



## Testimony Before the New York State Senate Finance Committee and Assembly Ways and Means Committee

January 31, 2022

Thank you for the opportunity to testify at this important hearing. My name is Noah Kazis. I am a legal fellow at the NYU Furman Center for Real Estate and Urban Policy.<sup>1</sup> In this capacity, I have conducted significant research on land use regulation, fair housing, and affordable housing policies, including authoring a white paper titled [Ending Exclusionary Zoning in New York City's Suburbs](#) that is particularly relevant to this testimony.

Governor Hochul's budget bills include two important proposals to reform New York's land use system that were included in Governor Hochul's budget bills (Parts AA and EE of the Education, Labor and Family Assistance (ELFA) Bill)). Each proposal would legalize types of housing—accessory dwelling units and transit-oriented multi-family residences—that are currently prohibited or infeasible to build in most of the state.<sup>2</sup>

As the Legislature considers these proposals, two important facts provide valuable context. First, there is a pressing need for New York State to change its zoning practices, in ways consistent with the overarching goals of these proposals. And second, other states have paved the way on zoning reform, giving New York a readymade menu of options for how to improve the affordability, equity, and sustainability of our housing systems.

The NYU Furman Center recently published two policy briefs making these arguments at greater length, which are attached here. The first, [The Case Against Restrictive Land Use and Zoning](#), summarizes the large body of academic research demonstrating how excessively restrictive land use regulations make housing more expensive, impede regional economic growth, entrench racial segregation and economic inequality, and increase greenhouse gas emissions.

Additionally, it shows how parts of New York have among the most exclusionary and excessively restrictive zoning practices in the country—by some measures, *the* most restrictive—with matters worst in the New York City suburbs. New York is a leader in many aspects of housing policy, from affordable housing production to tenant protection, but on land use, it is a national laggard. The costs

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<sup>1</sup> This testimony does not represent the institutional views, if any, of NYU, NYU School of Law, or the Wagner Graduate School of Public Service.

<sup>2</sup> The Governor has also proposed to allow New York City zoning to permit residential development more dense than a floor area ratio of 12.0 (Part CC). Though not the subject of the Furman Center's recent publications, this proposal is consistent with the recognition that every jurisdiction must contribute more to house a growing metropolitan region and that there are particular environmental and economic benefits to allowing high-density housing in New York City.



of state inaction are high, undermine the state's other housing goals, and fall hardest on low-income people and people of color.

Second, [\*Models and Questions to Reform Exclusionary Zoning in New York\*](#) provides an introduction to the many ways that other states have attempted to address these issues. New York stands almost alone in doing nothing to limit exclusionary zoning. Essentially all of New York's peer states—the other coastal states containing regions with high housing costs and strong economies—have acted. Moreover, in the last few years, state legislatures have only increased their attention to zoning oversight, addressing shortcomings in their previous laws and passing potentially transformative laws in states from Massachusetts and Connecticut to California. New York has the opportunity to borrow from these laws (as Parts AA and EE already do) and to adapt and combine them into a package of reforms that meets New York's particular housing needs and policy goals.

Parts AA and EE are just the beginning of a long-overdue conversation about the state's role in overseeing and improving our land use and zoning systems. There are details to be improved in each, learning from California's experience with accessory dwelling units and Massachusetts' recent efforts to promote transit-oriented development, for example. And both can be augmented with additional tools, including those more specifically focused on facilitating the construction of affordable housing. Since exclusionary zoning operates through an overlapping, coordinated set of land use policies and practices, an overlapping and coordinated set of responses will be necessary to address these ongoing harms.

I am happy to provide any assistance I can in this work. Please do not hesitate to reach out if I can be of help.

# The Case Against Restrictive Land Use and Zoning

The 2020 NYU Furman Center report, “Ending Exclusionary Zoning in New York City’s Suburbs,” highlights the harm that onerous land use restrictions inflict on the economy, on racial equity, and on the environment. Data on rents, prices, and construction rates show that even pre-pandemic there was an extreme housing shortage facing New York City and its suburbs. This policy brief broadly lays out the drawbacks of restrictive land use, then reviews the current state of New York’s zoning and explains the need for state intervention. The case for more flexible suburban land use regulations is stronger given increased demand from residents leaving the city in pursuit more spacious work-from-home environments.



Restrictive zoning has serious consequences for the New York region and its residents:

1.

Many studies have shown how rigid land use rules lead to more expensive housing, as a limited supply of housing cannot meet the needs of increasing or even steady demand.<sup>1</sup>

2.

Restrictive land use regulations can reduce economic productivity by disrupting agglomeration economies. In areas like New York, there is value added from the dense clusters of groups like artists, traders, and lawyers.<sup>2</sup> Proximity results in productivity, and so by capping the number of individuals who can move to an area, restrictive zoning laws cut off the potential for growth.<sup>3</sup> Therefore, zoning laws do more than simply increase an individual's rent payments: restrictive zoning laws have the potential to stifle regional growth, and even reduce GDP nationwide.

3.

Limiting housing redistributes wealth from renters, who are disproportionately lower-income, to higher income households who already own homes. But low-density zoning does not only draw the line between the economic haves and have-nots, it has also long been used as a tool to maintain or increase segregation.<sup>4</sup> In part because restrictive zoning locks in existing residential patterns, and in part because it increases the financial

barriers to homeownership, low-density zoning disparately affects people of color. Thus, reducing excessive barriers to housing production would not only allow for economic growth at large, it is an imperative for racial equity and economic justice.

4.

Restrictive zoning prevents the construction of more environmentally sustainable housing in dense, transit-oriented areas. Without housing available near cities, residents and workers must live further away, increasing sprawl.<sup>5</sup> In turn, new construction in less dense areas often requires residents to commute by car (increasing pollution and emitting greenhouse gases)<sup>6</sup> and live in larger spaces that use more energy to heat and cool.<sup>7</sup> It has also been linked to the degradation of water quality.<sup>8</sup> Multi-family housing, especially when near transit, is a critical part of efforts to fight climate change.

5.

Finally, restrictive zoning has a deleterious effect on one of the most American of ideals: choice. For a variety of reasons, including a desire to age in place, some households prefer to reside in an apartment rather than a detached single-family home. Restrictive zoning bans on apartments or bans on accessory dwelling units reduce the diversity of housing choices for many.

New York City suburbs' zoning practices contribute to each of these harms. While the city and other areas of the state must also reconsider their zoning policies, state action should focus on these suburban locales, where many measures suggest the problem is the most acute.

1 See, e.g., Joseph Gyourko & Raven Molloy, *Regulation and Housing Supply*, 5 HANDBOOK REGIONAL & URB. ECON. 1289 (2015) (reviewing literature); Edward L. Glaeser, et al., *Why Have Housing Prices Gone Up?*, 95 AM. ECON. REV. 329, 329 (2005).

