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Issue Brief

Hochul's Land-Use Planning Revolution: No Little Plans for New York

Eric Kober

SENIOR FELLOW
Manhattan Institute

Introduction

American city planners know well the famous quote from Chicago architect and urban designer Daniel Burnham: "Make no little plans; they have no magic to stir men's blood. . . . Make big plans; aim high in hope and work."[1] With the housing legislation that New York governor Kathy Hochul proposed as part of the state budget on February 1, she has taken these words to heart. Her plans are big; if enacted, they would constitute a veritable land use-planning revolution for a state government that has played a small role in such matters for decades.

In last year's budget, the governor proposed relatively timid legislation designed to spur housing in New York City's anti-growth suburbs.[2] The plan was quickly condemned by suburban politicians and withdrawn.[3] Now she's back, this time with a substantially more aggressive proposal[4]—one targeting not only the downstate suburbs but also New York City and, nominally, upstate. The target is 800,000 new homes over 10 years statewide.[5]

Hochul is certainly correct that action is needed. New York City's ongoing housing supply crisis[6] has been exacerbated by the lack of new housing production in the downstate New York suburbs (in contrast to the northern New Jersey suburbs, which produce far more new housing on a per-capita basis).[7] Other states' high-income suburban areas also produce substantially more new housing than New York City's in-state suburbs.

Upstate New York presents different issues. A severe rent burden[8] and high rental vacancy rates[9] in the large upstate cities likely indicate a shortfall in renters' incomes rather than in housing supply. That points to a different set of policies designed to supplement incomes rather than spur housing growth (a distinction that Hochul's proposed budget does not acknowledge). Because

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the proposed legislation, if enacted, would have significant consequences on housing supply only in New York City and the downstate suburbs, this brief focuses on how her proposals affect those areas.

One reason for the downstate housing supply crisis is that, historically, New York State has respected local control over land-use decisions to a greater extent than perhaps any other state. Although the U.S. has a tradition of deference to local governments in determining where and how land use can evolve, many communities, left to their own parochial concerns, will arrive at a consensus that little should change. That leads to artificially constrained housing markets where home prices rise to the benefit of incumbent homeowners but to the detriment of the broader statewide housing priorities like affordable housing. Because every state government has an interest in ensuring that its population is adequately housed—and that its system of housing regulation is flexible enough to accommodate a growing labor force as its economy expands—many have enacted, or at least considered, legislation curtailing unduly restrictive local zoning.[10] Hochul thus has many models for her proposed legislation.

The passage of legislation establishing statewide minimum zoning standards is a tug-of-war between housing advocates and neighborhood activists. Ideally, policymakers will make a good-faith effort to identify the best paths to housing-supply relief, while protecting communities that are attractive places to live.

People who identify with the YIMBY, or Yes-in-My-Back-Yard, housing-advocacy movement often fall into a trap of believing that any pro-housing policy is good and that any opponent is wrongheaded and should yield to those who know what's best for them. However, we live in a democracy; opponents deserve to be heard and their concerns respected. State legislation overriding local zoning should be proportional to need and consistent, to the greatest extent possible, with the priorities of local governments. By those criteria, some of Hochul's proposals are unsound and should not be approved by the state legislature. Others are better-conceived and are important to resolving the state's decades-long impasse[11] between the housing needs generated by New York City's powerhouse economy and the anti-growth agenda of suburban communities.

Details of the Proposed Housing Legislation

Of 13 separate housing-related provisions, the most far reaching are those to "Promote New Housing Statewide through Local Growth Targets and Fast Track Approvals" and to "Encourage Transit-Oriented Housing Development."

Growth Targets

The growth-targets legislation would apply to any city, town, or village in the state and to each of the 59 community districts within New York City. The initial targets are set for the three-year period starting on January 1, 2027, and new targets will be set for subsequent three-year periods. For entities within the Metropolitan Transportation Authority commuter district,[12] the initial growth target is 3% of the most recent census housing-unit count; for other entities, it is 1%. Income-restricted housing units count twice, and previously abandoned units made habitable count as 1.5 units toward the targets.

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52 Vanderbilt Ave.
New York, NY 10017
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The target is for the number of units "permitted," which is confusingly defined as those that have secured all land-use approvals short of obtaining an actual building permit. However, to guard against communities "gaming" the targets—by approving putatively permissive zoning but enacting other restrictions such that the housing cannot realistically be constructed—any unit that does not obtain a building permit within 12 months or a temporary or permanent certificate of occupancy within 24 months will be removed from the count. However, that unit could be counted in a subsequent three-year cycle if it obtains a certificate of occupancy in that cycle.

