

## Governor Brings New York's Housing Crisis Into Focus

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By Christopher Rizzo and Karen E. Meara. Published in the *New York Law Journal*.

The United States lacks some almost five million housing units needed to meet current demand. New York state and City face similar shortfalls. For example, the City's housing plan notes there are an estimated one million New York City households that qualify as low or extremely low income and only 424,000 units of housing available at rents they can afford. What is a shortage for middle-income and upper-income New Yorkers is therefore a full-blown crisis for working-class and low-income New Yorkers. This article outlines recent proposals from Gov. Kathy Hochul and the state legislature to address this crisis, as well as a novel challenge to a recent New York City rezoning that included a major affordability component. The new mayor has yet to release his plans but appears to be on board with the Governor's proposals so far.

### Eliminate the State's CAP of 12.0 on FAR

In the State of the State address, the Governor announced her intention to propose legislation to lift the 12.0 FAR cap on residential density in the Multiple Dwelling Law—a concern mostly in New York City. Section 26 of the law currently prohibits residential buildings on a “lot” from having a floor-area-ratio (FAR) of more than 12.0. For example, a 10,000-square foot lot can contain no more than 120,000 square feet of floor area. As a practical matter, New York City's Zoning Resolution and local zoning codes across the state impose much lower caps on development in the vast majority of neighborhoods. But in the handful of residential neighborhoods that already allow 12 FAR residential development (almost exclusively in Manhattan), lifting the cap could provide some housing expansion opportunities.

The State Legislature imposed the 12.0 FAR cap in 1960 very purposely to limit building densities and ensure that there was some proportion between lot size and building size. See 1960 N.Y. Laws c. 1072 Â§1, amended 1961 N.Y. Laws c. 748, Â§1. The Legislature's 1960 committee report stated the limit was adopted to “serve[] as a curb on excessive population density.” In the decades before the law's passage, “residential dwellings ha[d] risen to a height of three times the width of the widest street on which they abut.” The Committee viewed this “burgeoning growth” as a potentially “destructive force” which, by sacrificing light, air, and open space, can “produce an environment that is neither desirable nor healthful for urban living.” Report of the Joint Legislative Committee on Housing and Multiple Dwellings 86-87 (1960).

Most neighborhood advocates opposed the change to state law in 2015 when former Mayor de Blasio first sought it. But affordable housing advocates (and developers) are now likely to cheer the change as another tool in the City's toolbox to spur more housing production.

### Require Municipalities To Allow Accessory Dwelling Units and Foster Transit-Oriented Development

Governor Hochul seemed poised to push for suburbs to help meet the state's need for affordable housing via proposals relating to accessory dwelling units (ADUs) and transit-oriented development (TOD), but quickly reversed course in her 30-day amendments. An ADU is a small apartment which is either part of a primary dwelling, such as an attic or basement apartment, or located in a separate structure, like a garage, providing a secondary housing unit on an otherwise single-family lot. Such units are viewed as key to creating more affordable housing options in single-family areas, particularly for seniors and young adults as part of multigenerational housing. The ADU proposal would have required

localities to adopt zoning provisions authorizing ADU's on all owner-occupied single-family lots, a trend in several other states. But Governor Hochul has backed away from the proposal after receiving swift criticism from suburban lawmakers.

Governor Hochul also called for legislation that would require localities along commuter rail routes to rezone areas close to train stations to allow multifamily housing if they do not already. That proposal is fully in line with the December 2021 recommendations of the state's Climate Action Council, which urges the state to create "compact, mixed use, mixed income, walkable communities within a half mile of rail or transit hubs." Such TOD would not only create more housing, but would also help the state meet climate goals by reducing housing and transportation emissions associated with sprawl. However, like the ADU proposal, the Governor has now indicated she will not propose legislation for TOD unless and until she has more community-based support.