2 EDWARD L. GLAESER, CITIES, AGGLOMERATION AND SPATIAL EQUILIBRIUM 1–14 (2008).

3 Chang-Tai Hsieh & Enrico Moretti, *Housing Constraints and Spatial Misallocation* 3, Nat'l Bureau of Econ. Res., Working Paper No. 21154 (2017).

4 JESSICA TROUNSTINE, SEGREGATION BY DESIGN: LOCAL POLITICS AND INEQUALITY IN AMERICAN CITIES (2018); RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017); see also Solomon Greene, Margery Austin Turner, and Ruth Gourevitch, *Racial Residential Segregation and Neighborhood Disparities*, US Partnership on Mobility from Poverty (Aug. 2017), <https://www.mobilitypartnership.org/publications/racial-residential-segregation-and-neighborhood-disparities> (reviewing literature).

5 See, e.g., Arnab Chakraborty, et al., *The Effects of High-Density Zoning on Multifamily Housing Construction in the Suburbs of Six US Metropolitan Areas*, 47 URB. STUD. 437, 447 (2010).

6 See, e.g., Reid Ewing, Shima Hamidi, & Jack L. Nasar, *Compactness Versus Sprawl: A Review of Recent Evidence from the United States*, 30 J. PLAN. LIT. 413 (2015)).

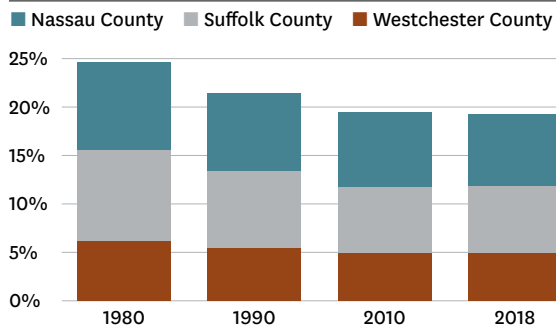
7 See, e.g., Hossein Estiri, *Differences in Residential Energy Use Between US City and Suburban Households*, 50 REG'L. STUD. 1919, 1920 (2015):.

8 See, e.g., John S. Jacob & Ricardo Lopez, Is Denser Greener? *An Evaluation of Higher Density Development as an Urban Stormwater-Quality Best Management Practice*, 45 J. AM. WATER RESOURCES ASS'N 687, 688 (2009).

# Quantifying New York's Lack of Housing Growth and Unaffordable Housing Prices

Several measures highlight how little housing was being created before the pandemic, despite the region's economic success. The city's suburbs remain national laggards, issuing fewer building permits per resident than essentially all other suburban Northeastern counties.<sup>9</sup> Additionally, a declining share of the metro population is housed by the state's three core suburban counties. Between 1980 and 2018, the region added millions of residents, yet Westchester, Nassau, and Suffolk's portion of residents dipped from 24.5 percent to just 19.2 percent.<sup>10</sup> Put differently, had Long Island continued to house its 1980 share of the population in 2018, it would be home to more than 800,000 additional residents.

## County Share of the Metro Area Population



Sources: Decennial Census (1980, 1990, 2010), American Community Survey (2018), NYU Furman Center

Indeed, by some measures, the New York region actually builds less housing<sup>11</sup> than the infamously restrictive Bay Area, which is known for high rental prices and tight zoning.<sup>12</sup>

<sup>9</sup> Furman Center analysis, HUD State of the Cities Data Systems: Building Permits Database.

<sup>10</sup> Furman Center analysis, data from U.S. Census Bureau, Population Division, via Google Data Explorer.

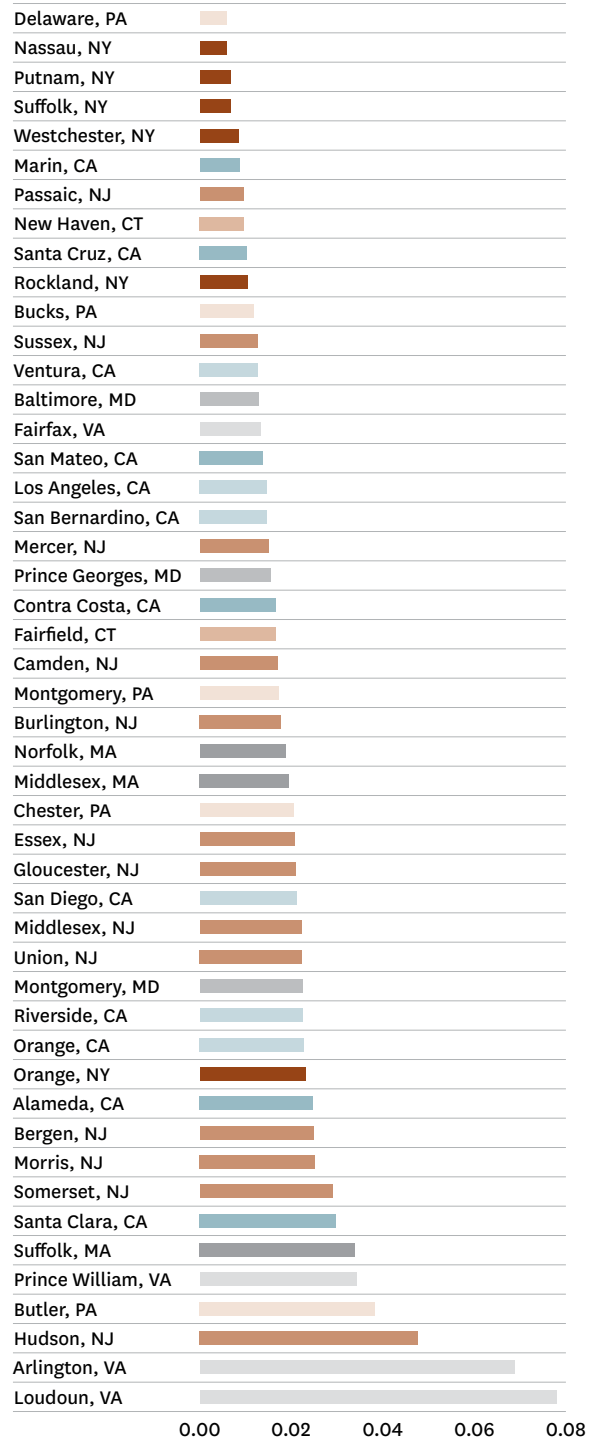
<sup>11</sup> Metropolitan Transportation Commission, *Housing Permits*, VITAL SIGNS, <http://www.vitalsigns.mtc.ca.gov/housing-permits> (last visited June 29, 2020).

<sup>12</sup> See Francesca Mari, *Where America's Fight for Housing Is an All-Out War*, N.Y. TIMES (FEB. 14, 2020) <https://www.nytimes.com/2020/02/14/books/review/golden-gates-housing-conor-dougherty.html>.