To avoid sanctions, a locality or New York City community district must be in "safe harbor," which can be achieved by meeting the growth target or taking other "preferred actions." The determination of whether a locality is in safe harbor will be made by a hitherto obscure state agency, the Division of Housing and Community Renewal (DHCR). But there is a significant technical problem: the determination needs to be made after the three-year target period is over, but until the determination is made for every city, town, and village in the state and all 59 community districts, these entities would be out of compliance and subject to sanctions. In the initial three-year period, starting in 2027, the legislation specifies that the determination will be based on the 2021–23 period, giving DHCR some time to set up its data-keeping system. However, beginning with the three-year cycle commencing in 2030, the determination will be based on housing permitted in the three years immediately preceding, requiring that DHCR set up a real-time monitoring system for land-use permissions by hundreds of jurisdictions so that the necessary determinations can be made immediately at the start of the year.

The counting system is unnecessarily complicated. Instead, the state should simply count building permits—information that is already reported by many jurisdictions to the U.S. Census Bureau.[13] An analysis of the effects of the proposal in New York City by the NYU Furman Center[14] uses permit data, not the actual metric employed in the legislation. In the 2011–19 period analyzed by Furman, housing permitting in the city was highly concentrated by community district, and many community districts would need to substantially ramp up housing construction to meet a 3% triennial target.

If growth targets are not met, a community can achieve safe harbor status for a three-year period by taking any two of five possible "preferred actions" in the prior three-year period. Communities that were not in safe harbor due to low housing permitting in the 2021–23 period could nonetheless be in safe harbor for the 2027–29 period by undertaking two of the following actions in the years 2024 through 2026.

The first preferred action is to permit accessory dwelling units (ADUs) as-of-right. These are second units on lots heretofore restricted to single-family homes. Localities could not require off-street parking if on-street parking exists, or if public transit is within a half-mile radius, nor could they require replacement of parking converted to an ADU.

The second preferred action is to permit lot splits. Combined with the ADU provision, this could allow four units where one was allowed previously.

A third preferred action is to "remove exclusionary measures." This is defined as a package that includes eliminating minimum lot sizes, as well as height and lot coverage limits that preclude multi-family housing. Parking minimums also must be entirely removed within one-half mile of public transportation and limited to one space per unit elsewhere. This provision is poorly drafted for several reasons. First, "multi-family housing" is undefined, and it's not clear whether it refers to a building with two, three, or more housing units. (A "multiple dwelling," defined in state law, has at least three units.) Second, local governments may view lot-size controls as an important protection against substandard housing, and it is not necessary to eliminate minimum lot-size regulations entirely to achieve the construction of multi-family housing, reasonably

defined. New York City's minimum lot size in many residential zoning districts is 1,700 square feet,[15] which is consistent with the construction of apartment buildings. The legislation should be redrafted to clarify the objectives of this preferred action.

The fourth preferred action is to permit "smart growth rezonings," defined as housing at a density of at least 25 units an acre over a third of the locality's "previously disturbed" land, without undue regulatory impediments to achieving that density. A typical development at 25 units per acre might be attached single-family homes, detached two-family homes on small lots, or garden apartments.

The final preferred action is "adaptive reuse rezonings." Such rezonings would permit, as-of-right, a unit density of at least 25 units per acre, over at least 100 acres previously zoned only for commercial use. As with smart growth rezonings, undue regulatory burdens that prevent the desired density from being achieved would be prohibited. The 100-acre requirement, however, may be difficult for small communities. The legislation should thus be amended to allow the conditions to be met by rezoning one-third of the locality's land area zoned for commercial use where smaller than 100 acres.

For New York City, these preferred actions would need to apply citywide, not only in specific community districts. For towns with land-use regulatory jurisdiction, they would have to apply throughout the town. The preferred actions are exempt from the state's environmental review requirements, resulting in much faster approval processes. Oddly, though, other actions[16] to meet the quantitative targets would not be exempt from environmental review; this seems an unfortunate omission.

In order to make safe-harbor determinations, DHCR will have to develop a system for evaluating whether local zoning changes were effective and not frustrated by undue restrictions, in addition to a database of housing permissions and production for every permit-granting jurisdiction in the state (and all 59 community districts).

Localities that neither meet housing targets nor undertake preferred actions would be subject to the legislation's sanctions: the requirement that local land-use regulatory entities approve "qualifying projects," except under limited circumstances. (This is known as the "builder's remedy" in other states.) A qualifying project would have at least 10 units, or 20 in the MTA commuter area counties. Twenty percent of the units would need to be affordable at a very low-income threshold, or 25% at a low-income threshold.[17]

Such qualifying projects would be exempt from environmental review and subject to specific time frames for the local review. Grounds for denial of an application would be limited to findings related to the inadequate capacity of local water, sewer, or utility infrastructure. "Aesthetics" can be grounds for denial only if defined by "objective standards" that are set in advance and not unduly burdensome.

