



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

February 9, 2022

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

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

These proposals are intended to help address New York's acute housing shortage, and in doing so, to promote the affordability, equity, and sustainability of our housing systems. While there is room for debate about how best to increase New York's housing supply, and room to improve each of the governor's proposals—conversations that the Legislature should deeply engage in and which the NYU Furman Center is happy to help inform—there should be little debate about the need for reform.

However, some have worried that the governor's proposals, and similar strategies for state-led zoning reform, intrude upon "home rule." But home rule poses no legal obstacle here. In fact, precisely the opposite is true. The state not only has the power to act (and a long history of acting) in the area of local zoning. It has a constitutional *obligation* to do so when local zoning fails to meet regional housing needs.

This testimony, therefore, makes two primary points. First, it describes New York's immense need for new housing, especially downstate, and therefore for land use laws which permit that housing to be built. Second, it makes clear that the Legislature has a constitutional obligation to act, consistent with New York's system of home rule and its allocation of state and local powers.

New York's Housing Crisis and the Need for More Homes

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

² The Governor has also proposed to allow New York City zoning to permit residential development more dense than a floor area ratio of 12.0 (Part CC). This proposal removes a state limitation on a local zoning power, and so does not pose even a potential home rule issue. Even so, this proposal is consistent with the recognition that every jurisdiction must contribute more to house a growing metropolitan region and that there are particular environmental and economic benefits to allowing high-density housing in New York City.

The high cost of housing across the New York City region is well-understood by the Legislature, as are the human consequences of those high housing costs. These include, most importantly, housing instability, eviction, and homelessness. The ever-increasing cost of housing places a heavy economic burden on middle-class New Yorkers as well.

One of the most important causes for incredibly high housing costs is the region's housing shortage. By some measures, the New York City suburbs build less housing than any equivalent region nationwide. Indeed, the New York metropolitan area builds less housing per capita than the Bay Area, which has become infamous for its resistance to housing construction.³

New York's in-state 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).⁴ All along the Northeast Corridor and California, *nowhere* allows less housing to be built than New York's suburbs.

Needless to say, these remarkable figures do not reflect a weak regional economy: New York City is not Cleveland or St. Louis, but rather home to a booming economy. New York's failure to build sufficient housing is the result of intense legal barriers to the production of new housing, barriers erected by local governments. A national survey conducted by researchers at the University of Pennsylvania's Wharton School found that the New York region had the second-most restrictive land use regulations in the nation, after the Bay Area.⁵ But again, this likely *underestimates* how tightly constrained New York's housing market is, as it includes much more housing-friendly New Jersey.

Look only at New York's in-state suburbs and it is entirely conceivable that they are the most tightly-zoned places in the country. Simply put, in much of the New York City region, local governments have made it illegal to build new housing.

³ *Id.* at 10 (citing Metropolitan Transportation Commission, *Housing Permits*, Vital Signs, <http://www.vitalsigns.mtc.ca.gov/housing-permits>).

⁴ *Id.* at 10 (compiling HUD building permits data).

⁵ 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>

Moreover, these same restrictive zoning practices not only drive up the cost of housing,⁶ they likely contribute to the region’s intense residential segregation,⁷ driving racial inequality, and increase carbon emissions, worsening climate change.⁸ They cost our economy *trillions* of dollars.⁹

How have things gotten so bad in New York? A large part of the answer is because, for generations, the state Legislature has allowed them to. Local governments have aggressively used their zoning powers to exclude, and unlike elsewhere, New York State has let them.

Almost all of New York’s peer states in the Northeast and on the West Coast have, with varying degrees of success, intervened to prevent local land use regulations from serving as tools of exclusion (as have many other states besides). New York, essentially alone among high-cost states with healthy economies, has no such law on its books.¹⁰ Indeed, when in the aftermath of the assassination of Martin Luther King, Jr., New York briefly attempted to override local zoning to integrate the suburbs—which at the time were nearly all-white—the Legislature quickly reversed course and withdrew that power a few years later.¹¹

A half-century later, it is long-past time for New York to join its peers and ensure that local land use powers are exercised consistently with the needs of all New Yorkers and to promote affordability, environmental sustainability, economic vitality, and racial equity.

