private developers. This type of judicial intervention does not differ greatly from that proposed by Sax. He argued that the judiciary should apply the inherent Public Trust Doctrine when a Maryland government decision to sell publicly owned, submerged land to private developers would negatively impact navigable waters.<sup>193</sup> Sax himself stated that the Public Trust Doctrine “must be capable of an interpretation consistent with contemporary concerns for environmental quality,”<sup>194</sup> and today, climate change is among the greatest environmental concerns.

The inherent Public Trust Doctrine could be expanded to protect citizens from the impacts of climate change by imposing additional duties on zoning authorities in their review of projects which do not actively combat the impacts of climate change. Further, with the expansion of the Public Trust Doctrine into discretionary zoning decisions involving grants of publicly owned land to private developers, courts could apply a higher level of scrutiny to the relevant zoning decisions.

Any expansion of the Public Trust Doctrine increases the opportunity for private citizens to challenge discretionary zoning decisions that contribute to gentrification and therefore reduce community resilience. As noted by Sax, the Public Trust Doctrine “seems to have the breadth and substantive content which might make it useful as a tool of general application for citizens seeking to develop a comprehensive legal approach to [climate change] problems.”<sup>195</sup>

Currently, discretionary land use decisions carry a presumption that “citizens must acquiesce in discretionary administrative actions which are not plainly in contravention of law.”<sup>196</sup> Accordingly, citizen groups are afforded limited

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191. See *Beginner's Guide to Land Use Law*, PACE LAW SCHOOL 15, <https://perma.cc/6CEW-NAXK> (last visited Jan. 23, 2022).

192. Sax, *supra* note 20, at 484.

193. See *id.* at 503–04.

194. *Id.* at 474.

195. *Id.*

196. *Id.* at 499.

arguments to challenge discretionary zoning decisions. The most successful types of challenges are process challenges, including failure to conform with a comprehensive plan, failure to comply with statutory procedures, and spot zoning.<sup>197</sup> However, with the increased use of PUDs, incentive zoning, and development agreements, these challenges have become harder to win.<sup>198</sup> Citizen groups have even fewer claims available to challenge the substance of a discretionary zoning decision because those are often subject to “a strong presumption of validity” that will not be undone “unless the plaintiff can demonstrate ‘by a preponderance of the evidence that the zoning regulation is arbitrary and unreasonable, or substantially unrelated to the public health, safety . . . or general welfare.’”<sup>199</sup>

Citizen groups have more success challenging zoning flexibility tools that do not grant a high level of deference to the zoning authority—like accessory uses or special exceptions. These tools usually require the consideration of specific criteria or require the application of a legal test. Whether a zoning authority has considered the correct criteria or applied the right legal test is usually a conclusion of law—warranting a stricter level of scrutiny from reviewing courts.<sup>200</sup> In Maryland, for example, conclusions of law are reviewed *de novo*—with no deference given to the zoning authority’s decision.<sup>201</sup>

If a Public Climate Trust overlay were created, private citizens could challenge discretionary zoning decisions violative of the overlay district. Assuming the overlay imposed specific review criteria or legal tests in a discretionary land use decision, citizen groups would have the opportunity to bring a conclusion of law claim—requiring a lower burden of proof and having a higher likelihood of success. If instead, the inherent Public Trust Doctrine were imposed through judicial intervention, discretionary zoning decisions would still be subject to a higher level of scrutiny and therefore require a lower burden of proof for citizen groups and produce an increased likelihood of success in challenging the substance of the decision.

#### B. APPLYING THE FRAMEWORK TO SUNSET PARK, NEW YORK

The application of the Public Trust Doctrine to the New York City ULURP process could ensure that future developments like Industry City would fail and could even provide the opportunity for the GRID framework to be implemented.

First, if New York City enacted an ordinance authorizing the creation of a Public Climate Trust overlay, the City Council could place the overlay zone onto land in communities most vulnerable to the impacts of climate change, as well as

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197. STEWART E. STERK ET AL., *LAND USE REGULATION* xii (3d ed. 2020).

198. *Id.* at 560.

199. *Id.* at 563 (quoting *Durand v. IDC Bellingham, LLC*, 793 N.E. 2d 359, 364 (2003)).

200. In Maryland, for example, “reviewing courts are under no constraint to affirm an agency decision premised solely upon an erroneous conclusion of law.” *Ins. Comm’r v. Engelman*, 692 A.2d 474, 479 (1997).

201. *See, e.g., Alviani v. Dixon*, 775 A.2d 1234, 1242 (2001).

land in the communities with the most potential to meet the climate goals of the city. The Public Climate Trust overlay could circumscribe additional review criteria for any discretionary zoning decision affecting land within the Trust—like whether the approval of a proposed project will negatively impact community resilience by permitting gentrification or whether the approval will frustrate the city’s renewable energy goals by permitting climate-blind development.