A denial could be appealed to a five-member statewide housing review board, established within DHCR. The board would rule on whether the denial was properly within the local jurisdiction's authority, as provided in the law. The members of the board would thus need to have the expertise to make technical determinations about local infrastructure capacity and design compliance, or access to such expertise. A denial by the board could be further appealed in court.

In any case concerning the denial of an application in a locality where DHCR has not yet made a safe-harbor determination, the board itself would be empowered to make that determination. That would effectively mean that if an automated system were not in place to make safe-harbor determinations immediately at the commencement of a three-year housing target period, DHCR staff would need to prioritize determinations for localities where an appeal was pending. This

creates an odd process in which localities can also apparently deny qualifying project applications on the grounds that they are actually in safe harbor, although DHCR has not yet so certified; the review board can then make the certification on appeal. The review board becomes the relief valve for DHCR's backlog of safe-harbor determinations.

The legislation also calls for the designation of specific trial judges as land-use experts to hear appeals of housing review board denials. These members would be supported and trained by a five-member Land Use Advisory Council. New York's trial courts—which are confusingly called state Supreme Courts—have a notable history of land-use decisions that interpret the applicable law incorrectly and are overturned on appeal.[18] The legislation seems a well-intentioned attempt to improve the quality of lower-court decisions.

Transit-Oriented Development

The transit-oriented development legislation would amend the general city, town, and village laws, each in a similar manner. These three laws authorize municipalities to enact zoning.

The proposed legislation would define "transit-oriented development zones," which are areas within a half-mile of the perimeter of a transit station, including waiting areas, entrances, and exits, and adjoining parking facilities (and including the station and parking). Waterways, flood plains, wetlands, other protected natural lands, parks, cemeteries, historic sites, and state or interstate-designated highways would be excluded, but local streets would not be excluded. Eligible transit stations include the New York City subway, PATH, and commuter rail stations.

The transit-oriented development zones would be divided into four tiers. Tier 1 includes those in New York City or within 15 miles of the city line. On Long Island, that extends to the western edge of Suffolk County; in Westchester, the zone extends as far north of the Bronx as Hawthorne. Tier 2 includes stations more than 15 but no more than 30 miles from the city line. Tier 3 goes to 50 miles; Tier 4 includes the remaining stations, those more than 50 miles from the city line.

The transit-oriented development zones around each station are required to be zoned to achieve a minimum average density of 50 units per acre in a Tier 1 zone, 30 units in Tier 2, 20 units in Tier 3, and 15 units in Tier 4. A typical residential building that achieves 50 units per acre might be a three-story garden-apartment complex. The village of Great Neck Plaza, surrounding the Great Neck Long Island Rail Road (LIRR) station in Nassau County, is in large part built up with such buildings and thus represents a Tier 1 prototype. However, few suburban stations in the Tier 1 zone meet the required density, and even in New York City, non-complying stations are widely found. The subway extends into low-density neighborhoods such as Howard Beach, Queens and some commuter rail stations, such as the Riverdale Metro-North station, or the Little Neck LIRR station, are surrounded largely by single-family homes. As one moves into the Tier 2, 3, and 4 zones, some stations' surroundings are hardly urbanized at all.

The legislation requires that all transit-oriented development zones be rezoned to the required densities within three years of the law's enactment. As an incentive, such rezonings would be exempt from environmental review.

In the very likely event of non-compliance, "qualifying projects"—defined as any residential project in a residential zoning district within the zone, up to the applicable unit density, with no specific requirements for including affordable units—will be eligible for a special review process identical to that for projects in localities that fail to achieve safe harbor under the growth-targets law. As in those scenarios, qualifying projects in transit-oriented development zones would be exempt from environmental review and subject to specific time frames for the local review.

Grounds for denial of an application would be limited to findings related to the inadequate capacity of local water, sewer, or utility infrastructure. "Aesthetics" can be grounds for denial only if defined by "objective standards" that are set in advance and not unduly burdensome.

Denials of qualifying projects could be appealed to the courts. Unlike the growth-targets law, this law has no provisions involving DHCR and the housing review board, or for improving the quality of judicial review. Additionally, the state attorney general is permitted to go to court to compel a locality to undertake the mandated transit-oriented development zone rezoning.