Zoning Reform and Home Rule

As the Legislature considers whether to enact land use reforms to address restrictive and exclusionary zoning, it is likely to hear concerns about improper impositions on “home rule” or “local control.” These concerns are misguided as a matter of New York law. Calibrating the proper scope of local discretion is

⁶ 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); Keith R. Ihlanfeldt, *The Effect of Land Use Regulation on Housing and Land Prices*, 61 J. URB. ECON. 420, 422 (2007); see also Kazis, *supra* note 2 at 5-6 (collecting additional sources).

⁷ See, e.g., 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). See also Kazis, *supra* note 2 at 7 (collecting additional sources).

⁸ See, e.g., Reid Ewing, Shima Hamidi, & Jack L. Nasar, *Compactness Versus Sprawl: A Review of Recent Evidence from the United States*, 30 J. PLAN. LIT. 413 (2015); 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). See also Kazis, *supra* note 2, at 7-8 (collecting additional sources).

⁹ Chang-Tai Hsieh & Enrico Moretti, *Housing Constraints and Spatial Misallocation*, 11 AM. ECON. J.: MACROECONOMICS 1 (2019).

¹⁰ Kazis, *supra* note 2 at 3-4.

¹¹ LIZABETH COHEN, SAVING AMERICA’S CITIES: ED LOGUE AND THE STRUGGLE TO RENEW URBAN AMERICA IN THE SUBURBAN AGE 265, 313-20.

an important policy concern. Local governments have much to offer in land use decision making. But New York law does not give local governments an absolute power over land use.

Instead, state law has always shaped and limited local zoning powers when statewide interests are at stake. The affordability, equity, and sustainability of our housing system are such statewide interests, and the state may, and should, act accordingly. More to the point, the Legislature has a constitutional obligation to act. The New York Court of Appeals has repeatedly insisted that the Legislature act to take on exclusionary zoning, yet the Legislature has not.¹² Now is the time to do so.

The New York State Constitution grants local governments the power and autonomy to manage their own affairs, but that power is always subject to legal limitations.¹³ Chief among these limitations is the state's preemption power, which represents "the untrammelled primary of the Legislature to act ... with respect to matters of State concern."¹⁴ A local law that is inconsistent with a valid state statute—either through an actual conflict or the state's assumption of responsibility for an entire field of activity—is preempted. Here, a state statute permitting the development of accessory dwelling units or moderate-density transit-oriented developments would conflict with any more-restrictive local zoning ordinance, and indeed be expressly intended to preempt such ordinances. This is well within the state's power.

Moreover, even a more targeted state intervention into local affairs—so-called "special legislation"—would be permissible. While the state Constitution places procedural constraints on the Legislature's enactment of special legislation, those constraints are inoperative where the legislation applies to a subject that is "in a substantial degree a matter of State concern."¹⁵ The Court of Appeals has expressly held that "[h]ousing is a matter of State-wide concern," and more to the point, done so in a case involving a state override of local zoning powers.¹⁶ Precedent is crystal clear that the Legislature is empowered to intervene in local zoning powers.

This is not just the law; it is also the common practice in New York. The Legislature has historically made use of its authority to oversee local zoning—in support of diverse land use objectives—and can do so again. The Legislature has overridden local land use authority to overcome Not-In-My-Backyard attitudes against everything from power plants to in-home daycares, recognizing the statewide need for these kinds of development.¹⁷ Similarly, the Padavan Law has allowed for the siting of group homes for people with developmental disabilities, regardless of local zoning, opening up communities to a population once excluded.¹⁸ At the same time, the Legislature has enacted environmental laws that

¹² *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 111 (1975).

¹³ N.Y. Const. Art. IX.