## Building Permits Per Capita, by County

### Region

- Bay Area
- Boston
- Connecticut
- Maryland
- New Jersey
- New York
- Northern Virginia
- Philadelphia
- Southern California



Sources: HUD SOCDs Building Permits Database, American Community Survey (2018), NYU Furman Center



The effects of these exclusionary policies clearly contributed to higher pre-pandemic housing prices and rents. These downstate suburban counties have seen home prices skyrocket, even when homes were pricey to begin with. As measured by the Federal Housing Finance Agency’s Housing Price Index, the cost of a single-family home in Nassau County has risen the second-highest amount since 1990 of all suburban counties in the Northeast.<sup>13</sup> Rents in these areas have also continued to rise. The median rent of a housing unit in Westchester County increased by roughly 2.5 times from 1990 to 2018, the third highest total among comparable suburban counties.<sup>14</sup> And because suburban housing markets are closely interconnected with the city, the shortage of affordable homes in the suburbs exacerbates the city’s housing crunch as well.<sup>15</sup>

## Exclusionary Zoning, Fair Housing, and Segregation in New York

New York is also a remarkably segregated region. By one common measure of residential segregation, the region has the second-highest level of black-white segregation in the country, after only Milwaukee.<sup>16</sup> The New York region has the third-highest levels of both Asian-white and Hispanic-white segregation.<sup>17</sup> Although there are multiple reasons for the region’s deeply segregated housing,

exclusionary zoning is one cause. The history of zoning in New York was explicitly racist in some places, while more carefully coded in others, but its effects were the same.

The depth of racial exclusion is further illustrated by the history of fair housing litigation in New York State. New York’s suburbs routinely fall short of their obligations under the Fair Housing Act—including by imposing low-density zoning and restrictions on multi-family housing. And even after they lose in court, they retain the tools to continue to obstruct affordable housing construction, sometimes for decades.

In one of the most famous Fair Housing Act cases in the country, *Huntington Branch, N.A.A.C.P. v. Town of Huntington*, restrictive zoning in the town of Huntington was used to prevent multi-family housing and an affordable rental project.<sup>18</sup> Despite civil rights groups triumphing against restrictive zoning in the United States Supreme Court, opponents of the project ultimately prevailed. By throwing up new roadblocks to development, opponents of the plans ensured that even now, 40 years after the project was proposed, the project has yet to break ground.<sup>19</sup> Examples like this one show just how immense the obstacles are to integrated, fair housing, and underscore the need for reform.

13 Furman Center analysis, see Federal Housing Finance Agency, *FHFA HPI County Map*, <https://www.fhfa.gov/DataTools/Tools/Pages/HPI-County-Map.aspx>.

14 Furman Center analysis, HUD State of the Cities Data Systems: Building Permits Database.

15 Evan Mast, *The Effect of New Market-Rate Housing Construction on the Low-Income Housing Market*, Upjohn Institute Working Paper 19-307 (Jul. 12019).

16 William H. Frey, *Black-White Segregation Edges Downward Since 2000, Census Shows*, BROOKINGS INST. (DEC. 17, 2018), <https://www.brookings.edu/blog/the-avenue/2018/12/17/black-white-segregation-edges-downward-since-2000-census-shows/>

17 See Population Studies Center, Institute for Social Research, *New Racial Segregation Measures for Large Metropolitan Areas: Analysis of the 1990-2010 Decennial Censuses*, <https://www.psc.isr.umich.edu/dis/census/segregation2010.html>.

18 *Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 488 U.S. 15 (1988). Pam Robinson, *Updated: Matinecock Court Vote Pushed Back*, *Huntington Now* (Nov. 18, 2021), <https://huntingtonnow.com/updated-matinecock-court-vote-pushed-back/>

19 Editorial, *A Major Step for Affordable Housing on LI*, *NEWSDAY* (Dec. 4, 2019), <https://www.newsday.com/opinion/editorial/matinecock-affordable-housing-long-island-project-bellone-1.39225726>.



## Restrictive Zoning as the Cause of New York’s Housing Shortfalls

New York has one of the strongest economies in the country: it is clear that a lack of housing supply, not limited demand for housing, is responsible for the slow rate of housing construction. According to one leading metric, the Wharton Residential Land Use Regulatory Index, the region has the second-strictest zoning in the country, only after the San Francisco metro area.<sup>20</sup>

For a more holistic understanding of the costs of restrictive zoning, one may look at local land use controls currently implemented in the suburbs. New York’s suburbs wield a vast array of land use techniques to restrict housing production. In some cases, the tools are blunt: like a moratorium on new housing or a ban on multi-family construction. In others, they are more subtle, like lengthy public review processes and zoning shrink-wrapped around the existing housing stock. Almost any piece of the land use process can contribute to the overall restrictiveness of local zoning, and each local government may use a different technique to limit housing production including: setback requirements, parking requirements, height limits, density limits, lot coverage requirements, minimum lot sizes, site plan reviews, architectural guidelines, discretionary approval processes, and more.

<sup>20</sup> Joseph Gyourko, Jonathan Hartley & Jacob Krimmel, *The Local Residential Land Use Regulatory Environment Across U.S. Housing Markets: Evidence from a New Wharton Index*, NBER Working Paper No. 26573, at 22 (Dec. 2019), <https://www.nber.org/papers/w26573.pdf>.

## Why the State Needs to Step In

Both practice and theory suggest that local governments will not fix these problems themselves. First, and perhaps most tellingly, New York’s suburbs haven’t opened their zoning to allow for affordability or access to opportunity. If anything, pre-pandemic housing production had declined, even as the region’s economy was booming. Long Island’s housing production fell by 58 percent from the 2001-2008 period to the 2009-2018 period; in the northern suburbs, production fell by 50 percent in the same period.<sup>21</sup>

Local governments have intense political incentives to avoid new development as well. As currently structured, suburban local governments tend to review land use proposals on a project-by-project, discretionary basis. As a result, project opponents who believe they will be directly affected by a new development, generally those within a block or two of the project site, are mobilized and fight hard against new construction. Meanwhile, the benefits of any particular new development are more diffuse and do not inspire active support. As Boston University political scientists found in a study of Massachusetts land use hearings, those who show up to testify at land use hearings are generally a project’s immediate neighbors—half live on the same block as the proposed development—and a mere 15 percent of them support the project.<sup>22</sup> Making land use decisions at the local level makes the negatives of development more politically salient, while making the positives politically invisible. In effect, our land use system is designed to give new housing’s fiercest opponents the loudest voice.

<sup>21</sup> N.Y.C. DEP’T CITY PLANNING, *THE GEOGRAPHY OF JOBS: NYC METROPOLITAN REGION ECONOMIC SNAPSHOT 26* (2d ed. 2019) <https://www1.nyc.gov/assets/planning/download/pdf/planning-level/housing-economy/nyc-geography-jobs2-1019.pdf>.

<sup>22</sup> KATHERINE LEVINE EINSTEIN, DAVID M. GLICK & MAXWELL PALMER, *NEIGHBORHOOD DEFENDERS* 97, 103 (2019). Those who testify are also disproportionately white, male, older, and more likely to own homes.



