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Ending Exclusionary Zoning in New York City's Suburbs

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I. Introduction

In 1968, in the wake of the assassination of Martin Luther King, Jr., New York State enacted what was meant to be heroic civil rights legislation to honor King’s memory: the creation of the Urban Development Corporation (UDC).² The UDC was given broad powers to build affordable housing across the state—including, importantly, the power to override local zoning where needed to build its projects.³ Governor Nelson Rockefeller, in Atlanta for King’s funeral, called the UDC part of a “true memorial to Martin Luther King ... made of action.”⁴ The UDC’s new president, Ed Logue, called for an end to “snob zoning.”⁵ The UDC was meant to integrate the suburbs, which at the time were overwhelmingly white.

Rockefeller and Logue failed. After commissioning a study of regional housing needs, the UDC attempted to build low-income housing—mostly townhouses and garden apartments—in nine Westchester County towns, unveiling its plans in 1972.⁶ The nine towns erupted in opposition: thousands of angry citizens packed public hearings in protest, and Logue even received death threats. Opposition spanned the political spectrum—left and right, Republican and Democrat. The state legislature repeatedly passed bills to strip the UDC’s power to override local zoning outside big cities; Gov. Rockefeller repeatedly vetoed those efforts, but by 1973, had no political choice but to acquiesce.⁷ The UDC lost its ability to disregard local zoning in the suburbs (tellingly, the UDC retained its zoning override powers in cities).⁸ And since 1973, New York State has not tried again. In New York, no statute stops the suburbs from engaging in exclusionary zoning.⁹

New York stands alone among its peer states—i.e. coastal states with high housing costs and healthy regional economies—in giving its local governments such broad authority over local land use. New York is a leader in affordable housing production, and in recent years has passed sweeping new tenant protections, but it is a laggard on land use reform. Essentially every one of New York’s peer states with respect to housing markets—Massachusetts, Connecticut, New Jersey, Pennsylvania, Illinois, California, Oregon, Washington and Florida—have adopted state-level reforms to promote housing development in high-cost suburban areas, and the few similarly-situated states that have not are prominently debating the issue.¹⁰ Nor are these states

² LIZABETH COHEN, *SAVING AMERICA’S CITIES: ED LOGUE AND THE STRUGGLE TO RENEW URBAN AMERICA IN THE SUBURBAN AGE* 265 (2019). Notably, this is the same year Congress enacted the Fair Housing Act, with a similar goal of ending residential segregation.

³ *Id.* at 313.

⁴ *Id.* at 265.

⁵ *Id.* at 315.

⁶ *Id.* at 315-16.

⁷ *Id.* at 319-20.

⁸ N.Y. Unconsol. Law § 6265(5).

⁹ As noted below, judicial doctrine may preclude the most egregious instances of exclusionary zoning. *Berenson v. Town of New Castle*, 38 N.Y.2d 102 (1975). But the courts have invited the Legislature to act, and the Legislature has consistently declined the invitation.

¹⁰ Maryland stands out, along with New York, as pairing high housing costs with a lack of state-level oversight of local exclusionary zoning. But in recent years, legislators have introduced high-profile legislation to tackle the issue. See Kriston Capps, *Denser Housing Is Gaining Traction on America’s East Coast*, BLOOMBERG CITYLAB (Jan. 3, 2020), <https://www.bloomberg.com/news/articles/2020-01->

alone; zoning reforms to overcome exclusionary zoning have been enacted in states as diverse as Utah and Vermont. Each state has taken its own approach: some focus more on affordable housing, some more on market-rate multi-family housing; some states work through a state-led technocratic planning process, while others let affordable developers sue exclusionary suburbs. Some states have been more successful than others, one (Florida) has all but given up, and none has come close to fully solving the problems of affordability and integration. But all of them have taken steps towards those goals—only New York has no statutory tool to promote land use reform and housing production in its suburban communities.¹¹ The result is a state with fewer homes, more expensive rents, and starker segregation than it would otherwise have. By some measures, New York has the most exclusionary zoning in the country.

Today, the need for reform is more pressing than ever.¹² The New York City suburbs are not building enough housing: not enough to support our regional economy, not enough to promote affordability, and not enough to expand access to the high quality of life and access to economic opportunity that the New York region provides. The New York City region is one of the most segregated in the nation. State intervention is needed to ensure that the region can grow—and that the opportunities it offers can be shared broadly. And upstate, though overall growth remains lower than downstate, land use laws continue to entrench racial segregation.¹³

Experience suggests that this problem will not be fixed at the local level. Despite the commitment of many local leaders trying to promote transit-oriented development, the local incentives against growth—both fiscal and political—are too strong to overcome town-by-town. As such, from the height of the civil rights movement to today’s housing affordability crisis, it has been state government’s role to combat exclusionary tactics. Local governments likely won’t solve these problems themselves. Even if the federal government steps in, states will still need to consider how best to support reform. While federal politicians from across the political spectrum—from Bernie Sanders and Elizabeth Warren, to Joe Biden and Amy Klobuchar, to HUD Secretary Ben Carson and Republican Senator Todd Young—have paid new attention to reforming local zoning, some of their policy proposals are focused on incentivizing states to act, for it is states that most directly can control land use.¹⁴ This paper therefore offers a guide for

[03/maryland-s-ambitious-pitch-for-denser-housing](#) (describing reform efforts in Maryland and Virginia). Even in rural Vermont, the State Senate recently passed a package of reforms legalizing middle-density housing across much of the state. *See infra* at notes 237-30.

¹¹ The closest is the Long Island Workforce Housing Act, which is targeted at a slightly different problem of setting aside units for middle-class housing, and which has been largely ineffective. *See infra* at note 252.

¹² This paper was largely written before the COVID-19 crisis. The aftermath of the pandemic is likely to change housing markets, at least on the margin and in the short-term. However, all of the trends described here are likely to continue, or even worsen, if high-income families have a renewed interest in suburban living.

¹³ *See, e.g.,* Justin Murphy, *Rochester Suburbs, Built for Segregation, Rally for Black Lives Matter*, ROCHESTER DEMOCRAT & CHRON. (Jun. 10, 2020), <https://www.democratandchronicle.com/story/news/2020/06/10/black-lives-matter-rochester-suburbs-pittsford-penfield-fairport-racism/5332699002/> (describing segregation in Rochester metro area and role of zoning).

¹⁴ *See, e.g.,* Maggie Astor, *How the Democratic Candidates Would Tackle the Housing Crisis*, N.Y. Times (Mar. 3, 2020), <https://www.nytimes.com/2020/03/03/us/politics/housing-homelessness-2020-democrats.html>; Press Release, HUD, HUD Issues Request for Information on Eliminating Regulatory

New York State to follow, and improve upon, its peer states and reform its broken suburban land use process.

This paper proceeds in five parts. First, it explains the costs of overly restrictive land use regulation, including decreased housing affordability, harms to the regional and national economies, increases in segregation and inequality, and adverse environmental outcomes. Second, it demonstrates that New York City's suburbs have failed to provide badly-needed housing. National data on population trends, housing prices and building permits; fair housing litigation; and case studies of particular suburban land use regimes all show the same thing: New York's suburbs are not building their fair share of housing. Third, it argues why the state must intervene. Local governments lack the capacity or incentives to make these changes on their own. As other states have realized, reforming suburban land use is a matter for the state government. Fourth, it offers a menu of interventions that have been adopted in other states. These offer both models for New York State and a framework of options for lawmakers to develop a customized state solution. Finally, this paper lays out a series of questions for policymakers to ask in developing a state-level response. There is no single, best solution to the problems of exclusionary zoning in the suburbs, but rather a range of strategies that New York should combine and adapt to its particular needs; these questions are meant to guide that process of adaptation.

II. The Harms of Restrictive Zoning Generally

The costs of overly-restrictive zoning are increasingly well-understood and increasingly understood to be high. Those costs—all of which are present in New York—fall into five main categories: restrictive zoning 1) makes housing less affordable, 2) makes the economy less productive, 3) exacerbates income and racial inequalities, 4) imposes increased environmental harms, and 5) limits the types of housing available for different living arrangements, including at different stages of life.¹⁵

When zoning limits the amount and density of housing that can be built, increased demand for housing is translated into higher housing costs rather than additional housing construction. Dozens of studies show that cities with stricter land use regulations have higher housing prices.¹⁶ Additional research has indicated that this relationship is causal. Longitudinal data from California and Massachusetts, for example, has been used to show that adding more or stricter land use regulations in a jurisdiction leads to less construction and higher prices.¹⁷ In a

Barriers to Affordable Housing (Nov. 26, 2019),

https://www.hud.gov/press/press_releases_media_advisories/HUD_No_19_171, YIMBY Act, S. 1919 (116th Congress).

¹⁵ This overview of the harms of restrictive zoning is adapted from Vicki Been, *City NIMBYs*, 33 J. LAND USE & ENV. L. 217 (2018).

¹⁶ 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).

¹⁷ Kristoffer Jackson, *Do Land Use Regulations Stifle Residential Development? Evidence from California Cities*, 91 J. URB. ECON. 45, 47 (2016); Jeffrey Zabel & Maurice Dalton, *The Impact of Minimum Lot Size Regulations On House Prices in Eastern Massachusetts*, 41 REG'L SCI. & URB. ECON. 571 (2011); Edward L. Glaeser & Bryce A. Ward, *The Causes and Consequences of Land Use Regulation: Evidence from Greater Boston*, 65 J. URB. ECON. 265, 265 (2009). Other studies have used

high-demand region like downstate New York, restrictive zoning creates a less affordable housing stock. When more people want to move to the New York region, they bid up the price of housing rather than create more homes for people to live in.

The cost of zoning falls not only on individual households paying more for housing. It also restricts the productivity and economic growth of the nation as a whole. Large, successful regions benefit from “agglomeration economies.” In a region like New York, goods, ideas, and information can be shared and exchanged more easily—there are more people to learn from, in closer proximity.¹⁸ This makes New Yorkers—from artists to bankers—more productive, just by virtue of being where they are, and more specifically, being near each other. As one metric of New York’s remarkable economic dynamism, the New York region represents six percent of the nation’s population but 8.6 percent of its gross domestic product.¹⁹ As a result, limiting the total number of people who can live in the New York City area forces many people to work in less productive regions (including much of the Sunbelt), with fewer positive agglomeration effects. They produce less for the overall economy, and earn less for themselves, because they aren’t able to move to New York.²⁰ This costs the region—we lose out on new jobs and new ideas—the entire state—we lose out on tax revenues—and ultimately the entire country.

The costs of restrictive zoning are not borne equally; rather, strict land use controls both exacerbate income inequality across regions and further racial segregation with metro areas. As economists Peter Ganong and Daniel Shoag have argued, historically, lower-income Americans used to move to high-wage regions to improve their economic prospects.²¹ Strict land use controls make this far more difficult, because many high-wage regions also have high housing costs. High-skilled workers can move to a New York or a San Francisco and benefit from their valuable employment opportunities, but for a low-skill or low-wage worker, the same move isn’t worth it: the higher cost of housing eats into the higher wages.

At the same time, high housing costs effectuate a transfer of wealth from those who don’t currently own a home to those who do: the latter group being far whiter and far wealthier.²²

instrumental variables to show causation: again, the research is clear that tighter land use restrictions lead to increased housing prices. Keith R. Ihlanfeldt, *The Effect of Land Use Regulation on Housing and Land Prices*, 61 J. URB. ECON. 420, 422 (2007); Raven E. Saks, *Job Creation and Housing Construction: Constraints on Metropolitan Area Employment Growth*, 64 J. URB. ECON. 178, 183 (2008); Christian A. L. Hilber & Wouter Vermeulen, *The Impact of Supply Constraints on House Prices in England*, 126 ECON. J. 358, 361 (2016); Albert Saiz, *The Geographic Determinants of Housing Supply*, 125 Q. J. ECON. 1253 (2010).

¹⁸ EDWARD L. GLAESER, CITIES, AGGLOMERATION AND SPATIAL EQUILIBRIUM 1–14 (2008).

¹⁹ Population figures from 2018 ACS one-year estimates; GDP figures from Bureau of Economic Analysis, Local Area Gross Domestic Product, 2018, using current dollars.

²⁰ Chang-Tai Hsieh & Enrico Moretti, *Housing Constraints and Spatial Misallocation* 3, Nat’l Bureau of Econ. Res., Working Paper No. 21154 (2017).

²¹ Peter Ganong & Daniel Shoag, *Why Has Regional Income Convergence in the U.S. Declined?* 102 J. URB. ECON. 76, 89-90 (2017); see also David Schleicher, *Stuck! The Law and Economics of Residential Stagnation*, 127 YALE L. J. 78, 96 (2017).

²² Matthew Rognlie, *Deciphering the Fall and Rise in the Net Capital Share: Accumulation or Scarcity?*, BROOKINGS PAPERS ON ECON. ACTIVITY 13 (Spring, 2015), https://www.brookings.edu/wp-content/uploads/2016/07/2015a_roggnlie.pdf; Lisa J. Dettling, et al., *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>

Homeowners have a median net worth 44.5 times that of renters.²³ By limiting the housing stock to what already exists, restrictive zoning redistributes wealth from those who are less advantaged to those who are more.

Low-density zoning is associated not only with income and wealth inequality, but racial inequality as well. Multiple studies have found that restrictive, low-density zoning is associated with higher levels of segregation by both income and race.²⁴ Conversely, land use systems that promote densification are associated with faster decreases in racial segregation.²⁵ 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. In doing so, it also denies people of color access to opportunities available in the suburbs, including schools and jobs. Indeed, historically, many communities originally enacted low-density zoning *precisely in order* to entrench racial segregation and prevent people of color from moving into white neighborhoods.²⁶ As such, it is no surprise that attacking restrictive zoning and allowing for denser development has always been an important element of Fair Housing Act litigation.²⁷ Overcoming excessive barriers to housing production is not only a matter of economic efficiency, but one of racial equity and economic justice.

Next, low-density development has negative consequences for the environment, including the climate. City living is remarkably green—urbanites walk and take transit, and live in smaller homes that are easier to heat and cool. By limiting density and development closer to urban centers, restrictive land use controls can force development out to the urban fringe.²⁸ Sprawl requires residents to drive more and further, increasing air pollution and greenhouse gas

²³ Jesse Bricker et al., *Changes in U.S. Family Finances from 2013 to 2016: Evidence from the Survey of Consumer Finances*, 103 FED. RES. BULLETIN, 13 (2017), <https://www.federalreserve.gov/publications/files/scf17.pdf>

²⁴ 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); Jonathan T. Rothwell & Douglas S. Massey, *The Effect of Density Zoning on Racial Segregation in U.S. Urban Areas*, 44 URB. AFF. REV. 779 (2009); Matthew Resseger, *The Impact of Land Use Regulation on Racial Segregation: Evidence from Massachusetts Zoning Borders*, Harv. Univ. Working Paper (2013), https://scholar.harvard.edu/files/resseger/files/resseger_jmp_11_25.pdf, JESSICA TROUNSTINE, *SEGREGATION BY DESIGN* (2018).

²⁵ ARTHUR C. NELSON, CASEY J. DAWKINS & THOMAS W. SANCHEZ, *THE SOCIAL IMPACTS OF URBAN CONTAINMENT* 91-92 (2016).

²⁶ TROUNSTINE, *supra* note 24; RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA*; *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).

²⁷ *See Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2522 (2015) (describing suits targeting exclusionary zoning as the “heartland” of disparate impact liability under the Fair Housing Act).

²⁸ 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). *See also* Rolf Pendall, *Do Land-Use Controls Cause Sprawl?* 26 ENV'T & PLAN. B 555 (1999); Kurt Paulsen, *Geography, Policy or Market? New Evidence on the Measurement and Causes of Sprawl (and Infill) in Metropolitan Regions* 51 URB. STUD. 2629 (2014).

emissions.²⁹ Low-density development also leads to more energy use, especially for heating and cooling: a bigger house takes more energy to climate-control, and a detached home lacks the insulation provided to rowhouses and apartments from attached units.³⁰ Sprawl also degrades water quality, in part through the increased paving and run-off it produces, and impinges on undeveloped areas and important natural habitats.³¹ Indeed, the United Nations Environment Program recently identified reforming land use rules which limit the construction of multi-family residential housing as an important step to closing the “emissions gap” between our current practices and where we need to be.³² In the New York region, which has the most extensive commuter rail system in the country, these environmental effects could be particularly strong. By building around our robust transit system, new, denser development could be particularly beneficial environmentally, to an extent not possible in other regions.

Finally, overly restrictive zoning can reduce choice for households, especially those who benefit from types of housing other than the detached single-family home. One family might prefer apartment living, but wish to live close to family, friends or jobs located in the suburbs; if apartments are banned in their suburb of choice, that option is closed off to them. This can be particularly important for older individuals.³³ Older households might want to remain in their communities without remaining in a large, detached house: they might wish to have a home that requires less upkeep, or might want an apartment without stairs. Others might prefer multi-unit layouts that facilitate intergenerational living, allowing them to move in with family while retaining independence and privacy. Restrictive zoning which bans apartments or accessory dwelling units precludes these kinds of choice about where to live.

²⁹ 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); Reid Ewing & Robert Cervero, *Travel and the Built Environment*, 76 J. AM. PLAN. ASS'N 265 (2010); Mark R. Stevens, *Does Compact Development Make People Drive Less?*, 83 J. AM. PLAN. ASS'N 7 (2017).

³⁰ Hossein Estiri, *Differences in Residential Energy Use Between US City and Suburban Households*, 50 REG'L. STUD. 1919, 1920 (2015); Reid Ewing & Fang Rong, *The Impact of Urban Form on U.S. Residential Energy Use*, 19 HOUS. POL'Y DEBATE 1, 22 (2008); Christopher Jones & Daniel M. Kammen, *Spatial Distribution of U.S. Household Carbon Footprints Reveals Suburbanization Undermines Greenhouse Gas Benefits of Urban Population Density*, 48 ENVTL. SCI. & TECH. 895, 901 (2014); Eirik Resch, et al., *Impact of Urban Density and Building Height on Energy Use in Cities*, 96 ENERGY PROCEDIA 800, 801 (2016).

³¹ 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); Reid Ewing, et al., *Endangered by Sprawl: How Runaway Development Threatens America's Wildlife*, NAT'L WILDLIFE FOUND. (2005), <https://www.nwf.org/~media/PDFs/Wildlife/EndangeredbySprawl.pdf>

³² UN Environment Programme, Emissions Gap Report 2019 58-59 (2019)

<https://wedocs.unep.org/bitstream/handle/20.500.11822/30797/EGR2019.pdf?sequence=1&isAllowed=y>

³³ See generally Sewin Chan & Ingrid Gould Ellen, *Housing for an Aging Population*, 27 HOUS. POL. DEBATE 167 (2017).

