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NY Looked Seriously at a 'Builders' Remedy' Law to Address Affordable Housing Shortage

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by Christopher Rizzo. Published in the *New York Law Journal*.

As this column has noted before, New York state has an acute housing shortage. At the current slow pace of construction (about 40,000 units in 2022), the state will never produce the 800,000 housing units needed to meet demand over the next 10 years. The housing shortage has markedly increased housing costs throughout the state, hitting low- and moderate-income New Yorkers hard.

Land costs, expiration of the statewide affordable housing tax credit, high interest rates and other factors are contributing to the slowdown. But restrictive municipal zoning is also a contributing factor. In March 2023, Gov. Kathy Hochul tried to address the problem of exclusionary zoning head-on by proposing the "New York Housing Compact"—a series of legislative reforms to reduce zoning bottlenecks and incentivize affordable housing construction. A key element of the proposal was a "builders' remedy"—the ability of developers to bypass local zoning controls and appeal to a statewide commission for approval of an affordable housing project. She hoped the proposals would be adopted in the legislative session that ended June 10, but the legislature did not take them up. However, given the ongoing nature of the housing crisis, this failed legislation will not be the last word. This column therefore focuses on the governor's Housing Compact and the elements of it that have succeeded in other states.

Hochul's 'Housing Compact' Sought to Recoup to the State a Modest Amount of Delegated Zoning Authority

The governor's proposed Housing Compact closely followed Massachusetts' approach (discussed below) and included these key elements:

- Required municipalities to adopt amendments to their local zoning codes to provide space for a 3% growth in housing stock every three years in downstate municipalities and 1% growth in upstate municipalities.
- Required municipalities with Metro North or LIRR rail transit stops (including within NYC) to rezone areas within ½ mile of the station to permit specified levels of density that would decline with distance from New York City.
- Incentivized the creation of affordable units by double counting such units towards a municipality's three-year targets.
- Provided municipalities a "safe harbor" status against challenge and override if they met housing growth targets or otherwise met progress metrics to facilitate housing growth.
- For municipalities that failed to achieve safe harbor status, the compact provided developers of certified affordable housing projects (20% of units at or below 50% of AMI or 25% of units at or below 80 AMI) that had been denied local approval a path to appeal to the state-level Housing Review Board, which would have the authority to issue all necessary approvals and bypass local reviews.

The proposal never made it past the concept stage when Democratic and Republican legislators aligned to oppose the concepts.

New York State Has Extensive Legal Authority to Impose Zoning Solutions on Municipalities, but Has Only Haltingly Exercised It

While some aspects of the Housing Compact shocked suburban legislators, the state has extensive authority to force changes in local zoning. In fact, local control of land uses exists only because New York Municipal Home Rule Law Section 10(4) permits local governments to issue regulations for building, zoning and planning. Local zoning must, however, be consistent with the state Constitution and generally applicable state laws. See *DJL Restaurant v. City of New York*, 96 N.Y.2d 91 (2001) (clarifying the ways in which the state can preempt local zoning). By and large, however, the state's interventions in local zoning tend to limit density and housing production rather than encourage it.

New York courts have been similarly reluctant to wade too deeply into local regulation of land-use matters. In 1975 the Court of Appeals had a perfect opportunity to issue a ruling on exclusionary zoning in *Berenson v. Town of New Castle*, 38 N.Y.2d 102 (1975). The plaintiff asked the court to find the town's zoning code, which prohibited all forms of multifamily housing throughout the town, unconstitutional. Instead, the court remanded the case to the lower court to make findings of fact about whether such a prohibition was arbitrary and capricious. Four years later, the Appellate Division held that a total prohibition on multifamily housing was indeed unconstitutional. But it declined to set forth a specific remedy, stating: "The zoning ordinance thus having been properly declared unconstitutional for failure to make adequate provision for multifamily housing, the judgment should be modified so as to delete the lower court's 3,500 unit requirement, but direct that matter be remanded to the town board to remedy its zoning deficiency within six months." (New Castle eventually adopted zoning to permit a limited amount of high-end, multifamily housing.) The court also emphasized the importance of leaving discretion and authority for zoning in the hands of municipalities.

Moreover, the state legislature did nothing in response to the Appellate Division's conclusion that a ban on multi-family housing is unconstitutional or to address zoning that tends to exclude low and moderate-income housing.