Comparing the "Growth-Targets" and "Transit-Oriented Development" Laws

These two proposals conflict more than they complement each other. The growth-targets law is, on the whole, moderate in its approach. Communities are given a range of options to achieve safe harbor. They are nudged to select from a menu of pro-housing actions, and if they do not, they are subject to a relatively modest sanction. There's a role for public participation and consensus-building by local governments. Even if consensus can't be reached, the number of future mixed-income housing developments actually constructed under the "builder's remedy" will be limited by the length of the approval process, the difficult underlying economics of mixed-income housing, and likely by litigation with multiple levels of appeal. Without government subsidies, which are not likely to be offered in an adversarial process, mixed-income housing will be feasible only in areas with very high market rents or sales prices.

In contrast, the transit-oriented development law is a hammer hanging over local governments, which must either act in a short time frame to enact zoning changes that will likely be extremely unpopular with voters, or else lose control over local land use. New York City, for example, could enact a plan that credibly addresses the 3% (over three years) growth target for the 2027–29 period, but if it leaves the leafy surroundings of Riverdale or Little Neck intact, it would still lose control of its zoning and be subject to legal action by the state attorney general. Similarly, a suburban community could undertake the two required "preferred actions" under the growth-targets law—say, allowing accessory units and lot splits—but still be subject to the transit-oriented development law's sanctions because it did not allow enough high-density development around its train station.

This hammering of local governments could perhaps be justified if the transit-oriented development density were necessary to achieve Hochul's housing goals. Her plan estimates that transit-oriented development will account for 190,000 new units over 10 years as a component of her total goal of 800,000 units.[19] A half-mile radius around the center of a train station (smaller than the proposed transit-based development zones, which are drawn around the perimeter of the station and its parking) is about 500 acres and yields about 25,000 units at 50 units per acre. A map of Nassau County published by the *New York Post* indicates that Nassau County alone has dozens of affected station areas.[20] It's easy to see that the transit-based development law's mandated bruising local rezoning political battles would, if realized successfully, create the potential for far more units than are necessary to achieve Hochul's goal in the next decade or two.

Garden City, for example, is a Nassau County village with a 2020 population of 23,272 and 7,715 housing units.[21] The growth-targets legislation sets a housing goal of about 770 new units in the next decade for this community. However, the transit-oriented development legislation would require that the village rezone within three years for more than 100,000 additional housing units.[22] While Garden City could, and should, meet the goal established in the growth-targets

legislation by allowing several apartment buildings to be constructed in the expansive open parking lots found in the Franklin Avenue commercial corridor, meeting the transit-oriented development mandate would truly turn the village into a big city within a few years. That's not a reasonable demand.

Perhaps the transit-oriented development law is intended to create a good cop–bad cop dynamic in legislative discussions, in comparison with the growth-targets law, which seems the moderate compromise choice. However, it's just as likely to give local officials who want no new housing at all a juicy target for attack. A good fate for the transit-oriented development proposal would be to incorporate it into the growth-targets law as another "preferred action" that local governments could take. In addition, the area that would require rezoning should be reduced to encompass only a subset of the 500+ acres within the half-mile radius of a transit station. A recent Massachusetts transit-oriented development law caps the amount of land that needs to be zoned for multi-family housing in transit-served communities at 50 acres or 1.5% of developable land, if smaller.[23]

A second issue with the transit-oriented development law, as drafted, is that few of the affected local governments have the in-house capacity to undertake the required rezonings. Many would need to rely on consultants, and the firms that provide such services in the New York metropolitan area would likely not be able to staff all the necessary studies, proposals, and local review processes simultaneously. A more flexible timeline is needed.

Additional Legislative Proposals

Collect Local Zoning and Housing Production Data

This proposal would require local governments to submit two sets of information to DHCR. First, entities with authority over buildings and construction would be required to submit information relating to "housing sites," an ambiguous term defined as "the site of planned construction . . . of one or more residential buildings." Building permitting and inspection agencies do possess data on building permit applications and approvals. (Linking those data from hundreds of jurisdictions to DHCR's statewide database, however, will be complicated and costly, and the legislation does not specify who will bear that cost.)

Such authorities, however, are typically not aware of the existence of "planned" residential developments in advance of building permit applications. Planning and zoning agencies, often different entities, might have that information, to the extent that a site's owner is seeking zoning approvals. The legislation also requires that DHCR be provided with information on governmental subsidies allocated to a "housing site"; that information would be in the records of a third entity, a housing agency, which might be at a different level of government, perhaps the county or the state. The cost and complexity of building DHCR's database would therefore tend to spiral upward. In addition to failing to fund this work, the legislation provides no sanction for non-cooperation by local governments, who may not see building the DHCR database as a priority.

