

# NY Shouldn't Pair 421-a Restoration And Good Cause Eviction

By **Alexander Lycoyannis** (February 29, 2024)

As New York's 2024 legislative session gets underway, housing policy is once again at the top of the agenda.

General agreement exists across the political spectrum that New York City desperately needs additional housing supply, but new construction has come to a screeching halt — largely due to the expiration of the 421-a tax abatement program, which had been the primary residential development incentive in New York City for a half-century.



Alexander Lycoyannis

Important political and economic players are seeking to restore 421-a in order to reignite housing construction and thereby exert downward pressure on residential rents.

However, leaders of New York's legislative majorities appear intent on imposing good cause eviction, or GCE, on virtually all of New York state's free-market housing stock, as well as new construction, as the price for 421-a's revival.

GCE, as currently proposed, is a strict rent control system that would severely limit rent increases and, more generally, hamstring owners' ability to do what they wish with their properties. It doesn't take much of a logical leap to conclude that any incentive to create housing by a revived 421-a would, in part or in whole, be negated by GCE's disincentive effects.

Given the critical need for new housing in New York and particularly New York City, the Legislature would be wise to decouple 421-a from GCE and focus exclusively on incentivizing the creation of more housing for their constituents.

## The 421-a Tax Abatement Program

The 421-a tax abatement program — so named because it was codified at Real Property Tax Law Section 421-a — was enacted in 1971 to attempt to stanch the flow of businesses and residents from New York City.

As initially enacted, 421-a sought to incentivize residential real estate development by offering a 10-year real estate tax abatement on vacant and underutilized land in exchange for such development.

Such an incentive was seen as necessary, at least in part, because of the disproportionately high tax rates New York City applied, and still applies, to residential rental property.

The 421-a program was amended in 1985 to introduce an affordability component. Specifically, new developments in a geographic exclusion area north of 14th Street and south of 96th Street in Manhattan were required to include at least 20% affordable units, either on- or off-site, in order to qualify for the abatement.

The program was further amended in 2006 to expand the GEA into certain parts of the outer boroughs and to require the affordable units to be on-site.

There was a temporary lapse in 421-a in 2015 — 421-a was not drafted to be permanent, but to be revisited every few years — but the program was revived in 2016 with increased affordability requirements after real estate developers and labor unions reached an agreement on construction wages for 421-a projects.

This most recent version of 421-a, known as Affordable New York, expired in 2022, as a result of which no tax incentive to create residential housing in New York City is currently on the books.

Undeniably, the 421-a program satisfied its objective. For instance, 421-a induced the construction of 68% of new multifamily units in residential properties of four or more units completed between 2010 and 2020; notably, only 10% of new units during this period were constructed without utilizing 421-a or other forms of property tax relief.[1]

The arguments against 421-a that led to its expiration frequently centered on its so-called cost to New York City in the form of purportedly lost tax revenue, and 421-a's tax abatements are often framed as an undeserved giveaway to real estate developers.

For instance, one argument against 421-a's extension was that the program's tax abatements purportedly caused \$1.77 billion in foregone tax revenue to the city in 2022, according to the NYC comptroller.[2]

This reasoning, however, is fundamentally flawed because it assumes the same level of housing construction with or without 421-a.

The reality is that given the very high tax rates New York City imposes on residential rental property, few if any of the buildings constructed utilizing 421-a would have come into existence absent the program's tax incentives — and of course, New York City collects no tax revenue on rental buildings that do not exist.

Thus, abating real estate taxes on new residential rental construction for a defined period of time costs New York City's coffers nothing and, once the exemption period expires, results in buildings taxed at full rates.

Moreover, 421-a indirectly stimulates the collection of tax revenue even during the abatement period. For example, New York City and the state collect income taxes from the construction workers, building employees, and others involved in constructing and operating 421-a buildings, as well as restaurants, retail stores and other local businesses patronized by building residents.

Unfortunately, New York legislators did not appreciate the inherently win-win nature of 421-a and permitted the program to lapse in 2022.

### **Good Cause Eviction Proposal**

While 421-a incentivized housing construction in New York City for half a century, GCE, if enacted in anything approaching its current form, promises a corresponding disincentive to construct new housing and maintain existing housing.