In contrast, when land use decisions are made at the state level, people can vote their values, not their most parochial fears. At the state level, the debate is over broad, generally-applicable policies, not specific sites and projects. Those who support more development and those who oppose it stand on equal footing, politically; neither side is uniquely mobilized. Additionally, at the state level, political ideology and interest groups play larger roles in politics than they do at the local level. Homeowners are always active in suburban politics, but advocates for civil rights or protecting against climate change only rarely are organized at the local level; shifting to the state level allows these important perspectives to be aired.

New York has already done this for many kinds of development. State law restricts local governments' zoning power with respect to everything from power plants to in-home daycares and group homes for people with developmental disabilities.<sup>23</sup> In each of these cases, the legislature determined that state intervention was needed to overcome local opposition to important kinds of land use. As all of New York's peer states—i.e. states with high housing costs, healthy regional economies, and restricted housing supply, largely located on the coasts—have recognized, this is equally true of housing. Zoning reform is a job for the state.

## Recent Legislation and Proposals

Over the last year, three bills have been introduced in the New York State Legislature to address the state's exclusionary zoning, and governor Hochul included several land use reform proposals in her 2022 State of the State address. The most recent of these, SB7635, is modeled after Massachusetts' "40B" law, which provides streamlined approvals and a state appeal process for qualifying affordable projects in certain localities where under 10 percent of the rental housing stock is affordable for low or moderate income households. That follows closely on the heels of SB7574, which would eliminate parking requirements, limit mandatory minimum lot sizes, and legalize denser, more affordable housing types such as duplexes and fourplexes statewide. In early 2021, companion bills were introduced in the Senate and Assembly to liberalize regulations around Accessory Dwelling Units, including basement apartments. Suburban land use reform has also been proposed by the executive branch: Governor Hochul's agenda includes measures to promote ADUs and higher density development along transit corridors. These developments represent an important step for Albany: a debate about how the state action can overcome local intransigence to promote more affordable, environmentally friendly, and racially equitable housing.

<sup>23</sup> See N.Y. Pub. Serv. L. § 172; N.Y. Soc. Serv. L. § 390(12); N.Y. Mental Hygiene L. § 41.34.





## Conclusion

Despite New York serving as a leader in affordable housing production and pushing for new tenant protection laws, New York has not taken on the challenge of land use reform. The surge within the suburban housing market during the height of the pandemic revealed a high demand from city residents as multiple offers well over the asking price became commonplace.<sup>24</sup> With localities refusing to update their zoning to allow for the production of more housing, the New York City region will become increasingly unaffordable, racial and economic divides will continue to grow, the local and regional economy will not function at full potential, and increased per capita carbon emissions will magnify the risks of climate change. While there are many tools available to do so, it is clear that exclusionary zoning in the suburbs must be curtailed.

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*Assistance preparing this brief was provided by Maxwell Austensen, Janelle Jack, Charles McNally, Jaden Powell, and Hayley Raetz. It was based on the paper Ending Exclusionary Zoning in New York City's Suburbs, by Noah Kazis.*

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<sup>24</sup> See Lisa Prevost, 5 Ways the Coronavirus has Changed Suburban Real Estate, N.Y. TIMES (July 17, 2020) <https://www.nytimes.com/2020/07/17/realestate/coronavirus-suburbs-real-estate.html>

# Models and Questions to Reform Exclusionary Zoning in New York



New York State has no statute limiting exclusionary zoning. This leads to less affordable housing,<sup>1</sup> heightened income and racial inequalities,<sup>2</sup> a less productive economy as fewer people can move to New York City and its suburbs,<sup>3</sup> more environmental harm as fewer people can live in denser forms of housing or near transit,<sup>4</sup> and limited choices for living arrangements outside of single-family homes.<sup>5</sup> The politics and historical record of land use decisions strongly suggest that changes at the state, rather than local, level are required to systematically address exclusionary zoning and expand New York's housing stock. Most of New York's peer states have stepped in to promote inclusive housing development. Their experiences can inform the choices of New York policymakers as they seek to solve New York's housing crisis.

## Options for Reform

### Streamlined Approval and Appeals Processes

This approach overrides some local zoning requirements by streamlining the zoning approval process for qualifying developments and allowing state review of local zoning decisions in particularly exclusionary locales. Massachusetts pioneered this model in chapter "40B" of its state code.<sup>6</sup>

1 See, e.g., Joseph Gyourko & Raven Molloy, *Regulation and Housing Supply*, 5 HANDBOOK REGIONAL & URB. ECON. 1289 (2015) (reviewing literature); Edward L. Glaeser, et al., *Why Have Housing Prices Gone Up?*, 95 AM. ECON. REV. 329, 329 (2005).

2 *Recent Trends in Wealth-Holding by Race and Ethnicity: Evidence from the Survey of Consumer Finances*, FEDS NOTES (Sept. 27, 2017), <https://doi.org/10.17016/2380-7172.2083>; Jonathan T. Rothwell, *Racial Enclaves and Density Zoning: The Institutionalized Segregation of Racial Minorities in the United States*, 13 AM. L. & ECON. REV. 290, 290 (2011).

3 Chang-Tai Hsieh & Enrico Moretti, *Housing Constraints and Spatial Misallocation* 3, Nat'l Bureau of Econ. Res., Working Paper No. 21154 (2017).

4 Reid Ewing, Shima Hamidi, & Jack L. Nasar, *Compactness Versus Sprawl: A Review of Recent Evidence from the United States*, 30 J. PLAN. LIT. 413 (2015).

5 See generally Sewin Chan & Ingrid Gould Ellen, *Housing for an Aging Population*, 27 HOUS. POL. DEBATE 167 (2017).

6 Paul M. Vaughn, *The Massachusetts Zoning Appeals Law: First Breach in the Exclusionary Wall*, 54 B.U. L. REV. 37 (1974).

Under 40B, mixed-income and affordable housing projects can apply for a single, comprehensive land use permit when seeking zoning approval. The local zoning board of appeals must follow a set time frame for delivering a decision and can approve the project despite noncompliance with local zoning provisions.<sup>7</sup> If the local zoning board does not approve a qualifying project, the developer can challenge the decision through a state appeals process in certain cases, generally in localities where less than 10 percent of the housing stock is considered affordable.<sup>8</sup> The appeals process differs from ordinary land use procedures in that the local zoning board carries the burden of proof to show that the denial was based on valid health, safety, environmental, or design concerns that outweigh the regional housing need.

The 40B law has been relatively successful. Massachusetts has created 31,000 affordable units and 27,000 market-rate units, and 36 more jurisdictions reached the 10 percent threshold for affordable housing since the law was enacted.<sup>9</sup> The legislation has led to more affordable housing in the Greater Boston area as compared to the New York metropolitan area, though housing costs remain high and multi-family development is still difficult and costly.<sup>10</sup> This suggests that the model should be used in conjunction with other policies to promote affordable and inclusive housing. Streamlined review and appeal processes do not appear to negatively impact property values or impede new construction, which some have theorized could result from local attempts to game

7 Mass. Gen. Laws ch. 40B § 21. 760 Mass. Code Regs. § 56.05.

8 Mass. Gen. Laws ch. 40B §§ 20, 23.

9 Carolina K. Reid, Carol Galante, and Ashley F. Weinstein-Carnes, *Addressing California's Housing Shortage: Lessons from Massachusetts Chapter 40B*, 25 J. AFFORDABLE HOUS. 241 (2017).