The second set of information relates to zoning. Local planning agencies are required to submit to DHCR, in a digital format specified by the agency, a map of zoning districts and explanatory material on specific zoning requirements, such as floor area ratios[24] and minimum lot sizes. Additionally, local agencies would be required to report zoning changes in the past year and whether "each zoning approval . . . was as-of-right or discretionary," a mandate that requires interfacing with the building-permitting entity's data. Again, there is a cost to revising local data-keeping systems to be consistent with DHCR's requirements, and the legislation provides no

source of funding. Developing a statewide zoning atlas is a good idea, since it enables researchers to better predict the effects of specific changes, such as the proposed transit-oriented development legislation. However, if the cost burden is placed on local governments, cooperation will be spotty.

The zoning component of the legislation also requires that in areas where residential development is not permitted, local planning agencies provide "the reasons such development is not permitted." That is a task of historical research, going back to the records of the original zoning decision, which may be decades in the past and not well documented. It's also not clear what the point of the exercise would be.

Create Greater Opportunities to Convert Office Spaces to Residential Housing

This proposal would, if enacted, have the potential to create many new housing units in New York City. The city's zoning and other building regulations, in combination with the underlying requirements of the state Multiple Dwelling Law, limit the size and shape of apartment buildings and preclude the conversion of most buildings originally constructed for non-residential purposes, including factories, warehouses, office buildings, stores, hotels, schools, and hospitals, from being converted to residences. Since the early 1980s, the state's Multiple Dwelling Law has had special rules[25] that facilitated widespread residential conversion of older non-residential buildings. These conversions are limited by zoning districts, with manufacturing districts and certain types of commercial districts excluded. Conversions are also limited by geography, with applicable areas specified in zoning. Finally, conversions are limited by date of construction, with the most permissive areas requiring that a converted building must have existed on January 1, 1977, consistent with current state law, while other conversion regulations state that the building must have existed in 1961.[26] Newer buildings are ineligible for the special conversion rules.

The proposed legislation allows conversions of non-residential buildings under the special rules, provided the building existed on December 31, 1990, extending the legislative applicability window to buildings completed during an additional 14-year period. It also includes a temporary override of the requirement that conversions of non-residential buildings be consistent with zoning. That override applies citywide, provided that an application for a building permit is filed by December 31, 2030, and construction commences within three years.

The legislation thus applies not only to a newer group of buildings but also, for a period of more than seven years (assuming enactment in 2023), to the large universe of buildings located in zoning districts where residential conversion has either been entirely prohibited or prohibited unless it complies with all the standard rules for apartment buildings. This includes buildings in residual manufacturing zones in Manhattan, such as the Garment Center and Midtown South, as well as in some areas in the other boroughs, such as East Williamsburg in Brooklyn, where strong market pressure exists for residential conversion but zoning changes have been resisted by local elected officials. The structure of the legislation—which creates a limited time window in which to pursue valuable conversions in strong-market areas before the zoning goes back into effect—is likely to result in a rush of residential conversion applications.

While very pro-housing, the bill's promotion of rapid change is likely to be disruptive to businesses in industrial areas, such as truck-intensive distribution facilities that need to be separated from residences. These businesses count on zoning prohibitions to enable their operation, often in late-night hours. The bill would also lead to sharp changes in real-estate market conditions in many industrial areas, as a new and very lucrative use would be introduced for existing buildings. The city has tried in the years since it began allowing residential encroachment in some historically industrial areas to signal clearly where businesses should, or should not, expect future land-use changes. Those signals should evolve over time, in response to market

conditions, as needs change. But it makes sense to identify industrial areas where businesses can reliably expect that there will not be new residences. This practice should not be entirely done away with by state override.

A way to make the legislation less disruptive, but still pro-housing, would be to limit the temporary override of zoning to buildings occupied as office space in 2019. That would be consistent with the rationale presented by the governor's Memorandum in Support. The section related to this bill is titled "Create Greater Opportunities to Convert Office Spaces to Residential Housing," and the stated purpose is to "respond to the rise of remote work while alleviating the housing shortage."[27] By limiting the applicability of the legislation to previously existing office space, the impacts of the zoning override on active industrial areas would be minimized. The city would still have the ability to identify—and propose for rezoning through the normal City Charter process—additional industrial areas where the introduction of residences is appropriate. The growth-targets legislation would give it an extra incentive to do so.

Authorize Tax-Incentive Benefits for Converting Commercial Property to Affordable Housing

A related bill amends the Real Property Tax Law to provide in New York City a property-tax exemption for residentially converted buildings that are rentals, contain six or more units, and include at least 20% affordable housing. To be eligible for the benefit, a building must commence construction by the end of 2032 and complete construction by the end of 2038. The exemption would last for a three-year construction period and 19 years after completion; it would be more generous in Manhattan south of 96th Street.