GCE is a sweeping rent control proposal that would apply to virtually all currently free-market housing accommodations in New York state.

While inapplicable to rent-stabilized apartments or to owner-occupied buildings with fewer than four units, as drafted it would apply to new construction and even to rentals of single-family homes.

In other words, aside from a few very narrow exceptions, GCE, if enacted, would essentially abolish free-market residential housing in New York state.

As currently proposed, GCE provides that unless an owner successfully establishes one of the specified good cause grounds for removal in court, "[n]o landlord shall remove a tenant from any housing accommodation, or attempt such removal or exclusion from possession, notwithstanding that the tenant has no written lease or that the lease or other rental agreement has expired or otherwise terminated."<sup>[3]</sup>

Thus, the default stance in any landlord-tenant dispute, even after lease expiration, is that unless the owner can prove good cause for eviction, the tenant has the right to remain in possession in perpetuity. And incredibly, GCE's definitions are so broad that this exceedingly broad right applies even to short-term renters, roommates and college students occupying dorms.

A review of the ostensible good causes for eviction reveals that, in large part, they exist on paper only. In fact, GCE's design becomes clear on analysis: The proposal's clear aim is to keep current tenants in place in perpetuity, or until they unilaterally choose to leave, and to deny owners a reasonable opportunity to recover possession.

### ***Nonpayment of Rent***

While nonpayment of rent is one good cause for eviction, the unpaid rent cannot be the result of an unreasonable rent increase.<sup>[4]</sup> The bill does not define "unreasonable," but does declare that a rent increase above 3%, or 150% of the consumer price index, whichever is greater, is presumptively unreasonable.<sup>[5]</sup>

However, the bill does not correspondingly declare a rent increase below those amounts to be presumptively reasonable. Thus, tenants would be free to challenge a rent increase of any amount as unreasonable.

With reasonableness being a factual question, tenants will be able to tie up almost any nonpayment proceeding — which, in turn, would incentivize owners to keep rents flat and avoid the necessity of justifying even small rent increases in court.

### ***Owner's Use***

While GCE states that owner's use is another basis to recover possession, this alleged good cause to recover possession is almost entirely illusory.

For one thing, owner's use recovery is unavailable in buildings with 12 or more units.<sup>[6]</sup> And in buildings with between five and 11 units, recovery of a single apartment would only be available if the owner can demonstrate "immediate and compelling necessity," an exceedingly difficult legal standard to meet under New York case law.<sup>[7]</sup>

### ***Other Good Cause Bases***

The other stated good cause bases, such as, for example, nuisance, occupancy causing violation of law, illegal use and refusal of access, are also structured such that they exist in

theory only; any attempt by an owner to recover possession on those bases would be onerous, prohibitively expensive or practically impossible. They would also lead to absurd results that could endanger public safety.

For instance, an owner can recover possession where the occupancy causes a violation of law only where the local government issues a vacate order,[8] which rarely if ever occurs.

Rather, the much more likely scenario is that the owner would be fined, likely repeatedly, for such a violation. So therefore, GCE would place the owner in a straitjacket; the owner would be powerless to remove a tenant from illegal accommodations and, simultaneously, would be subjected to repeated governmental penalties due to the tenant's continuous occupation of such accommodations.

In short, GCE would represent a radical reversal of centuries-old understandings of real property law. Essentially, a tenant or occupant of real estate would enjoy the status of owner with none of the attendant responsibilities, while the owner would bear all the burdens of real estate ownership with almost none of the accompanying benefits — most notably, the right to exclude those with whom the owner does not wish to associate or do business.

### **The Illogical and Counterproductive Pairing of 421-a and Good Cause Eviction**

As noted, 421-a was a key driver of residential housing construction in New York City for a half-century. On the other hand, GCE would suppress rents and make it virtually impossible to remove a tenant or occupant unless and until the tenant wishes to voluntarily leave — and very few, if any, developers would wish to invest in such a draconian rent control system.

Minnesota's Twin Cities provide a recent example of the disincentive effect caused by a newly enacted rent control regime.

In 2021, St. Paul voters approved a strict new rent control system capping annual rent increases on both existing and newly constructed apartments at 3%.