10 Nicholas J. Marantz & Huixin Zheng, *State Affordable Housing Appeals Systems and Access to Opportunity: Evidence From the Northeastern United States*, 30 HOUS. POL. DEBATE 370 (2020); AMY DAIN, THE STATE OF ZONING FOR MULTI-FAMILY HOUSING IN GREATER BOSTON (Jun. 2019), [https://ma-smartgrowth.org/wp-content/uploads/2019/06/03/FINAL\\_Multi-Family\\_Housing\\_Report.pdf](https://ma-smartgrowth.org/wp-content/uploads/2019/06/03/FINAL_Multi-Family_Housing_Report.pdf)



affordability thresholds.<sup>11</sup> Thus, this model is effective in increasing affordable housing stock by preventing local zoning boards from using ambiguous and arbitrary reasons to reject new development.

### New Jersey: Allocating Fair Share Obligations

New Jersey's approach has been contentious to implement but yielded notable results.<sup>12</sup> Based on the landmark court rulings in the *Mt. Laurel* litigation, New Jersey's model prevents localities from using zoning to exclude certain residents and requires that every municipality provide for its "fair share" of low- and moderate-income housing based on state demographics and growth projections.<sup>13</sup> New Jersey courts enforced these requirements by creating a builder's remedy wherein a developer can sue when an affordable housing development is rejected by a local zoning authority, and they can proceed with an affordable housing project if the court determines the town has not met its fair share obligations.<sup>14</sup>

After the effectuation of the *Mt. Laurel* doctrine by the courts, the legislature codified the doctrine and created a state agency to calculate and allocate fair share requirements.<sup>15</sup> The state agency faced many difficulties including judicial rejection of its fair share calculation methods and routine

politicization by gubernatorial administrations.<sup>16</sup> Yet New Jersey's state courts have defended *Mt. Laurel* and ensured its survival.<sup>17</sup> Despite the difficulties of implementation, the basic idea of allocating housing obligations and enforcing them with strong remedies has proven successful. The *Mt. Laurel* doctrine is directly responsible for more housing production than any of the other policy frameworks discussed here, and New Jersey towns contain significantly more affordable housing than municipalities across the New York State line.<sup>18</sup> Research has shown that new housing did not have negative effects on the localities it was built in and produced better life outcomes for new residents.<sup>19</sup>

This approach highlights the question of whether to maintain and enforce an anti-exclusionary zoning policy through the courts or a state agency. Judicial enforcement is clearly important to the *Mt. Laurel* doctrine's success, but a state agency to allocate fair share obligations has advantages as well. New York's approach should be influenced by how policymakers believe courts, agencies, and even third parties like developers might hamper or enhance the project of increasing affordable housing supply.

11 Reid, et al., supra note 9 at 253; Nicholas J. Marantz & Harya S. Dillon, *Do State Affordable Housing Appeals Systems Backfire? A Natural Experiment*, 28 HOUS. POL. DEBATE, 267 (2018).

12 Maddie Hanna, *40 Years Later, N.J. Courts, Towns, Still Wrestling with 'Affordable Housing'*, PHILA. INQUIRER (Oct. 13, 2017), <https://www.inquirer.com/philly/news/40-years-later-n-j-courts-towns-still-wrestling-with-affordable-housing-20171013.html> (80,000 units as of 2017).

13 S. Burlington Cty. *NAACP v. Mount Laurel Twp.* ("Mount Laurel I"), 336 A.2d 713, 724 (N.J. 1975).

14 S. Burlington Cty. *N.A.A.C.P. v. Mount Laurel Twp.*, 456 A.2d 390, 453 (1983).

15 N.J. Stat. Ann. § 52:27D-301 to -329.

16 In re Adoption of N.J.A.C. 5:94 & 5:95, 914 A.2d 348, 363–64 (N.J. Super. Ct. App. Div. 2007); In re Warren, 622 A.2d 1257, 1274-75 (N.J. 1993); Alan Mallach, *The Betrayal of Mount Laurel*, SHELTERFORCE <https://shelterforce.org/2004/03/01/the-betrayal-of-mount-laurel/>; See MaryAnn Spoto, *N.J. Supreme Court: Christie Can't Abolish Council on Affordable Housing*, NJ.COM (Jun. 11, 2012), <https://www.nj.com/news/2012/06/nj-supreme-court-christie-cant.html>

17 See In re Adoption of N.J.A.C. 5:96 & 5:97, 221 N.J. 1, 110 A.3d 31 (2015).

18 Nicholas J. Marantz & Huixin Zheng, *Exclusionary Zoning and the Limits of Judicial Impact*, J. PLANNING EDUCATION & RES. (2018).

19 DOUGLAS S. MASSEY ET AL., CLIMBING MOUNT LAUREL: THE STRUGGLE FOR AFFORDABLE HOUSING AND SOCIAL MOBILITY IN AN AMERICAN SUBURB 34 (2013).



## Legislative Developments Over the Last Year

Since the release of our white paper on exclusionary zoning in New York’s suburbs, several states have passed major legislation to override local land use restrictions that constrain the housing supply. Below is a brief summary of some of the most significant of those initiatives:

The California HOME (Housing Opportunity & More Efficiency) Act, known as SB9, allows owners to split single-family lots into two lots (each lot must be at least 1,200 square feet, among other restrictions) and build duplex housing on each. Cities and counties will be required to approve of development proposals that meet the law’s size and design standards.<sup>20</sup> An analysis by the Turner Center at UC Berkeley found that SB9 could potentially add over 700,000 units of housing in California over the next decade.<sup>21</sup> Another bill, SB 10, allows local governments to streamline environmental review for multifamily housing near transit.<sup>22</sup>

Massachusetts amended its statutes to require that all local governments served by transit (almost everywhere in Eastern Massachusetts) allow some as-of-right multifamily housing development near that transit. The size of the multi-family district will depend on the type of transit service available and the town’s population, but proposed guidance calls for adding sufficient zoned capacity to allow for over 344,000 new units. Non-compliant jurisdictions will lose eligibility for certain state infrastructure funds.<sup>23</sup>

In Connecticut, Public Act 21-29 seeks to make zoning regulations more equitable and encourage housing choice and economic diversity. The wide-ranging law included zoning overrides allowing for Accessory Dwelling Units (ADUs) and limited minimum parking spaces requirements for new housing units. It also eliminated the word “character” as a legal basis for zoning regulation, among other changes meant to limit (often-discriminatory) subjectivity in zoning, and required local zoning regulations to affirmatively further fair housing.<sup>24</sup>

<sup>20</sup> 2021 Cal. Stat. ch. 162.