During the period of the tax exemption, building service employees would need to be paid the "prevailing wage," typically what would be paid under a union contract. Buildings smaller than 30 units and buildings receiving substantial government assistance would be exempt from the wage requirement.

The affordability requirements would last in perpetuity. Affordable housing tenants would need to be income-eligible at rent-up, and their rents would subsequently increase in accordance with rent stabilization. Units paying market rents would not be required to be rent stabilized.

In a recent article,[28] I noted that providing tax exemptions on entire residentially converted former office buildings to achieve the inclusion of a small number of below-market units is a questionable idea. The amount of tax revenue the city would be giving up in its prime neighborhoods would be large, relative to the benefits of the affordable housing. I noted that the city's Office of Management and Budget would be scrutinizing the costs of this trade-off. The bill that has emerged, in which a relatively short benefit period is combined with a requirement that below-market rents be maintained in perpetuity and that prevailing wages be paid, seems designed to minimize costs to the city while maximizing benefits. However, these features will also limit the attractiveness to property owners and thus likely result in limited uptake.

Enable the City of New York to Create a Pathway to Legalize Preexisting Basement Dwelling Units in New York City

This proposed legislation would also allow New York City to create a program to permit the conversion of basements to dwelling units and legalize existing basement units created without permits. Owners of such existing units would be exempt from penalties. The city's zoning and local legislative changes would be exempt from environmental review and zoning changes subject to a shortened public review, omitting the customary advisory review of zoning text amendments by community boards, borough boards, and borough presidents. A single public hearing by

the City Planning Commission would be required. The shorter process could allow for the fast implementation of the proposed amnesty for units created without permits. The lack of typical community input would be controversial, however, and the rationale for excluding it is unclear.

Additionally, the proposal would not apply to "cellar" units created without a permit—defined as those in which more than half the height is below grade, in contrast to "basements," in which less than half is below grade. Units created in cellar units, which pose a greater health and safety challenge, likely outnumber those created in basements.[29] This, as well as the costs of legalization, limits its housing production impact. The legislation's exemption of such legalizations from the requirements of the Multiple Dwelling Law, which would apply if there were already two or more existing legal units in the building, may nonetheless be helpful for some property owners to secure fully legal status for their buildings.

Lift the Statutory Cap on Residential Density

Another provision of this legislation would allow New York City, through its zoning amendment process—and the Empire State Development Corporation (ESDC) through a general project plan within the city—to lift the floor-area-ratio cap in the Multiple Dwelling Law, which is currently set at FAR of 12.[30] Other provisions of the same section of the Multiple Dwelling Law do allow certain standards—such as requirements for rear and side yards, and courts[31]—to be waived, but only through New York City zoning. The proposal, however, would allow ESDC to override the FAR cap exclusively. Giving ESDC override authority in this one case needs better justification because the potential for abuse exists where no upper limit applies on the size of residential buildings. In comparison with zoning changes under the City Charter review process, ESDC general project plans are more likely to be driven by economic imperatives and less by planning considerations based on a vision of how best to shape the city's growth.[32]

Extend the Project Completion Deadline for Vested Projects in Real Property Tax Law 421-a by Four Years

Hochul declined to present a proposal in the Executive Budget package for the revival of the Section 421-a[33] property-tax exemption, which applied to new housing construction commenced in New York City prior to its expiration in June 2022. Any negotiations on such legislation will take place out of public view. She did, however, propose to extend the deadline for construction completion under the expired program from June 2026 to June 2030.

The New York City Department of City Planning had reported that nearly 60,000 new housing units had been permitted, presumably to qualify under the deadline, in the first half of 2022. The department cast doubt on the number of these units that would ultimately be completed, given the current high-interest-rate environment and potential economic recession.[34] These adverse factors may make new housing construction economically unfeasible in some cases. Extending the completion deadline would make it more likely that all the vested housing developments will ultimately be completed, since the next seven years are likely to include a period of favorable economic conditions in which financing to complete construction would be affordable and readily available.

Conclusion

Hochul's package of housing bills, closely examined, reveals some sensible reforms that the legislature should enact, some overreach that the legislature is likely to reject, and some measures that will likely have a more symbolic than substantive effect. Pro-housing advocates need to recognize that some opposition to this legislation may be deserved.

The state has an interest in ensuring that the exercise of local control over land use is consistent with the state's environmental and economic growth objectives. The growing labor force in the New York City region should have access to adequate and affordable housing. This requires a fluid housing market, not one regulated for the economic benefit of incumbent homeowners at the expense of newcomers. Where local control has not produced a desirable outcome, the state needs to step in and set clear limits on local discretion.