III. New York's Overly Restrictive Zoning

Building enough housing—and building densely—promotes housing affordability, economic vitality, racial and economic integration, and environmental protection. These are among the most pressing issues facing the New York region today. Yet the downstate area continues to produce far too little housing. This section demonstrates New York's deep failure to build enough housing in its suburbs, looking at measures of housing affordability and segregation as well as case studies of local zoning codes.

This section focuses on the New York City suburbs' failure to build enough housing, as by many measures, the problem is most acute in those locations. However, this paper's focus on suburban zoning should not be taken to suggest that New York City's land use patterns, or those in other parts of the state, are in order. Overly restrictive and exclusionary zoning is common upstate, as well as in New York City itself. Indeed, a recent report from the Citizens Budget Commission has highlighted that New York City proper builds far less housing (measured per capita or as a change in the number of housing units) than other economically successful American cities, whether fast-growing cities like Seattle and Denver or old and dense cities like Boston, Washington, D.C. and San Francisco.³⁴ Moreover, New York City's housing production is not distributed equally, and some of the city's highest-income neighborhoods, including the Upper East Side and Upper West Side, are actually losing population thanks to strict controls on new construction.³⁵ That said, the problems of housing supply and exclusion are even more acute in the suburbs, and the legal interventions to address those problems may be different in suburbia than in New York City. Accordingly, this paper focuses primarily, but not exclusively, on the downstate suburbs.

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

At a fundamental level, New York's suburbs are failing to build any significant amount of housing, even as the regional economy continues to boom. In absolute terms, Long Island granted building permits to only 56,000 housing units between 2001 and 2018: fewer even than the number of jobs it added.³⁶ This comes out to an annual rate of permitting just over 3,000 homes per year across all of Nassau and Suffolk Counties (population 2.8 million). The 81,000 units permitted across Westchester and the Hudson Valley (population 2.3 million) from 2001-2018 are better, but still plainly insufficient.³⁷

This failure to grow has limited New York's suburbs' ability to provide housing for new families. In fact, the New York suburbs are actually losing young workers, and with them, their future economic vitality. Long Island, where the problem is worst, saw its number of labor force

³⁴ CITIZENS BUDGET COMMISSION, STRATEGIES TO BOOST HOUSING PRODUCTION IN THE NEW YORK CITY METROPOLITAN AREA 8-9 (Aug. 2020), https://cbcnyc.org/sites/default/files/media/files/CBC_NYC-Housing-Production_08262020_0.pdf

³⁵ *Id.* at 13.

³⁶ N.Y.C. DEP'T CITY PLANNING, THE GEOGRAPHY OF JOBS: NYC METROPOLITAN REGION ECONOMIC SNAPSHOT 28 (2d ed. 2019) <https://www1.nyc.gov/assets/planning/download/pdf/planning-level/housing-economy/nyc-geography-jobs2-1019.pdf>

³⁷ Following the NYC Department of City Planning, this report defines the Westchester/Hudson Valley subregion to include Dutchess, Orange, Putnam, Rockland, Sullivan, Ulster, and Westchester Counties. *Id.* at 28, 31.

participants aged 25 to 54 decline by nearly five percent.³⁸ No suburban county in New York saw an increase in the number of labor force participants in that age bracket.³⁹ Notably, this effect is not limited to young, childless couples: 25 to 54 is a broad age band that includes most of the families with children who once defined suburban living. While New York’s suburbs remain affluent, desirable places to live, with great schools and other amenities, their stalled housing markets have walled off access to these communities.

A comparison to the Bay Area makes clear how far New York City’s suburbs have fallen behind. The Bay Area is infamous for its resistance to housing construction.⁴⁰ Yet by some measures, New York’s suburban areas build *less* than the Bay Area. From 1988 to 2017, fewer building permits were issued per capita in the New York metropolitan area than the Bay Area in every single year except 2007, 2008, and 2009 (during the collapse of the national housing market) and 2015 (when New York City’s numbers spiked dramatically in advance of the expiration of the 421-a tax exemption program⁴¹).⁴² The per-capita numbers have their weaknesses—in some ways, the Bay Area’s better showing on a per-capita basis reflects its prior resistance to allowing in residents—but even so, they demonstrate the region’s sluggish growth.

In fact, these numbers overstate the New York suburbs’ housing production. They include northern New Jersey—which builds far more than New York’s in-state suburbs—and the City itself, which has been the center of housing construction recently. New York’s suburbs are national laggards. Between 2010 and 2018, Nassau, Suffolk, Westchester and Putnam Counties each granted fewer building permits per capita than *any* suburban county in Southern California or the Bay Area—and less than all but a single suburban county in Massachusetts, Connecticut, New Jersey, Pennsylvania, Maryland, or Northern Virginia (namely, Delaware County, Pennsylvania).⁴³ New York’s suburban counties are also issuing fewer building permits *per new resident* than other Northeastern counties: even accepting the region’s sluggish growth, we are providing fewer new homes to accommodate that growth than elsewhere.⁴⁴ It goes without saying that New York’s suburbs are growing less quickly than sprawling Sun Belt metropolises like Atlanta or Houston—but by some measures they are growing more slowly than the most restrictive regions in the country.

Another way to measure New York’s sluggish suburban growth is to look at the declining share of the metro population housed by the state’s three core suburban counties: Westchester, Nassau, and Suffolk. In 1980, they housed roughly a quarter of the New York region’s

³⁸ ID. at 23.

³⁹ ID.

⁴⁰ Conor Dougherty, *The Great American Single-Family Home Problem*, N.Y. TIMES (Dec. 1, 2017) <https://www.nytimes.com/2017/12/01/business/economy/single-family-home.html> (calling California’s housing crisis “superlative” and detailing restrictions on growth that help fuel that crisis); 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>

⁴¹ NYU Furman Center, *New York City’s Building Permits Spike Ahead of 421-a Deadline*, THE STOOP (Jul. 16, 2015), <https://furmancenter.org/thestoop/entry/new-york-citys-building-permits-spike-ahead-of-421-a-deadline>

⁴² Metropolitan Transportation Commission, *Housing Permits*, Vital Signs, <http://www.vitalsigns.mtc.ca.gov/housing-permits> (last visited June 29, 2020).

⁴³ Furman Center analysis, HUD State of the Cities Data Systems: Building Permits Database.

⁴⁴ Furman Center analysis, HUD State of the Cities Data Systems: Building Permits Database.

population: 24.5 percent.⁴⁵ Because they barely grew, even as the region added millions of new residents, by 2018, those three counties housed only 19.2 percent of the metro population. 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. While the declining share of the region's population housed by Westchester, Nassau and Suffolk Counties is partly due to salutary trends, like the revitalization of New York City, it is also the result of negligible population growth in these counties.

The effect on affordability is substantial—New York's failure to build sufficient housing has contributed to its uniquely acute affordability crisis. 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.⁴⁶ The sole exception is Arlington, Virginia, which is unusually small, dense and urban—in some ways more like a city than a suburb. In a region where expensive housing costs are endemic, Nassau County saw higher housing cost growth than anywhere in the Boston area, in Connecticut, in New Jersey, in Pennsylvania, or in the Maryland suburbs of D.C. Westchester and Suffolk Counties fared only somewhat better on this metric.

New York's rents, too, have skyrocketed. The median rent of a housing unit in Westchester County increased by roughly 2.5 times from 1990 to 2018. Among suburban counties in the Northeast, this was the third-highest total: after the semi-urban counties of Arlington, Virginia, and Hudson County, New Jersey (home to Jersey City, and more densely populated than Philadelphia or Washington, D.C.).⁴⁷ Nassau County was close behind (Suffolk County saw relatively smaller increases in rents over this period). Once again, the housing affordability crisis appears far worse in New York City's in-state suburbs even than in other high-cost coastal regions: only California fares worse.

These affordability issues do not remain in the suburbs, either. The region's housing market is interconnected, and a shortfall in housing supply in the suburbs affects affordability in New York City as well.⁴⁸ The City's own housing crunch is exacerbated by the lack of a suburban safety valve. While many City residents prefer to live in a more urban environment, many would happily move to the suburbs, if housing were more available and affordable, perhaps particularly if more walkable, transit-oriented housing was available. Thus, new development in Westchester and Long Island would free up housing in the City as well, easing competition for existing units and helping to keep down price increases.

B. 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,

⁴⁵ Furman Center analysis, data from U.S. Census Bureau, Population Division, via Google Data Explorer.

⁴⁶ Furman Center analysis, *see* Federal Housing Finance Agency, *FHFA HPI County Map*, <https://www.fhfa.gov/DataTools/Tools/Pages/HPI-County-Map.aspx>

⁴⁷ Furman Center analysis, HUD State of the Cities Data Systems: Building Permits Database.

⁴⁸ Evan Mast, *The Effect of New Market-Rate Housing Construction on the Low-Income Housing Market*, Upjohn Institute Working Paper 19-307 (Jul. 1 2019) (showing regional interconnections of housing market and housing production).

after only Milwaukee.⁴⁹ The New York region has the third-highest levels of both Asian-white and Hispanic-white segregation.⁵⁰ These segregation levels have many causes—including express and intentional discrimination against individual home-seekers, as *Newsday*'s remarkable investigation of the Long Island housing market demonstrated⁵¹—but one reason appears to be the region's exclusionary zoning.

Indeed, historical research makes clear that in many New York towns and cities, exclusionary zoning codes were adopted for expressly racist reasons. One thorough study of the zoning code of Penfield, NY, a suburb of Rochester, found town officials discussing how adopting its mid-century zoning code would help prevent racial “integration” and keep “colored people” out of town.⁵² In other places, the racial intent behind low-density zoning may (or may not) have been more coded, or more implicit—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.

One of the most famous Fair Housing Act cases in the country, *Huntington Branch, N.A.A.C.P. v. Town of Huntington*, involved restrictive zoning in the Town of Huntington, which was used to keep out multi-family housing generally and, more specifically, a particular affordable rental project, named Matinecock Court. Matinecock Court was first proposed in 1978 and was still struggling to secure land use approvals as of 1981, at which point the project filed a Fair Housing Act suit.⁵³ After multiple trips through the court system, the local NAACP chapter won a landmark case in the Second Circuit in 1988; that opinion, which recognized the illegality of this restrictive zoning, was affirmed by the U.S. Supreme Court.⁵⁴ Yet despite the clear and forceful holdings of the federal courts, opponents were still able to impose enough roadblocks to development that the project could not move forward for decades.⁵⁵ Matinecock Court is only scheduled to break ground on its 146 units in 2020, more than forty years after the project was proposed, and even then in a diminished form—and the COVID-19 crisis may push that date

⁴⁹ 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/>

⁵⁰ 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>

⁵¹ Ann Choi et al., *Long Island Divided*, NEWSDAY (Nov. 17, 2019), <https://projects.newsday.com/long-island/real-estate-agents-investigation/>

⁵² Conor Dwyer Reynolds, *The Motives for Exclusionary Zoning*, Working Paper (September 2019), at page 91, 105, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3449772

⁵³ *Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 844 F.2d 926, 932 (2d Cir. 1988).

⁵⁴ *Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 488 U.S. 15 (1988).

⁵⁵ LIBN Staff, *Housing Purgatory*, LONG ISLAND BUSINESS NEWS (May 5, 2006), <https://libn.com/2006/05/05/housing-purgatory/>; Editorial, *A Place to Live*, N.Y. TIMES (Apr. 9, 2010), <https://www.nytimes.com/2010/04/10/opinion/10sat4.html>

further still.⁵⁶ That project opponents were able to stymie even a project backed by the highest court in the land speaks to the immense power that local governments have to block affordable housing in New York’s suburbs—and the efficacy with which they have used it. Illegal and discriminatory exclusionary zoning continues to persist in Long Island; more recently, the Second Circuit affirmed a decision finding Garden City’s exclusionary zoning to have violated the Fair Housing Act.⁵⁷

Likewise, Westchester County was sued in 2006 for its failure to comply with the Fair Housing Act’s mandate that the county must “affirmatively further fair housing,” litigation which resulted in a consent decree being signed in 2009. While some progress has been made under that consent decree, the County refused to abide by many aspects of the court’s order; plaintiffs were repeatedly forced to return to court to compel Westchester County to meet its fair housing obligations.⁵⁸ The District Court, writing in 2016, described the “recalcitrance” of the County,⁵⁹ and in 2017, the Second Circuit wrote that the County was engaging in “total obstructionism” and warned it to “stop making excuses.”⁶⁰ This protracted conflict was over an order requiring the construction of just 750 total units of affordable housing in high-income, predominantly white communities—about 100 a year—in a county of nearly one million people.

These stories from Long Island and Westchester County show the immense obstacles to integrated, fair housing. Even after the federal courts step in, it takes decades to build small numbers of units: there remain too many opportunities to add new layers of review and new land use restrictions. This starkly demonstrates the immense power that state law gives to local governments to control, and limit, housing development. It also underscores the need for reform: under current law, it is simply too difficult to build affordable housing and promote racial integration.

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

New York’s slow rate of housing construction plainly reflects obstacles to providing housing supply, not limited demand for housing—New York City is a “superstar” city with one

⁵⁶ Editorial, A Major Step for Affordable Housing on LI, *Newsday* (Dec. 4, 2019), <https://www.newsday.com/opinion/editorial/mattinecock-affordable-housing-long-island-project-bellone-1.39225726>

⁵⁷ *Mhany Mgmt. v. County of Nassau*, 819 F.3d 581 (2d Cir. 2016).

⁵⁸ *See, e.g., United States ex rel. Anti-Discrimination Ctr. Of Metro N.Y., Inc. v. Westchester Cty.*, No. 06cv2860 (DLC), 2016 WL 3566236 (S.D.N.Y. June 27, 2016), *aff’d sub nom. United States v. Westchester Cty.*, No. 16-2272-cv, 2017 WL 78458 (2d Cir. Jan. 9, 2017); *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cty.*, No. 06cv2860 (DLC), 2016 WL 3004662 (S.D.N.Y. May 24, 2016); *Cty. of Westchester v. U.S. Dep’t of Hous. & Urb an Dev.*, 116 F. Supp. 3d 251 (S.D.N.Y.), *aff’d*, 802 F.3d 413 (2d Cir. 2015); *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cty.*, No. 06cv2860 (DLC), 2012 WL 1574819 (S.D.N.Y. May 3, 2012), *aff’d*, 712 F.3d 761 (2d Cir. 2013).

⁵⁹ *United States ex rel. Anti-Discrimination Ctr. of Metro New York, Inc. v. Westchester Cty.*, New York, No. 06 CIV. 2860 (DLC), 2017 WL 728702, at *2 (S.D.N.Y. Feb. 23, 2017)

⁶⁰ *United States ex rel. Anti-Discrimination Ctr. of Metro New York, Inc. v. Westchester Cty.*, New York, 689 F. App’x 71, 75 (2d Cir. 2017)

of the strongest economies in the country. Unlike declining Rust Belt cities, New York’s slow growth is not the result of a weak local or regional economy.⁶¹

Indeed, scholarly studies of regulatory barriers to housing construction have identified the New York City region as among the most tightly regulated housing markets in the nation. As measured by the Wharton Residential Land Use Regulatory Index—a leading metric that provides a rough-but-standardized measure of how restrictive local land use controls are—the New York region has the second-strictest zoning in the country, after the San Francisco metro area.⁶² Moreover, these results are not driven by a small number of extremely-restrictive communities. Rather, New York’s suburban communities show a high level of land use regulation across the board.⁶³ Only San Francisco had a higher share of its communities classified as in the most restrictive quartile of jurisdictions.⁶⁴

The Wharton index is only one measure of zoning stringency, however—albeit an important one. Another way to look at the costs of restrictive zoning is to take a deeper dive into local land use controls: what exactly does zoning look like in an exclusionary suburban jurisdiction? New York City’s suburbs, like those in many regions of the country, have deployed a diverse and overlapping set of land use techniques to prevent new development. This section looks at two such suburbs as case studies—Bellerose, in Nassau County, and Bronxville, in Westchester County—not to single out these jurisdictions but to illustrate the vast array of land use techniques being used to restrict housing production.

Bellerose—a small Nassau County village of 1,178 people on the border of Queens, not to be confused with nearby Bellerose Terrace or Bellerose Manor—provides an example of the multitude of tools used to limit suburban growth.⁶⁵ Bellerose allows for essentially no housing development. It therefore shows how much New York has empowered its local governments to exclude—and how much at least some governments have taken up that invitation.

Bellerose is an extremely attractive place to live. It has its own Long Island Railroad station, providing a half-hour ride to Penn Station.⁶⁶ Few places in the nation have such desirable transit infrastructure—and soon, East Side Access will improve the LIRR’s service further. According to the Census, the median household income is \$165,170.⁶⁷ The New York Times has described Bellerose as “neat,” “quaint,” and “tree-lined.”⁶⁸

⁶¹ It is possible that this changes for the short-term as a result of the COVID-19 crisis—although recent anecdotal accounts focus on New Yorkers reconsidering whether to move to suburbs within the region, not whether to leave the larger metropolitan area. Moreover, there is little indication that COVID-19 will change the long-term economic forces driving the region’s recent economic strength, particularly once the disease is brought under control.

⁶² 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>

⁶³ *Id.* at 23

⁶⁴ *Id.* at 23 & tbl. 6.

⁶⁵ U.S. Census Bureau, *Bellerose Village, New York*, <https://data.census.gov/cedsci/profile?q=Bellerose%20village,%20New%20York&g=1600000US3605639&table=DP05&tid=ACSDP5Y2017.DP05>

⁶⁶ Marcelle S. Fischer, *Hidden Away Next to Everything*, N.Y. TIMES (Feb. 6, 2009), <https://www.nytimes.com/2009/02/08/realestate/08livi.html>

⁶⁷ U.S. Census Bureau, *supra* note 65.

⁶⁸ Fischer, *supra* note 66.