<sup>21</sup> Ben Metcalf, et al., *Will Allowing Duplexes and Lot Splits on Parcels Zoned for Single-Family Create New Homes?*, UC Berkeley Turner Center for Housing Innovation (Jul. 2021), <https://turnercenter.berkeley.edu/wp-content/uploads/2021/07/SB-9-Brief-July-2021-Final.pdf>

<sup>22</sup> 2021 Cal. Stat. ch. 163.

<sup>23</sup> Mass. Exec. Office of Housing and Econ. Dev., Multi-Family Zoning Requirement for MBTA Communities, <https://www.mass.gov/info-details/multi-family-zoning-requirement-for-mbta-communities> (last visited Dec. 22, 2021).

<sup>24</sup> 2021 Conn. Pub. Act No. 21-29.



## Planning Requirements

In this model, local governments are required to develop a plan to provide sufficient housing to keep up with population growth at various income levels. This provides for a high level of local discretion. Mandated planning requirements are used in California, Oregon, and Washington.<sup>25</sup>

In California, population growth predictions are made by a state agency and the housing obligations necessary to meet those predictions are then allocated by regional bodies.<sup>26</sup> Local governments must develop detailed, site-specific plans, called “housing elements,” for how they will meet their housing obligations.<sup>27</sup> The housing element is reviewed and approved by the state and, if inadequate, a jurisdiction may lose funding or its power to grant permits.

Housing element schemes, on their own, tend to have little effect.<sup>28</sup> The allocation of housing obligations became a political game in which localities vied to lower their housing production targets. Moreover, local governments were responsible for enforcing housing element requirements, which led to creative circumvention with little remedies available to developers. In addition, population growth predictions generated by the state were based on past levels of growth, resulting in artificially low projections for cities with historically exclusionary zoning.<sup>29</sup>

<sup>25</sup> Christopher S. Elmendorf, *Beyond the Double Veto: Housing Plans as Preemptive Intergovernmental Compacts*, 71 HASTINGS L.J. 79, 105-06 (2019).

<sup>26</sup> Cal. Gov’t Code § 65580 et seq.

<sup>27</sup> Cal. Gov’t Code § 65585.

<sup>28</sup> Paul G. Lewis, *Can State Review of Local Planning Increase Housing Production?*, 16 HOUS. POL. DEBATE 173, 190-92 (2005).

<sup>29</sup> Paavo Monkkonen, Michael Manville & Spike Friedman, *A Flawed Law: Reforming California’s Housing Element*, UCLA LEWIS CENTER FOR REGIONAL POLICY STUDIES (2019), <https://www.lewis.ucla.edu/2019/05/10/rhna-flawed-law/>; Elmendorf *supra* note 20 at 110.

California has attempted to improve the housing element system by updating the methodology for population growth projections and creating a streamlined zoning process for certain projects in jurisdictions that have not met their housing growth targets.<sup>30</sup> California has also allowed for a builder’s remedy.<sup>31</sup> The efficacy of these reforms remains to be seen, but they are expected to help address the weaknesses in California’s system. It is unlikely that planning requirements would work in isolation in New York State, where many localities have historically resisted new development and where there is no comprehensive planning framework to build upon.

## Providing for Multiple Housing Types

Pennsylvania has sought to increase its housing supply by prohibiting zoning ordinances that completely exclude multi-family housing, only allow for a nominal amount of multi-family housing, or do not allow for a locality’s fair share of multi-family housing.<sup>32</sup> A jurisdiction’s fair share is determined by looking at the potential for growth and current levels of development as well as the exclusionary effects of the current zoning ordinance.<sup>33</sup> While the restrictions are codified in state law, enforcement and implementation is left to the court system.

This is a simple model that prioritizes local knowledge, local discretion, and market forces in expanding the housing stock. There are no required levels of affordable housing or housing growth nor are there requirements for the types of zoning or where they must be located. For these reasons, this model may not sufficiently provide for the housing needs of low-income residents

<sup>30</sup> See generally Elmendorf, *supra* note 15; S.B. 35, 2017–2018 Leg. (Cal. 2017) (enacted).

<sup>31</sup> See generally Elmendorf, *supra* note 15.

<sup>32</sup> 53 PA. STAT. ANN. § 10604(4).

<sup>33</sup> *Surrick v. Zoning Hearing Bd.*, 382 A.2d 105, 108-11 (Pa. 1977).



or address all equity concerns.<sup>34</sup> However, this approach does successfully increase the overall production of multi-family housing, which may lead to lower market-rate rents and prices.<sup>35</sup>

### Funding Incentives

Some states have offered carrots in addition to sticks, tying zoning reform and housing production to funding incentives. Massachusetts, one leader in adopting this method, gives direct funding to jurisdictions that create zoning districts with “smart growth” features like as-of-right development at higher densities and affordability requirements in localities near transit, commercial centers, or similar areas.<sup>36</sup> Upon creating these districts, localities receive a large payout directly from the state based on the net increase in zoned capacity. Jurisdictions then receive a smaller sum for each unit permitted when they issue building permits. Participating localities also receive preferential status for other state grants and school funding to alleviate the potential burden of population growth.<sup>37</sup> There are also steep costs to appealing approvals of these projects, which decreases frivolous opposition. Connecticut, California, and Washington have all implemented similar models.<sup>38</sup>

While funding incentives do increase the production of housing, in Massachusetts those increases are largely in less affluent localities, which were already more affordable and more densely populated.<sup>39</sup> The approach is far less effective in the

most exclusionary, wealthiest, and least densely populated jurisdictions. Massachusetts’s 40B legislation is considerably more effective in promoting housing growth across a wide variety of localities.<sup>40</sup> Funding incentives also do little to address equity or fair housing concerns. This suggests that funding incentives should not be the sole method used to address exclusionary zoning, but instead be part of a larger comprehensive plan. In New York, where there are many affluent localities that do not need extra funding and are intent on remaining exclusive, this approach may have limited effect if not combined with other interventions.

### Partial Preemption of Local Zoning

A more direct approach is one in which the state preempts local zoning ordinances by prohibiting certain types of zoning and density limits. Until California passed the significant SB9 in September 2021 (See Legislative Developments Over the Last Year), Oregon was the only state to have enacted this kind of law for general residential uses (though more targeted interventions of this kind for uses like group homes or daycares are common in other states, including New York).<sup>41</sup> Single-family zoning is prohibited in Oregon cities of more than 10,000 people and in the metropolitan area of Portland. On all residential lots in those areas, two-unit buildings must be permissible. Four-unit buildings must be allowed in all residential zones in cities of more than 25,000 people. These minimum requirements, along with a grace period for local governments to update their zoning code, allow for some local discretion in implementation. However, if local governments do not adequately implement a new zoning code, a state model zoning code will supersede the local zoning ordinance.<sup>42</sup> Notably, Oregon passed this far-reaching land use reform in combination with new statewide rent regulations.