But state intervention should not, and need not, be a complete repudiation of local planning. Consistent with meeting the goals set by the legislature, local governments should have the ability to make choices, informed by democratic consent, about where and how their communities should change. The concept of setting local housing production targets, and letting local governments then decide how to meet them, is sound. Sweeping zoning overrides, as proposed by the transit-oriented development and office-conversion bills, will rightly be rejected by the legislature, and housing advocates should not see that as surprising.

The proposals are also inconsistent in their approach to the state's environmental review law, which would be overridden in some cases but not reformed more broadly. Mayor Eric Adams's "Zoning for Housing Opportunity" proposals,[35] for example, could, if enacted, allow New York City to meet the 3% housing stock growth target. But for that to happen, the city would be required to conduct a massive, multi-year environmental impact study because the growth-targets legislation exempts from environmental review only five specific "preferred actions." Only one of these actions, permitting accessory dwelling units citywide, is currently on the city's list of proposals for consideration. Furthermore, the city would continue to process private and city agency rezoning applications while its plan is under review, creating additional capacity for new housing. These plans are also subject to environmental review pursuant to state law.

Similarly, under the transit-oriented development legislation, zoning changes that meet the law's density requirements for the half-mile radius around a transit station and associated facilities would be exempt from environmental review. However, any lesser rezoning would be subject to environmental review, even though such rezoning would advance the law's goals with less impact on the environment. If accelerating housing construction is in fact a priority, and the consequences of waiving environmental review for very extensive land-use changes are deemed acceptable by the legislature, then all lesser land-use actions taken to meet the statutory housing targets should also be exempt from environmental review.

In another example of inconsistency, the legislation to legalize basement dwelling units overrides the New York City Charter and provides for a review process that cuts out the community boards, borough boards, and borough presidents. The assumption here is that the City Planning Commission and the City Council would not benefit from, for example, hearing from Staten Island Community Board 2 about the particular problems the city's proposal creates in their district. Community boards, borough boards, and borough presidents can often be maddeningly oppositional—that is the best way for a body that is merely advisory to get attention. However,

that is perhaps an argument for improving the way the City Charter solicits local comment, not for eliminating the local voice altogether. Taking this step to save 60 days in the review process, in order to resolve an issue that has festered for decades, seems unnecessary.

Properly modified, Hochul's housing package represents a significant step forward in addressing the housing-supply crisis afflicting the downstate region. By instituting new ground rules, the legislature can provide for considerable local discretion and the ability to shape communities for the better, while achieving statewide housing goals.

Summary of Recommendations

The legislature should enact a version of the housing growth-targets legislation, modified to establish actual building permits as the measure of progress against targets and to ensure that any land-use actions taken to meet growth targets are exempt from environmental review. The legislation should also be modified to clarify the "preferred actions" where necessary. The transit-oriented development legislation should be withdrawn, but a similar proposal, on a smaller scale, should be one of the preferred actions that can be taken to achieve safe harbor in the growth-targets legislation.

Legislators also need to consider how to staff and fund the required data-collection effort. They will have to identify the appropriate mix of DHCR, local government, and third-party staffing to ensure that needed data are timely and complete. The solution might be, for example, to contract out data compilation to one or more academic institutions that can draw on student labor.

The legislature should enact the proposed zoning override for residential conversions of preexisting office space in New York City for a limited period to alleviate the current vacancy problem. The legislature should also move the applicability date for the special Multiple Dwelling Law residential conversion rules to the governor's recommended date of December 31, 1990. The proposed legislation providing tax benefits for the inclusion of affordable housing in converted office buildings does not appear to be effective as drafted, and it would be too costly if made effective. The legislature should decline to enact such benefits.

The legislature should enact the proposed legislation to legalize basement apartments created in New York City without proper permits. However, it should delete the proposed override of the City Charter's land-use review provisions, which is unnecessary.

The legislature should enact the proposal to lift the residential density cap in the Multiple Dwelling Law, but only through New York City zoning. It should also extend the project completion deadline for Section 421-a projects.

Endnotes

1 Editorial Board, "A Chicago Tale: Why We're Happy to Erase the Asterisk from Daniel Burnham's 'Make No Little Plans,*' " *Chicago Tribune*, Mar. 6, 2019.

2 See Eric Kober, "Hinging on the Details," *City Journal,* Jan. 20, 2022.

3 Mallory Wilson, "Gov. Hochul Rolls Back Her ADU Proposal in NYS Budget," *LI Herald*, Feb. 19, 2022.

4 The governor's proposed housing legislation is contained within a much larger "Education, Labor and Family Assistance" bill. New York State Division of the Budget, FY 2024 New York State Executive Budget, "Education, Labor and Family Assistance Article VII Legislation," 79–215.