Bellerose guards these amenities closely with a highly restrictive set of land use controls. First, Bellerose imposes extremely strict base zoning. With the exception of the lots fronting Jericho Turnpike, the entire village is zoned for single-family detached residential uses only.⁶⁹ In that zone, no apartments, townhouses, or even duplexes are allowed, and the only permitted commercial uses are secondary offices for professionals like doctors and attorneys.⁷⁰ Minimum lot sizes are 6,000 square feet, houses must have yards on each side, and the maximum height of a single-family home is 30 feet⁷¹ (compared to truly large-lot zoning, which might require an acre or two per home, these geometric constraints are not especially onerous for a single-family residential zone⁷²). In Bellerose’s apartment-and-commercial zone, heights are limited to only two stories: in practice, this allows for an apartment over a storefront on certain blocks.⁷³ Multi-family residential is not allowed to fully cover the lot and off-street parking must be provided.⁷⁴ To ensure that these controls remain in place, a two-thirds supermajority is required to modify the Bellerose zoning code.⁷⁵

However, these base zoning controls are not the only mechanisms for controlling growth in Bellerose; they are not even the most important. For single-family housing, Bellerose has imposed a moratorium on new construction since 1976; a new single-family home can only be built as a replacement for an existing dwelling.⁷⁶ According to the Village Code, “Bellerose has reached a point where the addition thereto of any new dwellings, other than in replacement of existing dwellings on a one-for-one basis, would be detrimental to the integrity of the Village and to the health, safety and welfare of its residents.”⁷⁷ For non-single-family development, even a project which complies with zoning must go through site plan review and a public hearing process.⁷⁸ This allows the Village to make a site-specific discretionary decision about the merits of any particular project. That decision can incorporate essentially any type of considerations, including “congestion,” “light and air,” the “undue concentration of population,” service provision, traffic, and preserving property values.⁷⁹

In addition to site plan review, new development may also, at the discretion of the Village’s building inspector, require approvals from the Village’s Architectural Review Commission.⁸⁰ The Architectural Commission is on guard for both “excessive similarity” and “excessive dissimilarity” in building design, looking at everything from materials to window

⁶⁹ Code of the Incorporated Village of Bellerose § 210-3.

⁷⁰ *Id.* § 210-7.

⁷¹ *Id.* § 210-8 to 210-12.

⁷² Robert C. Ellickson, *Zoning and the Cost of Housing: Evidence from Silicon Valley, Greater New Haven, and Greater Austin* 16-26 (Jan. 14, 2020), available on SSRN at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3472145

⁷³ Code of the Incorporated Village of Bellerose § 210-22.

⁷⁴ *Id.* § 210-23, 210-24.1.

⁷⁵ *Id.* § 210-30.

⁷⁶ *Id.* § 210-48.

⁷⁷ *Id.*

⁷⁸ *Id.* § 45-12.

⁷⁹ *Id.* § 45-8.

⁸⁰ *Id.* § 6-8.

placement.⁸¹ Architectural review is separate from the permitting process for construction or alterations of landmarked properties or properties in historic districts.⁸²

Rental properties must go through still another regulatory process. To rent out a dwelling, landlords must secure a rental permit from the Village. This permit allows the Village to inspect the potential rental property and is to be granted only if the property is in compliance with all laws.⁸³

In addition to these explicit tools of growth management, other Village regulatory schemes—like the building codes, fire codes, housing codes, and stormwater management and flood prevention systems—may have their own exclusionary effects. The housing code, for example, prohibits the siting of mobile homes or trailer parks in Bellerose.⁸⁴ There may be subtler provisions limiting growth as well. Notably, the village attorney told the New York Times that the Village is “extra vigilant in terms of its property maintenance code and architectural review” because of the “tremendous pressures” from New York City that “pour over onto the village.”⁸⁵ This suggests that the village is using its full panoply of regulatory powers to control growth. Accordingly, Bellerose granted no building permits for new homes between 2010 and 2018 (notably, it is not the only Nassau County municipality to grant no permits for absolutely any new housing during this period).⁸⁶

Bronxville is another affluent suburban community. Its median household income is \$187,188,⁸⁷ its Metro-North station offers an easy ride to Grand Central, and its high school is routinely ranked among the very best in the nation. While the majority of Bronxville is zoned only to allow for detached, single-family residential uses, Bronxville does allow for multi-family development in a substantial area near the train station, where it has a historic town center.⁸⁸ In three small areas, it even allows for apartment buildings up to six stories tall.⁸⁹ As such, studies which only look at the zoning code on paper—like the Regional Plan Association’s recent creation of “multifamily friendliness scores” around the region’s rail stations—would treat Bronxville as relatively amenable to multi-family development.⁹⁰

However, in practice, this zoning does not translate into actual multi-family construction. The areas zoned for multi-family development already are built out, and the zoning appears not to feasibly allow for new growth. According to a comprehensive review of the minutes of Bronxville’s Planning Board, Bronxville has allowed only one multi-family residential

⁸¹ *Id.* § 6-10.

⁸² *Id.* § 25-4.

⁸³ *Id.* § 170-2, 170-7.

⁸⁴ *Id.* § 165-9.

⁸⁵ Fischer, *supra* note 66.

⁸⁶ N.Y.C. Dep’t City Planning, Metro Region Explorer, <https://metroexplorer.planning.nyc.gov/Housing/units-permitted-size#11.36/40.7278/-73.623>. East Williston Village is another municipality with no building permits granted for housing during this period.

⁸⁷ U.S. Census Bureau, QuickFacts, Bronxville Village, <https://www.census.gov/quickfacts/bronxvillevillagenewyork>

⁸⁸ *Zoning, Village of Bronxville, New York*, VILLAGE OF BRONXVILLE (Jan. 2014), https://www.villageofbronxville.com/sites/g/files/vyhlf336/f/file/file/zoning_map_brxproof.pdf

⁸⁹ Bronxville Village Code § 310-13.

⁹⁰ REGIONAL PLAN ASSOCIATION, UNTAPPED POTENTIAL: OPPORTUNITIES FOR AFFORDABLE HOMES AND NEIGHBORHOODS NEAR TRANSIT 27-28, 33 <https://rpa.org/uploads/pdfs/RPA-Untapped-Potential.pdf> (describing methodology, and scoring Bronxville as a 2 on a 0-3 scale).

development to move forward in the decade since the end of the Great Recession: a conversion of a storage facility downtown into eleven apartments.⁹¹ Even there, no housing has actually been built yet. The developers submitted eight different versions of its site plan to the village Planning Board over a four year period before receiving its approvals in 2016;⁹² as of late 2019, construction was not complete.⁹³

In places like Bronxville—which is hardly unique in this respect—multi-family housing was built long ago, and the zoning now reflects those existing buildings. Thus, the existence of a zoning code that allows for transit-oriented development in certain locations is no guarantee that any such development can actually occur. Such zoning codes are “shrink wrapped” to the existing built environment, and lengthy approval processes are needed to build anything new.

These case studies show the multiplicity of approaches that New York’s suburbs use to maintain their exclusivity and 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 tightly tied to the existing housing stock. The state has given local governments each of those tools, and acquiesced in their use for exclusionary purposes. Given the national data finding that the region, overall, is the second-most restrictively zoned in the nation, it is clear that suburban jurisdictions big and small have employed these land use tools widely—with a dramatic effect on housing production, housing costs, segregation, and the climate.

IV. Why the State Needs to Step In

Local governments control most land use regulation in New York State. They have the power to allow more, and more accessible, housing opportunities on their own. In a few instances, local governments have worked hard to build new multi-family housing. The Village of Patchogue, in Suffolk County, for example, has received plaudits for the redevelopment of its village center, which involved the construction of 714 new housing units in multi-family projects over a ten-year period.⁹⁴ New Rochelle created a new downtown overlay zone in 2015, which

⁹¹ Meeting minutes available at *Agendas, Planning Board, VILLAGE OF BRONXVILLE, NY*, <https://ecode360.com/documents/pub/BR1468/Agendas/?subCategory=Planning+Board> (last visited Jun. 30, 2020).

⁹² Carol P. Bartold, *100 Pondfield Road Condos Await Construction; Drawings Have Not Been Submitted Yet to Bronxville Building Inspector*, MY HOMETOWN BRONXVILLE (Feb. 22, 2017), http://myhometownbronxville.com/index.php?option=com_content&view=article&id=10174:100-pondfield-road-condos-await-construction-drawings-have-not-been-submitted-yet-to-bronxville-building-inspector&catid=16:real-estate&Itemid=14

⁹³ Carol Bartold, *Interior Demolition Work to Begin at 100 Pondfield; First Phase of Converting Former Storage Building to 11-Unit Rental Property*, MY HOMETOWN BRONXVILLE (Apr. 3, 2019), http://myhometownbronxville.com/index.php?option=com_content&view=article&id=12384:interior-demolition-work-to-begin-at-100-pondfield-first-phase-of-converting-former-storage-building-to-11-unit-rental-property&catid=16:real-estate&Itemid=14; Michael Woyton, *Bronxville Fall Activities, News: Mayor*, PATCH (Oct. 1, 2019) <https://patch.com/new-york/bronxville/bronxville-fall-activities-news-mayor>

⁹⁴ Deon J. Hampton, *Patchogue Revitalization Brings \$693M in Economic Growth, Officials Say*, NEWSDAY (Dec. 6, 2018), <https://www.newsday.com/long-island/suffolk/patchogue-redevelopment-1.24256500>; 4Ward Planning, *Village of Patchogue Revitalization, Economic Impact Analysis*, LONG

resulted in the approval of over 1,000 new homes in just two years, along with commercial space, a theater, and a hotel.⁹⁵ In both cases, strong mayoral leadership proved critical—as did extensive support from the state, which provided funding and technical assistance to support both rezonings and the actual redevelopments.⁹⁶ These locally-driven efforts, however, are few and far-between—and even where they exist, probably not at a scale sufficient to fully address New York’s housing supply shortfall.

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, housing production has gotten worse, even as the region’s economy is 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.⁹⁷ New York’s problems with slow suburban growth and exclusion have gotten worse, not better.

Local governments’ behavior is also, to some extent, rational—or at least explainable. There are strong fiscal and political incentives for local governments to maintain low-density zoning, and those incentives are difficult for any individual jurisdiction to overcome on its own. Fiscally, many local governments fear the cost of providing services to new residents, especially if those residents will live in smaller and more affordable units that pay lower taxes than the existing housing stock.⁹⁸ In the New York suburbs, property taxes are the bedrock of local government finance. On Long Island, for example, 72 percent of local governments’ own-source revenues come from the property tax, substantially more than the national average.⁹⁹ As a result, new, lower-cost development (like apartments or smaller homes) that generates relatively less property tax revenue per capita can cost more in local services than it provides in additional taxes. In practice, this fear is often not borne out. In Patchogue, for example, new development was found to bring in around six times more tax revenue than it imposed educational costs.¹⁰⁰ Still, in some jurisdictions, it can be financially rational—if not noble—for existing residents to exclude smaller or cheaper homes; in many others, local homeowners with limited information might fear new development just in case it burdens the local budget.¹⁰¹ The result is what is

ISLAND REGIONAL PLANNING COUNCIL 83 (Dec. 19, 2018), <https://lirpc.org/wp-content/uploads/2018/12/Long-Island-RPC-Village-of-Patchogue-Impact-Study-12.19.18.pdf>

⁹⁵ REGIONAL PLAN ASSOCIATION, *supra* note 90 at 19.

⁹⁶ https://www.ny.gov/sites/ny.gov/files/atoms/files/New_Rochelle_Award_Booklet.pdf

⁹⁷ N.Y.C. DEP’T CITY PLANNING, *supra* note 36 at 26.

⁹⁸ Lee Anne Fennell, *Homes Rule*, 112 YALE L.J. 617, 624 (2002) (citing Bruce W. Hamilton, *Zoning and Property Taxation in a System of Local Governments*, 12 URB. STUD. 205 (1975)); JESSICA TROUNSTINE, *SEGREGATION BY DESIGN* (2018).

⁹⁹ LONG ISLAND REGIONAL PLANNING COUNCIL, *STUDY ON ALTERNATIVES TO THE PROPERTY TAX 22* (Apr. 17, 2018), https://secureservercdn.net/198.71.233.254/1da.948.myftpupload.com/wp-content/uploads/2018/04/LIRPC-Property-Tax-Study_Final_041218.pdf. Even including state and federal aid, property taxes account for over 57 percent of local government revenues. *Id.* at 23.

¹⁰⁰ 4Ward Planning, *Village of Patchogue Revitalization, Economic Impact Analysis*, LONG ISLAND REGIONAL PLANNING COUNCIL (Dec. 19, 2018), <https://lirpc.org/wp-content/uploads/2018/12/Long-Island-RPC-Village-of-Patchogue-Impact-Study-12.19.18.pdf>

¹⁰¹ Bruce W. Hamilton, *Zoning and Property Taxation in a System of Local Governments*, 12 URB. STUD. 205 (1975).

known as “fiscal zoning”: the use of exclusionary zoning to reduce or maintain a per-capita tax burden.

In many states, one way around fiscal zoning is to use “impact fees”: charges imposed specifically on new development to pay for the additional services the new development requires. At their best, impact fees mitigate the budgetary impact of new development on existing residents (by shifting it to new residents), thereby reducing political opposition to new growth and increased density (at their worst, though, they are so high they discourage all new development, turning into a tool of exclusion themselves).¹⁰² In New York, however, the courts have left ambiguous whether and when local governments have the authority to impose impact fees.¹⁰³ As a result, local governments in New York avoid imposing such fees, removing one potential (though imperfect and often-abused) tool to get around the incentives for exclusion inherent in fiscal zoning.¹⁰⁴ This legal context renders New York distinctly unable to overcome the incentives for exclusionary suburban zoning through local action.

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 basis.¹⁰⁵ 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.¹⁰⁶ 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.

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 local 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.¹⁰⁷

¹⁰² Joseph Gyourko, *Impact Fees, Exclusionary Zoning, and the Density of New Development*, 30 J. URB. ECON. 242 (1991); Vicki Been, *Impact Fees and Housing Affordability*, 8 CITYSCAPE 139, 145 (2005).

¹⁰³ *Albany Area Builders Ass’n v. Guilderland*, 546 N.E.2d 920, 923 (N.Y. 1989).

¹⁰⁴ Vicky Chau & Jessica Yager, *Zoning for Affordability*, 25 N.Y.U. ENV. L. J. 1, 47 (2017). *See also* Been, *supra* note 90 (on promise and perils of impact fees).

¹⁰⁵ Local governments use a variety of techniques to preserve this discretionary review, from expressly requiring discretionary approvals to imposing base zoning so restrictive that any project would require new approvals.

¹⁰⁶ 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.

¹⁰⁷ Notably, at the local level, environmental politics has often focused on site-specific questions of open-space preservation—which can also be wielded as a tool of exclusion. *See* William A. Fischel, *The Rise of*

These institutional differences result in dramatically different outcomes. The same Massachusetts voters who overwhelmingly oppose individual developments at the local level handed the state’s anti-exclusionary zoning statute (see Part V.A) a clear majority when it was put to a referendum in 2010.¹⁰⁸ Likewise, in California, state politicians representing exclusionary communities can safely—even popularly—fight for improved housing production, even while local politicians from the same places oppose it. When the state senator representing Berkeley, California sponsored legislation to preempt local zoning and allow more development near transit (discussed in Part V.F), the mayor of Berkeley declared it a “declaration of war against our neighborhoods.”¹⁰⁹ In Oregon, the state effectively banned single-family zoning over opposition from local governments and the state league of cities.¹¹⁰ The political dynamics change at the state level, in a way that allows for more pro-housing policy.

The fiscal and political incentives for restrictive zoning are difficult for any local government to avoid. Thus, while there are some suburban jurisdictions in New York that are intentionally and invidiously exclusionary, even the most well-meaning towns will be prone to low-density, exclusionary zoning. Local leaders in New York’s suburbs, for example, have been fighting for transit-oriented development for many years. The limited successes of these sincere, locally-led efforts only underscores the importance of changing the underlying rules of the land use game.

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.¹¹¹ 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.

Moreover, it is a job for the state legislature. New York’s courts have developed a doctrine disallowing the most egregious forms of exclusionary zoning,¹¹² but this doctrine is widely considered to be too weak to drive widespread change. Under this doctrine, the Court of Appeals has even upheld a local zoning code requiring two-to-five acres per residential lot as

the Homevoters: How the Growth Machine was Subverted by OPEC and Earth Day, 20, in LEE ANNE FENNELL & BENJAMIN J. KEYS, EDs., EVIDENCE AND INNOVATION IN HOUSING LAW AND POLICY (2017).

¹⁰⁸ EINSTEIN, ET AL., *supra* note 106 at 107. To some extent, this reflects a consistent preference for the status quo. Recent statewide efforts to *strengthen* Massachusetts’ anti-exclusionary zoning tools have been unsuccessful (though various reforms have secured substantial support from the governor or passed the State Senate).

¹⁰⁹ Janis Mara, *Berkeley Mayor on Wiener-Skinner Housing Bill: ‘A Declaration of War Against Our Neighborhoods’*, BERKELEYSIDE (Jan. 22, 2018), <https://www.berkeleyside.com/2018/01/22/berkeley-mayor-wiener-skinner-housing-bill-declaration-war-neighborhoods>

¹¹⁰ Laura Bliss, *Oregon’s Single-Family Zoning Ban Was a ‘Long Time Coming’*, BLOOMBERG CITYLAB (Jul. 2, 2019), <https://www.bloomberg.com/news/articles/2019-07-02/upzoning-rising-oregon-bans-single-family-zoning>

¹¹¹ See N.Y. Pub. Serv. L. § 172; N.Y. Soc. Serv. L. § 390(12); N.Y. Mental Hygiene L. § 41.34.

¹¹² *Berenson v. Town of New Castle*, 38 N.Y.2d 102 (1975).

permissibly non-exclusionary.¹¹³ While not entirely toothless,¹¹⁴ the courts themselves have stated that a legislative solution is necessary.¹¹⁵ It is time for the legislature to heed that call.

V. Options For Reform

While New York has not enacted legislation to promote housing development and land use reform in its suburbs, essentially all of its peer states have. Each of those states has taken different approaches to the problem. This section summarizes the most important policies adopted by other states across the country,¹¹⁶ with an eye towards how they might inform New York's policy strategy. As such, these are not meant to be comprehensive analyses of each law, but rather introductions to the concepts and models that New York might borrow, and mix-and-match into its own strategy for zoning reform. This discussion includes both well-established systems in effect for decades and recently-enacted statutes designed to deal with today's housing affordability crisis.¹¹⁷

A. Massachusetts, Connecticut, Rhode Island, and Illinois: Building Affordable Housing in Exclusive Communities Through an Appeals Process

Massachusetts enacted the nation's first statute meant specifically to combat exclusionary zoning in 1969, the year after the federal Fair Housing Act was enacted.¹¹⁸ That law, Chapter 40B, inspired similar legislation in the neighboring states of Connecticut and Rhode Island, with Illinois following more recently. This model allows developers to override certain aspects of local zoning—both procedural and substantive provisions—where they seek to build mixed-

¹¹³ Robert E. Kurzius, Inc. v. Inc. Vill. of Upper Brookville, 51 N.Y.2d 338, 345 (1980).