### **Amend NYS Multiple Dwelling Law To Encourage Conversion of Hotels and Offices to Housing**

The Governor will seek a legislative amendment to the Multiple Dwelling Law to allow certain hotels and commercial buildings to convert to residential uses while complying with somewhat more lenient light and air standards. The NYS MDL Article 7-B and NYC Zoning Resolution *already provide* rules for conversion of commercial buildings to residential use. State law allows conversion of any commercial building erected before 1977 to residential uses (regardless of floor area limits) in the City's densest zoning districts. Likewise, the NYC Zoning Resolution (ZR Article I, Chapter 5) allows conversion of commercial buildings but only those erected prior to 1961 in certain community districts. (Lower Manhattan has a more lenient date of 1977.) There is thus some discrepancy between the laws. Where these conversion rules do not apply, the conversion of existing commercial buildings to residential uses is unduly burdensome and rarely happens.

The new proposal would take these exceptions further. It would allow any hotel in a zoning district allowing residential uses to convert to a residential use relying on its existing certificate of occupancy-which would presumably allow developers to rely on more lenient light and air requirements. It would also allow the conversion of any commercial buildings south of 60th Street constructed before 1980 to convert until 2027.

Presumably, both the state and the City will want to pair the amendments with a requirement to include affordable housing.

### **Replace Expiring Real Property Tax Law 421-a Affordable Housing Incentives**

The state's generous 421-a tax break for residential development that includes at least 25% income-restricted units will expire this June. Governor Hochul announced that she intends to replace the program with one that provides deeper and longer affordability commitments and thus uses taxpayer funds more efficiently. As currently structured, last year alone the program cost New York City \$1.7 billion in forgone tax revenue. According to a recent report from the New York University Furman Center, over the past decade the 421-a program incentivized construction of over 117,000 new housing units, primarily rentals (68% of all units in buildings with 4 or more apartments). Critics argue, however, that the current version of the program produced very little truly affordable housing, as developers had the option, and often elected, to meet affordability requirements by targeting middle income households making up to 130% of area median income (AMI) instead of low and very low income households.

Under Hochul's new proposal, the details of which were disclosed in her proposed budget bills in a new RPTL Â§485-w, income limits would be revised to ensure more lower income households would benefit from the tax break: for buildings with at least 30 units, developers would have to set aside at least 10% of units for households making less than 40% of AMI, 10% for those making less than 60% of AMI, and 5% for those making less than 80% AMI, and; for buildings with less than 30 units, 20% of units would have to be set aside for households making less than 90% AMI. Affordable units would have to remain permanently affordable in the larger buildings and for 35 years in the smaller buildings. Real estate developers are likely to argue that these deeper levels of affordability may make the program uneconomical so more negotiations should be expected.

## Soho Rezoning Challenged

A novel lawsuit filed on Feb. 10, 2022, *The Coalition for Fairness in Soho and Noho Inc. v. City of New York*, challenges the prior mayor's final rezoning under his administration's "Mandatory Inclusionary Housing 'MIH' Program." The petition raises a number of expected challenges to the rezoning such as failure to comply with the State Environmental Quality Review Act and failure to adequately assess the risks for displacement of existing residents. But the petition also includes several important constitutional challenges.

The late 2021 amendment to the zoning map replaces most of the prior, outdated manufacturing zoning in Soho and Noho with a new Soho/Noho Mixed-Use District. As with the other new MIH districts around the City, the MIH component of the District will allow new buildings to be much taller and bulkier in exchange for a mandatory 20-30% affordable component. Residents that occupy illegal, existing apartments in formerly industrial buildings can legalize their units by bringing them up to current building codes and paying a \$100/square feet conversion fee that the City will use to support the arts in Lower Manhattan. Many residents will thus have to pay hundreds of thousands of dollars to convert their apartments. Petitioners allege that the imposition of these conversion costs and fees violates the state and federal constitutions' prohibitions on impairment of contracts, uncompensated takings and more. The conversion fee appears to be unprecedented in the City and the constitutional challenge is thus worth watching.

The prior mayoral administration placed much hope on MIH districts. But the jury is still out on whether MIH will make a significant contribution to meeting the City's affordable housing needs. In its first four years, developers have built just over 2,000 units in the new MIH districts. Other city initiatives have produced and preserved many more affordable units citywide. Through tax breaks, use of public land and other strategies from 2014 through 2021 the City spurred the creation of 50,656 new affordable units and imposition of long-term rent stabilization requirements on 114,934 existing units. The data underscores that simply raising zoning limits is often not enough to encourage developers to build affordable units.

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