Almost immediately, two consequences resulted: (1) multifamily building permits in St. Paul fell by over 80% year-over-year, and (2) multifamily building permits in neighboring Minneapolis, which does not have a similar rent control ordinance, rose by 68%.[9]

So the evidence is in: GCE would deter the new housing investment that, everyone agrees, New York desperately needs.

Regrettably, however, Albany has not yet absorbed this real-world lesson in economics and human behavior. To the contrary, New York's legislative leaders have declared that 421-a will not be revived unless GCE, in some form, is also enacted.[10]

In other words, as it currently stands, New York state will be unable to incentivize housing production unless it simultaneously disincentivizes both new housing production and investment in existing free-market housing stock.

### **The Legislature Should Consider 421-a Alone and Table Good Cause Eviction**

Such a supposed grand bargain would be totally counterproductive and could actually make New York's housing shortage worse, as potential New York housing developers instead

invest in the many states and cities throughout the U.S. without good cause or other rent control restrictions.

In short, the pairing of 421-a and GCE makes no economic or logical sense; New York hasn't seen such an odd couple since Oscar Madison and Felix Unger called 1049 Park Avenue home.

New York's lawmakers should instead consider the revival of 421-a on a stand-alone basis and table the consideration of GCE.

Indeed, insofar as the most recent iteration of 421-a had both affordability and rent-stabilization components that still allowed new developments to pencil out, there should be ample opportunity for discussion and agreement on tenant protections in a revived 421-a program.

In the meantime, New Yorkers in desperate need of new housing watch and wait.

---

*Alexander Lycoyannis is a partner at Holland & Knight LLP.*

***Disclosure: The author discussed issues with the good cause eviction proposal in testimony to the New York State Senate in opposition to the GCE bill in January 2022.***

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

[1] Hayley Raetz and Matthew Murphy, "The Role of 421-a during a Decade of Market Rate and Affordable Housing Development," NYU Furman Center Data Brief, February 2022, available at [https://furmancenter.org/files/publications/The\\_Role\\_of\\_421-a\\_Final.pdf](https://furmancenter.org/files/publications/The_Role_of_421-a_Final.pdf) (last visited February 4, 2024).

[2] "A Better Way Than 421-a; The High-Rising Costs of New York City's Unaffordable Tax Exemption Program," <https://comptroller.nyc.gov/reports/a-better-way-than-421a/#:~:text=New%20York%27s%20421%2Da%20tax,nor%20to%20develop%20affordable%20housing>. (last visited February 4, 2024).

[3] Senate Bill S305, introduced January 4 2023, § 214(1) (available at <https://legislation.nysenate.gov/pdf/bills/2023/S305>).

[4] *Id.* at § 214(1)(a).

[5] *Id.*

[6] *Id.* at § 214(1)(g).

[7] See, e.g., *Buhagiar v NY State Div of Hous & Comm Renewal*, 138 AD2d 226 [1st Dept 1988]; *Pam v Weaver*, 9 Misc 2d 1029 [Sup Ct, Kings County 1957]; *Hammond v Marcelly*, 58 NYS 2d 565 [Mun Ct 1945]).

[8] Senate Bill S305, at § 214(1)(d).

[9] "St. Paul's Rent-Control Backfire," Wall Street Journal, July 11, 2022, available at <https://www.wsj.com/articles/st-paul-rent-control-backfire-minnesota-twin-cities-permits-building-apartments-11657472375>. The underlying HUD data is available at <https://socds.huduser.gov/permits/index.html> (last visited February 2, 2024).

[10] See, e.g., "New York Senate Majority Leader Andrea Stewart-Cousins discusses comprehensive housing policy," available at <https://spectrumlocalnews.com/nys/capital-region/politics/2024/01/03/andrea-stewart-cousins-on-comprehensive-housing-policy> (last visited February 2, 2024 ("But lawmakers, including Stewart-Cousins' deputy, Sen. Mike Gianaris, are hopeful that this year will bring about 'a grand bargain' which could include 'Good Cause Eviction,' a bill that lawmakers have demanded, in exchange for new tax incentives for developers, similar to 421a. According to her spokesman, when Stewart-Cousins discusses 'the principles of good cause,' she is referring to the Good Cause Eviction bill, although the parameters of that bill are subject to change during negotiations").