¹¹⁴ Cont'l Bldg. Co. v. Town of N. Salem, 211 A.D.2d 88, 93 (1995).

¹¹⁵ Suffolk Hous. Servs. v. Town of Brookhaven, 70 N.Y.2d 122, 130 (1987) (“Zoning, we have already recognized, is an essentially legislative task, and it is therefore anomalous that courts should be required to perform the tasks of a regional planner.”); Berenson, 38 N.Y.2d at 111 (“To that end, we look to the Legislature to make appropriate changes in order to foster the development of programs designed to achieve sound regional planning.”).

¹¹⁶ In fast-growing regions with lower housing prices, state overrides of local land use powers have often concerned different issues, like local restrictions on building materials. Because these regions have very different housing markets, different land use regimes, and different frameworks of local government law, these fights are further afield from New York's experience—though they also show the prevalence and power of state intervention into the local land use process. For a description of such legislation in 2019, see Salim Furth, *Hopeful News on Housing*, CITY JOURNAL (Jan. 3, 2020), <https://www.city-journal.org/legislation-housing-affordability>. State lawmakers may wish to learn from these regions as well, though they are not the subject of this brief.

¹¹⁷ This discussion looks at direct interventions into the land use process. Other tools can help change the underlying politics of land use by reforming local government finance and school funding or by increasing regional governance—but the effects of these reforms are less immediate and their direction less certain. Likewise, this paper does not investigate methods of reducing the cost of construction labor and materials, although these could be significant issues for housing production, particularly in New York City. See CITIZENS BUDGET COMMISSION, *supra* note 34 at 28.

¹¹⁸ Paul M. Vaughn, *The Massachusetts Zoning Appeals Law: First Breach in the Exclusionary Wall*, 54 B.U. L. REV. 37 (1974).

income or fully affordable projects, particularly in towns without a sufficient stock of affordable housing. Empirical evidence suggests that this model has helped promote the development of new housing, both market-rate and affordable.

Massachusetts' 40B—the most important of these laws—offers mixed-income and affordable housing developments (generally those with 20-25 percent of their units affordable) two mechanisms for overcoming local zoning: first, an alternative, streamlined process at the local level, and second, state review of the local zoning decision.¹¹⁹ Under the streamlined process, when a developer seeks to build a qualifying 40B development, it can apply for a single, comprehensive land use permit from the local zoning board of appeals.¹²⁰ Rather than needing to secure serial approvals from a planning board, a zoning board, a historical commission, and the like, the project is evaluated only once (although the ZBA may solicit recommendations from other local boards and departments). The ZBA must also adhere to a strict time frame, with hearings initiated within 30 days of the application and completed within six months; after that, the ZBA must reach a decision within 40 days or the permit is deemed granted.¹²¹ This timeline prevents undue delay. Finally, the ZBA is allowed to approve the project even if it does not comply with local zoning.¹²² This streamlined process is available for affordable projects statewide.

Even under a streamlined process, though, the local ZBA might not approve a project, or might attach onerous conditions. If so, a special state-level appeals process is available to challenge the ZBA's decision. This appeals process, however, is only available in towns where less than 10 percent of the total housing stock is affordable or otherwise qualifies as part of the state's subsidized housing inventory.¹²³ Towns that have built enough affordable housing already are exempt from this appeals process—their local decisions are not subject to state oversight beyond normal judicial review. A safe harbor also exists for towns with a state-approved housing production plan which make steady annual progress towards the 10 percent threshold at a rate of one-half percentage point every year.¹²⁴

In towns below the 10% threshold, appeals go before a state-level Housing Appeals Committee. A majority of Committee members are appointed by the state housing department.¹²⁵ The Committee is empowered to overturn the local zoning board's decision. Critically, the burden of proof is on the local zoning board to demonstrate that its decision was based on valid health, safety, environmental, or design concerns, and that those concerns outweigh the regional housing need.¹²⁶ This reverses the ordinary presumptions in land use litigation, where local

¹¹⁹ See 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).

¹²⁰ MASS. GEN. LAWS ch. 40B § 21.

¹²¹ *Id.*; 760 MASS. CODE REGS. § 56.05.

¹²² 135 Wells Ave., LLC v. Hous. Appeals Comm., 478 Mass. 346, 352 (2017) (“The municipality's zoning board of appeals, in turn, has authority to review the application in its entirety, to override local requirements or regulations, and to issue “permits or approvals” to the same extent, and with the same authority, as any of those local agencies”).

¹²³ MASS. GEN. LAWS ch. 40B § 20 (defining projects as “consistent with local needs” where ten percent of units in municipality are low- or moderate-income); § 23 (projects “consistent with local needs” not overturnable on appeal).

¹²⁴ 760 MASS. CODE REGS. § 56.03(4). Additional safe harbors exist as well. *Id.* § 56.03(1).

¹²⁵ MASS. GEN. LAWS ch. 23B § 5A.

¹²⁶ 760 MASS. CODE REGS. § CMR 56.07(2)(b)

decisions are presumptively valid. In other words, local governments can no longer rely on hazy assumptions (or worse, bad faith claims) about the impacts of new development: only a project which will demonstrably and substantially impact the community can be rejected. State laws, like wetlands protections and building codes, apply regardless, but local zoning provisions may not be used to obstruct housing without a good reason.¹²⁷

Connecticut, Rhode Island, and Illinois each have adopted variations on the 40B model of providing a “builder’s remedy” (or a legal mechanism that allows developers to build at higher densities than local zoning permits), though Massachusetts’ framework is considered to be the strongest and most effective.¹²⁸ Connecticut’s statute, section 8-30g, lacks the streamlining element of 40B, primarily utilizing the burden-shifting appeals process.¹²⁹ Connecticut also sends appeals to the judicial system, not a specialized state agency.¹³⁰ Rhode Island pairs the Massachusetts model with an obligation like that in California for local governments to develop a “housing element” as part of the state’s preexisting comprehensive planning process.¹³¹ Connecticut and Rhode Island also each customize the details of the model, like the threshold for coverage and the scope of safe harbors for municipalities making incremental progress in building affordable housing. Connecticut’s statute is generally considered to be weaker than Massachusetts’ (because, among other things, it lacks 40B’s procedural streamlining and its judicial enforcement structure has proven cumbersome), and has accordingly been less effective—though hardly ineffective—in building affordable housing in wealthier jurisdictions, while Rhode Island comes closer to Massachusetts’ results.¹³²

Illinois’s system, like Rhode Island’s, is a hybrid of the 40B model and a planning model.¹³³ Illinois municipalities with less than 10 percent of their housing stock affordable are required to plan for building more affordable housing, and in 2009, the state created a Housing Appeals Board to overturn permit denials in towns that had not met the goals in their own local plan. Illinois’ system is too new to be evaluated, though it is clear that the state has not yet secured widespread compliance.¹³⁴ Additionally, Illinois’ statute lacks one of the most important features of this model, the shifting of the burden of proof from developers to towns, and therefore is substantially weaker.

Massachusetts has seen meaningful results from 40B, although progress has been slow. When it was enacted, only four of Massachusetts’ 351 cities and towns had more than 10 percent of their housing affordable.¹³⁵ As of 2012, that number had risen to 40, including some of the state’s most affluent towns.¹³⁶ Around 31,000 affordable units and 27,000 market-rate units have

¹²⁷ MASSACHUSETTS HOUSING PARTNERSHIP, CHAPTER 40B HANDBOOK FOR ZONING BOARDS OF APPEALS 3 (Mar. 2017), <https://www.mass.gov/files/documents/2017/10/18/mhphandbookzoning.pdf>

¹²⁸ 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, 388 (2020).

¹²⁹ CONN. GEN. STAT. § 8-30g.

¹³⁰ *Id.* § 8-30g(f).

¹³¹ R.I. GEN. LAWS § 45-53-4.

¹³² *See generally* Marantz & Zheng, *supra* note 128.

¹³³ 310 ILL. COMP. STAT. 67

¹³⁴ Karen Berkowitz, *Many Towns Snub State’s Affordable Housing Mandate*, CHI. TRIB. (Aug. 7, 2015), <https://www.chicagotribune.com/suburbs/highland-park/ct-hpn-suburbs-affordable-housing-mandate-tl-0813-20150807-story.html>

¹³⁵ Reid et al., *supra* note 119 at 251.

¹³⁶ *Id.*

been built under the program.¹³⁷ These units represent around 7 percent of the state's total housing production, around 26 percent of the state's affordable housing production, and around 80 percent of the increase in affordable housing production in the suburbs.¹³⁸ These numbers must be taken in context. Some of these projects might have been approved without 40B. At the same time, the *threat* of 40B has allowed many developers to negotiate approvals not captured in these numbers: indeed, under many of these models, the threat of state intervention proves as important as actual instances of state intervention.¹³⁹ Still, the best research suggests a positive causal relationship, at least for rental projects.¹⁴⁰ 40B is used disproportionately more in the municipalities with the strictest zoning, strongly indicating that it has been effective in overcoming exclusionary local barriers to housing growth in the jurisdictions most resistant to multi-family development.¹⁴¹ As is to be expected, 40B has had little impact in the lower-demand and more rural areas outside the Greater Boston area.¹⁴²

Moreover, research shows that middle- and upper-income suburbs in Massachusetts allow significantly more subsidized and affordable housing than equivalent jurisdictions in New York, which is consistent with 40B opening up these jurisdictions. Low Income Housing Tax Credit projects are 2.5 times more common in the Boston suburbs than their New York equivalents, and the Boston-area suburbs also have higher shares of low-income renters and low-income renters who are not rent-burdened.¹⁴³

Of course, 40B has not proven sufficient to solve all of Greater Boston's housing needs. The region's zoning remains largely unfriendly to multi-family development, and insufficient housing has been created in recent years, leading to ever-increasing housing costs.¹⁴⁴ In recent years, state officials have debated how to augment 40B with new strategies for promoting housing growth, ranging from a gubernatorial proposal to eliminate certain supermajority requirements for local zoning changes¹⁴⁵ to a sweeping, multi-pronged reform proposal passed by the State Senate but not the State House.¹⁴⁶ Fifteen Boston-area mayors have also pledged to work together to build hundreds of thousands of new housing units in the region.¹⁴⁷ Advocates in Connecticut, too, are pushing for a slate of new tools to supplement the 8-30g process, in recognition of the deep segregation that still marks that state's housing system.¹⁴⁸

¹³⁷ *Id.* at 251.

¹³⁸ Rachel G. Bratt & Abigail Vladeck, *Addressing Restrictive Zoning for Affordable Housing: Experiences in Four States*, 24 HOUS. POL. DEBATE 594, 602 (2014).

¹³⁹ *Id.* at 604, 615.

¹⁴⁰ Lynn M. Fisher & Nicholas J. Marantz, *Can State Law Combat Exclusionary Zoning? Evidence from Massachusetts*, 52 URB. STUD. 1071 (2015).

¹⁴¹ *Id.*

¹⁴² Edward G. Goetz & Yi Wang, *Overriding Exclusion: Compliance With Subsidized Housing Incentives in the Massachusetts 40B Program*, 30 HOUS. POL. DEBATE 457, 458 (2020).

¹⁴³ Marantz & Zheng, *supra* note 128 at 381, 385.

¹⁴⁴ 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

¹⁴⁵ Mass. House Bill No. 4290 (2017-18 sess.).

¹⁴⁶ Mass. Senate Bill No. 2311 (2015-2016 sess.).

¹⁴⁷ METRO MAYORS COALITION, REGIONAL HOUSING TASK FORCE, <https://housingtaskforce.mapc.org/> (last visited Jul. 30, 2020).

¹⁴⁸ DESEGREGATE CONNECTICUT, <https://www.desegregatect.org/> (last visited Jul. 30, 2020).

Massachusetts' affordable housing production has come with relatively little social cost. Research suggests that 40B projects have had little-to-no impact on property values or service levels, even in single-family neighborhoods.¹⁴⁹ Additionally, the program is relatively popular, although each individual project is a source of deep local controversy. 40B was put up to a statewide referendum in 2010, and survived with a healthy 58-42 margin.¹⁵⁰

Research from Connecticut has also shown that these appeals-based models avoid one hypothesized unintended consequence. Some scholars have worried that because the threshold for coverage is determined as a percentage of total housing units, these systems create an incentive to reduce overall housing growth.¹⁵¹ However, a recent comparison of neighboring areas of Connecticut and New York shows no such “backfire” effect; if anything, Connecticut showed more market-rate single-family construction than New York.¹⁵² Thus, the Connecticut experience should provide some additional assurance that these appeals systems do not have adverse effects on market-rate development.

B. California, Oregon, Washington, Utah, and Florida: Planning for Growth

California, along with other West Coast states like Oregon and Washington, has until recently relied on planning requirements to overcome the undersupply of housing. (Florida, too, has followed this model, although it essentially abandoned enforcement of its laws starting in 2011.¹⁵³ And as discussed below, Utah adopted its own take on the model in 2019.) The basic idea is that every local government must develop a plan, to be updated periodically, for how it will provide sufficient housing to accommodate population growth at all income levels, and land use decisions must, to some extent, conform to that plan.¹⁵⁴ Population forecasts are made at the state or regional level. In California, forecasts are generated by state agencies and then housing obligations are allocated to local governments by regional Councils of Governments, with projected growth divided into four income bands.¹⁵⁵ The local plans, called “housing elements,” must be reviewed and approved by the state.¹⁵⁶ They must include considerable detail about how population growth will be accommodated, including by identifying particular sites for growth. Jurisdictions with inadequate plans risk losing funding or losing their power to grant permits at

¹⁴⁹ Reid et al., *supra* note 119 at 253. See also ALEXANDRA DEGENOVA ET AL., ON THE GROUND: 40B DEVELOPMENTS BEFORE AND AFTER (May 1, 2009), https://community-wealth.org/sites/clone.community-wealth.org/files/downloads/report-de_genova-et-al.pdf (in four case studies, finding that pre-development fears about impacts of 40B developments did not materialize).

¹⁵⁰ *Ballot Questions, 2. Comprehensive Permits for Low- or Moderate-Income Housing*, BOSTON.COM, http://archive.boston.com/news/special/politics/2010/ballot_questions/housing/results/ (last visited Jul. 1, 2020).

¹⁵¹ Fischel, W. A. (2011). The evolution of zoning since the 1980s: The persistence of localism. In D. H. Cole & E. Ostrom (Eds.), *Property in land and other resources* (pp. 288–293). Cambridge, MA: Lincoln Institute of Land Policy.

¹⁵² Nicholas J. Marantz & Harya S. Dillon, *Do State Affordable Housing Appeals Systems Backfire? A Natural Experiment*, 28 HOUS. POL. DEBATE, 267 (2018).

¹⁵³ Christopher S. Elmendorf, *Beyond the Double Veto: Housing Plans as Preemptive Intergovernmental Compacts*, 71 HASTINGS L.J. 79, 105-06 (2019).

¹⁵⁴ *Id.* at 100-02.

¹⁵⁵ CAL. GOV'T CODE § 65580 et seq.

¹⁵⁶ CAL. GOV'T CODE § 65585.

all: historically, no “builder’s remedy” was available for developers to secure a permit based on the shortcomings of a housing element.¹⁵⁷ This description is an oversimplification, as California’s land use system is famously complex—it “would have made Rube Goldberg blush,” according to one scholar¹⁵⁸—but captures the general approach prior to the mid-2000s.

In California, this planning process was largely a failure. A 2005 study found that jurisdictions with an approved housing element showed no difference at all in the number of building permits issued, or the type of projects for which permits were issued: successful planning just didn’t translate into actual housing production.¹⁵⁹ A more recent study generated slightly different results, finding that places with approved housing elements built more affordable housing but so much less market-rate housing that total housing construction was lower than in non-compliant jurisdictions.¹⁶⁰ In either case, the “housing element” model was ineffective at achieving its own goal of accommodating population growth.

This failure stemmed from multiple causes. First, its system of projecting growth was faulty, allowing low growth in the past to justify low growth in the future.¹⁶¹ Famously, Beverly Hills was required only to build three new units of housing in its housing element, because it was not projected to grow.¹⁶² Second, the method of allocating growth among jurisdictions was overly subject to political influence, allowing more affluent jurisdictions to effectively lobby to keep their numbers low.¹⁶³ Third, the model gave local governments the primary role in crafting their housing element and then complying with it. This invited local governments to evade both the letter and the spirit of the law.¹⁶⁴ Fourth, the model originally lacked strong remedies: an under-supply of housing did not lead in any mechanical way to more housing, or even to better land use regulations.

However, beginning in the 2000s and accelerating in 2017 through 2019, California has used the “housing element” law as a platform for a series of other changes, the cumulative effect of which is likely to be considerable.¹⁶⁵ It has adjusted the planning process itself, providing new methods for calculating projected housing needs and closing loopholes exploited by local governments. But it has also used local governments’ own plans as benchmarks for other reforms. For example, SB 35 of 2017 allows for certain qualifying projects to go through a streamlined, as-of-right zoning process—which is particularly important given California’s often-arduous discretionary land use review system—but only in jurisdictions which have not

¹⁵⁷ Elmendorf, *supra* note 154 at 103-04.

¹⁵⁸ *Id.* at 122.

¹⁵⁹ Paul G. Lewis, *Can State Review of Local Planning Increase Housing Production?*, 16 HOUS. POL. DEBATE 173, 190-92 (2005).

¹⁶⁰ Darrel Ramsey-Musolf *Evaluating California’s Housing Element Law, Housing Equity, and Housing Production (1990–2007)*, 26 HOUS. POL. DEBATE 488, 503 (2016).

¹⁶¹ Elmendorf, *supra* note 154 at 107-08.

¹⁶² Thomas Fuller & Conor Dougherty, *California Today: The Beverly Hills Affordable Housing Loophole*, N.Y. TIMES (Feb. 5, 2018), <https://www.nytimes.com/2018/02/05/us/california-today-beverly-hills-affordable-housing.html>

¹⁶³ 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/>

¹⁶⁴ Elmendorf, *supra* note 154 at 110.