¹⁴ *Albany Area Builders Ass'n v. Town of Guilderland*, 74 N.Y.2d 372, 377 (1989) (quoting *Wambat Realty Corp. v. State of New York*, 41 N.Y.2d 490, 497 (1977)).

¹⁵ *Adler v. Deegan*, 251 N.Y. 467, 491 (1929) (Cardozo, J., concurring).

¹⁶ *Floyd v. New York State Urb. Dev. Corp.*, 33 N.Y.2d 1, 7 (1973).

¹⁷ N.Y. Pub. Serv. L. § 172; N.Y. Soc. Serv. L. § 390(12).

¹⁸ N.Y. Mental Hygiene L. § 41.34.

preclude local governments from allowing certain developments, where it concluded that additional protection was necessary.¹⁹ When the Legislature determined that its delegation of the zoning power to local governments was being misused, it has not hesitated to step in.

Now, the evidence has mounted that local governments are misusing their power to zone out new housing: from accessory dwelling units to housing on small lots to multi-family housing to affordable housing. Neither the law nor the traditions of home rule stand in the way of the Legislature acting once again.

In fact, the law *obligates* the Legislature to intervene. In *Berenson v. New Castle*, the New York Court of Appeals held unconstitutional a local zoning ordinance which does not serve regional housing needs.²⁰ As the Court later put it, local governments may not zone “to maintain the status quo by preventing members of lower and middle socioeconomic groups from establishing residency in the municipality.”²¹

But rather than fully remedy the problems with exclusionary zoning, the Court of Appeals determined that this was the Legislature’s role. “[W]e look to the Legislature to make appropriate changes” to exclusionary zoning, wrote the court.²² The Court extended this invitation again in multiple subsequent cases, describing crafting the proper response to exclusionary zoning as “an essentially legislative task.”²³

The courts, therefore, have placed an obligation on the Legislature to enact land use reforms. Exclusionary and overly restrictive zoning violate the state’s constitution. And it is a truism of American law that where there is a right, there must be a remedy. But here, only the Legislature can remedy these ongoing constitutional violations; the courts will not.

If the Legislature cabins local zoning powers to ensure that more housing, and more types of housing, can be built in the state, it would not disturb the proper allocation of state and local powers. Rather, it would *restore* the proper allocation of powers under the state’s constitution. As a matter of law, it is the misuse of local zoning powers to constrict regional housing supply and to exclude which upsets the balance and violates the principles of home rule.

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¹⁹ See, e.g., N.Y. Env. Cons. L. Art. 24 (wetlands regulations); 6 NYCRR Part 617 (SEQR).

²⁰ *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 111 (1975).

²¹ *Gernatt Asphalt Prod., Inc. v. Town of Sardinia*, 87 N.Y.2d 668, 683 (1996)

²² *Id.* at 111.

²³ See, e.g., *Town of N. Hempstead v. Vill. of N. Hills*, 38 N.Y.2d 334, 341 (1975); *Robert E. Kurzius, Inc. v. Inc. Vill. of Upper Brookville*, 51 N.Y.2d 338, 347 (1980); *Suffolk Hous. Servs. v. Town of Brookhaven*, 70 N.Y.2d 122, 130 (1987).



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The Governor’s proposals are not the only options for the Legislature to discharge its constitutional obligations with respect to land use reform. There are other mechanisms available to address restrictive and exclusionary zoning; indeed, members of the Legislature already have introduced their own additional and complementary bills.²⁴ And the Governor’s proposals—though they offer critically important steps forward—can each be strengthened and improved in light of best practices and lessons learned from other states. That the Legislature act, though, is a matter of pressing importance: to the state’s economic wellbeing, its ability to provide families with affordable homes, its path toward racial equity, and its ability to meet the challenge of climate change.

I am happy to provide additional information on the need for zoning reform and how these budget bills might be refined and complemented. Please do not hesitate to reach out if I can be of any further assistance in addressing these critical issues.

²⁴ See Sen. Bill S7574; Sen. Bill S4547A; Sen. Bill S7635.