New Jersey's Courts and Legislature Took a Dramatically Different Approach From New York

New Jersey's top court and legislature took a starkly different approach to the issue of exclusionary zoning and builders' remedy in 1975. New Jersey's present affordable housing program is built on the New Jersey Supreme Court's landmark decision in *South Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151 (1975) and its sweeping ruling that exclusionary zoning of any kind violates the New Jersey Constitution. Unlike *Berenson*, *Mount Laurel* directly addresses the impact of the exclusionary zoning on low and moderate income households. At the time, the township essentially prohibited any housing type other than single family units on relatively large lots. The New Jersey Supreme Court held that under the state's constitution, municipalities can only exercise the state's police powers to regulate land-uses in a manner that promotes the general welfare. Exclusionary zoning violates this constitutional limitation as well as the rights of those seeking affordable housing to equal protection and substantive due process. Further, "every municipality must, by its land use regulations, presumptively make realistically possible and appropriate variety and choice of housing … More specifically, presumptively it cannot foreclose the opportunity of the classes of people mentioned for low and moderate income housing and in its regulations must afford that opportunity at least to the extent of the municipality fair share of the present and prospectively regional need therefore."

The legislature responded aggressively to this sweeping ruling and formed the Council on Affordable Housing to enforce the court's ruling by creating a process to oversee and certify each municipality's compliance with the requirements of *Mount Laurel.* When Gov. Chris Christie suspended the council's oversight and certification process in 2010, the Supreme Court reasserted its own direct jurisdiction and the process of certifying local compliance with *Mount Laurel* has continued.

The constant threat of lawsuits by aggrieved developers to overturn local zoning has led most municipalities to seek certification of their rezoning plans to provide for affordable housing.

California, Connecticut and Massachusetts Have Imposed Legislative Requirements on Municipalities to Increase Supply of Affordable Housing

California, Connecticut and Massachusetts each have state laws that now require municipalities to work with developers on zoning (and rezoning) applications to promote affordable housing or be overridden by state law or a state-level affordable housing commission. While California and Connecticut's laws have been mired in controversy, affordable housing advocates have lauded Massachusetts' approach, which is credited with producing 77,000 units of new housing that would not have been built without the program. The simplicity of the 1969 legislation is probably the key to its success:

- All municipalities must ensure that 10% of their housing stock is allocated to low and moderate-income households.
- Certified developers of affordable housing submit a single application (bypassing all other local processed) to the local zoning board of appeals for approval of a housing proposal to help municipalities meet that goal.
- In municipalities that have not met the goal and that deny an application, developers can appeal to the state's Housing Appeals Committee, which has the authority to issue all necessary project approvals.

While the law is not popular in many municipalities, voters by a margin of 2 to 1 declined to repeal the law in a 2010 referendum. And many municipalities, including affluent suburbs of Boston like Newton and Concord, have met their 10% affordability goals. The law has spurred a modest amount of litigation (68 reported decisions since 1969) but in most cases courts have upheld the determinations of the Housing Appeals Committee to approve developer's applications.

Without Legislative Action in New York on Affordable Housing, Housing Advocates and Developers Will Continue to Address Exclusionary Zoning in Courts

If the legislature fails to respond to this crisis, the matter will fall to courts. An ongoing dispute in Garden City is instructive. Affordable housing developer Mhany Management Inc. sued the village in 2005 in part over the failure to rezone a vacant 25-acre parcel for mixed income, multifamily housing. The litigation came to a head in 2015 when the district court ruled that the town violated the U.S. Fair Housing Act (42 U.S.C. Section 1981) (FHA) and the rights of racial minorities by refusing to permit affordable and multi-family housing on this or any other sites within the town. See *Mhany Management v. County of Nassau*, 4 F. Supp. 3d 549 (E.D.N.Y. 2014), affirmed in part by 819 F.3d 581 (2d Cir. 2016)("zoning laws or ordinances prohibiting construction of multifamily dwellings have been found in violation of the" FHA because of exclusionary zoning's disparate impact on racial minorities). The litigation culminated with a court order to Garden City to engage in a rezoning effort to create meaningful opportunities for multifamily and affordable housing.

Federal litigation under the FHA thus remains an option for advocates and developers seeking to challenge exclusionary zoning. But it is an awkward tool as the act is designed to address specific instances of racial discrimination in housing, not zoning practices that generally stymie affordable housing development. State litigation under New York's Constitution also remains an option based on the *Berenson* decision and its progeny, although state courts have been reluctant to impose specific housing solutions on municipalities. Finally, the state has some options for promoting affordable housing through its public benefit corporations, which can often override local zoning and land-use laws. There is no comprehensive solution to the affordable housing crisis, however, that does not run through the legislature.

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