¹⁶⁵ *See generally* Elmendorf, *supra* note 154.

met their required housing target.¹⁶⁶ Likewise, California has been gradually making the housing element more self-executing—more like a law and less like a plan—and adding builder’s remedies in some circumstances.¹⁶⁷

At its best, building a system of state-level interventions on top of locally-generated plans can improve local buy-in and secure the benefits of local knowledge while imposing tight state oversight and accountability. It remains to be seen, empirically, what effect the reforms to California’s “housing element” system will have, but local advocates are guardedly optimistic.¹⁶⁸

The newest state to adopt a planning-based model, Utah, has provided a twist on this strategy.¹⁶⁹ Like the West Coast states, Utah requires local governments to plan for housing growth, including at multiple income levels. But Utah’s 2019 legislation then ties eligibility for state transportation funding to local government’s adoption of at least three housing reforms from a lengthy pre-set menu.¹⁷⁰ These range from the modest (like subsidizing mortgages for city employees or working with technical assistance providers) to quite substantial reforms (like allowing high-density zoning, permitting single-room occupancy housing, or eliminating parking requirements). It remains to be seen which reforms local governments adopt—and therefore what impact this legislation has. Even so, Utah’s overall approach represents another option for states looking to promote housing growth while substantially preserving local discretion.¹⁷¹

C. New Jersey: Allocating Fair Share Obligations

New Jersey’s *Mt. Laurel* doctrine—perhaps the most famous anti-exclusionary policy in the nation—has taken a twisting path from its inception to today, filled with political controversy and shifting policies. Along the way, though, it has built approximately 80,000 units of housing and helped keep New Jersey much more affordable than it would have been otherwise.¹⁷²

Mt. Laurel stems from pioneering civil rights litigation brought by the Southern Burlington County chapter of the NAACP after the township of Mount Laurel denied an application to build affordable garden apartments in the township (the mayor at the time told a black church that “If you people can’t afford to live in our town, then you’ll just have to leave” –

¹⁶⁶ S.B. 35, 2017–2018 Leg. (Cal. 2017) (enacted).

¹⁶⁷ See generally Elmendorf, *supra* note 154.

¹⁶⁸ See also Christopher S. Elmendorf, Eric Biber, Paavo Monkkonen & Moira O’Neill, *Making it Work: Legal Foundations for Administrative Reform of California’s Housing Framework*, 46 ECOL. L. Q. (forthcoming 2020) (laying out further grounds for strengthening California law).

¹⁶⁹ Nolan Gray, *A Red-State Take on a YIMBY Housing Bill*, BLOOMBERG CITYLAB (Feb. 20, 2019), <https://www.bloomberg.com/news/articles/2019-02-20/utah-pro-housing-bill-is-zoning-reform-red-state-style>

¹⁷⁰ UTAH LAWS 2019, ch. 327.

¹⁷¹ California’s new “Prohousing Policies” framework similarly gives localities a menu of options for compliance. Under that framework, compliance provides local governments with preferences in various state funding schemes. See CAL. DEP’T HOUS. & COMMUNITY DEV., PROHOUSING POLICIES FRAMEWORK PAPER AND SURVEY (Oct. 2019), <https://files.constantcontact.com/4d29178d401/964e9b77-5215-4e2f-9720-8c46592830c4.pdf>

¹⁷² 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)

making clear the connection between exclusion by class and exclusion by race).¹⁷³ In 1975, the New Jersey Supreme Court held that the zoning power—a state power only delegated to local governments—could not be used to exclude, and that every municipality must provide its “fair share” of opportunities for low and moderate-income people to find housing.¹⁷⁴ Many local governments refused to implement the court’s decision; Mt. Laurel itself offered up only three tracts of land for affordable development, each one inappropriate for actual development, with the result that no new housing was actually built.¹⁷⁵ The state Supreme Court thus stepped in again, setting the stage for a sweeping judicial intervention into local land use: affordable housing developers denied a permit could sue the municipality for failing to meet their *Mt. Laurel* obligations; if the court determined that the town had not done its fair share, the court would provide a “builder’s remedy” and allow the project to proceed regardless of local zoning.¹⁷⁶ The courts were thus tasked with determining and allocating the statewide need for affordable housing and enforcing the law.

Given this flood of litigation, the legislature stepped in in 1985, creating a new state agency, the Council on Affordable Housing (COAH), to administer *Mt. Laurel*.¹⁷⁷ The legislature also allowed towns to avoid half of their fair share obligations by paying for the rehabilitation of housing in poor urban neighborhoods (this provision was repealed in 2008).¹⁷⁸ Over the years, the COAH pursued a variety of strategies for promoting the construction of affordable housing in New Jersey’s suburbs—some of which were rejected by the courts. A full recounting is outside the scope of this paper, but certain controversies are important in guiding New York’s policy thinking.

First, there have been changes to the methodology for calculating a municipality’s affordable housing obligation: the first two rounds of rules used immensely complex formulas incorporating data on local population and housing patterns, the third tied obligations to future job and housing growth. The third round’s “growth share” approach was meant to make the calculations simpler and more transparent, but were struck down by a court for, among other things, incentivizing municipalities to halt growth altogether.¹⁷⁹

Second, New Jersey initially allowed towns to impose residency preferences for allocating the affordable units. The state Supreme Court struck down those preferences as inconsistent with the inclusionary and integrationist purposes of *Mt. Laurel*.¹⁸⁰

Third, the COAH’s third round rules allowed for municipalities to meet their affordable housing obligations in part through “filtering,” the process by which units originally built for higher-income households eventually are used by lower-income households—at least when there

¹⁷³ DOUGLAS S. MASSEY ET AL., *CLIMBING MOUNT LAUREL: THE STRUGGLE FOR AFFORDABLE HOUSING AND SOCIAL MOBILITY IN AN AMERICAN SUBURB* 34 (2013).

¹⁷⁴ *S. Burlington Cty. NAACP v. Mount Laurel Twp.* (“Mount Laurel I”), 336 A.2d 713, 724 (N.J. 1975).

¹⁷⁵ *S. Burlington Cty. N.A.A.C.P. v. Mount Laurel Twp.*, 456 A.2d 390, 461-62 (1983).

¹⁷⁶ *Id.* at 453.

¹⁷⁷ N.J. Stat. Ann. § 52:27D-301 to -329.

¹⁷⁸ Harold A. McDougall, *Regional Contribution Agreements: Compensation for Exclusionary Zoning*, 60 TEMP. L.Q. 665 (1987); N.J. P.L. 2008 ch. 46.

¹⁷⁹ Roderick M. Hills, Jr. *Saving Mt. Laurel?*, 40 FORDHAM URB. L.J. 1611 (2013); *In re Adoption of N.J.A.C. 5:94 & 5:95 by the N.J. Council on Affordable Hous.*, 914 A.2d 348, 363-64 (N.J. Super. Ct. App. Div. 2007).

¹⁸⁰ *In re Warren*, 622 A.2d 1257, 1274-75 (N.J. 1993).

is sufficient housing supply in the market. The same decision which struck down the “growth share” approach also rejected filtering as an appropriate mechanism under *Mt. Laurel*. This raises important questions of how low-rent, but market-rate, units, are treated in state schemes to promote affordable suburban housing.¹⁸¹

Fourth, the third-round rules allowed municipalities to restrict half of their mandated affordable housing to seniors, thereby limit access to families with children. Again, this was struck down by a court as inconsistent with the fundamental purposes of the *Mt. Laurel* doctrine.¹⁸² This highlights the importance of defining what type of housing is being promoted.

Besides these policy disputes, the *Mt. Laurel* doctrine has also been subject to immense political controversy. Governor Jim McGreevey, a Democrat, used his control over the COAH to undermine *Mt. Laurel* at every turn, extending de facto moratoria on additional housing growth and shrinking projections of the number of affordable housing units required.¹⁸³ Governor Chris Christie, a Republican, went so far as to abolish the COAH.¹⁸⁴ In both cases, the courts have defended *Mt. Laurel*, with a good deal of staunchness.¹⁸⁵ Indeed, in 2017, the New Jersey Supreme Court ruled that municipalities must make up for the “gap period” from 1999 to 2015 when the COAH was essentially broken.¹⁸⁶ By some estimates, this will require 155,000 new affordable units to be built statewide over a ten-year period.¹⁸⁷

As this history makes clear, *Mt. Laurel* has had a bumpy and complicated path from constitutional doctrine to actual construction. The state’s strategy has taken many forms: involving both judicial and administrative control over the process and shifting standards for what must be built and where. Still, its basic approach—allocating obligations for the construction of affordable housing to each municipality in the state and enforcing those obligations with a builder’s remedy—has been a qualified success. It has led to the construction of approximately 80,000 homes for low- and moderate-income households, with many more to come.¹⁸⁸ Notably, recent research demonstrates that *Mt. Laurel* is responsible for increased affordable housing construction in Northern New Jersey as compared to areas of New York (which lacks any equivalent program) on the other side of the state line.¹⁸⁹

Moreover, New Jersey’s additional affordable homes have generally been successfully managed and well-integrated into New Jersey’s suburban communities. In *Mt. Laurel* itself, sociologist Douglas Massey studied the effects of the original affordable housing project which

¹⁸¹ Hills, *supra* note 179 at 1642.

¹⁸² In re Adoption of N.J.A.C. 5:94 & 5:95, 914 A.2d at 396.

¹⁸³ Alan Mallach, *The Betrayal of Mount Laurel*, SHELTERFORCE (Mar. 1, 2004), <https://shelterforce.org/2004/03/01/the-betrayal-of-mount-laurel/>.

¹⁸⁴ 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

¹⁸⁵ See In re Adoption of N.J.A.C. 5:96 & 5:97 ex rel. New Jersey Council on Affordable Hous., 221 N.J. 1, 110 A.3d 31 (2015) (responding to abolition of COAH).

¹⁸⁶ In re Declaratory Judgment Actions Filed by Various Municipalities, 152 A.3d 915, 918 (2017).

¹⁸⁷ Nicholas Pugliese, *Judge Says NJ Towns Must Allow Affordable Housing, Maybe More Than 150,000 New Units*, NORTHJERSEY (Mar. 8, 2018), <https://www.northjersey.com/story/news/new-jersey/2018/03/08/judge-says-nj-towns-must-allow-affordable-housing-maybe-more-than-150-000-new-units/408766002/>

¹⁸⁸ Hanna, *supra* note 172.

¹⁸⁹ Nicholas J. Marantz & Huixin Zheng. Exclusionary Zoning and the Limits of Judicial Impact. *Journal of Planning Education & Research* (2018).

sparked this entire doctrine; he found no effect on the town's property values, taxes, or crime rates.¹⁹⁰ At the same time, residents of those apartments had higher incomes and employment rates and better educational outcomes for children.¹⁹¹

D. Pennsylvania: Providing For Multiple Housing Types

Pennsylvania has adopted a different approach to suburban zoning. Pennsylvania does not set any targets for the number of units that must be built, either market-rate or affordable. Instead, it requires that every municipality zone for a variety of types of housing, including multi-family housing. This doctrine was first developed in the state courts, where it was rooted in the principle that zoning could not be used to “prevent the entrance of newcomers.”¹⁹² The courts first struck down zoning ordinances that entirely excluded multi-family housing and then expanded the doctrine to include ordinances that only allowed for a “token” amount of multi-family housing or less than a jurisdiction's “fair share.” The fair share analysis is based on three factors: whether the area is a good candidate for growth, the current level of development, and the exclusionary effect of the zoning restriction.¹⁹³ Jurisdictions need not accommodate every form of multi-family housing (they may permit townhomes but not apartments, for example) and need not accommodate multi-family housing everywhere.¹⁹⁴ These doctrines were subsequently codified into statutory law by the Pennsylvania Legislature in 1988, though at a high level of generality that leaves the details of interpretation and enforcement to the courts.¹⁹⁵

Notably, the Pennsylvania approach imposes no requirements for below-market-rent housing. It operates entirely through market mechanisms: by providing more housing, and more multi-family housing in particular, it seeks to lower market rates. Thus, some have criticized Pennsylvania for not doing enough for low-income residents.¹⁹⁶ That said, in terms of promoting *overall* production of multi-family housing, there is some evidence that Pennsylvania's approach is equally as effective as New Jersey's far more involved and contentious *Mt. Laurel* approach.¹⁹⁷

This approach continues to spread. In 2018, the Connecticut House of Representatives passed new legislation requiring all local governments to provide for a variety of housing types, including multi-family housing, and to consider regional needs, although the legislation was not taken up by the state Senate.¹⁹⁸ The same legislation also would have required that all local zoning be designed to affirmatively further fair housing. Although the enforcement provisions of

¹⁹⁰ MASSEY ET AL., *supra* note 173.

¹⁹¹ *Id.*

¹⁹² *National Land & Investment Co. v. Kohn*, 215 A.2d 597, 612 (Pa. 1965).

¹⁹³ *Surrick v. Zoning Hearing Bd.*, 382 A.2d 105, 108-11 (Pa. 1977).

¹⁹⁴ *In re Appeal of M.A. Kravitz Co.*, 460 A.2d 1075, 1081 (Pa. 1983).

¹⁹⁵ 53 PA. STAT. ANN. § 10604(4).

¹⁹⁶ 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).

¹⁹⁷ Marantz & Zheng, *supra* note 189.

¹⁹⁸ Conn. House Bill 5045 (2018).

the bill were weakened during the legislative process,¹⁹⁹ local governments would have been required to affirmatively demonstrate compliance on a regular cycle.

Likewise, in 2016, the Massachusetts State Senate passed a comprehensive zoning reform bill which, among other things, included an important provision along the lines of Pennsylvania’s law.²⁰⁰ The Massachusetts legislation would have required every town to zone for a reasonably-sized district allowing multi-family development, at state-set minimum densities. This legislation did not pass the Massachusetts House, but demonstrates the continued spread and appeal of this simple model for ensuring additional housing production.

E. Massachusetts, Connecticut, California and Washington: Funding Incentives

The least intrusive method by which states can attempt to encourage more suburban housing development is through funding incentives. These generally take two forms: project-specific or one-off planning grants and permanent programs incentivizing reform of underlying zoning. New York has, at various points, offered grants specifically targeting transit-oriented suburban development, such as the “Smart Growth grant program” administered through the state Environmental Protection Fund and the state’s recent Downtown Revitalization Initiative.²⁰¹ (The state also expends considerable resources supporting affordable housing more generally, including in the downstate suburbs, but these funds are not targeted at changing land use regulations.) Local governments like Nassau and Westchester County have also invested funds supporting transit-oriented growth.²⁰² These programs provide important funding to overcome infrastructure hurdles and provide small jurisdictions with the planning capacity they need for redevelopment. However, these programs are designed to help provide capacity for jurisdictions to achieve their own, pre-existing development goals; they generally do not incentivize local governments to adopt a new vision for local growth.²⁰³

Massachusetts offers the leading example of a broader incentive scheme through its “Chapter 40R” program, which was enacted in 2004.²⁰⁴ Under Chapter 40R, municipalities receive direct fiscal payments for adopting zoning overlay districts with “smart growth

¹⁹⁹ Mark Pazniokas, *Connecticut House Weakens, Then Passes Affordable Housing Bill*, CONN. MIRROR (Apr. 24, 2018) <https://ctmirror.org/2018/04/24/connecticut-house-weakens-passes-affordable-housing-bill/>

²⁰⁰ Mass. Senate Bill 2311 (2016).

²⁰¹ *Grant Opportunities - EPF Smart Growth Grants*, N.Y. DEP’T STATE, https://www.dos.ny.gov/opd/grantOpportunities/epf_smartgrowthGrants.html (last visited Jul. 1, 2020); *Downtown Revitalization Initiative*, N.Y. DEP’T STATE, <https://www.ny.gov/programs/downtown-revitalization-initiative> (last visited Jul. 30, 2020).

²⁰² David Winzelberg, *Nassau to Offer \$1M for Transit-Oriented Projects*, LONG ISLAND BUS. NEWS (Sep. 17, 2019), <https://libn.com/2019/09/17/nassau-to-offer-1m-for-transit-oriented-projects/>; *Transit-Oriented Development*, WESTCHESTER COUNTY, <https://planning.westchestergov.com/transit-oriented-development> (last visited Jul. 1, 2020).

²⁰³ In an interesting variation on these capacity-building strategies, Massachusetts has begun to place state staff directly in select cities to increase planning capacity. *TDI Fellows*, MASSDEVELOPMENT, <https://www.massdevelopment.com/what-we-offer/key-initiatives/tdi/tdi-fellows> (last visited Jul. 30, 2020).

²⁰⁴ 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

characteristics,” including as-of-right development at moderate densities (between 8 and 20 units per acre, depending on the type of town) and affordability requirements.²⁰⁵ These districts must be near transit, commercial centers, or other similar infrastructure. If such districts are adopted, the municipality receives between \$10,000 and \$600,000 immediately, based on the net increase in zoned capacity.²⁰⁶ It receives an additional \$3,000 per unit when building permits are issued and the town qualifies for favorable treatment on other grant programs and in school construction reimbursement.²⁰⁷ A later-enacted supplement provides “school impact insurance” by reimbursing towns for excess education costs caused by new developments and not provided by property taxes.²⁰⁸ Notably, to challenge approvals of 40R projects, plaintiffs must post a bond equal to twice the projected cost of delay to the developer and if they do not succeed in court, pay the developers actual carrying costs, making frivolous appeals highly unattractive.²⁰⁹

Similar programs exist in many other states. Connecticut’s Incentive Housing Zone program provides funding for the development of new, denser zones, along with \$50,000 for the adoption of the zone and between \$2,000 and \$5,000 per unit when building permits are issued.²¹⁰ California recently enacted a law allowing for the creation of “housing sustainability districts” along these lines. Given the importance of environmental review in California, California’s law also requires that environmental reviews be performed up-front in such districts.²¹¹ Washington, too, enacted a new incentive-based system for promoting upzoning in 2019.²¹² Like Massachusetts, Washington connected its incentives to new limitations on litigation, in its case, to the availability of appeals under the state’s environmental review law.²¹³

The results of Chapter 40R have been decidedly mixed. Forty-two districts have been created, creating an additional zoned capacity of 15,391 units as of 2018.²¹⁴ Of those, around 3,500 units had actually been built or were in construction.²¹⁵ About half those units were affordable.²¹⁶ While this housing growth is valuable, it is far less than Massachusetts’ zoning override and appeals process created in the same period (between 2007 and 2017, the 40B override process created more than 20,000 units).²¹⁷ More importantly, Chapter 40R has done little to build housing in exclusionary or high-opportunity areas. Almost half the housing built under Chapter 40R has been in just eleven older, post-industrial cities—places like Lowell or Chelsea, which are already more affordable and more densely developed.²¹⁸ Additionally, only five percent of the new zoning capacity created is in the core 36 municipalities at the heart of the

²⁰⁵ MASS. GEN. LAWS ch. 40R § 6.