34 See, e.g., Katrin C. Rowan, *Anti-Exclusionary Zoning in Pennsylvania: A Weapon for Developers, A Loss for Low-Income Pennsylvanians*, 80 TEMPLE L. REV. 1271 (2007).

35 Marantz & Zheng, *supra* note 12.

36 MASS. GEN. LAWS ch. 40R.

37 *Id.*; MASS. GEN. LAWS ch. 40S.

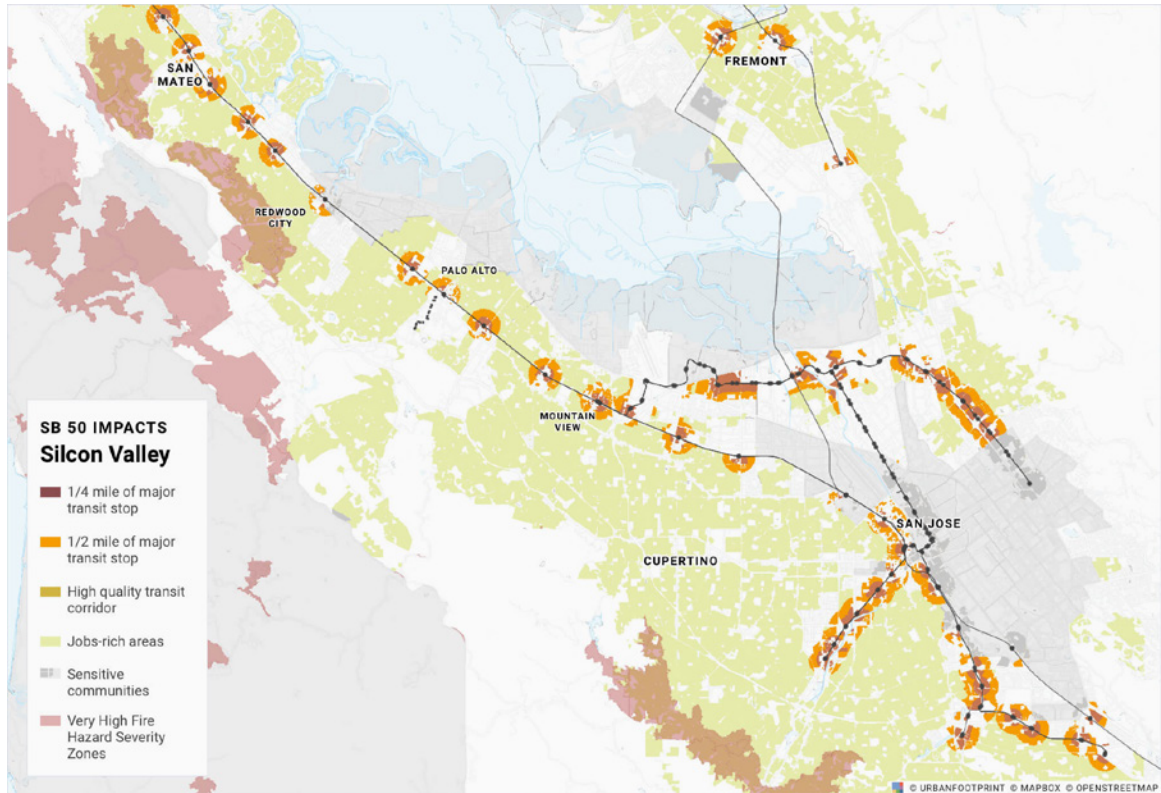
38 Incentive Housing Zone Program/ Housing for Economic Growth (HEG) Program, Conn. Dep’t of Hous., <https://portal.ct.gov/DOH/DOH/Programs/Housing-for-Economic-Growth-Program> (last visited Jul. 1, 2020); Cal. Assem. Bill 73 (2017); Ch. 348, Wash. L 2019 (66th Leg.).

39 CITIZENS HOUSING AND PLANNING ASSOCIATION, THE USE OF CHAPTER 40R IN MASSACHUSETTS: 2018 UPDATE (May 2018), [https://www.chapa.org/sites/default/files/TheUseofCh40R\\_2018.pdf](https://www.chapa.org/sites/default/files/TheUseofCh40R_2018.pdf)

40 *Id.* at 4.

41 Ch. 639, ORE. LAWS (2019).

42 Ch. 639, ORE. LAWS § 3 (2019).



Similar models have been considered by other states. Prior to California’s passage of SB9, “SB50” would have required upzoning to allow apartment buildings along transit corridors.<sup>43</sup> While SB50 was defeated, it’s supporters continued to push for state-level pre-emption, eventually resulting in the passage of SB9 and SB10, described in more detail above.<sup>44</sup> California’s experience highlights the different ways a preemption model can be designed to increase zoning capacity significantly. One analysis suggested that in the Bay Area alone SB50 would have increased the financially feasible market-rate development capacity from 380,000 units to 2,300,000 units.<sup>45</sup>

A related approach is employed in other countries wherein the national or regional government establishes the zoning districts that may be used and leaves local governments to design their zoning map with these preset “menu” options.<sup>46</sup> Used in Germany and Japan, this model allows for governments to preempt the most exclusionary zoning options while permitting local discretion. This approach not only increases housing production and prevents relatively steep housing prices but also reduces the transaction costs of zoning, given that all zoning codes are built on the same definitions.<sup>47</sup> Preemption should be a tool that New York policymakers consider, given the reticence of New York localities towards fair housing and inclusionary zoning.

43 Cal. Sen. Bill 50 (2019-20 session), [https://leginfo.ca.gov/faces/billTextClient.xhtml?bill\\_id=2019202000SB50](https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=2019202000SB50)

44 California enacts two laws to slice through local zoning rules, LOS ANGELES TIMES (Sept. 16, 2021) <https://www.latimes.com/california/story/2021-09-16/california-local-zoning-laws>

45 Ian Carlton, Miriam Zuk & Anna Cash, SB 827 2.0: *What Are the Implications for Communities in the Bay Area?*, URBAN DISPLACEMENT PROJECT, UC BERKELEY 4 (Oct. 1, 2018), [https://www.urbandisplacement.org/sites/default/files/images/udp\\_mapcraft\\_sb\\_827\\_policy\\_brief.pdf](https://www.urbandisplacement.org/sites/default/files/images/udp_mapcraft_sb_827_policy_brief.pdf)

46 Sonia Hirt, *To Zone or Not to Zone? Comparing European and American Land-Use Regulation*, Planung neu denken.de, pnd/online II 2010 at page 6, available at [https://vtechworks.lib.vt.edu/bitstream/handle/10919/48185/hirt\\_to\\_zone\\_or\\_not\\_to\\_zone.pdf?sequence=4](https://vtechworks.lib.vt.edu/bitstream/handle/10919/48185/hirt_to_zone_or_not_to_zone.pdf?sequence=4)