If the Industry City site were placed under the Public Climate Trust, the City Council would be prohibited from approving the Industry City proposal unless the property owner could demonstrate how its proposal would actively contribute to the city’s climate goals and that the proposal would not result in gentrification of the community. Here, the developer would not be able to do so. The Industry City developer failed to enter into a Community Benefits Agreement that satisfied the needs and concerns of community members, so the developer would not likely be able to demonstrate that its proposal would not cause gentrification of the Sunset Park community. Further, the developer failed to articulate how the development would contribute to the city’s climate goals, whereas community members clearly articulated how the proposal would negatively impact the community’s climate resiliency. As a result, the Industry City proposal would have been denied if the application’s review were subject to the Public Climate Trust overlay criteria.

The Public Climate Trust overlay would not only impose additional criteria for approval of a project like Industry City within designated trust land but would also limit the City Council’s discretion in other tactics to approve the project. For example, if the Industry City site were within the Public Climate Trust overlay district, the project’s developer might try to persuade the City Council to remove the land from the trust overlay entirely with a promise of short-term economic benefits. The removal of the land from the Trust overlay district would allow the developer to avoid the more stringent review criteria. However, the Public Climate Trust overlay framework would prohibit the City Council from removing the land for short-term economic gains alone. Instead, the Trust overlay would require the City Council to articulate how the removal of the Industry City site from the trust would satisfy the necessary criteria outlined in the enabling statute.

The Public Climate Trust framework is particularly promising for Sunset Park because Sunset Park advocates are calling for an amendment to the City Charter to allow communities to apply for rezoning plans, just as private companies can.<sup>202</sup> This would permit organizations like UPROSE to submit rezoning applications consistent with their GRID proposal. Here, the Public Climate Trust framework may be more efficient than applications to rezone because rezoning would be subject to the lengthy ULURP process. Instead, under the Public Climate Trust, the enabling statute could create a designation process that would

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202. Rose Adams, *What’s the Future of the Sunset Park Waterfront Now That the Industry City Rezoning is Dead?*, BROWNSTONER (Sept. 29, 2020, 11:07 AM), <https://perma.cc/HZ4T-D6G9>.

allow citizens and citizen groups to submit trust designation proposals directly to the zoning authority. Accordingly, communities would have the opportunity to participate and shape development going forward.

Expanding the Public Trust Doctrine would still be beneficial to communities like Sunset Park even if the New York City government does not create a Public Climate Trust overlay through a statute. A court inclined to impose public trust duties onto local government bodies in discretionary zoning decisions subject to the ULURP process might have overturned a City Council vote to approve the Industry City proposal. With a broad expansion of the Public Trust Doctrine, a judge could conclude that the approval of the Industry City proposal is problematic because it will likely decrease community resilience in Sunset Park. Even with a more limited expansion of the Public Trust Doctrine, a judge could conclude that although the Public Trust Doctrine may not impose additional duties for every discretionary land use decision, it does impose duties when the decision involves the acquisition of publicly owned land. Because the Industry City proposal relied on the ability to acquire a parcel of city-owned property, the city's actions should be subject to greater scrutiny. Accordingly, a judge could require the City Council to provide evidence affirmatively demonstrating how the sale of the public land within the Industry City project increases community resilience.

#### CONCLUSION

The Public Trust Doctrine is a legal framework, founded in natural resource law, that imposes duties on the government to manage critical resources responsibly for the benefit of the public, not private interests. The application of the Public Trust Doctrine largely exists in the form of judicial intervention, but Public Trust restrictions can also be applied through statutes or constitutions. Over time, courts have expanded the types of resources subject to protection under the Inherent Public Trust Doctrine from strictly waterways to include wildlife, habitats, and even the atmosphere. Courts can apply the Public Trust Doctrine to an even broader array of resources if the government expressly demonstrates the intent to manage resources for the public good.

Climate change is such a multifarious and imminent threat that every land use decision could have impacts that decrease a community's climate resilience. This Note argues that both climate-blind development and gentrification decrease a community's resilience. Accordingly, even developed land should be considered a critical resource necessitating the application of the Public Trust Doctrine through either statutes or judicial intervention. Therefore, local governments, under the Public Trust Doctrine, have a duty to improve community resilience in every discretionary zoning decision. Finally, there is a legal framework under which local governments can proactively apply the Public Trust Doctrine to their discretionary land use processes in order to combat the climate crisis or through which the judicial branch can intervene when local governments fail to do so.

It is important to note that there are many limitations to this Note and further research would be beneficial. First, further research could analyze how the expansion of the Public Trust Doctrine into land use decisions may lead to paternalistic, counterproductive outcomes. Heavy reliance on judicial intervention decreases democratic accountability within the land use process, and every opportunity should be explored to increase community involvement so that community members are the ones who identify community needs.<sup>203</sup> Second, it may be helpful to explore potential conflicts with the Takings Doctrine, spot zoning, or Dillon's rule issues. Finally, communities will need to understand the feasibility of expanding the Public Trust Doctrine to meet the specific needs of their residents and how it would best operate within their specific land use process.

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203. NAT'L LOW INCOME HOUS. COAL., *supra* note 59.