²⁰⁶ ID. § 9.

²⁰⁷ ID.

²⁰⁸ MASS. GEN. LAWS ch. 40S.

²⁰⁹ MASS. GEN. LAWS ch. 40R § 11.

²¹⁰ 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).

²¹¹ Cal. Assem. Bill 73 (2017).

²¹² Ch. 348, Wash. L 2019 (66th Leg.)

²¹³ *Id.*

²¹⁴ CITIZENS HOUSING AND PLANNING ASSOCIATION, *supra* note 204 at 21.

²¹⁵ ID.

²¹⁶ ID.

²¹⁷ ID. at 4.

²¹⁸ ID. at 16.

Greater Boston area.²¹⁹ In other words, Chapter 40R has largely helped struggling cities receive funding for revitalization efforts and smoothed the path forward for more politically popular projects. Affluent suburbs, on the other hand, have preferred to maintain their low-density zoning. Similarly, in Connecticut, while 72 municipalities have received planning grants to develop new zoning since its program was created in 2008, only two towns have completed any housing.²²⁰

These results point to an inherent weakness in any model based on funding incentives. The wealthiest jurisdictions—the places where state intervention is most badly needed to produce new housing—are least responsive to additional funds. In fact, these are the kinds of towns that happily pay to buy up open parcels of land to prevent new construction—or even exercise eminent domain to do so. Funding incentives can be an important aspect of a comprehensive approach to increasing housing production—at least where sufficient funds are appropriated to provide strong incentives—but they are not well-targeted to addressing concerns about exclusion, equity, or fair housing.

F. Oregon, California & Abroad: Partial Preemption of Local Zoning

Recently, states have begun to consider—and in the case of Oregon, enact—the partial preemption of local zoning. Under this model, the state sets a ceiling for how restrictive zoning can be in a particular location; local governments have no power to impose stricter zoning beyond that ceiling.²²¹

Leading the way among states, Oregon recently abolished single-family zoning in all cities of more than 10,000 people and in the Portland metropolitan area: on every parcel of residentially-zoned land, it now must be permissible to build a two-unit building. In cities of more than 25,000 people and the Portland region, up to four-unit buildings must be allowed in all residential zones.²²² This represents a sea change in the local land use system: previously, 77 percent of residential land in Portland was reserved for single-family homes²²³; the share was presumably even larger in Oregon's smaller and less dense cities and suburbs. While change is likely to be gradual, given the nature of the single-family housing market, the potential capacity for Oregon's housing stock was expanded dramatically in one fell swoop. Notably, Oregon paired this preemption with a major package of tenant protections and rent regulations, as well as with a strengthening of its planning requirements for affordable housing.²²⁴ Oregon also

²¹⁹ ID.

²²⁰ CONN. DEP'T HOUS., ANNUAL REPORT TO THE GOVERNOR AND THE GENERAL ASSEMBLY ON INCENTIVE HOUSING ZONES (Jan. 2017), <https://portal.ct.gov/-/media/DOH/IHZANNUALREPORTpdf.pdf?la=en>

²²¹ Depending on the content of the state preemption, local governments may retain control over details of the land use process like parking requirements or setback requirements. Preemption laws have contained provisions to ensure that local governments do not use those residual regulatory powers to undermine the state law.

²²² Ch. 639, ORE. LAWS (2019).

²²³ Emily Badger & Quoc Trung Bui, *Cities Start to Question an American Ideal: A House With a Yard on Every Lot*, N.Y. TIMES (Jun. 18, 2019), <https://www.nytimes.com/interactive/2019/06/18/upshot/cities-across-america-question-single-family-zoning.html>

²²⁴ Liam Dillon, *How Can States Fight Soaring Housing Prices? Oregon is Capping Rent Increases and Cutting Single-Family Zoning*, PHILA. INQUIRER (Aug. 3, 2019), <https://www.inquirer.com/real->

established an innovative implementation system. Local governments are instructed to bring their zoning into compliance with the new system—giving them some discretion over how to do so—but the state is creating a model zoning code that will supersede local zoning if the local government fails to institute a compliant new alternative.²²⁵

Other states have considered—though so far failed to enact—zoning preemptions limited to transit-accessible locations. The most high-profile of these proposals comes from California, where Senator Scott Weiner has introduced a series of bills (first SB 827, then SB 50) to mandate upzonings near transit.²²⁶ The precise details of this legislation have evolved over time, over the course of the political process. In all iterations, though, the basic premise was that within a half-mile radius of a transit stop, the state would mandate that zoning allow for the construction of a midrise apartment building (in many versions, at least 45 or 55 feet tall). Local height, density and design limitations, including parking requirements, would be preempted within that radius. The most recent version of SB 50 was narrowly defeated in the California Senate in 2020, and Senator Weiner has since pivoted to legislation that, like Oregon, would eliminate single-family zoning rather than allow higher-density development.²²⁷

The various forms the legislation has taken over time speak to the many options such a policy can include. Some amendments added protections for renters and for rent-controlled housing, to address concerns about displacement; then further amendments created a delayed implementation plan for “sensitive communities”: essentially those with high levels of poverty and segregation.²²⁸ The mandatory upzoning for apartments was extended from transit-rich areas to “job-rich” areas, although that term was never precisely defined. Compromises were struck to exempt smaller counties, particularly in the Bay Area.²²⁹ The legislation was merged with a bill

[estate/housing/affordable-housing-rising-rent-single-family-zoning-oregon-california-20190803.html](https://www.sharedprosperitypartnership.org/wp-content/uploads/2020/03/How-States-Can-Support-Shared-Prosperity-by-Promoting-Affordable-Rental-Housing.pdf); Solomon Greene & Aaron Shroyer, *How States Can Promote Shared Prosperity in Cities by Promoting Affordable Rental Housing*, SHARED PROSPERITY PARTNERSHIP 11 (2020), <https://www.sharedprosperitypartnership.org/wp-content/uploads/2020/03/How-States-Can-Support-Shared-Prosperity-by-Promoting-Affordable-Rental-Housing.pdf>

²²⁵ Ch. 639, ORE. LAWS § 3 (2019).

²²⁶ Cal. Sen. Bill 827 (2017-18 session),

https://leginfo.ca.gov/legislator/faces/billTextClient.xhtml?bill_id=201720180SB827; Cal. Sen. Bill 50 (2019-20 session), https://leginfo.ca.gov/legislator/faces/billTextClient.xhtml?bill_id=201920200SB50.

²²⁷ Adam Brinklow, *Pivotal Transit-Housing Bill Fails Senate Vote*, SF CURBED (Jan. 27, 2020), <https://sf.curbed.com/2020/1/27/21080059/sb50-transit-housing-bill-wiener-senate-vote-2020>; Matt Levin, *Wiener’s New Housing Bill Would Still End Single-Family-Only Zoning – But More Gently*, CAL MATTERS (Mar. 10, 2020), <https://calmatters.org/housing/2020/03/end-single-family-zoning-california-wiener-housing-production-bill/>

²²⁸ Scott Wiener, *SB 827 Amendments: Strengthening Demolition & Displacement Protections*, MEDIUM (Feb. 27, 2018) https://medium.com/@Scott_Wiener/sb-827-amendments-strengthening-demolition-displacement-protections-4ced4c942ac9; *New Amendments to SB 50 Change Approach to Identifying “Sensitive Communities”*, TERNER CENTER FOR HOUSING INNOVATION (May 13, 2019), <https://ternercenter.berkeley.edu/blog/new-amendments-to-sb-50-sensitive-communities>

²²⁹ Marisa Kendall, *Controversial California Housing Bill to Move Forward After Compromise*, MERCURY NEWS (Apr. 24, 2019), <https://www.mercurynews.com/2019/04/24/controversial-housing-bill-moves-forward-after-compromise/>

to make four-unit buildings legal as-of-right in all residential zones in most urban parts of the state, along the lines of Oregon’s legislation.²³⁰

Given the shifting content of the legislation—and the inherent uncertainties of the real estate market—it is difficult to quantify what the likely effect of SB 50 or similar legislation would have been with great precision. Still, the effect would likely be profound. One analysis suggested that in the Bay Area alone, this legislation would have increased the financially feasible market-rate development capacity from 380,000 units to 2,300,000 units.²³¹ Given the Bay Area’s current housing stock—roughly 2.78 million units as of 2010—such an increase would transform the California housing market.²³²

Other states have considered similar, though less sweeping, efforts. In Washington, for example, legislation was introduced both to preempt single-family zoning in neighborhoods near parks, transit, or hospitals,²³³ and to require zoning that allows for larger apartment buildings near light rail stations.²³⁴ Connecticut has also explored the idea of shifting control over development near transit to the state, although without employing such a powerful preemption mechanism. In 2015, then-Governor Dannel Malloy proposed the creation of a new state authority that would manage development near the state’s transit stations; among other powers, the authority would have been able to exercise eminent domain.²³⁵ Fearing the incursion on local land use powers, the proposal was swiftly dismissed by the state legislature.²³⁶ In Vermont, the State Senate recently unanimously passed legislation which would preempt large-lot zoning and legalize duplexes in all places with water and sewer infrastructure; where duplexes were already legal, the legislation would require four-unit homes.²³⁷ The legislation, which also preempts and liberalizes certain regulations of accessory dwelling units and parking requirements, is now before the state House.²³⁸

A different, but related, concept to these preemption measures comes from overseas: what some have called the zoning “menu.” In countries like Japan and Germany, the national

²³⁰ Adam Brinklow, *Key California Transit-Housing Bill Goes Easy on North Bay*, SF CURBED (Apr. 25, 2019), <https://sf.curbed.com/2019/4/25/18515997/sb-50-transit-housing-north-bay-wiener-mcguire-senate-vote>

²³¹ 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

²³² Metropolitan Transportation Commission, *Bay Area Census, San Francisco Bay Area*, <http://www.bayareacensus.ca.gov/bayarea.htm>

²³³ Wash. Sen. Bill 5769 (2019-20 Session), <https://app.leg.wa.gov/billsummary?BillNumber=5769&Year=2019&initiative>

²³⁴ Wash. Sen. Bill 5424 (2019-20 Session), <https://app.leg.wa.gov/billsummary?BillNumber=5424&Initiative=false&Year=2019>

²³⁵ Bill Cummings & Alex N. Gecan, *Malloy Proposes Transit Authority for Train Station Projects*, CONN. POST (Mar. 16, 2015), <https://www.ctpost.com/local/article/Malloy-proposes-transit-authority-for-train-6137736.php>

²³⁶ Associated Press, *Lawmakers to Revise Malloy Proposal on Transit*, REGISTER CITIZEN (Mar. 23, 2015), <https://www.registercitizen.com/news/article/Lawmakers-to-revise-Malloy-proposal-on-transit-11986504.php>

²³⁷ Robert Steuteville, *State Moves Forward With Zoning Reform*, CONGRESS FOR A NEW URBANISM (Jul. 27, 2020), <https://www.cnu.org/publicsquare/2020/07/27/state-moves-forward-zoning-reform>

²³⁸ *Id.*

government permits local governments to draw the zoning map: they may choose which zones go where. Local governments have little or no control over the zoning text, however. The national government defines what is permitted in each zoning district. Thus, anywhere in Germany, a “small-scale residential” zone allows for one- or two-family houses, along with small shops, restaurants, and non-disruptive industrial uses.²³⁹ Anywhere in Germany, a “general residential” zone allows for both detached houses and apartments, along with certain commercial and industrial uses.²⁴⁰ In effect, this system preempts the most exclusionary zoning techniques, for local governments may not invent a single-family zone or a large-lot zone that isn’t already on the “menu.” (It also has similarities to the creation of a model zoning code, which local governments are then required to adopt). This system has other benefits as well: by standardizing zoning across jurisdictions, it makes land use regulation clearer and easier to understand, reducing transaction costs. Indeed, in Japan, because the zoning is standardized, third parties can certify that a project complies with zoning—eliminating local governments’ ability to delay or interpose subjective standards.²⁴¹ This approach is part of a land use system that has allowed Tokyo to accommodate immense housing demand through increased supply, allowing that city to avoid the intense increases in housing prices that peer cities like New York or London have experienced.

G. A Special Case of Preemption: ADUs

One type of housing which has received special attention from state legislatures is the accessory dwelling unit (ADU). An ADU is a separate housing unit (often called a “granny flat”) built on the property of an otherwise-single-family home, often in the form of a backyard cottage or an attic with a separate entrance. The ADU may be separately occupied from the main unit, but cannot be sold separately.²⁴² ADUs are popular because they are more easily integrated into detached single-family neighborhoods than many other forms of housing and because they provide supplemental income to existing homeowners; in this way, they provide a different political constituency for suburban housing growth. However, traditional zoning often frustrates their construction, either intentionally or unintentionally. An ADU might run afoul of requirements that only a single family can live on a lot; a backyard cottage might violate rear setback requirements; or converting a garage into housing might violate parking requirements.

Accordingly, states have turned to preemption to ensure that ADUs can be built and operated. At least five states have enacted laws partially or fully preempting local regulation of ADUs: California, Oregon, Rhode Island, New Hampshire and Vermont, and others, like

²³⁹ 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

²⁴⁰ *Id.*

²⁴¹ 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

²⁴² John Infranca, *The New State Zoning: Land Use Preemption Amid a Housing Crisis*, 60 B.C. L. REV. 823, 828 n.21 (2019).

Washington, encourage their creation.²⁴³ California, once again, provides a particularly rich case study of the difficulties and promise of preemption for ADUs.

California's first attempt to override local restrictions on ADU construction came in 2002, when the state required that local governments use a simple, ministerial approval process for ADUs rather than a restrictive, discretionary process.²⁴⁴ However, a study by Margaret Brinig and Nicole Stelle Garnett found that many local governments imposed hidden barriers to ADU construction, limiting the effect of the state's first efforts.²⁴⁵ In response, California passed a series of new laws in 2016, 2017, and 2019, each time cutting off mechanisms by which local governments might impede ADU construction.²⁴⁶ For example, the state first required that local governments allow one ADU within existing structures, then required that a second ADU be allowed on each lot as well. California limited local governments' ability to impose parking requirements on ADUs, to require minimum lot sizes for ADU construction, and to charge sewer, water, and impact fees. Review processes have been streamlined further—with California requiring that localities ministerially approve ADUs under certain conditions, essentially making construction as-of-right—and homeowners' associations have been prohibited from banning ADUs.

In effect, California has systematically closed off local capacity to block ADUs and made clear that it will not allow further local efforts to evade local zoning. Moreover, the state has created a legal framework where most single-family lots can be upgraded to include three separate housing units (the original structure plus two ADUs).²⁴⁷ While this is not quite the equivalent of permitting a new three-unit building, it is an important path towards adding housing in low-density neighborhoods. As of 2018, before the final round of ADU reforms were enacted, ADU construction jumped to roughly 7,000 units per year in California; this is a small but hardly insignificant figure.²⁴⁸

H. Other Recent Efforts in California

In recent years, California has been moving with remarkable rapidity towards widespread reform of its zoning system. These measures are for the most part too new to be fully evaluated, but they show promise and provide additional options for a state like New York. Below are brief descriptions of some of California's many reform efforts (those involving accessory dwelling units and proposals for mandatory upzoning near transit have already been discussed).

²⁴³ *Id.* at 867-70.

²⁴⁴ Margaret F. Brinig & Nicole S. Garnett, *A Room of One's Own? Accessory Dwelling Unit Reforms and Local Parochialism*, 45 URB. LAW. 519 (2013).

²⁴⁵ *Id.* at 535-38.

²⁴⁶ See Infranca, *supra* note 242 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.

²⁴⁷ Liam Dillon, *How Lawmakers Are Upending the California Lifestyle to Fight a Housing Shortage*, L.A. TIMES (Oct. 10, 2019), <https://www.latimes.com/california/story/2019-10-10/california-single-family-zoning-casitas-granny-flats-adus> (sum of new ADU laws allow “as many as three homes on parcels in most single-family neighborhoods across California”).

²⁴⁸ Patrick Sisson, *Will California's New ADU Laws Create a Backyard Building Boom?*, CURBED (Oct. 11, 2019), <https://www.curbed.com/2019/10/11/20909545/adus-development-california-real-estate-housing-shortage>

Density Bonuses: Since 1979, California has essentially required its local governments to offer voluntary inclusionary zoning programs. Local governments are required to give a density bonus to projects that meet minimum affordability levels. However, this program was only rarely used, as local governments had other mechanisms to make this sort of development uneconomical or otherwise undesirable.²⁴⁹ Thus, in 2015, California limited local governments' authority to impose minimum parking requirements on certain density-bonus eligible projects (those with higher affordability levels and near transit), in order to keep down project costs.²⁵⁰ Then, in 2016, the state introduced a new streamlined approval process for density bonus projects.²⁵¹ In combination, the goal of these reforms is to encourage developers to seek density bonuses, thereby building more total housing and more affordable housing.²⁵²

Streamlining and Promoting As-of-Right Development: California's land use approval process is famously complex and time-consuming, often involving a gauntlet of discretionary approvals. In 2017, California created a new, streamlined process for qualifying projects. The process only applies to developments which meet affordability standards and, in larger projects, pay a prevailing wage.²⁵³ Moreover, it only applies in cities that have not met the housing production target set forth in their "housing element." Where it applies, though, cities must review the project based only on objective criteria set forth ahead of time, through a ministerial process. Put differently, staff can ensure that a project meets height limits or setback requirements, for example, but a local board does not get to vote on the project and qualities like "neighborhood character" may not be considered. This streamlined process has already been

²⁴⁹ Infranca, *supra* note 242 at 848.

²⁵⁰ Cal. Assem. Bill 744 (2015-16 Leg. Session)

²⁵¹ 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>

²⁵² Of course, many jurisdictions—including many towns and villages in the New York City suburbs—have passed inclusionary zoning laws which require setting aside a percentage of units in new development for income-restricted housing. This paper does not include such inclusionary zoning laws as a strategy for reducing over-restrictive zoning. In most cases, inclusionary zoning laws are primarily concerned with the affordability mix of whatever units are built, as opposed to increasing the number of units under construction. These laws take a variety of forms, and done right are an important part of the legislative toolkit, but in some instances can discourage the development of multi-family housing. Cf. Jenny Schuetz, Rachel Meltzer & Vicki Been, *31 Flavors of Inclusionary Zoning: Comparing Policies from San Francisco, Washington, DC and Suburban Boston*, 75 J. AM. PLANNING ASSOC. 441 (2009). In general, such inclusionary policies are a possible complement for the strategies discussed in this paper—not a substitute.