47 Christopher S. Elmendorf and Darien Shanske, *Auctioning the Upzone*, 69 CASE WESTERN RESERVE L. REV. (forthcoming 2020), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3448750](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3448750)





### A Special Case of Preemption: ADUs

Accessible dwelling units (ADUs) are separate housing units located on a single-family lot. They can be in a backyard cottage, attic with separate entrance, or even a garage. ADUs are widely attractive because they increase density while somewhat preserving the look of single-family neighborhoods and provide additional income to homeowners. These benefits have motivated some states to preempt local zoning regulations that prevent ADUs, such as onerous setback, parking, and density regulations. While California, Washington, Connecticut, Oregon, Rhode Island, New Hampshire, and Vermont have all acted to override local zoning of ADUs, California's policy framework is the most instructive.<sup>48</sup>

California first sought to preempt local zoning in favor of ADUs by creating a streamlined approval process, but this approach was circumvented by local governments.<sup>49</sup> California has since repeatedly worked to close loopholes that allow localities to create hidden barriers to the creation of ADUs.<sup>50</sup> With these reforms, California has effectively prevented local governments from blocking ADUs and provided a path for most single-family lots to contain three separate housing units. The creation of ADUs can increase density in low-density, high opportunity neighborhoods. ADUs would obviously have a minimal impact on housing production in New York's many higher density areas but could be an important tool in single-family neighborhoods.

48 John Infranca, *The New State Zoning: Land Use Preemption Amid a Housing Crisis*, 60 B.C. L. REV. 823, 867-70 (2019).

49 Margaret F. Brinig & Nicole S. Garnett, *A Room of One's Own? Accessory Dwelling Unit Reforms and Local Parochialism*, 45 URB. LAW. 519 (2013).

50 See Infranca, *supra* note 57 at 861-67; See also Dylan Casey, *Making Sense of This Year's ADU Legislation*, CARLA (Sep. 13, 2019), <https://carlaef.org/2019/09/13/making-sense-of-this-years-adu-legislation/>, for summaries.

### Other Efforts in California

California has taken many substantial actions to change its zoning system. Considering other measures by California will be instructive for New York State. These measures include density bonuses, streamlined as-of-right approval processes, and giving transit agencies control over zoning near their stations.

California has long had legislation that requires local governments to give density bonuses to certain affordable housing projects, but local governments often found ways to make these projects uneconomical.<sup>51</sup> The state has now limited the ability of local governments to block these projects and created a streamlined approval process for them.<sup>52</sup> California has also created a streamlined approval process for affordable developments in cities that have failed to meet their housing element targets.<sup>53</sup> This process limits the discretion that can be used by local zoning boards and allows for some developments as-of-right regardless of the local zoning regulations. The new process has led to the creation of a substantial amount of new housing units and increased the willingness of local governments to negotiate with affordable housing developers.<sup>54</sup> California expanded this streamlined approach by including more middle-income projects, further reducing discretionary review in certain circumstances, and setting procedural guidelines that limit the number of public hearings that can be held.<sup>55</sup> Promoting streamlined, as-of-right development processes can ensure that development is less hampered by delays and allowing for increased density can reduce housing costs.

51 Infranca, *supra* note 57 at 848.

52 Cal. Assem. Bill 744 (2015-16 Leg. Session); See *California Governor Signs Four Bills Affecting Density Bonus Projects*, Allen Matkins (Sep. 29, 2016), <https://www.allenmatkins.com/real-ideas/california-governor-signs-four-bills-affecting-density-bonus-projects.html>.

53 Cal. Sen. Bill 35 (2016-17 Leg. Session).

54 Marisa Kendall, *Is California's Most Controversial New Housing Production Law Working?* MERCURY NEWS (Nov. 24, 2019), <https://www.mercurynews.com/2019/11/24/is-californias-most-controversial-new-housing-production-law-working/>.

55 AB 1485 of 2019; Ch. 368, CAL. LAWS (2017).



Lastly, California has implemented legislation that gives the zoning power near the Bay Area Rapid Transit (BART) stations to BART itself.<sup>56</sup> Whatever zoning standards BART selects for the land it owns must be adopted by the local governments. This could lead to as many as 20,000 new homes along transit lines if BART opts for high density zoning.<sup>57</sup> In New York, this targeted approach could be used in the many areas located near transit lines, especially where there are parking lots and other under-developed spaces.

## Choices for New York

In looking to reform its zoning, New York can draw on the approaches discussed above to develop policies that work for the state. In adapting elements of the different models, New York can mix-and-match, drawing on what works and the state's own specific goals. Here are some of the different choices policymakers in New York will need to consider:

- Should the state offer incentives to local governments to improve their zoning ordinances, sanction localities that do not work to increase housing supply, or preempt local zoning ordinances?
- Should the state government intervene statewide, in certain regions, in localities that lack sufficient affordable housing, in areas near transit infrastructure, or in high opportunity areas?
- Should the state look to prevent the lowest-density zoning (i.e. detached single-family homes on large lots) or ensure higher-density zoning (i.e. midrise multifamily buildings)?
- Should the state override local zoning only for below-market-rate housing developments or also for market-rate multi-family housing?
- If mandating the development of affordable housing, what level of affordability will be sufficient to meet local housing needs without discouraging production? Will senior housing qualify as affordable housing and how might affordability requirements align with the LIHTC program?
- Who will have the authority to enforce the new zoning policies—the judicial system or a state agency?
- How much of local governments' zoning decision-making power will they retain? Will the state constrain local governments' procedural tools or the substance of the zoning codes they are allowed to enact? Will the state intervene before or after local governments are allowed to take a first attempt at making their zoning less exclusionary?
- In setting requirements for levels of affordable housing or total housing supply, will the standards be statewide or jurisdiction specific?
- How will the state account for the already-higher densities and increased levels of affordable housing in large cities, and especially in New York City?
- Should the state pair infrastructure improvements with land use reforms to allow for higher density development? How would this look?
- What other housing reforms should the state undertake to complement land use reforms and ensure success?

<sup>56</sup> Ch. 1000, CAL. LAWS (2018), [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201720180AB2923](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB2923).

<sup>57</sup> Adam Brinklow, *New Bill Would Allow BART to Develop Housing*, CURBED SF (Apr. 4, 2019), <https://sf.curbed.com/2018/4/19/17258720/bart-bill-housing-ab-2923>.



## Conclusion

New York stands nearly alone among its peer states in permitting its suburbs to restrict growth without regard for regional housing needs. The cost has been immeasurable: a housing affordability crisis affecting the entire region, levels of racial segregation among the worst in the country, billions of dollars lost for the regional and national economies, and a missed opportunity to build a lower-carbon, transit-oriented region. But New York’s decades-long failure to act offers the faintest of silver linings: we now have the opportunity to borrow from other states and to build on the models they have provided. Legislators have the toolkit they need to expand opportunity and growth for all New Yorkers, and to push back on a shameful legacy of segregation. All the legislature needs to do—and do swiftly—is act.

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