5 Governor Kathy Hochul, "Governor Hochul Announces Statewide Strategy to Address New York's Housing Crisis and Build 800,000 New Homes," press release, Jan. 10, 2023.

6 See Eric Kober, "New York City's Far-Reaching Housing Proposals Are Still Not Ambitious Enough," Manhattan Institute, Jan. 5, 2023, 1–2.

7 Sam Mellins, "The Rent Is Too Damn High. Blame the Suburbs," *New York Focus,* Oct. 6, 2022.

8 A household that experiences severe rent burden pays more than 50% of its income in rent.

9 Vicki Been, Jiaqi Dong, and Hayley Raetz, "Critical Land Use and Housing Issues for New York State in 2023," NYU Furman Center, 3, 6.

10 Anthony Flint, "The State of Local Zoning: Reforming a Century-Old Approach to Land Use," Lincoln Institute of Land Policy, Dec. 23, 2022.

11 See Lizabeth Cohen, "The Doomed 1970s Plan to Desegregate New York's Suburbs," *Bloomberg CityLab,* Oct. 21, 2019.

12 New York City, plus Nassau, Suffolk, Westchester, Putnam, Dutchess, Rockland, and Orange Counties.

13 U.S. Census Bureau, Building Permits Survey. The Census Bureau's system does not characterize whether new units are income-restricted and does not capture rehabilitation of abandoned units, so mechanisms would still be needed to add these data.

14 David Brand, Twitter post, Feb. 9, 2023.

15 New York City Zoning Resolution, §23-32, Minimum Lot Area or Lot Width or Residences.

16 An example might be removing minimum parking requirements, but not doing so citywide.

[17] The thresholds are 50% and 80% of Area Median Income (AMI), which is an income level established for different areas, and household sizes by the U.S. Department of Housing and Urban Development. The income limits can be found at https://www.huduser.gov/portal/datasets/il.html.

[18] See, for example, Steve Salkin, "NY Appellate Courts Defer to Board of Standards In Zoning Cases," AMLaw.com, October 2021.

[19] Governor Kathy Hochul, "Achieving the New York Dream: 2023 State of the State," 32.

[20] Zach Williams, "Kathy Hochul Colonizing Long Island with Housing Order, NY GOP Pols Say," *New York Post*, Feb. 3, 2023.

[21] U.S. Census Bureau, 2020 Census.

[22] Four LIRR stations are within Garden City (Stewart Manor, Garden City Country Club, Garden City, and Country Life Press) and four more just outside it, so that portions of the village are within the half-mile perimeter radius (New Hyde Park, Merillon Avenue, Mineola, and Hempstead).

[23] Amy Dain, "What the MBTA Communities Law Means for Your Town," *CommonWealth Magazine*, Jan. 2, 2023.

[24] The floor area ratio establishes the maximum size of a permitted building based on a multiple of the lot area. For example, if the floor area ratio is 2, a 10,000-square-foot lot could be developed with a maximum of 20,000 square feet of floor area.

[25] New York State Multiple Dwelling Law, §277.

[26] See Kober, "New York City's Far-Reaching Housing Proposals Are Still Not Ambitious Enough," 9.

[27] New York State Division of the Budget, FY 2024 New York State Executive Budget, "Education, Labor and Family Assistance Article VII Legislation: Memorandum in Support," Part J, pp. 16–17.

[28] Eric Kober, "Affordable Housing Made Expensive," *City Journal*, Jan. 18, 2023.

[29] See Kober, "New York City's Far-Reaching Housing Proposals Are Still Not Ambitious Enough," 6–7.

[30] Ibid., 22.

[31] New York State Multiple Dwelling Law, §26.

[32] An example would be the stalled Penn Station redevelopment plan. See Matthew Haag and Patrick McGeehan, "The Penn Station $7 Billion Fix-Up Moves Ahead: Here's What to Know," *New York Times,* July 21, 2022; Steve Cuozzo, "NY's Kathy Hochul Silent on '$306B' Penn Station Redevelopment Plan in State of the State Address," *New York Post,* Jan. 16, 2023.

33 The Section 421-a tax exemption for new multi-family housing is in part designed to equalize the tax treatment of rental buildings and the more favorably taxed condominiums, and in part to provide an incentive for the inclusion of a percentage of the units in the building at below-market rents. See Kober, "New York City's Far-Reaching Housing Proposals Are Still Not Ambitious Enough," 2.

34 NYC Dept. of City Planning, "New Housing Permits in the First Half of 2022," November 2022.

35 Discussed in Kober, "New York City's Far-Reaching Housing Proposals Are Still Not Ambitious Enough," 5–17.