In considering inclusionary zoning legislation in New York, it is worth closely examining the Long Island Workforce Housing Act. That state legislation essentially created a regional inclusionary zoning mandate. Due to poor drafting, weak enforcement, and affordability levels set too high, the Act has widely been considered a serious disappointment. See CENTER FOR POPULAR DEMOCRACY, *THE CRISIS OF FAIR, AFFORDABLE HOUSING ON LONG ISLAND: AN ANALYSIS OF THE LONG ISLAND WORKFORCE HOUSING ACT* (May 2015), <http://lifairhousing.org/wp-content/uploads/2016/02/The-Crisis-of-Fair-Affordable-Housing-on-Long-Island-2015.pdf>; Thomas P. DiNapoli, *Long Island Workforce Housing Act*, OFFICE OF THE NEW YORK STATE COMPTROLLER (Jan. 2016), <https://www.osc.state.ny.us/sites/default/files/local-government/audits/2017-12/lgsa-audit-swr-Long-Island-Workforce-global.pdf>

²⁵³ Cal. Sen. Bill 35 (2016-17 Leg. Session).

used to produce around 6,000 units of housing, mostly in the Bay Area; it has also been used as a negotiating chip with local governments to force them to the bargaining table.²⁵⁴ A new law enacted in late 2019 expands this streamlining process to include more middle-income projects, which may help fast-track more projects (but may also shift the income mix of what is constructed).²⁵⁵

California has also acted to reduce the scope of discretionary review where developments already comply with the objective land use requirements set forth in zoning and planning laws. Under California's Housing Accountability Act, local governments are limited in their ability to disapprove of projects which comply with "objective" zoning standards. Reforms enacted in 2017 tighten the standards of that law, sharply reducing local governments' ability to unfairly claim that a project did not in fact meet those objective standards.²⁵⁶ Those same reforms also strengthen enforcement, increasing attorneys' fees to promote third-party enforcement and increasing courts' powers to impose fines or order a locality to approve a project.

California's Housing Crisis Act, enacted in 2019, provided yet another round of procedural reforms meant to streamline the approval process.²⁵⁷ That law limits local governments' ability to use protracted public approval processes to discourage development. It forbids local governments from holding more than five public hearings for a particular project; allows local governments only one chance to declare that additional items are required for a project's application; and limits local governments' powers to change the standards for project approval after a preliminary application has been submitted. Additionally, the Act prohibits further downzoning of residential areas, with certain exceptions. This Act largely sunsets after five years, unless extended.

BART Bill: One of the most important places to build more housing is near transit infrastructure. Transit-oriented development is more environmentally friendly, as it reduces the need for driving by residents, and maximizes the value of transit investments by promoting ridership. However, many train stations in suburban areas are surrounded by parking lots for use by residents of outlying single-family zones, not housing. In 2018, California enacted legislation effectively transferring the zoning power around the Bay Area's rapid transit stations to the transit agency itself.²⁵⁸ Under this law, BART may set transit-oriented zoning standards for land it owns around each of its stations, and local governments are required to adopt those standards in their zoning codes. Notably, BART already owned 200 acres of land around its own stations: it only needed control over land use regulation. Local housing advocates estimate that if BART

²⁵⁴ 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/>

²⁵⁵ AB 1485 of 2019.

²⁵⁶ Ch. 368, CAL. LAWS (2017), https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201720180SB167

²⁵⁷ Ch. 654, CAL. LAWS (2019), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB330

²⁵⁸ Ch. 1000, CAL. LAWS (2018), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB2923

proposes relatively high densities, it could build up to 20,000 homes along the Bay Area’s rapid transit system.²⁵⁹

VI. Choices for New York

As this discussion should make clear, New York need not adopt a neighboring states’ model wholesale. Elements of each program can be mixed-and-matched. Connecticut, for example, takes the burden-shifting appeals process from Massachusetts, but not its streamlined approval process; meanwhile, California has passed standalone bills trying to streamline local zoning approvals. Massachusetts, which originated the affordable housing appeals model, has debated supplementing that model with new policies promoting as-of-right market-rate development. New York can, and should, take the best of each program and adapt them for the state’s particular conditions. Indeed, many current reform efforts propose combining multiple, overlapping state interventions into the local zoning process.

Moreover, there is no single-best policy, for two separate reasons. First, each model emphasizes different aspects of the problem. While removing exclusionary zoning will help promote affordability, integration, regional economic growth, and emissions reductions, the relative weight placed on addressing each will differ in any policy approach. To be clear, each of these strategies has the potential—if successfully implemented—to promote each of these goals simultaneously: reducing exclusionary zoning should promote racial equity, housing affordability, economic growth, and environmental sustainability. Still, at the margins, different policies prioritize different goals.

Second, while there is enough evidence to clearly show which strategies don’t work, at least on their own—namely, funding incentives and planning processes—there is not sufficient research to identify the most effective state interventions. As such, rather than offer a fixed policy proposal, this report highlights some of the most important policy choices that should go into the design of a state zoning reform initiative.

That said, in crafting its own zoning reform package, it will not be sufficient for New York to address only one narrow aspect of the zoning process. As the case studies in this brief illustrate, New York’s local governments use an overlapping set of regulatory tools to limit growth; removing only one tool leaves all the others in place. And as New York’s fair housing history shows, local governments will respond to one legal intervention with new forms of exclusion. Any state zoning reform must be prepared to overcome an immense assortment of land use controls, either by holistically attacking each exclusionary practice (and remaining vigilant against the new ones developed subsequently) or by overriding local authority altogether.

A. Carrots or Sticks?

Offering local governments incentives to improve is, for self-evident reasons, more popular than withdrawing local regulatory powers or sanctioning local governments which fail to produce sufficient housing. As a first step, such incentives may have a role to play in reforming New York’s suburban housing market. If they are used, New York should follow Massachusetts’

²⁵⁹ 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>

example and ensure that such incentives are structured to promote long-term policy change, not merely to fund one-off projects that are already politically attractive.

However, even Massachusetts' 40R program has shown limited efficacy. Funding incentives have helped promote growth in places that were already more affordable, more urban, and more interested in building new housing. Funding incentives have not promoted growth in high-income suburbs; those affluent communities have less need for state money and more interest in exclusion. In New York, a similar scheme might promote new housing development in places like New Rochelle but not across the town line in Scarsdale. An approach that uses carrots but not sticks will likely fail to promote integration and fair housing. Moreover, in a wealthy region like New York, an incentives-only approach will only have a very limited aggregate effect. That said, New York should consider integrating incentives into a broader strategy—including to help build political support and to provide temporary increases in planning capacity.

B. Where Should Intervention Take Place?

Each of the above systems offers a different vision of where, geographically, state intervention is required. Some interventions are statewide, like most ADU laws and planning mandates, or Pennsylvania's requirement that a variety of housing forms be permitted in all municipalities. Other interventions apply broadly, but allow for targeted exemptions. Oregon's ban on single-family zoning exempts the smallest local governments. In New York, a law might only apply downstate. These statewide or region-wide approaches have the important benefits of simplicity and breadth. The scope of the law is easy to understand and treats all locations equally. However, a broader geographic scope is generally more appropriate for less-intense interventions: it is one thing to mandate ADUs be allowed statewide; another to allow five-story apartment buildings statewide.

Another approach is to target only jurisdictions that have not built sufficient affordable housing—in Massachusetts and Connecticut, for example, towns where ten percent of the local housing stock is not income-restricted. This targets the most exclusionary locations and provides an incentive for local governments to improve voluntarily (a town which reaches the threshold avoids further state intervention). Within this category, there are further distinctions that can be made: is affordability defined in terms of the number of subsidized and below-market-rent units, or should low-cost market-rate units be included in the calculation? Do special housing types, like senior housing or ADUs, count?

States can intervene in local zoning around transit infrastructure: this encourages environmentally-friendly transit-oriented development and ensures that statewide and regional investments in transit are not monopolized by local incumbents. It also allows for more intensive development, as concerns about traffic and parking are mitigated. California's BART bill has taken this approach in the Bay Area, and unsuccessful proposals in California and Washington would have done so in a more sweeping and state-wide fashion. Given New York's extensive commuter rail system, this approach has particular applicability, and the Regional Plan Association has emphasized transit-oriented development as a strategy for the region's suburbs.²⁶⁰ In some jurisdictions, however, this approach might need to be tailored to New York's geography. Some of New York's suburbs were originally developed around rail and still

²⁶⁰ REGIONAL PLAN ASSOCIATION, *supra* note 90.

retain a dense town center around their train stations; in those locations, the most important opportunities for growth may be slightly further away from the train station than in California.

California also considered intervening in the zoning of high-opportunity areas: those with better schools, shorter commutes, and other hallmarks of high quality-of-life. This approach—though less well-developed than the others—prioritizes housing that provides access to good neighborhoods and the many social advantages those neighborhoods bring.

In addressing this question, it should be noted that statewide or regional interventions have the potential to generate substantially more new housing. Estimates of statewide zoning reforms in New York suggest that they could generate hundreds of thousands of new units in the New York City region alone, and California’s SB 50 might have allowed for millions of new units.²⁶¹ Standing alone, more targeted zoning interventions will not produce nearly this many units. At the same time, even the most geographically broad interventions are likely to have a far greater impact in high-demand areas—like the New York City region—than in rural areas. Massachusetts’ 40B program, notably, has had relatively little effect in Western Massachusetts.

Of course, a single bill can combine these geographies. Legislation could allow duplexes to be built in all residential districts, region-wide, while also allowing apartments to be built near all transit stations and promoting mixed-income developments in exclusionary communities, for example. In fact, a combination is likely to best suit New York’s needs, as each of these approaches prioritizes a different harm from restrictive zoning. Statewide interventions prioritize overall housing supply; “fair share” models prioritize integration; and transit-oriented zoning places a particular premium on environmental outcomes. These goals are not in tension, and lawmakers need not choose between them.

C. Eliminating Low-Density Zoning or Allowing High-Density Zoning?

In general, state interventions take two different approaches to the question of exclusion. One set seeks to broadly eliminate the lowest-density zoning. Efforts to eliminate single-family zoning, to allow ADUs, or to ensure that townhouses can be built in all municipalities all fall into this category. Each of these allows for a very gradual densification—from one unit per lot to two or three—spread across large swaths of the city. These small-scale developments may be referred to as “gentle density” or providing “missing middle” housing. These types of interventions have the advantage of being broad but incremental: allowing modest changes to the single-family neighborhoods that cover most of the region. The Regional Plan Association estimates that legalizing ADUs and allowing conversions of single-family homes to two or three-unit homes would lead to the construction of more than 200,000 new housing units in the Hudson Valley and Long Island alone, even if only a small fraction of homeowners took advantage of the new law.²⁶²

The other set of interventions seeks to ensure that mid-rise projects (three-to-five-story apartments, generally, though in many New York suburbs, taller buildings might be appropriate) can be built in particular locations. These larger projects offer their own advantages. They offer more opportunities for providing below-market-rent units, for example. For transit-oriented projects, they maximize utilization of the limited space within walking distance of a train or bus

²⁶¹ *Id.*; REGIONAL PLAN ASSOCIATION *supra* note 262.

²⁶² REGIONAL PLAN ASSOCIATION, BE MY NEIGHBOR (Jul. 2020), <https://rpa.org/work/reports/be-my-neighbor>

station. Larger projects also, by definition, provide more housing per project, and therefore may be an important part of any strategy for building enough housing at a fast-enough pace to affect the housing market. Massachusetts' Chapter 40B, California's BART bill, and New Jersey's *Mt. Laurel* system each take this approach. Once again, these approaches can be combined.

D. Affordable Housing or Market-Rate Development Too?

Some state zoning reforms have prioritized the construction of market-rate units, while others have focused on the construction of below-market-rate housing. At one end of the spectrum, Pennsylvania has no requirement for the provision of below-market-rate units at all. It relies on increased supply, and the guarantee that some of that supply will be in lower-cost forms of housing like apartments and townhouses, to provide some measure of affordability. ADUs, similarly, are low-cost but market-rate developments.

At the other end of the spectrum, Massachusetts' Chapter 40B originally was designed with 100 percent affordable projects in mind, although mixed-income projects are now the norm.²⁶³ Even today, though, the program does not override local zoning for fully market-rate projects; its provisions only apply for projects with a qualifying affordability component (although the threat of an affordable 40B project leads many towns to negotiate an approval of an all-market-rate project instead). Likewise, the *Mt. Laurel* doctrine concerns local governments' obligation to provide for low- and moderate-income housing. Indeed, the New Jersey courts rejected efforts to rely on market-based "filtering" mechanisms as a form of compliance with those obligations. Again, however, because the builder's remedy available in New Jersey allows for the construction of mixed-income buildings, in practice, *Mt. Laurel* has created both market-rate and affordable buildings.

Many policies fall somewhere in the middle. California's housing element, for example, requires the construction of sufficient housing for each of four income bands. It is intended to provide both enough market-rate housing for those who can afford it and enough subsidized housing for those who, even in a less supply-constrained world, cannot. The increasingly elaborate set of policies being built on top of the housing element incorporate this approach.

New York's suburbs are building neither enough subsidized housing nor enough market-rate housing. Both are important to the overall health of the region's housing market, and each plays its own role. Affordable units are particularly helpful at promoting economic and racial integration in exclusionary communities, for example. Market-rate units, which can be provided in greater number without subsidy, may play a bigger part in relieving regional-level demand pressures (helping affordability region-wide and allowing more people to share in the New York City area's prosperity). There are good reasons for state policy to promote either affordable or market-rate construction in the suburbs—or both.²⁶⁴

²⁶³ Kenneth Forton, *Expanding the Effectiveness of the Massachusetts Comprehensive Permit Law by Eliminating its Subsidy Requirement*, 28 B.C. ENVTL. AFF. L. REV. 651, 664 (2001).

²⁶⁴ As noted *supra* note 252, "inclusionary zoning" laws which encourage or require that some percentage of units be set aside as affordable housing can play a role as complementary policy solutions.

E. If Affordable, What Levels of Affordability?

Where only affordable housing projects are eligible for state support, it is critical to appropriately determine what affordability levels qualify. Under Massachusetts' 40B statute, a mixed-income project is eligible for streamlining and zoning overrides if, among other things, 25 percent of units are affordable to households earning 80 percent of Area Median Income (AMI), or if 20 percent of units are affordable at 50 percent of AMI.²⁶⁵ Under Connecticut's law, for unsubsidized projects, 30 percent of units must be affordable, half at 80 percent of AMI and half at 60 percent of AMI, to qualify for the protections of section 8-30g.²⁶⁶ Connecticut's deeper affordability requirements have the obvious advantage of promoting housing opportunities for lower-income households. However, those requirements have also been criticized for rendering many mixed-income projects uneconomical, even with the advantages of 8-30g. Indeed, many close observers of Connecticut politics believe that the Connecticut legislature, which required these deeper affordability levels in amendments enacted in 2000, did so in response to a coalition between non-profit affordable housing developers (who are more interested in very-low-income housing than for-profit developers) and the most exclusionary suburbs in the state (who simply wanted to minimize growth).²⁶⁷

As this story illustrates, if state intervention is tied to the provision of affordable housing, the state must strike an appropriate balance in defining what level of affordability is sufficient. If the affordability requirements are set too high, few projects will qualify for state intervention at all, undermining the entire endeavor and, perversely, leading to less overall affordability. If the affordability requirements are set too low, then developers receive valuable rights to avoid local land use restrictions without offering as many affordable units as they might have. These calculations will be highly sensitive to the carrots and sticks provided by the state intervention, as well as to local market conditions. Notably, New Jersey's Mount Laurel doctrine has required much deeper affordability levels than Massachusetts' 40B program. Striking the balance perfectly at the state level may prove difficult: this is a substantial, though hardly insuperable, challenge facing any policy requiring affordability as a condition for intervention.

New York should also consider whether housing limited to seniors should qualify as affordable housing under these models. This question was a subject of much controversy in New Jersey. Senior housing is often more politically palatable, as seniors rarely send children to local schools and are perceived as less disruptive. However, limiting new housing opportunities to seniors also raises serious equity concerns, acting as a tool of exclusion and depriving housing opportunities to the young children who might benefit most from them.²⁶⁸

Finally, New York should consider whether, and how, to align the affordability requirements (if any) included in a zoning override program with those of the Low Income Housing Tax Credit (LIHTC). LIHTC is, by far, the largest affordable housing production program in the country. Remarkably, one-third of all multifamily rental housing built between

²⁶⁵ Reid et al., *supra* note 119 at 265.

²⁶⁶ CONN. GEN. STAT. § 8-30g(a).

²⁶⁷ Robert D. Carroll, *Connecticut Retrenches: A Proposal to Save the Affordable Housing Appeals Procedure*, 110 YALE L.J. 1247, 1270-72 (2001).

²⁶⁸ Raj Chetty, Nathaniel Hendren & Lawrence F. Katz, *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*, 106 AM. ECON. REV. 855 (2016).

1987 and 2006 were LIHTC units.²⁶⁹ However, LIHTC developments are likely to have very different business models than unassisted mixed-income projects which rely on the cross-subsidization of affordable units. To the extent that New York is requiring the inclusion of below-market-rate units, it should think carefully about whether the details of its program facilitate the construction of unassisted developments, LIHTC-assisted developments, or both.

F. Courts or Agencies, and Other Enforcement Decisions

States have split over whether, and how much, administration should be vested in a state agency, as opposed to the judicial system. Some mechanisms, like California's ongoing review of local housing plans, all-but require an agency structure. For those that do not, however, this is a critical choice of institutional design. The *Mt. Laurel* saga, where control over the policy has shifted back-and-forth between the courts and the state Council on Affordable Housing, makes plain the importance of the question. Even within a single policy approach, this is a choice that must be made: appeals under Massachusetts' 40B system go to a state agency-controlled appeals board, while appeals under Connecticut's largely similar 8-30g statute go to court.

Judicial enforcement brings many advantages. Courts can be more politically insulated than agencies, which may enable them to enforce the law firmly, without bowing to politically powerful suburban interests. Judicial enforcement is particularly helpful in safeguarding against political backsliding by future administrations opposed to building more suburban housing. Multiple New Jersey governors have sought to neuter the *Mt. Laurel* doctrine and the courts have helped protect it; in New Jersey, judicial enforcement has clearly been a core element of *Mt. Laurel*'s success. Relatedly, courts can help hide accountability in a politically advantageous way: they make easy targets for elected officials to point the finger at for new development. Judicial enforcement is also quicker in the short term: it avoids the work of creating a new bureaucracy.

Agencies, too, have their own advantages. Agencies are capable of much more fine-grained analysis and generally better suited for discretionary tasks. They also can work with local governments on reaching compliance; courts are designed for adversarial dispute resolution, not technical assistance and collaboration. Agencies bring larger bureaucratic capacity, greater expertise in the details of land use policy, and the ability to engage over the long term. If the new responsibilities for overseeing local land use policies are housed in the same agency as administers housing subsidies—in New York, the Division of Housing and Community Renewal—then subsidies can be coordinated with land use reform efforts.²⁷⁰ Moreover, in the long-run, administrative adjudication is likely cheaper and easier than judicial enforcement, and more available to those without deep pockets. Finally, agencies can proceed

²⁶⁹ DEP'T HOUS. & URBAN DEV., OFF. POL. DEV. & RES., WHAT HAPPENS TO LOW-INCOME HOUSING TAX CREDIT PROPERTIES AT YEAR 15 AND BEYOND? 3 (2012), https://www.huduser.gov/portal/publications/what_happens_lihtc_v2.pdf

²⁷⁰ This raises the separate, though important, question of whether housing subsidies should be reallocated towards high-opportunity suburbs or concentrated in low-income neighborhoods. Increased housing production in the suburbs is consistent with either strategy for how to provide housing subsidies, but this is an issue that HCR and other policymakers would need to think through.

proactively, whereas courts must wait for a plaintiff to bring suit (though this can be encouraged through fee-shifting mechanisms and generous standing provisions).²⁷¹

Once again, the choice between judicial and administrative enforcement is not a binary. Policymakers might wish to submit certain local actions to discretionary review by an expert agency while letting other bright line rules be enforceable in court. Whether judicial enforcement is appropriate for New York will also depend on the attitudes of the state's court system: the New Jersey courts were civil rights leaders at the time of *Mt. Laurel*.

Importantly, agencies are themselves political players, with the capacity to advocate for additional or policies as needed. Law professor Anika Singh Lemar has observed that historically, in many cases when states have preempted local zoning authority, it has been at the behest of a state agency.²⁷² For example, state social service agencies helped lobby for laws limiting local power to zone out group homes for people with disabilities. As Lemar points out, if state housing agencies were tasked with reducing the cost of market-rate housing—as opposed to now, when they are responsible for administering housing subsidies—they could become long-term partners in pro-housing coalitions. There may be a strong argument, therefore, for creating a state office responsible for monitoring market-rate housing conditions and building up the state's bureaucratic expertise in land use issues, even if that office does not initially administer the state's zoning reform policies.

Under either judicial or administrative enforcement schemes, it is important to think through how outside actors can be enlisted to strengthen enforcement. For example, an important element of Massachusetts and New Jersey's systems is the threat of a builder's remedy, which often results in bringing developers and towns to the negotiating table rather than actual litigation. California has created mechanisms for third parties to challenge local zoning, ensuring active monitoring from public interest organizations—not only developers who may need to avoid upsetting local officials. To ensure robust compliance, New York should ensure that there are similar mechanisms to augment enforcement.

G. What Role for the Local Government?

Perhaps the most fundamental question in designing a state-level zoning reform is what role local governments should play. Some reforms leave local governments with their full decision-making power; they merely require that local governments take certain steps along the way to making those decisions. California's original planning requirements fell into this category. Notably, these planning-focused reforms are often integrated into comprehensive planning processes that are not robust in New York.²⁷³ Unless New York wants simultaneously to adopt a new comprehensive planning process—a separate debate beyond the scope of this paper—New York may lack the institutional framework to pursue this model.

²⁷¹ Proactive state enforcement has not been a hallmark of agency-run models in New Jersey and Massachusetts—though proactive administrative enforcement powers could be added. Bratt & Vladeck, *supra* note 138 at 625-26.

²⁷² Anika Singh Lemar, *The Role of States in Liberalizing Land Use Regulations*, 97 N.C. L. REV. 293 (2019).

²⁷³ See N.Y. DEP'T STATE, ZONING AND THE COMPREHENSIVE PLAN (2015), https://www.dos.ny.gov/lg/publications/Zoning_and_the_Comprehensive_Plan.pdf

Others give local governments full power over land use in the first instance, adding state-level review only after local governments deny land use approvals to qualifying projects. The Massachusetts appeals model fits this paradigm. Local governments can zone however they like, and may even deny a permit to an affordable housing project developer if they have good reason. At no point does Massachusetts decree *ex ante* what local zoning codes must look like.

A third category of reforms mandate that local governments meet certain state-set obligations, but let them choose how to comply. New Jersey, for example, sets an affordable housing production target for municipalities to meet (California now does similarly); Pennsylvania imposes a rule on what kinds of zone local codes must include. Local governments can craft their own path towards meeting those goals, or face litigation and perhaps a builder's remedy.

Fourth, states can constrain local governments' procedural tools. Massachusetts requires a consolidated permitting process with a fixed timeline, replacing an extended approval process across multiple boards. California has reduced local governments' power to use discretionary approval processes, insisting on as-of-right zoning for many projects. These reforms say nothing about the substance of the local zoning power, but prohibit local governments from using procedural tools which have traditionally posed roadblocks to residential growth. In other words, the state can standardize and streamline the land use approval process.

Finally, a fifth category preempts local authority over the substance of zoning. In Oregon, local governments of jurisdictions greater than 10,000 people may no longer map single-family zones. In California, local governments no longer exercise effective control of the zoning around BART stations. In many states, local governments may no longer exclude ADUs. And abroad, local governments may not create their own zoning districts at all, only choose where to map pre-set districts. This preemption could be broad, or as narrow as placing a ceiling on how much parking a local government can require for a certain kind of development.

The proper role for local governments is a difficult question. Cities, towns, and villages are close to the ground and bring important local knowledge to the land use process. Traditionally, this is one reason why they have been empowered to set land use policy. But local governments also have unique incentives to be exclusionary, and no incentives to think about the needs of the region. Additionally, where states have allowed local governments to retain substantial discretion, they have frequently found those local governments to use that discretion to evade the state's instruction. California has been in such a back-and-forth conflict with its municipalities for decades. Given New York's fair housing history, where local resistance has been fierce even in the face of federal court orders, it is reasonable to expect resistance to zoning reform as well. Imposing only planning requirements will likely fall short, and even procedural reforms will likely only suffice in combination with other, substantive limitations on the local zoning power. Builder's remedies and preemption will likely be necessary for housing to be built in a timely manner.

New York legislators should also think about the political dynamics each of these alternatives creates. While outright preemption might be more controversial in the short term, it has the beneficial effect of reducing future conflict: rather than project-by-project fights, development can simply proceed according to the new rules. In contrast, appeals processes like 40B, or procedural reforms, still require each development to go through an approval process—and those processes may become even more rancorous as a result of the state's intervention.

H. How to Set Targets?

Most of these approaches require setting a target for how much housing each jurisdiction is required to build. This target might be expressed in terms of the amount of affordable housing or the total amount of housing, but in either case, the state must set a quantitative threshold for how much a jurisdiction needs to build. States have adopted a variety of strategies. First, some states use a fixed standard for all jurisdictions: 10 percent of units must be affordable, for example. Others develop a particularized calculation, town by town. Using a fixed percentage provides clarity and avoids a great deal of administrative complexity, but at the cost of sacrificing some precision and tailoring to local economic or physical conditions. Setting a uniform standard also has generally involved setting a percentage-based target, which runs the risk of incentivizing towns to halt construction altogether in order to keep their denominator low—although there is evidence that this risk has not materialized.²⁷⁴ Setting town-by-town targets allows the state to demand more of jurisdictions with higher market demand, higher prices, strong public services, and the like, but comes with its own costs. In New Jersey and California, the process for setting each jurisdiction’s housing target has invited political controversy, political gamesmanship, and extensive litigation. It is also worth noting that even with a fixed target, the market-driven nature of all real estate development provides some degree of local tailoring: overriding local zoning to allow mixed-income developments, for example, will not create any developments in rural or economically depressed areas without demand for those developments. New York should carefully weigh the advantages and disadvantages of setting individualized targets for each covered jurisdiction.

Where states have opted to set jurisdiction-specific targets, doing so is a complicated and necessarily imprecise exercise. There is no perfect mechanism to predict housing needs into the future—especially since the regional economy is not independent from its housing market—and no objective metric by which to allocate those needs geographically. New Jersey, for example, initially developed immensely complicated, and contestable, formulas for allocating affordable housing obligations, which included data on everything from household income and housing prices, to property tax rates and amounts of undeveloped land, to projections about household formation and housing price filtering into the future.²⁷⁵ California recently revised its method of calculating housing needs to, among other things, ensure that low population growth in the past—itsself often the result of exclusionary zoning—not be used to justify setting low housing targets for the future.²⁷⁶ The same law also introduces a new focus on housing cost burdens, as compared to a national average, as a key metric for setting targets: where too many households are paying too much for housing, the state will increase a jurisdiction’s housing production targets.²⁷⁷ Prior to this law, California’s system was widely criticized for steering development away from the places where it was most needed.²⁷⁸ If New York decides to set jurisdiction-specific housing production targets, it must be careful to choose metrics which as closely as

²⁷⁴ Marantz & Dillon, *supra* note 152.

²⁷⁵ Hills, *supra* note 179 at 1620.

²⁷⁶ Ch. 974, Cal. Laws 2018,

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB828

²⁷⁷ *Id.*

²⁷⁸ Elmendorf, *supra* note 154; Monkkonen et al., *supra* note 163.

possible mirror its actual goals, including improving affordability, reducing segregation, and reducing carbon emissions.

I. What to Do With New York City?

Many state zoning reforms either explicitly or implicitly exempt big cities, as their focus is on exclusionary suburbs. Massachusetts' Chapter 40B does not cover Boston, which is governed by different land use rules than the rest of the state.²⁷⁹ Other systems apply to large cities in theory, but not in practice. Pennsylvania's requirement that all municipalities provide opportunities for multi-family housing development, for example, applies to Philadelphia, but Philadelphia easily clears that bar. Likewise, cities in Connecticut and New Jersey already provide their "fair share" of affordable housing. In contrast, zoning reforms in California and Oregon have tended to apply statewide and to include large cities. This reflects those states' historic focus on regulating the land use process rather than its outcomes, as well as more recent trends toward broad statewide preemption proposals.

The question of what to do with New York City is a particularly important one for New York State to consider. The downstate region is, of course, dominated by New York City. This poses a challenge not generally faced by other states that have undertaken successful zoning reforms. Connecticut and New Jersey are suburban states; their largest cities have fewer than 150,000 and 300,000 residents, respectively. In Massachusetts and California, where large and prosperous cities anchor major metropolitan areas, those cities make up a far smaller share of the overall region. Boston represents around 14 percent of its metro-area population; San Francisco, around 18 percent.²⁸⁰ In contrast, New York contains 43 percent of its region's population. Places that would be independent jurisdictions in those regions (like Cambridge or Newton, Massachusetts, or Oakland and Berkeley, California, each of which are served by their city's subway system) are part of New York City here. If you exclude the New Jersey and Connecticut suburbs, which are outside New York State's jurisdiction, the relative size of New York City compared to its in-state suburbs is even larger.

This creates an important policy choice: should New York City be covered, and if so, how? If New York City were exempted from the state's intervention into local zoning—either expressly, or because it already provides a substantial amount of affordable and subsidized housing—then an enormous fraction of the downstate region would be left untouched. Moreover, New York City includes many areas which have restrictive and low-density zoning. According to the New York Times, a full 25 percent of Queens' residentially-zoned land area, and 22 percent of Staten Island's, allows only for single-family development.²⁸¹ The Regional Plan Association has calculated that a full six square miles of that single-family-zoned land (which they point out is the size of Manhattan below 34th Street) is within a ten-minute walk from a subway or rail station (and still more has high-quality bus service).²⁸² These are areas likely to be particularly well-suited for housing production.

²⁷⁹ MASS. GEN. LAWS ch. 40B § 21 (defining comprehensive permit process in relationship to ch. 40A, which does not govern Boston).

²⁸⁰ Furman Center analysis, Census Bureau annual population estimates of cities and metropolitan statistical areas, 2019.

²⁸¹ Badger & Bui, *supra* note 223.

²⁸² REGIONAL PLAN ASSOCIATION, *supra* note 90 at 5.

On the other hand, policies built around the “fair share” concept would likely exclude New York City. In recent decades, the City has built far more market-rate housing and far more affordable housing than its in-state suburbs. Moreover, the “fair share” models offer their exemptions at the level of the municipality, not the neighborhood: 40B and *Mt. Laurel* do not offer a ready-made mechanism for overriding zoning in Eastern Queens but not East New York. If New York wishes to adapt those models, it will have to develop a mechanism to administratively subdivide New York City and determine which neighborhoods’ zoning requires state intervention.

As such, in New York State, there are decided advantages to incorporating tools which apply statewide, not at the municipal level—at least as one part of a reform package. If, for example, New York required that three-unit buildings be allowed in all residential neighborhoods, this would apply equally to single-family zones in the city and the suburbs, while having no effect on most of New York City’s neighborhoods, which allow for multi-family housing. This could be paired with more precise interventions in the most exclusionary suburbs and around transit.

J. Coordinating with Infrastructure Provision

Zoning is not the only obstacle to increased housing construction in the New York City suburbs—though it is surely one of the most significant. In some areas, there is not the infrastructure to support dense development. This should not be an impediment to action in New York State, but it is an issue that must be addressed: especially for interventions that seek to build larger multi-family buildings. In particular, larger buildings may not be able—or able cost-effectively—to obtain water and dispose of wastewater in areas that rely on wells and septic systems.

Without a mechanism to build new wastewater infrastructure, zoning overrides are limited in their potential reach. Thus, in states like Massachusetts, even where state law provides zoning overrides, local governments that have infrastructure designed for low-density development (especially wastewater infrastructure) can maintain their low densities.²⁸³ Indeed, this may be true even where the locality chose that infrastructure precisely to maintain an exclusionary land use pattern.²⁸⁴

In New York, there is substantial geographic variation in sewerage. Around 85 percent of Nassau County is connected to sewers, while only 26 percent of Suffolk County is.²⁸⁵ Notably, in Nassau, the affluent North Shore is unsewered. Reforms which addressed land use controls, but not infrastructure, might therefore have a considerable impact in Nassau County while leaving much of Suffolk County and the North Shore unaffected.

New York should consider whether, and how, to pair infrastructure improvements with land use reforms. Unlike rezonings, building new infrastructure can require costly capital

²⁸³ See *Reynolds v. Stow Zoning Bd. of App.*, 37 N.E.3d 656 (Mass. Ct. App. 2015) (denying 40B appeal for project based on wastewater disposal concerns).

²⁸⁴ Ellickson, *supra* note 72 at 58 (“A town’s decision to refuse to provide sanitary sewers can be the cornerstone of its exclusionary land use policy.”)

²⁸⁵ Dorian Dale, *Wastewater Management in Nassau and Suffolk Counties, New York*, LONG ISLAND COMMISSION FOR AQUIFER PROTECTION (2017)
http://www.liaquifercommission.com/images/Wastewater_Management_Report.pdf

investments. But failing to address infrastructure limits the potential of any intervention into suburban zoning, and in particular threatens to excuse the most exclusionary places from any obligation to serve the region’s housing needs. New York need not build more infrastructure to benefit from expanded housing production, but it would need more infrastructure to maximize housing production and to ensure all locations do their fair share.

There are options for how to overcome infrastructure issues. In California, water and sewer providers must prioritize proposed affordable housing developments in setting service allocations.²⁸⁶ In New Jersey, courts applying the *Mt. Laurel* doctrine have the power to mandate that municipalities or sewerage authorities expand sewerage to affordable housing developments, particularly if sewer expansion is necessary for a jurisdiction to meet its fair share obligations.²⁸⁷ New York might empower courts or an administrative agency to do similarly. It could also pair such mandates with financial assistance or incentives.

New York must not, however, let cries of insufficient infrastructure stand in the way of addressing its housing crisis. Claims that suburban infrastructure cannot handle growth are common components of any debate over growth—and generally unfounded or overblown. New York’s suburbs have, in many cases, declining school-age populations,²⁸⁸ the nation’s best rail infrastructure, and immense prosperity. There is ample room to grow—if not at any particular site, then in the aggregate. New York need only consider whether to invest in more, and more equitable, growth as well.

K. Pairing Land Use Reform With Other Policies

These reforms stand on their own as promising and important policy interventions. However, both as a political and a policy matter, there may be value in pairing state interventions into local zoning with other types of housing reform. In Oregon, the state’s preemption of single-family zoning was informally paired with a statewide rent regulation law (a strategy considered in California as well).²⁸⁹ This pairing eased political concerns that low-income households might be harmed by new construction, while also assuaging policy concerns that rent regulation would limit housing supply. In California and Connecticut, policymakers connected land use reforms to the codification at the state level of the federal Fair Housing Act’s requirement to “affirmatively further fair housing” (which has come under threat from the Trump Administration). This clarifies the important civil rights stakes of promoting housing growth in the suburbs—just as Massachusetts’ 40B and New Jersey’s *Mt. Laurel* each grew out of the fair housing movement in the 1960s and 1970s. As New York continues to debate both rent regulation and fair housing, suburban land use reforms should be brought into those conversations.

²⁸⁶ Ch. 727, CAL. LAWS 2004.

²⁸⁷ *Bi-Cty. Dev. of Clinton, Inc. v. Borough of High Bridge* 805 A.2d 433, 448 (N.J. 2002)

²⁸⁸ E.J. McMahon, *New York Public School Enrollment: Back to the Early 1990s, and Still Falling*, Empire Center (Sep. 3, 2019), <https://www.empirecenter.org/publications/new-york-public-school-enrollment-back-to-early-1990s-and-still-falling/>

²⁸⁹ Dillon, *supra* note 224.

VII. Conclusion

New York stands nearly alone among its peer states in permitting its suburbs to restrict growth without regard for regional 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. This paper offers legislators the toolkit they need to expand opportunity and growth for all New Yorkers, and to push back on a shameful legacy of segregation. It walks policymakers through the policy choices they must make in adapting those tools to New York. All the legislature needs to do—and do swiftly—is act.